

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 27, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000923-MR

DATE 9/17/09 Kelly Klaker b.c.
APPELLANT

MARCO BYRD

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 07-CR-00959

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This is a matter of right appeal from a judgment wherein Appellant was convicted of first-degree trafficking in a controlled substance, second offense, and of being a first-degree persistent felony offender (PFO I) for which he was sentenced to fifty (50) years. Appellant claims as error: double enhancement from his prior convictions; that he was substantially prejudiced when the Commonwealth's main witness disappeared after direct examination and could not be cross-examined for six days; and the failure to declare a mistrial after a Commonwealth's witness improperly testified to prior bad acts in violation of KRE 404(b). Upon review of Appellant's arguments, we adjudge that there was no improper double enhancement using his prior convictions and that the trial

court did not err in failing to grant a mistrial when the Commonwealth's chief witness temporarily disappeared after direct examination. However, we believe that the cumulative effect of the KRE 404(b) testimony from three of the Commonwealth's witnesses warranted a mistrial in this case. Thus, we reverse and remand.

On July 5, 2005, detectives Steve Chapelle and Jackie Hunt arranged a controlled drug buy using a confidential informant named Sheila Howard. According to Detective Chapelle, at around 5:00 p.m. on that date, Howard called Appellant, Marco Byrd, and asked if she could buy 1/16 of an ounce of crack cocaine. Byrd told Howard to meet him in five minutes. However, the detectives asked Howard to stall so they would have time to set up the surveillance.

Howard met Byrd in an alley behind State Street, where Byrd and his family lived. Howard testified that Byrd broke a rock of crack cocaine off of a bigger piece of crack and sold it to her. After the deal was complete, Howard gave the officers a description of the man who sold her the drugs. The detectives immediately proceeded to the alley and observed a man fitting that description. Howard positively identified the man who had sold her the crack as Marco Byrd.

After a three-day jury trial, Byrd was found guilty of first-degree trafficking in a controlled substance, second offense. The jury then recommended that Byrd be sentenced to twenty (20) years in prison for the trafficking conviction, enhanced to fifty (50) years, after finding him guilty of

PFO I. The trial court entered its judgment on November 26, 2007, sentencing Byrd according to the jury's recommendations. This appeal followed.

DOUBLE ENHANCEMENT

Byrd argues that the trial court improperly allowed double enhancement when two of his prior convictions from the same judgment were split to enhance his sentence for trafficking in a controlled substance, second offense, and for PFO I. After the jury found Byrd guilty of trafficking in a controlled substance, the court held an "enhancement phase" wherein the jury was to determine if Byrd was guilty of second offense trafficking in a controlled substance based on a prior trafficking conviction from August 27, 2001, Indictment No. 01-CR-00376-001. After the jury found Byrd guilty of second offense trafficking, the penalty phase was held.

In the penalty phase, the jury was instructed to determine if Byrd was guilty of PFO I based on a conviction for first-degree trafficking in a controlled substance from August 27, 2001, Indictment No. 01-CR-00021-002, and a conviction for first-degree possession of a controlled substance, first offense, from October 23, 1997, Indictment No. 97-CR-00525. On the verdict form, the jury was first asked to fix Byrd's punishment for trafficking in a controlled substance, second offense, which the jury fixed at twenty (20) years. The jury was next asked to find if Byrd was guilty of PFO I and, if so, to fix his punishment between 20 and 50 years in lieu of his above punishment for trafficking in a controlled substance, second offense. The jury found Byrd guilty of PFO I and sentenced him to fifty (50) years.

Byrd argues that because his two prior trafficking convictions from a single judgment dated August 27, 2001 were ordered to run in a consecutive uninterrupted term, they were merged for enhancement purposes and could not be split for second or subsequent offender enhancement (KRS 218A.1412) and PFO I (KRS 532.080) enhancement. Byrd cites to Gray v. Commonwealth, 979 S.W.2d 454, 457 (Ky. 1998), which held that such convictions from a single judgment could not be used for dual enhancement purposes. Byrd, however, acknowledges that Gray was overruled by Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002), and concedes that under Morrow, the use of the two prior convictions for dual enhancement in this case was proper. Byrd asks this Court to overturn its holding in Morrow.

We are not inclined to disturb our holding in Morrow. Hence, there was no error in the use of the two prior convictions for subsequent offender and PFO enhancement in this case.

TEMPORARY DISAPPEARANCE OF COMMONWEALTH'S WITNESS

Byrd next argues that he was substantially prejudiced when the Commonwealth's chief witness, Sheila Howard, disappeared after direct examination and could not be cross-examined until six days later. Howard was called as the Commonwealth's final witness on the first day of trial. She testified to the details of the drug buy and identified Byrd as the person who sold her the drugs. The audiotape of the buy, much of which was inaudible, was played during her testimony and Howard was asked to interpret what was

happening and what was being said on the tape. Following Howard's direct examination, the trial recessed for the day.

Howard failed to appear for trial the next morning, October 17, 2007, when Byrd was set to cross-examine her. Neither party had any explanation for Howard's absence. The trial court indicated that it might order a mistrial if Howard was not located that day. Nevertheless, over Byrd's objection, the trial court permitted the Commonwealth to take its witnesses out of order and continue with the presentation of its case while authorities attempted to locate Howard. The court specifically informed the jury that the Commonwealth was taking its witnesses out of order, but that the defendant would have an opportunity to cross-examine Sheila Howard.

When Howard could not be located by the Commonwealth by the end of the day, the trial court suspended the trial until October 23, 2007, so that she could be found, and a bench warrant was issued for her failure to appear. Byrd's counsel objected to the continuance. He specifically stated that he did not want a mistrial, but instead was moving to strike Howard's testimony on direct. Byrd's position was that the continuance of the trial for six days would effectively deprive him of his right cross-examine Howard because of the extended length of time between direct and cross-examination. The prosecution suggested that the videotape of Howard's testimony on direct could be played for the jury prior to cross-examination. The court denied Byrd's motion to strike Howard's testimony.

Howard was subsequently located by police on October 18, 2007 on the street in a “cracked out” state. On October 23, she was brought to court for Byrd’s trial in a jail uniform. Prior to putting Howard on the stand, the court admonished the jury that the continuance was not the fault of the Commonwealth or the defendant. Without requesting that Howard’s testimony on direct be replayed for the jury, Byrd proceeded to extensively cross-examine Howard. When asked why she was not present for trial on October 17, 2007, Howard replied that she went out to use drugs. Howard also admitted that she had been arrested in 2005 for drugs both before and after the controlled buy at issue in this case.

Byrd now argues that the trial court erred in granting a continuance and should have ordered a mistrial when Howard failed to show up for trial for cross-examination on October 17, 2007. As stated above, Byrd’s counsel expressly stated that he did not want a mistrial. Accordingly, we shall review said argument for palpable error only pursuant to RCr 10.26. In Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997), this Court “interpreted the requirement of ‘manifest injustice’ as used in RCr 10.26 ... to mean that the error must have prejudiced the substantial rights of the defendant, i.e., a substantial possibility exists that the result of the trial would have been different.” (internal citation omitted).

“An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses.” Davenport v. Commonwealth, 177 S.W.3d 763, 767 (Ky. 2005) (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

Contrary to Byrd's claim, we do not see that the six-day delay in his cross-examination of Howard denied him his right to cross-examine Howard or his right to a fair trial. Byrd was able to and did cross-examine Howard extensively, and in so doing, thoroughly impeached her credibility. If anything, Howard's disappearance and Byrd's opportunity to question her about it (in jail garb) worked to Byrd's advantage by his ability to portray her as a criminal and drug addict.

"A mistrial is an extreme remedy to be utilized only when the record reveals a 'manifest necessity' for such action." Turner v. Commonwealth, 153 S.W.3d 823, 829 (Ky. 2005). The granting of a continuance is within the sound discretion of the trial court, and unless, from a review of the whole record, it appears that the court has abused that discretion, this Court will not disturb its ruling. Williams v. Commonwealth, 644 S.W.2d 335 (Ky. 1982); RCr 9.04. From our review of the trial as a whole, we cannot say that the trial court abused its discretion in granting the six-day continuance here for the purpose of locating Howard. We do not see that Byrd was prejudiced by the delay, especially in light of the admonition given by the trial court. Accordingly, there was no error, palpable or otherwise, in failing to declare a mistrial.

PRIOR BAD ACT TESTIMONY

During the direct examination of Detective Steve Chapelle, the Commonwealth asked how he knew that 136 State Street was Byrd's address. Chapelle replied that the address matched Byrd's driver's license and that Byrd had been entered in the police department's "CAD" system 28 times in the past

ten years with that address. Defense counsel objected on the grounds that the witness was attempting to give bad character evidence. The court suggested that the Commonwealth clarify that the “CAD” system referred to any contact with police, so the jury would not infer that Byrd had committed 28 other crimes. The Commonwealth and Byrd agreed to that clarification. The Commonwealth then established through Chapelle’s testimony that the “CAD” system referred to any contact with police such as through accident reports, contact cards, victim offense reports, or citations.

On cross-examination of Chapelle, the following exchange occurred:

Defense counsel: Whose idea was it to set up this transaction on this particular date?

Chapelle: I believe Miss Howard told me that she had, um, spoken with him and, uh um, of course I had heard of, of Marco prior to this in reference to drug transactions.

Byrd’s attorney immediately objected and a bench conference ensued. Byrd moved for a mistrial based on the KRE 404(b) reference to his prior drug transactions. The trial court agreed that the testimony was improper under KRE 404(b), but decided that an admonition would suffice. Byrd’s counsel stated that he did not believe an admonition would be adequate, and reiterated his request for a mistrial. The court denied the motion for mistrial, but warned that a mistrial would be granted if the witness “got cute again.” The trial court admonished the jury that the second part of the witness’ answer was not responsive and that it should disregard that portion of the answer regarding what the witness knew or did not know about Byrd.

When Detective Jackie Hunt testified for the Commonwealth, he was asked on re-direct why Byrd was not arrested right after the drug buy in question. Detective Hunt replied that they were still making drug buys off of Byrd in trying to build a case against him, so he was still under investigation. Byrd immediately objected, and the court overruled the objection. Byrd asked to approach, and moved for a mistrial based on the cumulative effect of the KRE 404(b) testimony from Hunt and Chapelle, and the fact that no notice had been given of the Commonwealth's intent to present such evidence as required under KRE 404(c). The trial court denied the motion, reasoning that any improper KRE 404(b) testimony was not so detrimental as to deny Byrd a fair trial. No admonition was given regarding Hunt's statement.

In cross-examining Sheila Howard, Byrd asked whether she had a conversation with police officers later that day, and Howard responded, "Well, there was actually two buys." At that point, Byrd again moved for a mistrial, arguing that Howard failed to respond to the question and intentionally interjected KRE 404(b) evidence of additional drug buys for which Byrd was not being tried in this case.¹ He additionally argued that a mistrial was warranted because of the cumulative effect of the KRE 404(b) evidence from Chapelle, Hunt and Howard. The trial court again denied the motion for mistrial, but admonished the jury to disregard evidence of any other offenses other than the one he was being tried for in this case.

¹ Apparently, Byrd was indicted in a separate indictment for additional drug transactions with Howard that were made on the same day.

Under KRE 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Although testimony explaining why a defendant had become a suspect in a drug investigation is admissible and relevant to avoid any implication that the defendant was unfairly singled out, testimony that the defendant was a drug dealer or was suspected of selling drugs in a certain vicinity is improper. Gordon v. Commonwealth, 916 S.W.2d 176, 179 (Ky. 1995); see also Peyton v. Commonwealth, 253 S.W.3d 504, 516 (Ky. 2008), cert. denied, __ U.S. __ (2008). In Muncy v. Commonwealth, 132 S.W.3d 845, 847 (Ky. 2004), wherein the Commonwealth presented evidence of other undercover buys from the Appellant, we recognized, “it would typically be improper for the Commonwealth or a testifying witness to refer to the undercover buys as Appellant was not being tried for such conduct.” Although the Muncy Court ruled that the evidence was admissible, the ruling was based on the fact that Appellant had opened the door to such evidence when he denied having knowledge of the drugs. Id.

In the instant case, Byrd did not testify, and there was no argument presented that evidence of other drug transactions would be admissible under any of the exceptions in KRE 404(b)(1). Detective Chapelle’s testimony that Byrd was in the “CAD” system 28 times was a blatant attempt to interject improper KRE 404(b) evidence of Byrd’s criminal history. And Chapelle’s comment that he had “of course” heard of Byrd in reference to other drug transactions was more than simply an explanation of how he had become a

suspect in the drug investigation. It amounted to saying that he knew Byrd as a drug dealer. Further, the references by Detective Hunt and Sheila Howard to the other drug buys from Byrd on the same day were improper under KRE 404(b).² Byrd was not being tried for those buys, there was no KRE 404(c) notice that they would be introduced, and there was no argument that they were admissible under any of the exceptions in KRE 404(b)(1). In fact, the Commonwealth and the trial court conceded that the references to the other buys on the same day were improper. The question then becomes whether the trial court erred in not granting Byrd's motion for a mistrial.

As stated earlier, a mistrial is an extreme remedy and should only be declared when there is a 'manifest necessity' for such action. Turner, 153 S.W.3d at 829. We have held that "for a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Maxie v. Commonwealth, 82 S.W.3d 860, 863-864 (Ky. 2002). "A trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion." Id. at 863. Furthermore, an admonition is presumed to have cured the prejudicial effect of improper evidence. Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999).

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when

² While Byrd on appeal refers only to the prior bad act testimony from Chapelle, we shall likewise consider such testimony from Hunt and Howard because Byrd argued the cumulative effect of all the KRE 404(b) testimony below and because due process requires us to take notice of matters which bring into question the substantial fairness of the trial. See Vachon v. New Hampshire, 414 U.S. 478, 479, n.3 (1974).

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).

Had there been only an isolated reference to other drug deals by Byrd, we agree that the admonition would have been sufficient to cure any resulting prejudice. See Matthews v. Commonwealth, 163 S.W.3d 11, 18 (Ky. 2005). And, unlike our recent case of Peyton, 253 S.W.3d 504, wherein we adjudged that the officer's comments were vague or did not rise to the level of manifest injustice, in the instant the case the comments were not vague and the issue was preserved below, thus we are not reviewing the issue under the higher palpable error standard. Id. at 516-17.

In this case, the three primary witnesses for the Commonwealth gave improper testimony about other drug transactions by Byrd, and one of the witnesses offered up blatantly prejudicial testimony regarding Byrd's criminal history. Notwithstanding the admonitions, we do not see how a jury could disregard the recurring implication that Byrd was a known drug dealer and judge him on the single offense for which he was being tried. The jury's recommendation of a 50-year sentence, which was the maximum enhanced sentence he could receive, demonstrates "a strong likelihood" that the effect of the inadmissible evidence was devastating to Byrd. See Johnson, 105 S.W.3d at 441. An error is not harmless if it had a reasonable probability of affecting the verdict. Shane v. Commonwealth, 243 S.W.3d 336, 341 (Ky. 2007). While

it is true that the jury would ultimately learn of Byrd's criminal history as a drug trafficker in the penalty phase, a finding of harmless error for that reason would defeat the purpose of the bifurcated proceeding in a case such as this.

For the reasons stated above, the judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

Abramson, Cunningham, Noble, Schroder, Scott, and Venters, JJ.,
concur. Minton, C.J., not sitting.

COUNSEL FOR APPELLANT:

Erin Hoffman Yang
Department of Public Advocacy
Assistant Public Advocate
100 Fair Oaks Ln. Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Jason Bradley Moore
Attorney General's Office
Assistant Attorney General
1024 Capitol Center Drive
Frankfort, KY 40601-8204