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RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000047-MR

JOHN MANN — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 08-CR-00950-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

Appellant, John Mann, appeals as a matter of right[1] from a judgment entered upon a jury verdict convicting him of first-degree rape, first-degree sodomy, first-degree robbery, and of being a first degree persistent felony offender. For these crimes he was sentenced to a total of forty years' imprisonment.

Appellant now raises three issues in this appeal: (1) that a mistrial should have been granted when, in violation of the trial court's rulings, a police officer testified that Appellant's accomplice, in an out-of-court interview, identified Appellant as a participant in the crimes; (2) that the trial court's imposition of a post-incarceration, five-year period of conditional discharge

[1] Ky. Const. § 110

pursuant to KRS 532.043 violates *ex post facto* principles; and (3) that the trial court's imposition of sex offender residency restrictions pursuant to KRS 17.545 violates *ex post facto* principles. The Commonwealth concedes that Appellant is entitled to relief with respect to imposition of post-incarceration conditional discharge and residency restrictions.

For the reason set forth below, we affirm Appellant's conviction, but agree that *ex post facto* considerations do not permit the imposition of a five-year period of conditional discharge or the imposition of the current sex offender residency restrictions. We accordingly remand for entry of a new judgment excluding these terms and conditions.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the verdict, the facts are as follows. During the period of time that the crimes were committed, Appellant and Steven Stewart were friends and co-workers. They did painting jobs together and often socialized together in the evenings after work. Frequently, they drove around Covington together, drinking and looking for prostitutes. Occasionally, they picked up prostitutes and took them to secluded areas to have sex with them. Stewart would also, on occasion, steal their jewelry.

On October 7, 1994, at about 2 a.m., K.H. was walking along Scott Street in Covington from a bar to her boyfriend's apartment. A vehicle stopped along side of her. The occupants of the vehicle, an adult male driver and an adult male passenger, offered her a ride and she accepted. Instead of going to her

boyfriend's apartment, however, K.H. was taken to a secluded, wooded area where both men raped and sodomized her, stole her jewelry, and left her.

Later, police officers patrolling the area saw K.H. running to her boyfriend's apartment. Upon further inquiry, they took her to a hospital for medical care and a rape examination. At the hospital, DNA evidence was collected. K.H. described the driver of the vehicle as a white male adult with short "spiky" hair, clean shaven, and over 6 feet tall. The police investigations produced no suspects.

Eight years later, in 2002, the Covington Police Department obtained funding to submit evidence collected from unsolved cases for DNA testing. In that process, the DNA-evidence from K.H.'s rape kit was tested and entered into a national database. In 2004, the database matched the DNA from the rape kit to Steven Stewart with a probability equal to 1 in 36 quadrillion. As a result, Stewart was arrested and ultimately identified as the passenger in the 1994 crimes against K.H. In an interview with Covington Police Detective Mike McGuffy, Stewart admitted the crimes and identified Appellant as his accomplice and the driver of the vehicle. Stewart eventually entered into a plea agreement and agreed to testify against Appellant during any subsequent court proceedings.

McGuffy eventually located Appellant in Mt. Horeb, Ohio and went there to interview him. In the course of the interview, Appellant did not directly admit his culpability in the 1994 rape and sodomy of K.H., nor did he

absolutely deny it. As fairly summarized, Appellant admitted the following: (1) that in 1994, he and Stewart frequently drove the streets of Covington, drinking, and picking up prostitutes, and taking them to secluded areas to have sex with them; (2) that Stewart would steal jewelry from the girls they picked up; (3) that it was "possible" that he and Stewart picked up a white female in the early hours of October 7, 1994, and took her to a secluded area to have sex with her, "because [Stewart] always pick[ed] us up prostitutes"; (4) that it was "possible" that Stewart had raped and sodomized K.H., and although Appellant did not remember being involved in a rape, it was "possible" that he was simply unable to recall it because he was too intoxicated at the time to remember it.

Evidence collected during the initial police investigation was determined to contain a mixture of DNA from three different individuals: K.H., Stewart, and an unidentified individual. While meeting with Appellant, McGuffy obtained a sample of his DNA for testing. Although the test results could not conclusively link Appellant to the crimes, neither did it exclude him as a contributor to the mixed DNA-laden evidence. Statistically, the test results excluded as a possible contributor 190 out of every 191 persons in the relevant population. Appellant was among the remaining one out of every 191 persons whose DNA was consistent with having been a contributor of the DNA evidence. In addition, a 1995 photograph established that Appellant then had short, spiky hair and was 6'1" in height, closely matching the description K.H. gave shortly

after the attack, except that the photo showed a slight mustache instead of the clean shaven face that K.H. described.

Appellant was indicted for first-degree rape, first-degree sodomy, first-degree robbery, and of being a first-degree persistent felony offender. He was convicted and sentenced to forty years' imprisonment. This appeal followed.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR A MISTRIAL

Appellant first argues that the trial court erred by denying his motion for a mistrial after Detective McGuffy testified in direct contravention of a series of trial court rulings, that Stewart, in his out-of-court confessions, had identified Appellant as his accomplice.

Initially, Stewart accepted a plea deal with the Commonwealth and agreed to testify against Appellant at his trial. However, when Appellant's trial date finally arrived, Stewart reneged on the deal and refused to testify. The Commonwealth's inability to present Stewart's testimony at trial enabled Appellant to challenge the introduction of Stewart's out-of-court statement to McGuffy to the extent it incriminated Appellant. *See Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) (The Confrontation Clause applies not only to in-court testimony, but also to testimonial out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence); and *Commonwealth v. Stone*, 291 S.W.3d 696,700 (Ky.2009) ("[A] defendant is denied his Sixth Amendment right to confront his accusers by the introduction into evidence of an out-of-court 'testimonial statement' made by a declarant

who is unavailable for cross-examination.")

Following extensive discussions concerning the admissibility of Stewart's statement the trial court ruled that: (1) testimony that Stewart had identified Appellant as his accomplice would not be permitted; (2) testimony that Stewart had indicated that he and Appellant knew each other would not be permitted; and (3) the Commonwealth could not ask McGuffy what he did after his interview with Stevens, because the expected response, "I attempted to locate Appellant," would imply Stewart's incrimination of Appellant. The prosecutor asked McGuffy what he had said to Appellant to let him know he was being investigated. Despite the trial court's carefully delineated ruling to comply with *Crawford,* McGuffy responded:[2]

McGuffy: Yes, I told him what my investigation entailed, why I showed up in Mt. Horeb, Ohio, just off the cuff one day. And I explained to him it was a rape investigation and that Steven Stewart had said that he was the co-defendant . . .

Counsel: Objection

McGuffy: . . . in this rape investigation.

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[2] In the bench conference following McGuffy's improper testimony, defense counsel suggested that McGuffy was aware of the trial court's rulings, and that McGuffy and the prosecutor spoke together during the break just prior to the testimony, thereby implying bad faith in the detective's improper testimony. In his brief, Appellant implies, without directly arguing, that there was bad faith on the part of the Commonwealth or McGuffy in interjecting the improper testimony. Any such argument would be severely impeded by Appellant's failure to ask the trial court to make findings regarding the question of bad faith. Because such findings are lacking, we are unable to consider Appellant's suggestions of bad faith in our review. Nevertheless, it is fundamental that the Commonwealth and its witnesses must follow the trial court's rulings, and it is the responsibility of the Commonwealth to assure this compliance.

Appellant followed his objection with a motion for a mistrial. After further discussion, the trial court overruled the motion for a mistrial, but gave the jury the following admonition:

> The objection to [McGuffy's testimony] will be sustained, and I want to kind of give you a reason why. You understand statements given sometimes when they are not in court are not subject to testing. And as a result of that, if you hear what someone says outside of the courtroom, that's not subject to testing. And by that, I mean cross-examination, etc., etc., it's just there. So you're going to be admonished to forget the detective just made the statement linking anything that Mr. Stewart may have said to him. Thank you.

Whether to grant a mistrial is within the sound discretion of the trial court, and "such a ruling will not be disturbed absent ... an abuse of that discretion." *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). 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. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985), *habeas corpus granted on other grounds by Skaggs v. Parker*, 235 F.3d 261, 275 (6th Cir. 2000). The error 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 [except by grant of a mistrial]." *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005) (citing *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996)). Accordingly, a high bar is set for the granting of a mistrial, and great deference is given to the trial court's ruling on the issue.

In addition, a jury is presumed to follow an admonition to disregard evidence. *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006). There are only two circumstances in which the presumed effectiveness of an admonition falters: (1) when 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); *see also Boone v. Commonwealth*, 155 S.W.3d 727, 729-730 (Ky. App. 2004). Clearly, there existed a factual basis for the line of inquiry; it was not a fabrication. But we perceive no reason to conclude that the jury could not follow the admonition.

In evaluating whether the trial court abused its discretion in denying Appellant's request for a mistrial, we further note that the jury otherwise heard evidence that strongly suggested that Stewart had identified Appellant as his accomplice. First, jury knew from the victim's testimony and the DNA tests that two men perpetrated the crimes. The jury was properly informed that the DNA tests all but conclusively established Stewart's guilt, and that Stewart had pled guilty to the crimes. The jury was fully informed of the contents of Appellant's own interview with McGuffy, in which Appellant admitted his association with Stewart during the relevant time, his participation with Stewart in similar sexual activity, albeit consensual sex with prostitutes, not

rape, and that it was "possible" he was with Stewart when the rape occurred. Finally, the jury was aware of the results of the DNA test which, although not conclusive in identifying Appellant as a participant in the crimes, left him among a very select minority (one out of 191) who could have been a contributor of the DNA. Given that the DNA analysis first led investigators to Stewart and the improbable circumstance that Stewart would have had an associate other than Appellant with whom he frequently engaged in criminal debauchery during the relevant time frame, the jury easily could have deduced on their own that Stewart had pointed the police in Appellant's direction.

Therefore, McGuffy's testimony, while improper, cannot be found to be "devastating to the defendant." We are unable to conclude that the *Crawford* violation contained in McGuffy's testimony deprived Appellant of a fair trial, or that the prejudicial effect of the error was not cured by the admonition. In summary, the trial court did not abuse its discretion in determining that there was not a manifest necessity to declare a mistrial.

III. THE IMPOSITION OF A FIVE-YEAR PERIOD OF CONDITIONAL DISCHARGE WAS IMPERMISSIBLE

Appellant next argues that the imposition of a five year period of conditional discharge upon him in the final judgment violates *ex post facto* principles. The final judgment contained a provision that "[p]ursuant to KRS 532.043 in addition to the penalties authorized by law, Defendant shall be subject to a period of conditional discharge following release from incarceration upon expiration of sentence or completion of parole. The period of conditional

discharge shall be for five (5) years."

As noted by Appellant, KRS 532.043 became effective on July 15, 1998,[3] whereas his crimes were committed in October 1994. In *Purvis v. Commonwealth*, 14 S.W.3d 21 (Ky. 2000), we examined KRS 532.043 in detail and concluded that, pursuant to *ex post facto* considerations, the statute "is unconstitutional as applied to offenses committed before the effective date of the act." *Id.* at 24. The Commonwealth agrees that *Purvis* is dispositive. Accordingly, we vacate the conditional discharge provision of the judgment.

IV. THE IMPOSITION OF RESIDENCY REQUIREMENTS FOLLOWING RELEASE WAS IMPERMISSIBLE

Similarly, in the final judgment entered on December 18, 2009, the trial court included a provision that Appellant "[c]annot reside within 1,000 yards [sic] of a high school, middle school, elementary school, preschool or licensed day care center, near a park, playground, or other places where children and juveniles tend to congregate." Appellant contends that this provision of the judgment violates *ex post facto* principles.

The circuit court clearly imposed this provision pursuant to KRS 17.545 (which actually imposes a residency prohibition of 1,000 *feet*, not 1,000 *yards*). KRS 17.545's predecessor statute, KRS 17.495, which contained substantially the same provisions, was examined in *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009). In *Baker*, we held "the statute may not constitutionally be applied to those like Respondent, who committed their crimes prior to July 12,

[3] The statute originally provided for a three year conditional discharge period but was later amended to impose a five year period.

2006, the effective date of the statute. To do so violates the *ex post facto* clauses of the United States and Kentucky constitutions." *Id.* at 447. The Commonwealth agrees that *Baker* controls, and, we accordingly vacate the residency provision of the judgment.

V. CONCLUSION

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed, but the sentence is reversed and the cause is remanded to the Kenton Circuit Court for entry of judgment and imposition of a sentence consistent with this opinion.

All sitting. All concur.

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