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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000090-MR

HUMBERTO RAMIREZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 17-CR-00254

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON,¹ MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: Humberto Ramirez appeals from the judgment and sentence of two and one-half years entered by the Fayette Circuit Court on December 27, 2017, following his conviction at a jury trial of first-degree trafficking in a

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

controlled substance (less than two grams of methamphetamine),² no operator's license,³ and no/expired registration plates.⁴ Ramirez challenges two of the trial court's evidentiary rulings and contends testimony from one of the Commonwealth's witnesses invaded the province of the jury. Following a careful review, we affirm.

In the early morning hours of February 5, 2017, Lexington Metro Police Department Officer Jeremy Adkins initiated a traffic stop on a vehicle after discovering the license plate had been cancelled for failure of the registered owner to maintain insurance coverage on the vehicle. Officer Adkins asked the driver, later determined to be Ramirez, for his operator's license and proof of insurance. Ramirez presented expired proof of insurance cards and two identification cards from Mexico; he could not produce a valid driver's license. Officer Adkins was informed by dispatch that Ramirez had an outstanding arrest warrant for failure to maintain vehicle insurance and the officer subsequently requested backup officers be sent to the scene.

Officer Adkins got Ramirez out of the vehicle, handcuffed him, and searched him. The search revealed approximately \$1700 in cash in his left front

² Kentucky Revised Statutes (KRS) 218A.1412, a Class D felony.

³ KRS 186.410, a Class B misdemeanor.

⁴ KRS 186.170, a violation.

pocket and a clear cellophane wrapper containing approximately two grams of a clear, crystalline substance in his right front pocket. Ramirez admitted the substance was methamphetamine he had received “from a friend.” He insisted he was not a drug user and told officers he would voluntarily submit to a drug test. After receiving consent, another officer searched Ramirez’s vehicle and located a shopping bag containing approximately \$14,000 in cash, a digital scale, and four cellular telephones. Ramirez told officers he did not have a bank account and kept his cash with him because his wife was a drug user who could not be trusted with money. He indicated he had bought the scale at a yard sale several weeks prior but, due to a recent move of residence, had not removed it from his vehicle. Before being transported from the scene, Ramirez asked Officer Adkins to go through one of the phones—an Apple iPhone found in the center console of the vehicle—to locate his wife’s phone number so he could inform her he was being jailed.

Ramirez was subsequently indicted on the above-stated charges.

When plea negotiations were unsuccessful, the matter was set for a jury trial. Prior to trial, the Commonwealth moved for and was granted—without objection from Ramirez—permission to forensically search the cellular phones seized from

Ramirez. Using a forensic tool known as Cellebrite,⁵ Detective Jimmy Sisson of the LMPD Computer Forensics Unit was able to retrieve a series of text messages dating from August 2016 appearing to reference drug trafficking. Det. Sisson also recovered three photographs taken shortly before Ramirez was arrested. One of the photos was a “selfie” of Ramirez. The other two showed a Tupperware container on a digital scale identical to the one Ramirez had in his vehicle. The first of these two photographs showed the weight of the empty container, and the second—taken approximately thirty seconds later—showed the container holding a clear, glass-like substance and an increased weight of exactly one pound.

On the morning of trial, Ramirez objected to introduction of any recovered text messages from the seized iPhone sent or received prior to the date of his arrest, arguing these messages would be improper “other crimes” evidence. The trial court concluded presentation of the messages to the jury would not run afoul of the prohibition on introducing evidence of other crimes or wrongs set forth in KRE⁶ 404(b), but rather would be evidence of an on-going act of criminal activity. Det. Sisson ultimately testified regarding content of the text messages and the three photographs recovered from the iPhone.

⁵ Using this tool, examining officers are able to access and examine cellphone data including call logs, contact lists, text messages, emails, photos and videos.

⁶ Kentucky Rules of Evidence.

LMPD Det. Jared Curtsinger was called as an expert witness on narcotics activity in the Lexington area. Det. Curtsinger informed the jury of the types of items typically located when a drug user was arrested as opposed to items found when a drug trafficker was arrested. Based on his experience, finding a person with multiple cellular telephones, large quantities of cash, digital scales capable of weighing ounces and pounds, and no paraphernalia to ingest drugs, indicated that person was a drug trafficker rather than a user.

Det. Curtsinger explained methamphetamine manufactured in Kentucky tended to be cloudy and off-white, pink or another color tone depending on the precursor used. He then stated methamphetamine manufactured in the American West or in Mexican “super-labs” was crystal clear and came in large, glass-like shards. Det. Curtsinger noted Kentucky historically had a larger problem with opioid drugs than methamphetamine, but Lexington had become a central hub for drug trafficking operations for Mexican cartels.

This testimony drew an immediate objection and a motion for mistrial. Ramirez argued the Commonwealth had no proof the drugs seized from him came from a Mexican “super-lab” and Det. Curtsinger’s testimony created the implication he was a member of a Mexican cartel, suggested he was a mid- to large-scale trafficker, and unduly prejudiced the jury. The trial court found testimony about Mexican “super-labs” and differences in appearance of

methamphetamine manufactured locally or abroad was outside the range of the Commonwealth's notice of what Det. Curtsinger's expert testimony would be and sustained the objection to any testimony tending to connect Ramirez with Mexican cartels. The motion for mistrial was overruled, but the Commonwealth was instructed to have Det. Curtsinger clarify his prior testimony referred to methamphetamine trafficking in general and he had no evidence connecting Ramirez to cartels or super-labs. The trial court informed Ramirez it would entertain a motion for an admonition following the clarification testimony.

Ramirez stood firm in his request for a mistrial, arguing no curative testimony or clarification could undo the prejudice or remove the improper implications from the minds of the jurors. The trial court reiterated its belief a mistrial was not warranted but clarification of the testimony was needed. It again indicated a willingness to provide an admonition if requested. The Commonwealth resumed questioning Det. Curtsinger to obtain the curative testimony and, after eliciting the requested testimony, moved on to other topics without further mention of the offending portions of the Officer's testimony. No request for an admonition was forthcoming.

Det. Curtsinger told the jury about current "street" prices for methamphetamine, stating a gram would cost approximately \$50, an ounce would go for \$800 to \$1200, and a pound would bring between \$15,000 and \$22,000. In

response to an inquiry from the Commonwealth about the content of the text messages, Det. Curtsinger opined they were consistent with negotiations for the sale and purchase of illicit drugs. After summarizing the evidence, Det. Curtsinger told jurors he had concluded Ramirez was engaged in trafficking in methamphetamine.

Ramirez testified on his own behalf. He informed jurors of his upbringing in Mexico, telling them he began working at age ten and did not finish school. He indicated he could neither read nor write. Consistent with what he told the arresting officers, he testified he had no bank account, did not trust his wife with money due to her drug addiction, and admitted to possessing methamphetamine. He denied selling methamphetamine and, contrary to what he had told officers at his arrest, told the jury he intended to use the methamphetamine found in his pocket. Ramirez admitted he used the iPhone police seized at his arrest but claimed others in his home had access to it and also used it at times. He specifically disclaimed any knowledge of the Tupperware container, its contents, or any photographs of it located on the iPhone.

The jury found Ramirez guilty of first degree trafficking in methamphetamine, no operator's license, and cancelled registration plates, and recommended a sentence of two and one-half years' incarceration. The trial court sentenced Ramirez in accordance with the jury's recommendation and further

ordered forfeiture of the cash seized when Ramirez was arrested. This appeal followed.

Ramirez raises three allegations of error in seeking reversal. First, he contends he was entitled to a mistrial following Det. Curtsinger's testimony inferring he was a mid-level trafficker associated with a Mexican drug cartel. Next, Ramirez contends the trial court erred in permitting the Commonwealth to introduce text messages pre-dating his arrest because he was not charged with an on-going criminal conspiracy. Finally, he argues Det. Curtsinger invaded the province of the jury when he gave opinion testimony the recovered text messages represented negotiations to traffic in narcotics and the evidence as a whole led him to conclude Ramirez was a drug trafficker.

Ramirez first argues the trial court erred in failing to grant his motions for a mistrial. He contends Det. Curtsinger was improperly permitted to testify about irrelevant matters which were unduly prejudicial when he implied Ramirez was a mid-level drug dealer with connections to a Mexican cartel. He maintains the testimony served only to create animosity toward him, inflame passions, and bias the jury. Ramirez argues no proper purpose or justifiable reason existed to introduce any evidence inferring he trafficked in anything other than the drugs located on his person, the methamphetamine he had at his arrest was manufactured

in Mexico or in a “super-lab” operated by a cartel, or that he was in any way related to a Mexican cartel.

“Mistrials are an extreme remedy that should be granted only sparingly and upon a showing of manifest necessity.” *Dickerson v. Commonwealth*, 485 S.W.3d 310, 322 (Ky. 2016) (citing *Graves v. Commonwealth*, 285 S.W.3d 734, 737 (Ky. 2009)). “[A]dmonitions are preferred over mistrials.” *St. Clair v. Commonwealth*, 455 S.W.3d 869, 892 (Ky. 2015).

There are only two situations in which the trial court’s admonition will not be presumed to cure a reference to inadmissible evidence:

(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, or (2) when the question was asked without a factual basis and was “inflammatory” or “highly prejudicial.”

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (internal citations omitted). “A trial court is authorized to use its discretion to declare a mistrial only when there is a manifest necessity, when the right to a fair trial has been infringed upon and the prejudicial event cannot otherwise be remedied.” *Gray v. Commonwealth*, 534 S.W.3d 211, 215 (Ky. 2017). “The standard for reviewing the denial of a mistrial is abuse of discretion.” *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002) (overruled on other grounds by *Padgett v. Commonwealth*,

312 S.W.3d 336 (Ky. 2010)); *see also Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). Nothing here presents the manifest necessity for granting of the “extreme remedy” of a mistrial.

The trial court concluded no egregious transgression had occurred and directed the Commonwealth to clarify Det. Curtsinger’s testimony to the jury to cure any improper inference. The Commonwealth elicited testimony from Det. Curtsinger that he was previously referring to methamphetamine trafficking in general and he had seen no evidence connecting Ramirez or the methamphetamine in his possession with a “super-lab” or Mexican cartel. No admonition was requested. We cannot say the brief testimony Ramirez challenges infringed on his right to a fair trial. Additionally, any prejudice from the initial testimony was cured by the rehabilitative testimony and could have been further remedied by an admonition, if requested. There was no abuse of discretion in denying the motion for mistrial.

Next, Ramirez argues the trial court erred in permitting introduction of text messages dating back over two months prior to his arrest. He contends the text messages constituted improper evidence of other, uncharged criminal acts and should have been excluded under KRE 404(b). We disagree.

KRE 404(b) prohibits introduction of “[e]vidence of other crimes, wrongs, or acts” used “to prove the character of a person in order to show action in

conformity therewith[.]” The purpose of the rule is to prevent admission of evidence of a defendant’s prior bad acts which “show a propensity or predisposition to again commit the same or a similar act.” *Southworth v. Commonwealth*, 435 S.W.3d 32, 48 (Ky. 2014). However, such evidence may be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” KRE 404(b)(1).

Professor Lawson notes that under KRE 404(b), evidence of other crimes should be admitted to prove intent only when intent is in genuine dispute. Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25, p. 98 (3d ed. 1993). Of course, even when in dispute, a trial court must still determine that the evidence is relevant to prove the intent to commit the crime charged. *Id.* Further, the evidence is subject to exclusion under KRE 403.

Walker v. Commonwealth, 52 S.W.3d 533, 535-36 (Ky. 2001).

To find Ramirez guilty of first degree trafficking in methamphetamine, the jury was required by the instructions to conclude he knowingly possessed methamphetamine and he intended to sell or distribute it to another person. Ramirez clearly conceded he possessed methamphetamine, and his entire defense strategy was to discredit the Commonwealth’s witnesses to create reasonable doubt about his intent to sell the drugs. This theme prevailed from opening statements to closing arguments. Because Ramirez placed his mental state in issue, prior bad acts evidence was admissible and proper under KRE 404(b). *Walker*, 52 S.W.3d at 536 (citing *United States v. Thomas*, 58 F.3d

1318 (8th Cir. 1995)). Further, the text messages were relevant as they tended to show Ramirez intended to sell the drugs he possessed rather than ingest them himself. The trial court properly admitted this evidence.

Finally, Ramirez alleges Det. Curtsinger invaded the province of the jury in his opinion testimony that the recovered text messages represented negotiations to traffic in narcotics and the evidence as a whole led him to conclude Ramirez was a drug trafficker. Conceding this argument is unpreserved for appellate review, Ramirez requests palpable error review pursuant to RCr⁷ 10.26.

“This Court reviews unpreserved claims of error on direct appeal only for palpable error. To prevail, one must show that the error resulted in ‘manifest injustice.’” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). RCr 10.26 states

[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

To determine whether a manifest injustice has occurred, reviewing courts are required to determine whether “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Martin*, 207 S.W.3d at 4. An error cannot be

⁷ Kentucky Rules of Criminal Procedure.

palpable unless there is a “substantial possibility” the result would have been different without the error, *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006), or was “so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin*, 207 S.W.3d at 3. Justice Cunningham, in his concurring opinion in *Alford v. Commonwealth*, 338 S.W.3d 240, 251 (Ky. 2011), once described the threshold for palpable error: “It should be so egregious that it jumps off the page . . . and cries out for relief.” The instant case does not rise to this level.

Although Ramirez claims Det. Curtsinger improperly interjected his own conclusions into the case because testimony from a police officer “often carries a special aura of reliability,” he admits jurors were intelligent enough to come to the same conclusions without Det. Curtsinger “lending his imprimatur.” In light of this admission, the correctness of which we have no doubt, there can be no showing Ramirez was denied due process of law nor a substantial possibility the result of trial would have been different absent the two statements from Det. Curtsinger. There was no invasion of the province of the jury. There was no palpable error. Ramirez has established no basis for relief.

For the foregoing reasons, the judgment of the Fayette Circuit Court is **AFFIRMED.**

ALL CONCUR.

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