IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0998-MR

DANTE LAMONT MORTON — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
02-CR-349

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Fayette Circuit Court jury convicted Appellant, Dante Morton, of two counts of robbery in the first degree. The jury recommended that Appellant serve twenty years in prison for each count, to run consecutively for a total of forty years; the judge modified the recommended sentence to thirty years imprisonment, ordering ten years of one of the twenty-year terms to run concurrently. Appellant appeals to this court as a matter of right, Ky. Const. § 110(2)(b), arguing that the trial court made three prejudicial errors: (1) overruling Appellant's motion for a new trial based on the admission of impermissible hearsay statements from two witnesses; (2) overruling Appellant's motion for a mistrial after the Commonwealth's opening statement discussed anticipated testimony from a witness who later refused to testify; and (3) overruling Appellant's motions for a mistrial

and a new trial based on KRE 404(b), when a police witness stated that he located Appellant in prison. Finding no prejudicial error, we affirm.

I. FACTS.

On November 25, 2002, a few minutes past 10:00 p.m., Brooke Grow and Cary Bacon, employees at the Long John Silver's restaurant located in the Tates Creek Center in Lexington, went outside after the restaurant had closed to dispose of the garbage and smoke cigarettes. As Grow walked to her car to get her cigarettes, a man approached her, waving a black gun in her face. He told Bacon and Grow to reenter the restaurant; once inside, he ordered all of the employees to the floor. Brandishing the gun, he asked who was in charge. Shannon Penman, the team leader that night, responded. The robber then ordered everyone to the front of the restaurant and instructed Penman to get a bag and to make the employees lie down in front of the counter. After Penman procured a bag, he asked her where the safe was located. She proceeded to the safe and unlocked it as demanded. The top portion of the safe was programmed for a one-minute opening delay, and the robber became agitated when it did not immediately open. After taking a total of $1,763.00 from the safe and the money allotted for deposit, the robber departed the premises, leaving behind no fingerprints or physical evidence. Because he had worn a bandana over his face, none of the employees were able to give a thorough description of him. They later described him as a young, thin, dark-complected black male, about 5'9" to 5'10" tall, wearing dark clothes and black and white tennis shoes.

An almost identical incident occurred at the same Long John Silver's restaurant less than one month later on December 20, 2002, between 10:15 and 10:30 p.m. This time, Jerad Moreland, Reggie Moore, and two other employees, intended to go outside

to empty a vacuum cleaner and dispose of the trash. When they opened the door, a man emerged from around the corner of the building and pointed a gun at Moore's face. He entered the restaurant, ordered the employees to the front, and instructed them to lie on the floor. He asked who had the keys to the safe. Angela Turner responded and then acceded to his demands to open the safe and put money from the bottom portion of the safe into a bag. The robber became impatient when the top part of the safe failed to open. Turner explained that it would take ten minutes for the safe to open, and the robber responded, "It'll only take a minute." (As a security precaution taken in reaction to the November robbery, the safe had been programmed for a ten-minute opening delay.) Having lost patience, the robber emptied the cash drawers and left without taking any money from the top part of the safe. Similar to the previous robbery, the perpetrator did not leave any evidence behind and had concealed his face, this time with a ski mask. The descriptions of the December robber resembled those given of the November robber, i.e., a thin, black male in his teens to early twenties, 5'9" to 5'10", and wearing black and white tennis shoes. Moore, who was present for both robberies, testified that the December robber appeared thinner than the November robber, but that he could have been the same person. None of the witnesses were able to positively identify Appellant as the robber on either occasion.

The police soon focused on Appellant as the prime suspect for both robberies. Detective Robert Sarrantonio of the Lexington Police Department received a tip from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") that came from a suspect in another case. The suspect informant revealed that the robber's first name was Dante. The tip prompted the police to re-interview employees at Long John Silver's. From the interviews, the police learned that the suspect's last name was possibly Morton. Later,

after speaking with Moore and Derek Leavell, one of Appellant's street acquaintances who supplied information on the robberies after being arrested, himself, the police arrested Appellant.

Leavell testified that Appellant had told him that he robbed Long John Silver's twice to get money to buy a car. Leavell also testified that Appellant had first told him of his plans to commit the robbery and then showed him the money he had stolen.

Paul Love, a friend of Appellant, reluctantly testified that Appellant had told him that he needed money to buy a car and that he would get the money "just like wait and see." Appellant later bought a car, which was subsequently stolen from a mall parking lot. Appellant then stated that he was "thinking about hitting it again," to obtain money to purchase another car. Love testified that he knew about the first robbery and had spoken to Sarrantonio about it.

Richard Deener, a jailhouse informant, testified similarly to Leavell and Love. He testified that Appellant told him that he had gotten away "clean" with the first robbery, so he "hit it again." Deener stated that Appellant had also told him that the police had no evidence – only two witnesses who lacked credibility.

II. HEARSAY.

Appellant contends that the trial court committed prejudicial error by overruling his motion for a new trial because two witnesses gave impermissible hearsay testimony. We disagree.

A. Mark Gibson.

On cross-examination by Appellant, Mark Gibson, a manager at Long John Silver's, testified that another employee told him that the robber's name was Dante. Gibson made this statement twice, almost contemporaneously. Appellant objected after

the second statement. The trial judge sustained his objection and admonished the jury to disregard Gibson's testimony as to what other employees had told him.

The Commonwealth claims that Gibson's statement was admissible pursuant to KRE 801A(a)(1), as a prior inconsistent statement to impeach Reggie Moore's testimony that he did not know who committed the robberies and that he did not tell anyone who did it. This argument fails. Gibson's testimony was not a prior inconsistent statement made by Moore, the declarant; rather, it was a statement from another employee. In fact, Gibson testified that while Moore told him that he knew who committed the robberies, he refused to reveal the robber's name. Thus, Gibson's statement naming Appellant was impermissible hearsay.

However, no error occurred because the trial judge admonished the jury to disregard the statement. It is presumed that the jury will follow a curative admonition. Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997). This presumption is overcome only: (1) when there is an overwhelming likelihood that the jury will be incapable of following the admonition and the impermissible testimony would be devastating to the appellant; or (2) "when the question was asked without a factual basis and was inflammatory or highly prejudicial." Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 441 (2003) (citations omitted). Neither exception applies here. Because the impermissible hearsay amounted to a mere reference to Appellant's first name, and multiple other witnesses (Leavell, Deener, and Love) testified that Appellant had confessed the robberies to them, the evidence was neither devastating nor inflammatory. Additionally, the impermissible testimony was unsolicited, not resulting from any question, much less one lacking a factual basis; notably, Gibson gave the

testimony at issue on cross-examination by Appellant. Thus, the admonition cured any possible prejudice.

B. Sarrantonio.

Sarrantonio's alleged hearsay testimony was elicited on direct examination by the Commonwealth regarding the steps in his investigation that led him to suspect Appellant as the robber. Sarrantonio testified that he had received a tip from the ATF that someone had revealed that an individual named Dante committed the robberies.[1]

> A: At that time . . . myself and Detective Johnson received information from the ATF that they had a person that was giving them information in reference to the Long John Silver's robbery, and that they were aware of who it was.
>
> Q: And did you receive a name at that time?
>
> A: Yes. We received a first name of Dante.
>
> Q: And at that point, was Dante Morton a suspect?
>
> A: At that time, we did not know his last name. All we knew was that it was a person by the name of Dante.
>
> Q: So what did you do next?
>
> A: We continued on with the investigation. We went back and re-interviewed managers.

Appellant then objected and requested that the judge admonish the jury not to consider Sarrantonio's testimony about the ATF tip for its truth, but only as an explanation of the officers' actions. The trial judge refused his request when the Commonwealth stipulated that it would not attempt to elicit testimony from Sarrantonio about what other interviewees had told him. Shortly thereafter, Sarrantonio stated that as a result of re-

[1] Presumably, this individual was Ira Robinson, who later refused to testify, as he was the only individual in this case who had any connection with the ATF.

interviewing some of the Long John Silver's employees, he learned that Appellant was a possible suspect. Appellant did not object.

Appellant argues that Sarrantonio's testimony about the tip from the ATF as well as his statement that his interviews yielded Appellant's name as a possible suspect should have been excluded as investigative hearsay. (He does not argue on appeal that the trial court erred in failing to give the requested admonition.) Both challenges to Sarrantonio's testimony are unpreserved. First, when a party states grounds for an objection, the party is limited to the grounds stated; all other grounds are deemed waived. Harris v. Commonwealth, Ky., 342 S.W.2d 535, 539 (1960). The admonition Appellant requested regarding the ATF tip reveals that his objection was based on how the testimony was used; he did not request an admonition that the jury disregard the testimony altogether, but merely that the jury consider it only to explain the officer's actions. Indeed, the request for the admonition expressly conceded that the ATF tip was admissible, just not for the reason that Appellant challenges it on appeal. He cannot now argue that the trial court should have excluded the testimony altogether. Second, preservation requires that the opposing party state any grievances by contemporaneous objection. KRE 103(a)(1). Because Appellant failed to object to Sarrantonio's testimony that he learned from his interviews that the suspect's name was Dante Morton, he failed to preserve the issue for our review. Thus, we review this issue for palpable error. RCr 10.26; KRE 103(e).

Both of Appellant's challenges to Sarrantonio's testimony are substantively valid. We condemned the admissibility of investigative hearsay in Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988):

> Prosecutors should, once and for all, abandon the term "investigative hearsay" as a misnomer, an oxymoron. The rule is that a

> police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case.

Id. at 541. Thus, "investigative hearsay" is admissible only to explain police action where it is at issue. See id. at 541-42 (police testimony discussing telephone call made during investigation of suspect's whereabouts and conclusions from witness interviews was impermissible hearsay); Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 79 (1995) (out-of-court statement explaining why police took victim into protective custody deemed inadmissible investigative hearsay because the officer's motive for doing so was not in issue). None of the challenged testimony falls under the exception set forth in Sanborn. While Sarrantonio's statement about the ATF tip and his summation of the employee interviews may have explained how the police came to suspect Appellant, it was nonetheless inadmissible, because the investigation was not in issue. In fact, the Commonwealth makes no attempt to argue that it was. It merely makes the mistaken assertion that the testimony was admissible to explain how Sarrantonio conducted the investigation.

However, the admission of the testimony does not rise to the level of palpable error. Palpable error requires a showing of manifest injustice, RCr 10.26, which Appellant has not made here. Where impermissible testimony is cumulative of other testimony, its admission is harmless error. White v. Commonwealth, Ky., 5 S.W.3d 140, 142 (1999) (admission of hearsay testimony rendered cumulative and harmless by nearly identical testimony of two other witnesses); Patterson v. Commonwealth, Ky. App., 555 S.W.2d 607, 609 (1977) (same). While Sarrantonio's impermissible statements identified Appellant as the robber, the testimony of Leavell, Love, and

Deener, did so as well. Thus, even if Appellant had preserved these issues, the outcome would have been the same.

III. ROBINSON'S REFUSAL TO TESTIFY.

Appellant contends that the trial court erred by refusing to grant a mistrial because the Commonwealth's opening statement described the testimony it anticipated from Ira Robinson, who later refused to testify. Appellant claims that this deprived him of the opportunity to confront a witness whose "testimony" was communicated by the Commonwealth, and to challenge that testimony.

In her opening statement, the prosecutor described Robinson's anticipated testimony as follows:

> The first person to share this information with the police was someone who admittedly didn't want to and probably never would have, but he got into trouble himself. Ira Robinson. Ira Robinson was arrested on other charges on December 22. He told an officer that he knew who was robbing the Long John Silver's, and his name was Dante. . . . When Ira was interviewed by the detectives, he gave more details than that. Dante had told Ira he was going to rob Long John Silver's. A few days later, Dante told Ira that he did it and bragged he got about $3,000.00 from the robbery. But sadly, Dante explained to him, he had bought a car with his free money . . . but his car had already been stolen. Then, a few weeks later, right before Ira got locked up on December 22, Dante bragged to him, "I hit it again." But Dante explained to Ira that he didn't get as much money because they had changed the timer on the safe.

Robinson was arrested for a federal offense while on probation for a state offense. After his arrest, he gave the police information on the robberies pursuant to a plea agreement in which he agreed to testify truthfully in any action on behalf of the government. He was sentenced for the federal offense one week prior to Appellant's trial. On the first day of trial after the parties had given opening statements, Robinson was transported to the courthouse to testify. The transporting jailer, who had spoken with Robinson that day, informed the prosecutor that Robinson had said that he was not

going to testify. Doubting that he would testify truthfully if he testified at all, the prosecutor requested a hearing outside of the jury's presence. Robinson appeared before the court, and after being informed of the possible consequences of refusing to testify, still declined to testify. The prosecutor stated that she did not have notice of Robinson's refusal until the hearing and requested that he be held in contempt of court. Later that day, after the court had procured an attorney for Robinson, he was held in contempt of court and sentenced to six months imprisonment to run consecutive to the term that he was then serving.

At the close of the Commonwealth's case, Appellant moved for a mistrial on grounds that the prosecutor's description of the testimony she anticipated from Robinson prejudiced him because Robinson did not testify, thus was not subject to cross-examination. The prosecutor reiterated that she was unaware when she made her opening statement that Robinson would refuse to testify. The trial judge overruled the motion for a mistrial finding that the prosecutor had made her opening statement in good faith. Appellant did not request an admonition to the jury to disregard that portion of the prosecutor's opening statement.

Before the jury retired to deliberate, the court gave admonitions regarding the permissible usage and scope of a closing argument and that the attorneys' arguments were not evidence. Similarly, Appellant's attorney had cautioned the jury during his opening remarks that opening statements only describe the evidence that the parties expect to produce and do not constitute evidence, themselves.

The trial court properly denied Appellant's motion for a mistrial. Where a prosecutor states that she will produce evidence or prove certain facts and fails to do so, the court must consider whether the prosecutor acted in bad faith and whether

prejudice resulted to the substantial rights of the defendant. Freeman v. Commonwealth, Ky., 425 S.W.2d 575, 578 (1967) (citations omitted) ("Counsel has the right to direct the attention of the jury to all facts and circumstances that he in good faith believes will be allowed to develop in the evidence."); Decker v. Commonwealth, 303 Ky. 511, 198 S.W.2d 212, 214 (1946) (no reversal because of inappropriate opening statement unless prejudice results); Mullins v. Commonwealth, Ky., 79 S.W. 258, 258-59 (1904) (no grounds for reversal where Commonwealth failed to produce evidence to support its claim in opening statement that defendant killed victim to prevent him from testifying against him in another trial because there was no proof of misconduct on the part of the prosecutor that affected the substantial rights of the defendant).

Nothing indicates that the prosecutor here acted in bad faith during her opening statement. The trial court made a finding of fact to that effect, and findings of fact are not disturbed on appeal unless clearly erroneous, i.e., unsupported by substantial evidence. Commonwealth v. Deloney, Ky., 20 S.W.3d 471, 473 (2000). The record supports the judge's factual finding. The prosecutor stated that she had no reason to believe that Robinson would refuse to testify until after opening statements were completed. Additionally, the prosecutor knew of Robinson's plea agreement in which he promised to testify for the state. Robinson had also spoken to the police regarding the robberies on two prior occasions. Thus, it was reasonable and in good faith for the prosecutor to describe his anticipated testimony in her opening statement.

We now turn our inquiry to whether the prosecutor's opening statement prejudiced Appellant's substantial rights. No prejudice occurred because the facts contained in the prosecutor's description of Robinson's anticipated testimony were cumulative of the testimony of numerous other witnesses. People v. Coleman, 543

N.E.2d 555, 561 (Ill. App. Ct. 1989) (prosecutor's opening statement describing anticipated testimony from a non-testifying witness that defendant bought murder weapon was not prejudicial because three other witnesses testified that he did); State v. Fisher, 680 P.2d 35, 36-37 (Utah 1984) (opening statement describing anticipated testimony that defendant threatened victim was not prejudicial because it was cumulative of other testimony); cf. Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 494 (1995) (although erroneous, testimony was harmless error because it had been previously elicited). The Commonwealth stated that Robinson would testify to the following: (1) that Appellant was the robber; (2) that Appellant stole approximately $3,000.00; and (3) that the car he bought with the robbery money was stolen so he robbed Long John Silver's again to get more money to buy another one. Because the testimony of Leavell, Love, and Deener, established these same facts, Appellant was not prejudiced. Additionally, Sarrantonio's testimony recounting Appellant's statement to the police established that Appellant's car had been stolen.

Furthermore, admonitions to the jury that attorney statements do not constitute evidence cured any prejudice. The jury received two such admonitions; one from defense counsel during his opening statement, which immediately followed the Commonwealth's, and one from the court before closing arguments. It is well-settled that admonitions can rectify a situation such as this.

> It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given.

Frazier v. Cupp, 394 U.S. 731, 735-36, 89 S.Ct. 1420, 1423, 22 L.Ed.2d 684 (1969) (court's admonition that attorney statements are not evidence cured prejudice); United States v. Dunlap, 28 F.3d 823, 825 (8th Cir. 1994) (no prejudice where court and prosecutor stated that attorney statements are not evidence); Crane v. Sowders, 708 F.Supp. 163, 165 (W.D. Ky. 1989) (same); People v. Maese, 164 Cal. Rptr. 485, 489-90 (Cal. Ct. App. 1980) (admonitions that attorney statements are not evidence and to ignore attorney statements unsupported by evidence cured prejudice); People v. Lampton, 438 N.E.2d 915, 917-19 (Ill. App. Ct. 1982) (same); cf. Price v. Commonwealth, Ky., 59 S.W.3d 878, 880-81 (2001) (admonition cured prejudice where prosecutor, in closing argument, performed an impermissible demonstrative reconstruction of the crime). Nor can Appellant complain that the admonitions were deficient for lack of specificity as he failed to request one. See Frazier, supra, at 736 n*, 89 S.Ct. at 1423 n* ("A more specific limiting instruction might have been desirable, but none was requested."). Because the Commonwealth acted in good faith and the jury was admonished, the Commonwealth's opening statement is not grounds for reversal.

IV. PRIOR BAD ACTS.

Appellant argues that the trial court erred by refusing to grant a mistrial or a new trial when Sarrantonio stated that he located Appellant at the Fayette County Detention Center. Appellant contends that his testimony contravened the prohibition in KRE 404(b) against evidence of a witness's prior bad acts to prove only that he was a person of bad character. The testimony in question was elicited when Sarrantonio was describing his investigation.

Q: What did you do in regards to Mr. Morton?

A: Then we located him at the Fayette County Detention Center and placed charges on him.

Appellant then moved for a mistrial on the grounds that the testimony informed the jury that Appellant had a criminal record. He argued that an admonition would not cure the impermissible testimony. In response, the prosecutor stated that she did not expect Sarrantonio to testify that Appellant was in jail at the time of his arrest for the robberies. The trial judge overruled Appellant's motion. Later, Appellant made an unsuccessful motion for a new trial on the same grounds.

Appellant was not prejudiced because it is presumed that juries generally follow admonitions. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 82-83 (2000) (admonition rendered mistrial unnecessary where inappropriate comments were brief and undetailed); Johnson, 105 S.W.3d at 440-41 (denying new trial because admonition cured error). It is irrelevant that the jury in the case sub judice did not receive an admonition. Because Appellant failed to request one, the only issue on appeal is whether an admonition would have cured the error. See Graves v. Commonwealth, Ky., 17 S.W.3d 858, 865 (2000) (no error where further admonition or remedial action, which appellant did not request, would have cured evidence of prior bad acts).

As stated supra, the presumption in favor of an admonition's effectiveness is overcome only (1) when there is an overwhelming likelihood that the jury will be incapable of following the admonition and the impermissible testimony would be devastating to the appellant; or (2) "when the question was asked without a factual basis and was inflammatory or highly prejudicial." Johnson, supra, at 441 (citations omitted). Neither exception applies. Sarrantonio's statement was brief and did not reveal why Appellant was incarcerated or for how long. See id. (testimony that defendant previously pled guilty to a criminal offense not prejudicial because underlying

offense was not discussed and could have been something as minor as a speeding violation). See also Bledsoe v. State, 21 S.W.3d 615, 624 (Tex. Ct. App. 2000) (no prejudice where police officer testified that he served warrant on defendant at jail because admonition was given, the reasons for incarceration were not stated, the prosecutor did not dwell on the statement, and the prosecutor did not act in bad faith). Nor was it elicited by an improper question; Sarrantonio stated that he located Appellant in prison only when asked what he "did in regards to" Appellant.

Accordingly, the judgment of conviction and the sentences imposed by the Fayette Circuit Court are affirmed.

All concur.

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