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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000804-MR

BRIAN BALDWIN APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 16-CR-00179

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

GOODWINE, JUDGE: Brian Baldwin appeals a judgment of the Taylor Circuit Court sentencing him to three years' imprisonment and requiring him to pay restitution in the amount of $157.50, plus the 5% clerk's fee. Having reviewed the record and the applicable legal authority, we affirm.

BACKGROUND

On August 17, 2016, Officer Mark Gilpin of the Campbellsville Police Department responded to a "call for service" at the Crescent Hill Manor apartment complex. While speaking to the manager of the complex, he observed Baldwin, whom he knew, walk across the parking lot and get into a vehicle. Shortly thereafter, Baldwin pulled over close to Officer Gilpin and initiated contact. During the conversation, Baldwin reached into his pocket and pulled out a small plastic baggie of methamphetamine and handed it to Officer Gilpin. After looking at the baggie, Officer Gilpin asked another officer at the scene to field test it. After handing the officer the drugs, Baldwin volunteered that he had slashed a tire on a vehicle owned by a resident who had angered him in his unsuccessful attempt to retrieve his girlfriend's belongings.

Based upon the positive field test results for methamphetamine, Officer Gilpin asked Baldwin to step out of the vehicle and placed him under arrest. During a search incident to the arrest, Officer Gilpin found brass knuckles in Baldwin's pocket. Baldwin was subsequently indicted for first-degree possession of a controlled substance, first offense (methamphetamine); carrying a concealed deadly weapon; and criminal mischief in the third degree.

At trial, Baldwin testified he had been searching for his girlfriend who had not returned home as expected. When the girlfriend finally arrived at

Baldwin's grandparents' home where he had been staying, she asked Baldwin for help in retrieving her belongings from a friend's apartment. Before leaving his grandparents' house, another friend who was with Baldwin at the time handed him a baggie of methamphetamine that she had received from someone else to give to him. Baldwin admitted that he knew the baggie contained methamphetamine and that he accepted it. Baldwin also testified that he then drove to Crescent Hill Manor to retrieve his girlfriend's belongings and stated that, after the unsuccessful attempt to retrieve the belongings, he became frustrated and angry at the resident and proceeded to slash a tire on the resident's vehicle.

A jury convicted Baldwin on all charges and recommended sentences of three years' imprisonment on the possession of a controlled substance charge, 365 days in jail for carrying a concealed deadly weapon, and 90 days in jail on the criminal mischief charge related to the tire slash. The trial court sentenced Baldwin to a total of three years' imprisonment and ordered restitution for the slashed tire in the amount of $157.50, plus a 5% clerk's fee. The trial court found Baldwin to be a "poor person" pursuant to KRS[1] 453.190(2) and waived all court costs and fines. The judgment entered on March 30, 2017, on AOC Form 450 waived the court costs and the $500.00 fine but ordered Baldwin to pay restitution in the amount of $157.50 plus a 5% clerk's fee.

[1] Kentucky Revised Statutes.

This appeal followed. Baldwin argues that the trial court erred in: (1) denying his motion for a directed verdict or a judgment of acquittal on the possession of controlled substance charge; (2) denying his pretrial motion to sever the charge of criminal mischief; (3) denying his motion for a mistrial following the introduction of alleged improper and prejudicial penalty phase testimony; (4) denying his request for probation; and (5) imposing a fine on an indigent defendant.[2] He also asserts that the cumulative effect of these numerous errors deprived him of a fundamentally fair trial.

STANDARD OF REVIEW

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Regarding the severance of charges for trial, an appellate court "will not overturn a trial court's joinder determination absent a showing of actual prejudice and a clear abuse of discretion." *Elam v. Commonwealth*, 500 S.W.3d 818, 822-23 (Ky. 2016).

A decision to grant a mistrial "is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Graves v. Commonwealth*, 285 S.W.3d 734,

[2] Baldwin is mistaken in this assertion. The trial court waived the fine.

737 (Ky. 2009) (quoting *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005)). Whether such a necessity exists is determined on a case-by-case basis and we review the trial court's denial of a mistrial for abuse of discretion. *Id.* (citations omitted).

An appellate court will overturn decisions regarding probation only upon a showing of abuse of discretion. *Turner v. Commonwealth*, 914 S.W.2d 343, 347-48 (Ky. 1996).

ANALYSIS

In support of his contention that the trial court erred by not granting a directed verdict or judgment of acquittal on the possession of controlled substance charge, Baldwin argues that his possession of the drugs was not unlawful. Citing *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011), Baldwin insists that his possession of the methamphetamine was innocent and continued no longer than necessary to dispose of the drugs to the proper authorities.

In *Benham, supra*, the Supreme Court of Kentucky clarified the directed verdict rule and its proper application:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury

> questions as to the credibility and weight to be given to such testimony.

816 S.W.2d at 187. In *Acosta v. Commonwealth*, the Supreme Court further refined the *Benham* standard stating:

> The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; if the evidence is more than a scintilla and it would be reasonable for the jury to return a verdict of guilty based on it, then the motion should be denied. [*Benham*, 816 S.W.2d at 187-88.] On appellate review, the standard is slightly more deferential; the trial court should be reversed only if "it would be *clearly unreasonable* for a jury to find guilt." *Id*. (emphasis added).

391 S.W.3d 809, 816 (Ky. 2013). The *Acosta* court also noted that a directed verdict should be granted only if a defendant is "entitled to a complete acquittal[.]" *Id*. at 817 (quoting *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978)). In other words, taking the evidence as a whole, it must be "clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses." *Id.* (quoting *Campbell*, 564 S.W.2d at 530). Finally, *Benham* instructs that "[a] reviewing court does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented." 816 S.W.2d at 187.

Baldwin was charged with possession of a controlled substance in the first degree, methamphetamine. KRS 218A.1415(1)(c) defines that offense as

complete when a defendant “knowingly and *unlawfully* possesses . . . [m]ethamphetamine.” (Emphasis added.) In *Commonwealth v. Adkins*, the Supreme Court examined the “innocent possession” defense in the context of KRS 218A.220 which exempts from the controlled substance prohibitions “persons whose ‘temporary incidental possession . . . is for the purpose of aiding public officers in performing their official duties.’” 331 S.W.3d 260, 265 (Ky. 2011) (quoting KRS 218A.220). The Supreme Court concluded that KRS 218A.220 “is meant to encourage persons who find controlled substances or otherwise come innocently into their possession to turn them in and give whatever information they might have about them.” *Id.* at 266. However, the Supreme Court also made clear that:

> As with innocent possession in general, the defense this portion of KRS 218A.220 provides **requires that the possession be incidental and that the possessor notify the appropriate authorities and turn in the controlled substance as soon as reasonably possible.**

Id. (emphasis added). It is important to note that *Atkins* does not stand for the proposition that merely asserting the defense of innocent possession automatically entitles a defendant to a directed verdict of acquittal; rather, *Atkins* holds that one asserting a properly supported defense is entitled to an instruction reflecting the alleged innocent possession. Baldwin does not argue he was improperly denied the instruction.

With this background of the defense of innocent possession in mind, we turn to an examination of the Commonwealth's evidence and whether it was sufficient to withstand Baldwin's directed verdict motion. Because there is no dispute that Baldwin knowingly possessed the methamphetamine, the focus of our review is whether his possession was unlawful. Other than the act of relinquishing the drugs itself, the only evidence in support of Baldwin's innocent possession defense is his own testimony.

Baldwin testified that after receiving the baggie from a person he knew to be an addict, he placed the drugs in his pocket while he attempted to retrieve his girlfriend's belongings from the Crescent Hill Manor complex. He admitted knowing the baggie contained methamphetamine when he accepted it and stated that he was not really sure why he accepted the drugs if it was not to use them. Thus, Baldwin's own testimony undermines his directed verdict argument. After insisting that a week before accepting the drugs he resolved to not only avoid drugs, but to avoid people associated with drugs, Baldwin admitted to hanging out with the person who gave him the drugs, whom he described as a drug addict, and then driving with her from Louisville to Campbellsville in search of his girlfriend. Baldwin admitted to accepting what he knew was methamphetamine and acknowledged he did so with no real plan for the drugs after placing them in his

pocket. He ultimately gave the drugs to Officer Gilpin only after realizing that an officer who knew him was present at the scene of the tire slash.

Further, Baldwin was evasive when the Commonwealth questioned him about the precise source of the drugs. When asked who gave him the drugs, he first said, "a friend." Then, after further prodding, provided the name "Amy." Although Baldwin described her as "a family friend from Louisville," he claimed to not know her last name when asked.

Baldwin's testimony and actions with respect to the drugs clearly put him at odds with what the Kentucky Supreme Court envisioned as constituting a credible "innocent possession" defense. The trial court did not err when, after reviewing all the evidence in the light most favorable to the Commonwealth, it concluded that Baldwin's possession of the methamphetamine could reasonably be found to violate the "unlawfully possesses" element of KRS 218A.1415. Because there was more than a mere scintilla of evidence offered by the Commonwealth that Baldwin unlawfully possessed the methamphetamine, the trial court correctly refused to grant a directed verdict of acquittal. The weight, effect, and credibility of evidence and testimony are for the jury to decide. *Davis v. Commonwealth*, 398 S.W.2d 701, 703 (Ky. 1966). We are persuaded that the trial court did not err in leaving the question of whether Baldwin's possession was lawful for the jury. Importantly, the trial court gave instructions that did not preclude the jury from

embracing Baldwin's "innocent possession" defense had they so chosen. There was no error.

Baldwin next argues that the trial court abused its discretion in denying his pretrial motion to sever the misdemeanor charge of criminal mischief in the third degree. Concerning severance, the Kentucky Supreme Court provides guidance in determining whether it rises to the level of reversible error:

> We "will not overturn a trial court's joinder determination absent a showing of actual prejudice and a clear abuse of discretion. We must be clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge that the refusal to grant a severance was an abuse of discretion."

Elam v. Commonwealth, 500 S.W.3d 818, 822-23 (Ky. 2016) (citing *Murray v. Commonwealth*, 399 S.W.3d 398, 405 (Ky. 2013)). At the hearing on the motion to sever, the trial court stated:

> Criminal Rule 6.18 basically talks about two or more offenses, whether misdemeanor or felonies, or both, may be charged in same indictment if offering same or similar or, here's the or, are based on same acts or transactions connected together. Because all these allegations allegedly occurred on August 17, because that's the whole framework for why the officer went there to begin with, I'm going to deny the motion to sever.

The acts which culminated in the criminal charges leveled against Baldwin all occurred on the same date and centered around Baldwin's distress and self-described anger over the search for his girlfriend and his inability to retrieve

her belongings. The methamphetamine in Baldwin's possession had been given to him prior to leaving Louisville to drive to Campbellsville in an attempt locate his girlfriend. He made the trip in the company of the person who had given him the drugs, a person he knew to be an addict. After his girlfriend's arrival at his grandparents' house in Campbellsville, Baldwin drove to Crescent Hill Manor to retrieve her things, became upset when he was unsuccessful, and then slashed the tire of the resident who had angered him. It was at this point that Baldwin saw the officer who responded to the disturbance call and voluntarily gave the officer the drugs in his possession.

Like the trial court, we are convinced that all of Baldwin's actions were sufficiently connected to sustain joinder for trial. Our decision finds support in the rationale set out in *Cherry v. Commonwealth*, 458 S.W.3d 787 (Ky. 2015). In concluding that Cherry's commission of various criminal offenses over the course of several hours justified joinder, the Supreme Court stated:

> As this Court has previously explained, to justify joining separate offenses in a single trial, "[t]here must be a sufficient nexus between or among them." *Peacher* [*v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013).] The required nexus must arise "from a 'logical' relationship between [the crimes], some indication that they arose one from the other or otherwise in the course of a single act or transaction, or that they both arose as parts of a common scheme or plan." *Id.*

Id. at 794. Like Cherry, Baldwin made a series of poor decisions during an ongoing course of conduct that resulted in charges stemming from closely related events, all of which occurred within a short period of time. Thus, the trial court did not abuse its discretion in refusing to sever the misdemeanor criminal mischief charge from Baldwin's trial on charges of drug possession and carrying a concealed deadly weapon.

Baldwin next focuses on the testimony of probation and parole employee Maryann Sapp, arguing that the trial court abused its discretion in denying his motion for a mistrial based upon her allegedly improper and prejudicial testimony during the penalty phase. Prior to the exchange between the Commonwealth and Sapp which led to the allegedly improper testimony, Sapp testified to Baldwin's record of six misdemeanor convictions and one felony conviction. After Sapp reported Baldwin's 2015 conviction for escape in the second degree, the Commonwealth asked her to state the level of crime assigned to the offense and Sapp responded that it was a Class D felony. When Sapp started to relate the next conviction on Baldwin's record, the following exchange occurred:

> Sapp: I have a Fayette District Court case number 09-F
>
> Commonwealth (interjecting): What does F stand for?
>
> Sapp: Felony.

Baldwin's counsel objected and requested a mistrial based upon the Commonwealth identifying the crime to the jury as a felony when he had pled guilty to a misdemeanor. After the trial court denied the motion for a mistrial without giving a curative admonition, the following exchange took place:

> Commonwealth: In connection with 09-F-3339, what was Mr. Baldwin convicted of?
>
> Sapp: He was convicted of receiving stolen property under $10,000.
>
> Commonwealth: Is that a misdemeanor?
>
> Sapp: Yes.

Sapp then continued to list Baldwin's seven other misdemeanor convictions.

Baldwin now contends that the identification of the initial charge of 09-F-3339 as a felony necessitated a mistrial. As previously stated, "[a] mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Graves, supra*. The purpose underlying such a rigorous standard is "to reserve the extraordinary relief of declaring a mistrial for situations in which an error has been committed that is of such magnitude that the litigant would be denied a fair and impartial jury absent a new trial." *Shabazz v. Commonwealth*, 153 S.W.3d 806, 810-11 (Ky. 2005). A mistrial is almost universally viewed as a remedy to be utilized only in situations "when there is a fundamental defect in the proceedings

which will result in a manifest injustice." *Id*. (quoting *Gould v. Charlton Co., Inc*., 929 S.W.2d 734, 738 (Ky. 1996)). The alleged error in this case falls far short of meeting that standard.

Baldwin's mistrial argument is weakened by the fact that immediately prior to the objectionable exchange, an actual felony conviction had been put before the jury. In other words, it is not as though Baldwin's prior convictions had all been misdemeanors and it was only the allegedly improper identification of the letter "F" as indicating a felony charge which placed the idea of a prior felony conviction in the jurors' minds. Before Sapp's allegedly improper testimony about the nature of the charge in 09-F-3339, the jury had properly heard of a prior felony conviction in another case.

In addition, Baldwin complains of the failure to give a curative admonition. In *Buchanan v. Commonwealth*, 399 S.W.3d 436, 444 (Ky. App. 2012), this Court stated "[w]e have long held that an admonition is usually sufficient to cure an erroneous admission of evidence[.]" There was no need for an admonition in this case because any error in Sapp's testimony was effectively cured by the Commonwealth's own follow-up questions which conclusively established that Baldwin's conviction in 09-F-3339 was a misdemeanor and not a felony. Because the Commonwealth cured any possible confusion as to the nature of Baldwin's conviction in 09-F-3339, there was little chance that he was unduly

prejudiced by Sapp's explanation of the meaning of the letter "F." The trial court did not err in refusing to grant a mistrial or in failing to give an admonition.

In his fourth allegation of error, Baldwin challenges the denial of his request for probation as an abuse of discretion. Citing KRS 218A.1415 and KRS 218A.010(43), Baldwin insists that the trial court's findings do not meet the statutory standards concerning presumptive probation. KRS 218A.1415(1) states in pertinent part:

> (d) If a person does not enter a deferred prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, **unless a court determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010.**

(Emphasis added.) KRS 218A.010(43) defines presumptive probation as:

> a sentence of probation not to exceed the maximum term specified for the offense, subject to conditions otherwise authorized by law, that is presumed to be the appropriate sentence for certain offenses designated in this chapter, notwithstanding contrary provisions of KRS Chapter 533. **That presumption shall only be overcome by a finding on the record by the sentencing court of substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety**[.]

(Emphasis added.)

In denying Baldwin's request for probation, the trial court made the following findings:

> You're correct that under possession charges there can be a presumptive probation. I also will note that in this particular matter, [the jury] also convicted [Baldwin] of the misdemeanor charges but his record . . . It's just, it's just not good. That's obviously the reason why the jury chose to give him the maximum in this particular case. Baldwin has 205 days [of jail credit]. I think there's probably a good chance as [Baldwin's counsel] accurately noted, that [Baldwin will] come up for parole here very quickly. I would be very surprised if he's in there much longer. He would then be monitored by parole and so I'm going to follow the jury recommendation and I'm going to sentence him to 3 years on the possession charge, 365 days on the carrying a concealed weapon, 90 days on the criminal mischief. I'm going to run all those sentences concurrent for a sentence of 3 years.

Baldwin's criminal history, as considered by the jury in its recommendation and referenced by the trial court in denying his request, contained multiple criminal convictions, two probation revocations, a felony conviction, multiple convictions related to theft, a DUI, and two convictions for domestic abuse. Based upon those facts, the trial court stated its reason for denying Baldwin presumptive probation and it did so for "substantial and compelling reasons" as required by KRS 218A.010(43).

Kentucky law is well-settled that trial courts are afforded wide discretion in deciding whether a grant of probation is appropriate under the circumstances of a particular case. Appellate courts will disturb a probation decision only upon a demonstration that the trial court has abused its considerable

discretion. *Turner v. Commonwealth*, 914 S.W.2d 343, 347-48 (Ky. 1996). The test by which a reviewing court weighs abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (quoting *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)); *Arnett v. Commonwealth*, 366 S.W.3d 486, 489 (Ky. App. 2011). Given the trial court's findings as to Baldwin's record and his apparent inability to benefit from his experience with the criminal justice system, there was nothing arbitrary, unreasonable, or unfair in the trial court's decision to deny Baldwin's request for probation. We, therefore, perceive no abuse of the trial court's discretion.

Baldwin also maintains that the cumulative effect of these errors deprived him of a fair trial, requiring reversal. Baldwin's argument fails under the rationale set out by our Supreme Court in *Brown v. Commonwealth*:

> We have found cumulative error **only where the individual errors were themselves substantial, bordering, at least, on the prejudicial**. Where, as in this case, however, none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice. Although errors crept into this trial, as they inevitably do in a trial as complex and long as this one, they did not, either individually or cumulatively, render the trial unfair.

313 S.W.3d 577, 631 (Ky. 2010) (emphasis added) (internal citations omitted). Considering our resolution of the individual issues advanced in this appeal, and the

lack of substantial prejudice occasioned by any of them, the doctrine of cumulative error is not implicated.

Finally, Baldwin asserts that the trial court erred in imposing court costs and a $500 fine despite having found him to be a poor person under KRS 453.190(2). The Commonwealth agrees with Baldwin that the trial court never intended to impose the $500 fine in this case. The trial court orally stated at sentencing, "I'm going to waive his financial obligation from the standpoint of fines and court costs. There is restitution of $157.50 that I can't waive."

Neither the court costs nor the fine was imposed on the AOC-450 form, Judgment & Sentence.[3] Restitution of $157.50 was ordered,[4] along with a 5% clerk's fee. The 5% fee is not a court cost; rather, it is collected by the clerk as a cost of collecting and distributing restitution. Neither restitution nor the 5% clerk's fee can be waived. KRS 532.032(1) provides:

> Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. **The provisions of this section shall not be subject to suspension or nonimposition.**

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[3] Although it appears from a close examination of the judgment that the boxes for court costs, restitution, and fine were initially checked, the check marks for court costs and fine were whited out to conform with the trial court's oral statement at sentencing that court costs and fine would be waived.

[4] As required, the victim, for whose benefit restitution was being ordered, was also named.

(Emphasis added.) KRS 533.030 provides:

> The circuit clerk shall assess an additional fee of five percent (5%) to defray the administrative costs of collection of payments or property. This fee shall be paid by the defendant and shall inure to a trust and agency account which shall not lapse and which shall be used to hire additional deputy clerks and office personnel or increase deputy clerk or office personnel salaries, or combination thereof[.]

533.030(3)(b). Because KRS 532.032(1) unequivocally states that the "provisions of this section shall not be subject to suspension or nonimposition[,]" that section necessarily encompasses the referenced statutes, in this case KRS 533.030(3)(b). Thus, under statutory mandate, neither restitution, nor the 5% fee, may be waived. Accordingly, we find no error in the trial court's handling of the court costs, fine, restitution, or clerk's fee.

CONCLUSION

Based upon the foregoing, the judgment of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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