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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-14-04 ELLA GRAVITT, D.C.

2002-SC-0067-MR

CHARLES HUGHES, JR. — APPELLANT

V.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES WEDDLE, JUDGE
00-CR-103

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Hughes, Jr., was convicted by an Adair Circuit Court jury of trafficking in a controlled substance, first degree, second or subsequent offense. KRS 218A.1412. He was sentenced to twenty years in prison and appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant claims the trial court committed reversible error by (1) failing to declare a mistrial after the judge inadvertently informed the jury that this was Appellant's "second or subsequent offense;" (2) instructing the jury in a manner that violated his right to a unanimous verdict; and (3) denying his motion for a directed verdict of acquittal. Finding no error, we affirm.

* * *

On August 30, 2000, Detective George Atwood of the Kentucky State Police and Rhonda Bridgewater Jones, a Kentucky State Police informant, were attempting to make a "drug buy" while conducting an ongoing narcotics investigation in Adair County. They contacted John Thompson, a drug "runner" (the middleman between the dealer and the purchaser), and told him that they wanted to purchase $100 worth of crack cocaine. Thompson had them drive him to the home of Jimmy Miller. Miller, however, claimed not to have any crack cocaine, so Atwood, Jones, and Thompson drove around the area looking for a willing seller. The trio sighted Appellant on the sidewalk and Thompson asked Atwood to stop the car. Thompson got out to speak to Appellant, then returned to the car and told Atwood and Jones to drive to his apartment building. When they arrived at the apartment, Thompson informed them that the crack cocaine would arrive shortly.

Appellant arrived at the building on a moped and drove to the back corner of the apartment complex. Jones gave Thompson $100, which she testified was enough to purchase one gram of crack cocaine. Thompson left to meet with Appellant, while Jones and Atwood remained in the car, where they were unable to see either Thompson or Appellant. Thompson returned to the car with some crack cocaine and without the $100. There was some dispute as to whether he returned with two rocks of crack cocaine, or with only one rock that had been chipped. Regardless, Jones did not believe Thompson had returned with a quantity of crack cocaine sufficient for the amount paid and accused Thompson of stealing some of it. Jones testified that the amount provided was closer to a "fifty" (0.5 grams) than the "hundred" (one gram) she had expected to receive. She also testified that it was common for a runner to keep some of the crack cocaine and that she had done so herself when she worked as a drug

runner. Thompson denied stealing any of the crack cocaine and told Jones that she could check with the dealer about the amount obtained.

Jones got out of the car and walked over to Appellant. She said to him, "Ten Watt, you can do me better than this," and "Ten Watt, we paid for a hundred." (Jones explained that Appellant was her cousin and that "Ten Watt" was her nickname for him.) Jones testified that Appellant then handed something to Thompson, which Thompson then handed to her. While Jones admitted that she could not see exactly what was passed from Appellant to Thompson, she was sure it was the same item that Thompson handed to her. This item proved to be an additional rock of crack cocaine. Atwood remained in the car during this transaction and could see only Jones. The entire transaction was tape-recorded, but the only voices audible on the tape are those of Jones, Thompson, and Atwood. Appellant's voice cannot be heard. As a result of this transaction, Appellant was arrested and charged with trafficking in a controlled substance in the first degree.

I. FAILURE TO GRANT MISTRIAL.

At the beginning of the trial, the trial judge read the indictment to the jury, as follows: "On or about August 30, in the year 2000, in this county, that the defendant, Charles 'Junie' Hughes, Jr., committed the crime of trafficking in a controlled substance in the first degree, second or subsequent . . . ." The trial judge then said, "Strike that. Approach the bench gentlemen." At the bench, the trial judge apologized for reading the words "second or subsequent" and asked if defense counsel wished him to admonish the jury to disregard the slip. Defense counsel responded that he would like the judge to simply continue with the trial. The trial resumed and the judge admonished the jury that the indictment was not evidence and should not be considered as such.

Appellant now contends that the judge should have sua sponte declared a mistrial. Appellant states he was prejudiced by the trial judge's inadvertence because the words "second or subsequent" (1) were read by the judge, as opposed to the prosecutor, whom the jury would assume was not impartial; (2) were read at the beginning of the trial, when the jurors are paying closer attention; and (3) indicated that he had been convicted of an identical offense on at least one other occasion. Thus, Appellant argues, the jurors knew he had sold drugs in the past and convicted him solely for that reason and not because the Commonwealth presented sufficient evidence to prove its case.

The flaw in Appellant's reasoning is that he failed to request a mistrial and waived his right to an admonition. Conceding that he failed to preserve the issue for appeal, Appellant requests review for palpable error. RCr 10.26. To demonstrate palpable error, Appellant must show that manifest injustice occurred, i.e., a substantial probability that the outcome of his trial would have been different had the error not occurred. Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511, 513 (1986).

A mistrial is an extreme remedy that should be granted only when a manifest injustice has occurred that would deprive the defendant of a fair and impartial trial. Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 738 (1996). In most cases, an admonition will cure any error that results from the introduction of improper evidence, as it is assumed that a jury will follow the admonition. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 485 (1999). An admonition is insufficient only when one of the following conditions exists: (1) there is an overwhelming probability that the jury will not follow the admonition and the introduced evidence will be devastating to the defendant, or (2) the question had no factual basis and was inflammatory or highly prejudicial. Johnson v.

Commonwealth, Ky., 105 S.W.3d 430, 441 (2003) (citation omitted). Obviously, the second circumstance does not apply here. Nor will we assume that the jury must have concluded that the adjectives "second or subsequent" were intended to modify the unspoken noun "offense." Cf. Tamme v. Commonwealth, Ky., 973 S.W. 2d 13, 34 (1998) (court would not assume that jury would conclude from reference to previous trial that Appellant had previously been found guilty and sentenced to death). We conclude that the jury could reasonably have been expected to follow an admonition to disregard the adjectives. See, e.g., Kinser v. Commonwealth, Ky., 741 S.W.2d 648, 653 (1987) (admonition sufficient to cure police testimony that he "knew enough about the case to think that [the defendants] had possibly committed this murder").

The fact that an admonition was not given does not change the result. Failing to request an admonition is an accepted trial strategy. See Hall v. Commonwealth, Ky., 817 S.W.2d 228, 229 (1991), overruled on other grounds by Commonwealth v. Ramsey, Ky., 920 S.W.2d 526, 527 (1996). If no admonition is requested, the only issue on appeal is whether an admonition, if requested and given, would have cured the error. Cf. Graves v. Commonwealth, Ky., 17 S.W.3d 858, 865 (2000). Since an admonition would have cured the trial judge's mistake, there can have been no error, palpable or otherwise, in failing to grant a mistrial.

II. JURY INSTRUCTIONS.

Appellant asserts that the jury instruction on trafficking in a controlled substance in the first degree violated his right to a unanimous verdict. The instruction read as follows:

> You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this instruction, if, and only if, you

believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about August 30, 2000 . . . he sold or delivered a quantity of cocaine to Rhonda Bridgewater Jones and or [sic] John Thompson.

A jury instruction may permit conviction under alternative theories of guilt only if the evidence would support a finding of guilt under each of the alternative theories. Davis v. Commonwealth, Ky., 967 S.W.2d 574, 582 (1998). If one of the theories is not supported by the evidence presented at trial, the right to a unanimous verdict is violated. Id. Appellant contends that his case is like Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000), in which the jury was instructed that it could find the defendant guilty of trafficking in a controlled substance if he had manufactured, distributed, dispensed, sold, or transferred any cocaine, or possessed cocaine with the intent to sell it, whereas the evidence only supported the theory of possession with intent to sell. Id. at 881-84. Appellant contends that the Commonwealth failed to present any evidence that he sold cocaine and that, at most, the evidence showed only that he transferred the cocaine to Thompson.

Again, the alleged claim of error was not preserved. Appellant did not object to the instructions or tender any alternative instructions. RCr 9.54(2). Again, we are requested to review this claim for palpable error. RCr 10.26. In fact, no error occurred. There was sufficient evidence presented at trial to reasonably support the theories that Appellant had sold or transferred cocaine to Thompson and/or Jones. Jones testified that she saw Appellant pass something to Thompson and that Thompson immediately gave that item to her. She further testified that the item was a rock of crack cocaine. This is sufficient to support a conviction under the "delivered" portion of the instruction. Further, Jones and Atwood both testified that they told Thompson that they wanted to

buy crack cocaine and gave Thompson $100 to make the purchase. After a meeting with Appellant, Thompson returned with cocaine and without the money. This was sufficient to support an inference that Appellant sold the crack cocaine to Thompson. When Jones complained that she had not received her money's worth of cocaine, Thompson told her to address her complaints to the dealer. Jones's testimony that she complained to Appellant about the amount, and that he responded by providing more cocaine, reasonably supports the conclusion that he had sold the first rock of crack cocaine to Thompson. This case can be distinguished from Burnett, supra, because in Burnett, there was absolutely no evidence to support several of the theories listed in the instruction, while in the case sub judice, evidence existed to support both theories.

III. DIRECTED VERDICT OF ACQUITTAL.

Appellant contends that the trial court erred in denying his motion for a directed verdict of acquittal. The Commonwealth claims the issue is unpreserved, as Appellant did not renew the motion as required by Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998). However, a renewal is required only when the motion is made at the close of the Commonwealth's case, the motion is denied, and the defendant then presents additional evidence. See United States v. Lopez, 576 F.2d 840, 842 (10th Cir. 1978) ("[A] defendant who moved for a judgment of acquittal at the close of the government's case must again move for a judgment of acquittal at the close of the entire case if he thereafter introduces evidence in his own defense because, by presenting such evidence, the defendant is deemed to have withdrawn his motion and thereby to have waived any such objection to its denial.") (interpreting Fed.R.Crim.P. 29). However, renewal is not required if the defense rests immediately after the motion is denied, as in the case sub judice. Commonwealth v. Pevely, Ky. App., 759 S.W.2d 822, 823 (1988)

("The phrase within RCr 10.24 'at the close of all the evidence' is to be construed to mean when all the evidence that is going to be introduced has been introduced."); see also United States v. Kubeck, 487 F.2d 1256, 1258 (6th Cir. 1973) (when no additional evidence is offered by the defendant, further reliance on the motion is not deemed waived and renewal is not required); Robinson v. State, 875 S.W.2d 837, 841 (Ark. 1994) (same).

While the issue is preserved, it does not warrant reversal. A directed verdict is proper only when the testimony fails to incriminate the accused or is "wholly insufficient to show guilt." Bradley v. Commonwealth, Ky., 465 S.W.2d 266, 267 (1971). Thus, if the trial judge believes it is reasonable for a jury to find the defendant guilty, the defendant is not entitled to a directed verdict of acquittal. Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977). Here, there was sufficient evidence for a reasonable jury to convict Appellant. Jones's testimony described a sequence of events in which money and drugs were passed between Jones, Thompson, and Appellant. That testimony created a reasonable inference that Thompson gave Jones's money to Appellant, who then provided him with the crack cocaine that Thompson returned to Jones. Furthermore, when Jones complained about the amount of crack cocaine received, Appellant gave Thompson an item that Thompson then gave to Jones, which was subsequently determined to be another rock of crack cocaine. On a motion for directed verdict, the court must draw all fair and reasonable inferences in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The trial judge was required to assume for purposes of this motion that the item passed from Appellant to Thompson was the same rock of crack cocaine that Thompson passed to Jones.

Appellant asserts that Jones was not a credible witness because she has twice been convicted of drug-related offenses. However, questions of credibility and weight of the evidence are matters for the jury. Id. The jury heard Atwood testify that Jones was working as an informant to "work off drug charges" and that she had been paid for her services as an informant. Jones admitted that she was a paid informant, that she had dealt drugs for many years, that she had several drug related convictions, and that she had been addicted to drugs for seven years. This evidence provided the jurors with a complete picture of her character and integrity and allowed them to determine her credibility as an eyewitness. Her status as a convicted felon and paid informant did not entitle Appellant to a directed verdict of acquittal.

Accordingly, the judgment of conviction and the sentence imposed by the Adair Circuit Court are AFFIRMED.

All concur.

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