

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000652-MR

JEFFREY LYNN CRAFT

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 12-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** * ** * ** *

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Jeffrey Lynn Craft appeals a judgment entered after a three-day jury trial. He claims the trial court erroneously denied a mistrial when the Commonwealth suggested during closing argument that Craft may have been purchasing something besides cigarettes during a stop prior to a collision—leading to jury speculation that Craft and his daughter were purchasing illegal drugs. Craft

also alleges the trial court erroneously ordered him to pay court costs and a partial public defender fee despite having found him to be a poor person. The Commonwealth agrees court costs and the partial attorney fee were assessed in error, but argues there was no manifest necessity for a mistrial and an admonition—had one been requested—would have cured any error during summation. Upon review of the record, the briefs and the law, we agree with the Commonwealth and affirm denial of the mistrial, but vacate the assessment of court costs and the partial public defender fee.

FACTS

Bad blood has existed between Craft and Michael Lewis—his relative and neighbor—since Lewis beat Craft’s son and left him for dead in a creek. On March 18, 2011, Lewis, while riding a motorcycle, collided with Craft’s car. Craft and Lewis disagree about what prompted the collision. Craft claims Lewis was taunting him by repeatedly driving alongside him, acting as though he was going to pass him, and then falling back into the lane behind him. According to Lewis, Craft drove in front of him and locked his brakes, causing Lewis to crash into the back of Craft’s car and his body to hit the car’s trunk, after which Craft sped away, but later returned. Lewis suffered abrasions to both knees and elbows, three bruised ribs and a knot on the top of his head; damage to his motorcycle was estimated at \$3,757.95. Craft was arrested soon after the collision and was ultimately released on bail.

As a result of the incident, on June 14, 2012, Craft was indicted on charges of operating a motor vehicle under the influence of alcohol/drugs, first offense;¹ wanton endangerment in the first degree;² failure to maintain required insurance/security, first offense;³ criminal mischief in the first degree;⁴ assault in the second degree;⁵ and, leaving the scene of an injury accident.⁶ On July 11, 2012,

he appeared for arraignment, and on July 16, 2012, the Letcher Circuit Court entered an order finding Craft to be indigent and appointing the Department of Public Advocacy (DPA) to represent him. A partial fee for legal representation in the amount of \$1,150.00, payable in \$30.00 monthly installments, was assessed. Craft did not balk at being assessed the partial fee.

Jury trial began February 6, 2013, and concluded two days later. The assault charge was dismissed without prejudice; Craft was found not guilty of leaving the scene; and, he was convicted of the remaining four charges.

¹ Kentucky Revised Statutes (KRS) 189A.010(5)(a), a misdemeanor. Craft failed field sobriety tests soon after the incident. Blood testing revealed the presence of Butalbital, a controlled substance commonly known as Fioricet, at three times the therapeutic range in his bloodstream.

² KRS 508.060, a Class D felony.

³ KRS 304.39-080, a misdemeanor.

⁴ KRS 512.020, a Class D felony.

⁵ KRS 508.020, a Class B felony.

⁶ KRS 189.580(1), a Class A misdemeanor.

On March 19, 2013, the Letcher Circuit Court entered judgment consistent with the jury's verdict sentencing Craft to thirty days for operating a motor vehicle under the influence, ninety days for second-degree wanton endangerment, ninety days for failure to maintain required insurance and five years for first-degree criminal mischief, for a total sentence of five years. Additionally, he was ordered to pay court costs of \$130.00 and restitution in the amount of \$3,757.95.

Afterwards, on April 11, 2013, Craft was found to be a pauper under KRS 453.190 and KRS 31.110(2)(b), and allowed to appeal without paying costs. This appeal followed.⁷

ANALYSIS

We review the denial of a motion for a mistrial for an abuse of discretion. *Gosser v. Commonwealth*, 31 S.W.3d 897, 906 (Ky. 2000). We will reverse only upon a showing of a:

“manifest necessity for such an action or an urgent or real necessity.” *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672, 678 (1985), cert denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986). The trial court has broad discretion in determining when a mistrial is necessary. As explained in *Wiley v. Commonwealth*, Ky. App., 575 S.W.2d 166 (1979), “Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of

⁷ The notice of appeal states the item being appealed is a judgment entered March 21, 2013. However, the only judgment in this case was signed on March 13, 2013, and entered on March 19, 2013. Even though the judgment being appealed is improperly identified, under *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), dismissal would be inappropriate, especially since the Commonwealth has confessed error regarding two of the three claims.

substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared. . . .” *Id.* at 169, quoting *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).

Id. The comment during the Commonwealth’s summation that prompted the request for a mistrial was as follows:

You [the jury] can decide for yourself if it was for some reason that they [Craft and his daughter] so badly needed that hundred dollars that day—that they went out to get the bond money that day—that they had to run to the bank. [They] went here, they went there. **Maybe they bought something other than a pack of cigarettes.**

Defense counsel immediately objected, claiming the prosecutor was urging jurors to draw an unreasonable inference. To the contrary, the Commonwealth argued the erratic behavior of Craft and his daughter on the day of the collision fully supported the inference. The trial court sustained the objection, directed the Commonwealth to go no further on the point, and overruled the request for a mistrial. When the trial court asked if there was anything further, defense counsel responded, “No, your Honor,” and the Commonwealth resumed its summation. Because no admonition was requested—even though the trial court specifically asked if more was desired—no error occurred. *Soto v. Commonwealth*, 139 S.W.3d 827, 861-62 (Ky. 2004). Not requesting an admonition is a well-known trial tactic—the goal being to avoid drawing more attention to the objectionable comment. *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1990). Absent a request for an admonition, we will not fault the trial court for not *sua sponte* giving one.

Craft's two other arguments pertain to the trial court having found him to be a poor person under KRS 453.190(2), but nevertheless assessing court costs and a public defender fee. Having found Craft to be a pauper on April 11, 2013, and having previously found him to be indigent under KRS Chapter 31, it was improper for the Letcher Circuit Court to assess court costs and a partial public defender fee; both are hereby vacated. *Miller v. Commonwealth*, 391 S.W.3d 857, 870-71 (Ky. 2013).

Therefore, we affirm the denial of the requested mistrial, but vacate the assessment of court costs and the partial public defender fee.

ALL CONCUR.

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