RENDERED: AUGUST 9, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000107-MR

CHARLES TYRONE POYNTER — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 16-CR-00338

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Charles Tyrone Poynter has directly appealed his convictions for trafficking in a controlled substance (cocaine), two counts, and persistent felony offender in the first degree, entered by the Nelson Circuit Court following a jury trial. Poynter was sentenced to two concurrent terms of five

years' imprisonment on the underlying charges, enhanced to two concurrent terms of fifteen years' imprisonment on the status offense. We affirm.

Poynter was charged with selling cocaine on July 7 and 12, 2016, to a confidential informant working with the local drug task force. The informant, Stephanie Wright, herself a drug addict, was paid $100 per transaction. On the above dates, she purchased a small amount of cocaine from Poynter, paying him $40.00 each time. Poynter was arrested, and the Nelson County grand jury returned an indictment against him on November 16, 2016, with an amended indictment returned on July 5, 2017. Poynter's trial lasted three days in October 2017. He was found guilty as described above and sentenced to a total of fifteen years' imprisonment. This appeal follows.

Poynter makes three arguments on appeal. He first contends that he was denied effective cross-examination of the confidential informant when the circuit court disallowed questions pertaining to Ms. Wright's shoplifting conviction. Pryor insists that it was erroneous for the circuit court to limit cross-examination in this way, as it should have been allowed pursuant to Kentucky Rules of Evidence (KRE) 608, 609(a), and *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013).

The Commonwealth had moved *in limine* to prevent Poynter's impeachment of its witness by use of her misdemeanor shoplifting conviction. The

circuit court originally agreed with Poynter that he should be allowed to pursue this line of inquiry. Ultimately, however, the Commonwealth's motion was granted, with the circuit court relying on language in *United States v. Washington*, 702 F.3d 886, 893 (6th. Cir. 2012) ("This circuit has adopted the position that theft and related crimes do not ordinarily amount to crimes of dishonesty or false statement.").

But Poynter urges that the circuit court's reliance was misplaced, and that he should have been permitted to ask Wright about her shoplifting conviction. The decision in *Allen, supra*, held that, although a criminal defendant could inquire about a witness's misdemeanor convictions, actual proof thereof was impermissible under KRE 608 and 609. Thus, it would appear that the Commonwealth's motion *in limine* was wrongly granted and that Poynter's request was wrongly denied.

However, *Allen* contains the proviso that the "error, however, does not automatically require reversal. Like all evidentiary errors, it is subject to the harmless error rule, RCr [Kentucky Rule of Criminal Procedure] 9.24. The test for harmlessness is whether the error substantially swayed the verdict. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009)." *Allen*, 395 S.W.3d at 467. Under a harmless error analysis, we cannot agree with Poynter that the circuit court's ruling affected the outcome of the proceedings. Poynter's counsel

conducted a thorough cross-examination of the witness, including the fact that she had been convicted of a felony, that she was a drug addict who had acted as an informant in order to access cash for her own drug purchases, and that she had been ousted from the confidential informant program for violation of her agreement with law enforcement. Her credibility was sufficiently impaired and any lack of questioning about her shoplifting activity would not have made any significant further effect towards impeaching her. *Winstead*, *supra*.

Poynter secondly argues that the circuit court erred in failing to declare a mistrial after the confidential informant testified that she was "honestly terrified" of Poynter. Poynter maintains that this statement, even if unsolicited by the prosecution, was unduly prejudicial to him and that the circuit court's admonition to the jury to disregard the statement did not cure the harm done. We disagree.

> It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion. Moreover, a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a "manifest necessity for such an action." "The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way."

Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004) (footnotes omitted). "An abuse of discretion exists where the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Rigdon v. Commonwealth*, 522 S.W.3d 861, 870 (Ky. 2017) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Furthermore, '"[w]hen an admonitory cure is possible, a mistrial is not required.' And the 'jury is presumed to follow the trial court's admonition."' *Doneghy v. Commonwealth*, 410 S.W.3d 95, 107 (Ky. 2013) (footnotes omitted). *See also Hilton v. Commonwealth*, 539 S.W.3d 1, 16 (Ky. 2018).

Here, the witness's remark, although not favorable to the defense, was not sufficient to rise to the level mandating the extreme remedy of declaring a mistrial. *Woodard*, *supra*. We find no abuse of discretion and, thus, no error in this regard.

Poynter lastly asserts that the circuit court erred in not declaring a mistrial when it was discovered that the prosecution failed to obtain and share the file maintained by the police relating to the confidential informant. Again we find no abuse of discretion. Although the circuit court denied the defense motion for mistrial, it fashioned the following remedy: The circuit court gave an early recess on the date defense first learned of the undisclosed file; it ordered the Commonwealth to provide the defense a copy of the file; and it ordered the

Commonwealth to recall the two witnesses, subject to defense cross-examination and possible impeachment.

Despite the circuit court's remedial efforts, Poynter claims that he was not given sufficient time to prepare to his satisfaction. But that falls short of demonstrating prejudice. *See Dunn v. Commonwealth*, 360 S.W.3d 751, 768 (Ky. 2012). The materials were provided to Poynter's counsel, and he was given an opportunity to examine them and again confront the two witnesses whose testimony was potentially affected by the newly disclosed documents. We find no abuse of discretion in the denial of Poynter's second motion for a mistrial. *Woodard*, *supra*.

Accordingly, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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