

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001806-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 15-CR-00023

PATRICIA HASKIELL¹

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND MAZE, JUDGES.

KRAMER, CHIEF JUDGE: The Commonwealth appeals the Adair Circuit Court's order granting Patricia Haskiell's motion requesting the court to order that a new trial following the mistrial that the court had granted would violate her rights against double jeopardy. After a careful review of the record, we reverse and

¹ The Commonwealth states in its brief that Haskiell's name was misspelled on the notice of appeal as "Haskeill." We will use the correct spelling of her name, *i.e.*, "Haskiell" in this opinion.

remand for further proceedings because the circuit court abused its discretion when it granted her motion, which constituted a dismissal of the indictment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Patricia Haskiell was indicted on charges of: (1) manufacturing methamphetamine, first offense; and (2) possession of drug paraphernalia. Her case proceeded to a jury trial. During the presentation of the defense's case, the following discourse occurred between defense counsel and Patricia's brother, Adam Haskiell, and then between the Commonwealth Attorney and Adam:

Defense counsel: "You ever known your sister to fool with methamphetamines?"

Adam Haskiell: "No."

Defense counsel: "Manufacture methamphetamines?"

Adam Haskiell: "No."

Defense counsel: "I pass the witness."

[Commonwealth Attorney began cross-examination of the witness.]

Commonwealth Attorney: "Since [defense counsel] brought it up, you know her ever being charged with manufacturing methamphetamine?"

Adam Haskiell: "No."

Commonwealth Attorney: "You've never been to court with her on two previous charges of manufacturing meth?"

At that point, defense counsel moved for a mistrial, claiming that the questions asked by the Commonwealth were highly prejudicial because they informed the jury that the defendant had been charged with manufacturing methamphetamine previously. The Commonwealth countered that it asked the question because the defense had opened the door; Adam had perjured himself; so the Commonwealth had a right to make the perjury known to the jury. Thus, the Commonwealth contended that it had a right to impeach Adam's credibility.

The circuit court granted Patricia's motion for a mistrial. She then filed a motion claiming that a new trial would violate her double jeopardy rights. Specifically, Patricia contended that a retrial is permissible upon the granting of a mistrial unless the motion for a mistrial was "intentionally provoked by the government's actions." She argued that she could not be retried because her motion for a mistrial had been provoked by the Commonwealth's actions in questioning Adam. Patricia alleged that when the Commonwealth asked her brother if he had been "present in the courtroom on prior occasions when [she] was appearing for other methamphetamine[-]related charges," the Commonwealth knew that her brother's testimony in response to the question "would expose the jury to inadmissible evidence and provoke the defendant to move for a mistrial."

The circuit court noted that jeopardy had attached during Patricia's first trial. The court then granted her motion alleging that a new trial would violate her rights against double jeopardy. The Commonwealth now appeals, contending

that the circuit court erred when it dismissed the charges against Patricia on double jeopardy grounds. The Commonwealth does not challenge on appeal the circuit court's granting of Patricia's motion for a mistrial.

II. ANALYSIS

We first note that Patricia alleges in her appellee's brief that there is nothing in the record to indicate the jurisdictional procedure of KRS² 22A.020(4)(b) was followed in this appeal. KRS 22A.020(4)(b) states:

An appeal may be taken to the Court of Appeals by the state in criminal cases from an adverse decision or ruling of the Circuit Court, but only under the following conditions:

Such appeal shall be taken in the manner provided by the Rules of Criminal Procedure and the Rules of the Supreme Court, except that the record on appeal shall be transmitted by the clerk of the Circuit Court to the Attorney General; and if the Attorney General is satisfied that review by the Court of Appeals is important to the correct and uniform administration of the law, he may deliver the record to the clerk of the Court of Appeals within the time prescribed by the above-mentioned rules.

Based upon the language of the statute, the purpose of KRS 22A.020(4)(b) is for the Attorney General to ensure that the appeal is one worth taking, presumably so that precious governmental and judicial resources are not wasted on frivolous appeals. In the present case, the appellant's brief was submitted by the Attorney General and the Assistant Attorney General. Therefore, the Attorney General has

² Kentucky Revised Statute.

approved of the filing of this appeal because he finds it is important to correct the trial court's ruling and to provide for the uniform administration of the law.

Consequently, this claim lacks merit.

We also note that Patricia claims in her appellee's brief that the Commonwealth did not move in the circuit court pursuant to CR³ 52.02 as required by CR 52.04, yet it claims in its brief that "[t]he trial court granted the motion, and dismissed the case on grounds of double jeopardy, without holding a hearing and without making a finding that the Commonwealth had acted with the intention of provoking [Patricia] to move for a mistrial." In its order granting Patricia's motion, the circuit court did not specifically state that the Commonwealth had acted with the intention of provoking Patricia into moving for a mistrial. However, the simple fact that the court granted Patricia's motion implies such a finding because, as discussed *infra*, that is the only basis for granting such a motion.

Consequently, this claim lacks merit.

We now turn to the Commonwealth's argument that the circuit court erred when it dismissed the charges against Patricia on double jeopardy grounds. The circuit court's order granting Patricia's motion qualifies as an order dismissing the indictment. We review a circuit court's decision to dismiss an indictment for an abuse of discretion. *See Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision

³ Kentucky Rule of Civil Procedure.

was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”

Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

When a trial court ends a trial after it began but “before a verdict was reached on grounds unrelated to guilt or innocence[,] such action constitutes a mistrial.” *Derry v. Commonwealth*, 274 S.W.3d 439, 445 (Ky. 2008). In cases where a defendant requested “to end the proceeding before the merits could be addressed by the jury, he actually asked for a mistrial. (A dismissal of the indictment could follow, but the trial had to be ended first).” *Derry*, 274 S.W.3d at 445.

“[J]eopardy attaches when the jury is empaneled and sworn[.]”

Cardine v. Commonwealth, 283 S.W.3d 641, 646 (Ky. 2009). The Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution “guarantee that no person shall be tried twice for the same offense.” *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000). “Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a ‘manifest necessity’ for a mistrial or 2) the defendant either requests or consents to a mistrial.” *Cardine*, 283 S.W.3d at 647 (internal quotation marks and citation omitted). “Manifest necessity has been described as an urgent or real necessity. The propriety of granting a mistrial is determined on a case by case basis.” *Scott*, 12 S.W.3d at 684 (internal quotation marks and footnotes omitted).

Even if a criminal defendant successfully moves for a mistrial, under the United States Constitution, he may still “invoke the bar of double jeopardy in a second effort to try” him if “the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.”

Oregon v. Kennedy, 456 U.S. 667, 679, 102 S. Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982). This principle also applies under the Kentucky Constitution’s Double Jeopardy Clause. *See Stamps v. Commonwealth*, 648 S.W.2d 868, 869 (Ky. 1983). Further, under Kentucky law, a “party seeking to prevent his retrial upon double jeopardy grounds must show that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court.” *Terry v. Commonwealth*, 153 S.W.3d 794, 804 (Ky. 2005) (citing *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989)).

The attachment of jeopardy merely begins the inquiry as to whether the Double Jeopardy Clause of the Fifth Amendment proscribes a retrial. . . . When a trial is aborted at the volition of the defendant himself, the considerations are different from those that prevail when the interruption is precipitated by the prosecution or by the trial court sua sponte. . . . [I]f there is no bad faith and the choice has not been forced upon the defendant, he is not in a position to cry double jeopardy when the trial is relaunched.

Commonwealth v. Lewis, 548 S.W.2d 509, 510 (Ky. 1977), *abrogation on other grounds recognized by Cardine*, 283 S.W.3d at 646.

In the present case, jeopardy attached because the jury was impaneled and sworn. The defense asked its own witness Adam if he had ever known Patricia to “fool with” or manufacture methamphetamines, to which Adam responded in the negative. By asking these questions, the defense “opened the door” for the Commonwealth to inquire about the topic. “[O]pening the door’ to otherwise inadmissible evidence is a form of waiver that happens when one party’s use of inadmissible evidence justifies the opposing party’s rebuttal of that evidence with equally inadmissible proof.” *Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009) (citation omitted).

The open door doctrine does not pave the way for responsive evidence just because it fits in the same general category as evidence already admitted. For example, admitting hearsay from one side does not mean the other side can offer hearsay. . . . The question in each case is not whether initial proof shares some common quality with proof offered in response. Rather, it is whether the latter answers the former, and whether it does so in a reasonable way without sacrifice of other important values.

Stone, 291 S.W.3d at 702 (citation omitted).

After the defense asked its own witness if he had ever known Patricia to “fool with” or manufacture methamphetamine, the Commonwealth asked Adam on cross-examination if he knew if Patricia had ever been “charged with manufacturing methamphetamine.” Adam responded in the negative. The Commonwealth then asked Adam: “You’ve never been to court with her on two

previous charges of manufacturing meth?” At that time, the defense moved for the mistrial.

The facts of the present case are similar to those of at least two other cases. In *Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003),

Appellant’s counsel called Appellant’s daughter to the stand and asked her the following question:

Q: Have you ever seen your dad have any illegal drugs in the house?

A: No.

During cross-examination, the prosecutor asked:

Q: I believe [Appellant’s counsel] asked whether or not you’ve ever seen your father sell drugs. Is that correct?

A: [inaudible].

Q: And your answer was no. Have you ever known him to sell?

A: No.

Q: Do you know why he pled guilty (pause). Let me approach your honor.

Johnson, 105 S.W.3d at 439-40. In *Johnson*, rather than granting a mistrial and dismissing the indictment as occurred in the case before us, the trial court admonished the jury to disregard the question about whether Appellant had ever pled guilty. On appeal, the Appellant in *Johnson* alleged that despite the

admonition, he was entitled to a new trial pursuant to KRE⁴ 404(b). *See id.* at 440-41. The Kentucky Supreme Court found that the admonition cured the error. The Court then stated that

[e]ven if there had been no admonition, it is doubtful we would find reversible error. The daughter's testimony that she had never 'seen [her] dad have any illegal drugs in the house' was inadmissible character evidence. [C]haracter can be proven only by evidence of general reputation or by opinion, not by specific instances of conduct. Thus, the daughter's testimony opened the door, if only slightly, to inquiry on cross-examination as to specific instances of conduct. KRE 405(b).

Id. at 441 (internal quotation marks, citations and footnote omitted).

In another case, *Commonwealth v. Higgs*, 59 S.W.3d 886 (Ky. 2001), the defendant's father

testified for the defense that two days before the shooting he had a conversation with [the defendant] in which [the defendant] denied stealing [the] property; and that he told [the defendant] that "things were being blamed on him" and that he should always have witnesses with him wherever he went so that he could prove "that he didn't do it." In response to inquiry on cross-examination, [the defendant's father] admitted that in the summer of 1995, he, too, had accused [the defendant] of stealing property from him. Although [the defendant's father] did not say that [the defendant] actually stole his property, the clear implication of his testimony was that he believed [the defendant] had stolen his property.

In *Higgs*, the Kentucky Supreme Court held as follows regarding the defendant's father's testimony:

⁴ Kentucky Rule of Evidence.

The effect of [his] direct testimony was that he did not believe [the defendant] was a thief, which amounted to an opinion of [the defendant's] good character for honesty. KRE 405(a). . . . The effect of the information elicited on cross-examination was that, at least as recently as the summer of 1995, [the defendant's father] did believe [the defendant] was a thief. Having offered an opinion of [the defendant's] good character for honesty, [the defendant's father] opened the door for cross-examination impeaching the credibility of that opinion, even if the impeachment took the form of a specific instance of [the defendant's] bad conduct relevant to that character trait. KRE 405(b). . . .

As noted in *Shimon [v. United States]*, 352 F.2d 449, 453 (D.C. Cir. 1965)], the target of this kind of impeachment evidence is the credibility of the character witness, not the prior conduct of the defendant. Upon request, the jury should be admonished as to the limited effect to be given to such evidence.

Higgs, 59 S.W.3d at 894-95 (citations omitted).

Based upon the Kentucky Supreme Court's reasoning in *Johnson* and *Higgs*, the Commonwealth's act of asking Adam if he knew if Patricia had ever been "charged with manufacturing methamphetamine," and if he had "never been to court with her on two previous charges of manufacturing meth," was proper. Adam's testimony for the defense on direct that he had never known Patricia to "fool with" or manufacture methamphetamine was inadmissible character evidence because it involved specific instances of conduct, rather than simply evidence of her general character. Therefore, Adam's testimony opened the door to allow the

Commonwealth to ask him about specific instances of conduct, in accord with *Johnson*, which the Commonwealth did. *See Johnson*, 105 S.W.3d at 441.

Further, these questions by the Commonwealth were proper pursuant to *Higgs* because they also served the purpose of impeaching the credibility of Adam, who had testified as a character witness for Patricia. *See Higgs*, 59 S.W.3d at 895 (discussing *Shimon*, 352 F.2d at 453).

Because the Commonwealth's questions were proper, the Commonwealth did not act in bad faith in asking them. Consequently, the circuit court abused its discretion in dismissing the indictment on double jeopardy grounds. *See generally Terry*, 153 S.W.3d at 803-04.

Accordingly, the order of the Adair Circuit Court is reversed and the case is remanded for further proceedings.

ALL CONCUR.

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