

RENDERED: MAY 14, 2010; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001325-MR

PAMELA CATRON GUFFEY

APPELLANT

v.
APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 07-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER,
JUDGES.

COMBS, JUDGE: Pamela Catron Guffey appeals from her conviction in Clinton
Circuit Court on the charge of first-degree trafficking in a controlled substance.
Guffey contends that she is entitled to a new trial. We disagree and affirm the
judgment.

On November 17, 2006, Guffey sold two oxycodone/acetaminophen tablets to Sharolyn Renee Cross, who was working with the Kentucky State Police as a confidential informant. Evidence regarding the sale was presented to the grand jury, and Guffey was indicted on March 2, 2007. The matter proceeded to trial in which Guffey was convicted on October 26, 2007. She was sentenced by the court to serve five-years' imprisonment. This appeal followed.

Guffey argues that the trial court erred by denying her post-verdict motion for a new trial. In her motion filed on November 5, 2007, Guffey contended that she was entitled to relief because during *voir dire*, a juror had failed to disclose that she (the juror) was related by marriage to the county attorney. In his motion, counsel acknowledged that he had become aware that this juror was the mother-in-law of the county attorney **before** the jury was charged and retired to deliberate.

On appeal, the Commonwealth contends that Guffey's allegation of error is not properly preserved for our review for two reasons. First, the Commonwealth argues that Guffey's post-trial motion was filed out of time and, as a consequence, should not have been addressed on its merits by the trial court. Second, the Commonwealth argues that any objection to the juror's participation was waived since Guffey failed to advise the court of her concerns until after the proceedings had finally concluded. By failing to raise a timely objection, the Commonwealth contends that Guffey deprived the court of an opportunity to seat one of its two alternate jurors, thus avoiding the alleged error.

Kentucky Rules[s] of Criminal Procedure 10.06(1) (RCr) provides as follows:

The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits.

Although a motion for a new trial based upon newly discovered evidence may be filed within one year of the judgment, a motion based upon **any other grounds** must be filed within five days of the verdict. Excluding intermediate Saturdays and Sundays, Guffey's post-verdict motion was not filed within five days of the verdict. Since the verdict was returned on Friday, October 26, the five-day time period began to run on Monday, October 29. The last day to file the motion in compliance with RCr 10.06(1) was, therefore, Friday November 2. Because the motion was filed too late to raise this issue, the court could not have properly addressed it on the merits. Consequently, we decline to review the trial court's order denying the motion.

Alternatively, Guffey argues that she is entitled to a new trial because the trial court erred by failing to declare a mistrial upon her motion. We disagree.

Sharolyn Cross, the confidential informant, was called by the Commonwealth to testify at trial. On direct-examination, Cross gave a detailed account of her purchase of two Percocet tablets from Guffey on November 17, 2006. During cross-examination, defense counsel attempted to show that Cross's

testimony was inconsistent with the testimony of Albany Police Officer Jimmy Garner. Garner testified that Cross and Guffey had arranged to meet for a drug transaction on November 17. After Cross had been searched, wired, and supplied with “buy money,” Garner and Kentucky State Police Detective Russell Decker conducted a loose surveillance of the meeting place.

During her cross-examination, Cross told the jury that she had not spoken with Guffey for several days before November 17 and that the two of them had not discussed the number of pills that Cross would purchase. With reference to the “buy money” supplied by Officer Garner, defense counsel asked Cross, “How did you know how much money to give her [Guffey] when you got to the house?” Cross replied, “Because I know what she sold them for. I’m not the only person she sold them to.” Following Cross’s reply, defense counsel objected and asked to approach the bench. Defense counsel contended that Guffey was entitled to a mistrial based on Cross’s non-responsive, prejudicial comment to the jury. The trial court reasoned that defense counsel had invited the response, and the court denied the motion for a mistrial. Nevertheless, it vigorously admonished the jury not to consider Cross’s final comment.

On appeal, Guffey contends that the trial court’s admonition to the jury was insufficient to overcome the unfair prejudice that resulted from Cross’s non-responsive, gratuitous reply. The Commonwealth argues that the trial court did not err by concluding that defense counsel’s question invited the response that

Cross gave from the stand; therefore, the court did not err by refusing to order a mistrial as there was no manifest necessity to declare one.

A trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion. *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002). An admonition is often deemed to be a proper remedy in such an instance. It is well-established that “[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error.” *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant [citation omitted]; or (2) when the question was asked without a factual basis *and* was “inflammatory” or “highly prejudicial.”

Id.

We are not persuaded that there is an overwhelming probability that the jury was unable to follow the severe admonition given by the court or that Cross's comment was “devastating” to Guffey's defense. The second factor simply does not apply in this case. Therefore, under the *Johnson* criteria, there was no manifest necessity for a mistrial. The trial court did not abuse its discretion by denying the motion for a mistrial, and Guffey is not entitled to relief on this ground.

We affirm the judgment of conviction of the Clinton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Roberts Horsman
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky