

RENDERED: DECEMBER 19, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001525-MR

PAUL BRANHAM

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE REBECCA K. PHILLIPS, JUDGE  
ACTION NO. 09-CR-00118

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: The narrow question presented is whether the Carter Circuit Court abused its discretion when it refused to grant appellant Paul Branham's motion for a mistrial after a witness for the Commonwealth referred to prior drug transactions involving Branham. We see no abuse and affirm.

Branham was indicted on first-degree trafficking in a controlled substance. His case proceeded to trial on August 24, 2010. The evidence at trial revealed that, on September 9, 2009, Kentucky State Police Detective Phil Clark arranged for a confidential informant to engage in a controlled drug buy with Branham. The informant was familiar with Branham, having known him since grade school. The informant testified he travelled to Branham's residence and met with Branham and Branham's wife on the front porch. According to the informant, Branham sold him five thirty-milligram Oxycodone pills for \$30 each; Branham refused to sell the pills cheaper, and claimed he would have more later in the week. Subsequent testing revealed the pills purchased were indeed Oxycodone.

An audio recording captured the informant's interaction with Branham. The audiotape recorded the voices of two males and a female, a discussion concerning price, and a reference to the availability of more pills. The audio recording therefore corroborated the informant's testimony.

Branham sought to discredit the informant's credibility and to call into question the informant's version of events. Branham's theory was that the informant hid pills on his person, took the drug-buy money, and faked the transaction hoping to help himself with regard to his own pending drug charges. On cross-examination, the informant admitted he agreed to work as a confidential informant because he had been charged with trafficking in narcotics and was attempting to help himself. Also, the informant testified that, while working as a

confidential informant, he had prescriptions for Percocet and Xanax; he could not recall if he informed Detective Clark about the prescriptions.

Detective Clark was the Commonwealth's final witness. He testified that he followed the informant to Branham's house and, upon arriving, observed a man and a woman sitting on the porch; Detective Clark continued to drive past Branham's house while the transaction was taking place. After the transaction, Detective Clark pulled Branham's driver's license and the informant again confirmed Branham's identity.

Detective Clark played for the jury the audio recording of the alleged drug transaction, after which the following exchange occurred:

Commonwealth: Detective Clark, I'm sure everyone is wondering, why is this recording so long?

Detective Clark: Um, the reason the recording is longer is, um, *I've made three drug transactions with Mr. Branham* and, uh, the debrief did occur at the church . . . .

Branham objected and requested a mistrial. The Assistant Commonwealth Attorney replied she did not expect Detective Clark to respond in that fashion. The circuit court, after careful consideration, denied Branham's motion,<sup>1</sup> but admonished the jury as follows:

You are to disregard any testimony by Detective Clark concerning other encounters with Mr. Branham. Such testimony is not to be considered in any way, shape, or form by the jury. Do you all understand this admonition? . . . Remember the admonition for purposes of

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<sup>1</sup> Before ruling, the circuit court inquired of the parties whether there were any other intentional or inadvertent attempts to interject inadmissible information regarding other crimes or criminal activity by Branham. Branham agreed no other incidents occurred.

deliberation in the future and purposes of continuance of trial.

On August 27, 2010, the circuit court entered a written order confirming its bench ruling. As explained both in its oral and written rulings, the circuit court found persuasive and relied on the unpublished decision of the Supreme Court of Kentucky in *Byrd v. Commonwealth*, 2007-SC-000923-MR, 2009 WL 2706747 (Ky. 2009), wherein the Court stated that “[h]ad there been only an isolated reference to other drug deals by [the defendant], we agree that the admonition would have been sufficient to cure any resulting prejudice.” *Id.* at \*6.

The jury ultimately found Branham guilty and recommended the maximum sentence of ten years’ imprisonment. The circuit court sentenced Branham accordingly. Branham appealed.

Branham maintains he was entitled to a mistrial based on Detective Clark’s improper statement because it constituted inadmissible prior bad act evidence under Kentucky Rules of Evidence (KRE) 404(b)<sup>2</sup> and the circuit court’s admonition was not sufficient to protect his right to a fair trial. Branham claims Detective Clark’s wholly inappropriate statement severely undermined his defense that the informant faked the drug transaction, and eviscerated his attempts to discredit the informant.

A mistrial is an “extreme remedy” that should not be invoked unless the record reflects a manifest necessity for such an action. *Tunstall v. Commonwealth*,

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<sup>2</sup> KRE 404(b) provides, in pertinent part: “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”

337 S.W.3d 576, 591 (Ky. 2011) (citations omitted). A manifest necessity exists if the harmful evidence is “of such magnitude that [the defendant] would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way.” *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002). “Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial.” *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005). The trial court, not this Court, is “best situated” to determine if a mistrial is warranted. *Id.* We will not disturb the trial court’s decision absent an abuse of its discretion. *Maxie*, 82 S.W.3d at 863.

When an admonition is given it is presumed the jury will abide by the admonition and disregard the evidence. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). An “admonition thus cures any error,” *id.*, and, in turn, obviates “the necessity of a mistrial.” *Maxie*, 82 S.W.3d at 863. This presumption is overcome in only two situations: “(1) when an overwhelming probability exists that the jury is incapable of following the admonition and a strong likelihood exists that the impermissible evidence would be devastating to the defendant; or (2) when the question was asked *sans* a factual basis and was ‘inflammatory’ or ‘highly prejudicial.’” *Johnson*, 105 S.W.3d at 441 (citations omitted).

Branham maintains Detective Clark’s improper statement was highly prejudicial in that it rendered moot all his efforts to discredit the informant, and the admonition did little to stem that prejudice. We are not convinced Detective Clark’s improper statement was in fact the bombshell believed by Branham. We

agree the statement is particularly concerning because it references other bad acts identical to the one for which Branham was being tried. However, the statement was isolated, unsolicited, and unresponsive to the Commonwealth's question. There is no dispute that Detective Clark's response to the Commonwealth's innocuous question was entirely unexpected. Similarly, Detective Clark's statement lasted mere seconds before being instantly interrupted by objection. It was elicited at the close of his direct examination and after the jury heard the audio recording of the drug transaction. Consequently, the statement could be isolated and disregarded effortlessly from the bulk of Detective Clark's testimony. It was not said in an accusatory tone, and its recitation lacked emotion, dramatics, and passion. *See Tunstull*, 337 S.W.3d at 591. Considering the totality of the testimony at trial, much of which was damaging to Branham, Detective Clark's improper statement was not "of such magnitude that" Branham was denied a fair and impartial trial. *Maxie*, 82 S.W.3d at 863. Branham's counsel did an admirable job discrediting the informant; Detective Clark's unfortunate utterance did not undo and render moot all of counsel's hard work.

Furthermore, we cannot discern any viable rationale why the jury would fail to heed the circuit court's admonition to take no notice of Detective Clark's statement. The circuit court's admonition was clear, forceful, and direct, and "there is simply no reason to believe the jury was unable to follow the trial court's admonition" to disregard Detective Clark's "isolated" reference. *Barnett v.*

*Commonwealth*, 317 S.W.3d 49, 60 (Ky. 2010). The circuit court's admonition cured the prejudice.

In sum, we are convinced that the jury was capable of both disregarding Detective Clark's isolated inappropriate statement and judging Branham on the sole offense for which he was being tried. Accordingly, we are unable to conclude that the circuit court abused its discretion when it denied Branham's motion for a mistrial.

We affirm the Carter Circuit Court's August 27, 2010 order.

ALL CONCUR.

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