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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: APRIL 30, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000243-MR

LEONARD BATES III — APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 18-CR-00119

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In March 2019, a jury convicted Leonard Bates, III of Trafficking in a Controlled Substance, First Degree, and Complicity to Trafficking in a Controlled Substance, First Degree, and of being a First-Degree Persistent Felony Offender ("PFO1"). He was sentenced to twenty years' imprisonment and appeals to this Court as a matter of right.[1] Bates raises two issues on appeal: (1) the trial court erred by allowing hearsay testimony regarding his role in the illicit drug transaction, and (2) his due process rights were violated because the jury saw him enter the courtroom with a bailiff from an area of the

[1] Ky. Const. § 110(2)(b).

courthouse where the cells were located. Finding neither argument meritorious, we affirm.

I. Factual and Procedural Background.

In May 2018, Daniel Merlin contacted Shawn Lowe to purchase a quantity of methamphetamine from him. Merlin was unable to drive to Louisville to retrieve the drugs from Lowe, so Lowe told Merlin that he and Bates would drive down to Muhlenberg County to deliver the drugs to Merlin. Lowe and Bates arrived at the designated meeting place only to discover that Merlin, in an effort to get charges against his girlfriend dismissed, had actually orchestrated the drug buy through detectives working with the Pennyrile Narcotics Task Force. Lowe and Bates were arrested upon arrival.

David Thompson, Director of the Pennyrile Narcotics Task Force, testified that Bates stated he knew why the officers were there and gave consent to search the vehicle. Subsequently, Bates admitted to having methamphetamine and marijuana in a bag in the backseat of the car. Thompson found a bag on the driver's side of the back seat that contained a large quantity of methamphetamine.[2] A second bag with digital scales and another quantity of methamphetamine was discovered on the passenger side floorboard. [3]

Bates and Lowe were initially cooperative after their arrest and attempted to arrange a buy between them and someone "up the ladder." On scene detectives observed Bates making a phone call to someone in an attempt to set

[2] 104.7 grams of meth.

[3] 9.276 grams of meth.

up a purchase of methamphetamine. During this time, Bates told officers that they were "fronted" the drugs and would pay their suppliers when they returned home. Both Bates' and Lowe's efforts to arrange a controlled buy were unsuccessful. At no time did either man state that Bates was just a driver that had no association with the drug trafficking. Following a jury trial, Bates was found guilty of first-degree trafficking in a controlled substance, complicity to first-degree trafficking in a controlled substance, and of being a first-degree persistent felony offender. This appeal followed.

II. Standard of Review.

We review a trial court's decision to admit evidence for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). "The test for an abuse of discretion 'is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). Absent a finding of an abuse of discretion, we will not overturn a trial court's evidentiary decision. *Id.*

Additionally, a trial judge's ruling on a motion for mistrial is also reviewed under the abuse of discretion standard. *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009).

> However, 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. The trial judge, in making a mistrial decision, must use sound discretion in declaring a mistrial because a constitutionally protected interest is inevitably affected. And although a trial court is vested with discretion on granting a mistrial, the power to grant a mistrial ought to be used sparingly and only with the utmost caution, under urgent

> circumstances, and for very plain and obvious causes. Simply put, 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.

Id. (internal citations and quotations omitted).

III. Analysis.

At trial, Bates' defense theory was that he was merely an unwitting driver without knowledge of the arranged drug transaction between Merlin and Lowe. Bates first argues that the trial court erred by admitting hearsay statements that indicated Bates was involved in the drug transaction negotiations between Lowe and Merlin. During trial, Merlin testified how the transaction was arranged.

Commonwealth:	Just tell us the nature of the conversation, the contact you had with Shawn Lowe.
Merlin:	I had messaged him, said that I would be interested in buying the 4 ounces, but that I had to get my money together, and that was to kind of put it off for a couple of days to give me time to get things worked out with Detective Griggs. Shawn messaged me back and said, you know, whenever, he told me that, he was going to take some money off his fee, or what he was making to do it and that Mr. Bates would take some off his fee for doing it, and that, but that I was going to have to pay $100 to have it delivered from Louisville to here.
Commonwealth:	Other than driving, are you aware of any other relationship between Leonard Bates and Shawn Lowe?
Merlin:	They lived together at a halfway house.
Commonwealth:	My question is, so far as, was this a driving relationship only, or did Mr. Bates participate?

Merlin: Shawn told me that, cause I had haggled about prices. . .

Defense Counsel: We're going to object to hearsay. (objection overruled).

Merlin: I couldn't drive all the way to Louisville for that price, and he said that he would talk to Mr. Bates, and see if he would agree to come down on the price, to kind of make up for the difference in what it would cost me to come to Louisville.

Commonwealth: Did you get a price reduction at that time?

Merlin: Yes.

Bates asserts that the Commonwealth was attempting to offer Lowe's statements for the truth-of-the-matter asserted and that no hearsay exception applied. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE[4] 801(c). The Commonwealth maintains that Lowe's statements fall underneath the coconspirator exception to the general hearsay rule. KRE 801A(b)(5) states, "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy." For a statement to qualify under the coconspirator exception, proof must exist that "(1) a conspiracy existed, (2) both the defendant and the declarant were participants in the conspiracy, and (3) the statement was made during and in furtherance of the

[4] Kentucky Rules of Evidence.

conspiracy." *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 752 (Ky. 2005) (citing *Marshall v. Commonwealth*, 60 S.W.3d 513, 520 (Ky. 2001)). "The government must establish these three prongs by a preponderance of the evidence." *Monroe v. Commonwealth*, 244 S.W.3d 69, 76 (Ky. 2008) (citing *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S. Ct. 2775, 2778–79, 97 L. Ed. 2d 144 (1987)).

A conspiracy existed between Bates and Lowe. Merlin contacted Lowe to arrange a drug transaction. Merlin knew that Bates had driven Lowe to other drug transactions. Earlier in his testimony, Merlin testified that Lowe messaged him that Bates would take some money off his fee for a delivery fee from Louisville. When detectives approached Bates at the designated delivery spot, Bates knew why the officers were there, and stated that he "was trying to make a little money." Thus, proof by a preponderance of the evidence existed that co-defendants Bates and Lowe were coconspirators in the delivery of drugs from Louisville to Muhlenberg County—satisfying the initial two prongs of the coconspirator exception. Merlin's testimony, that Lowe "would talk to Mr. Bates, and see if he would agree to come down on the price, to kind of make up for the difference in what it would cost me to come to Louisville," satisfies the requirement that the statement was made during and in furtherance of the conspiracy. Lowe's discussion of the details and price of delivery assuredly was made during and in furtherance of Lowe's and Bates' conspiracy to deliver drugs from Louisville to Muhlenberg County. Accordingly, the trial court did not err in overruling Bates' objection.

Bates next argues that the trial court erred by overruling his motion for a mistrial when jurors allegedly saw him walk in and out of the courtroom through a side door accompanied by a bailiff. A trial court should grant a mistrial only if "manifest necessity for such an action or an urgent or real necessity" exists. *Cardine*, 283 S.W.3d at 647. Bates contends that the above actions resulted in a manifest necessity for a mistrial, because they violated his right to a fair trial and were analogous to the jury seeing him brought into the courtroom in shackles. *See* RCr[5] 8.28(5) ("During his or her appearance in court before a jury the defendant shall not be required to wear the distinctive clothing of a prisoner. Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint[]").

"We have repeatedly held that the inadvertent viewing of the defendant in either handcuffs or another restraint for the sole purpose of being taken to or from the courtroom is not automatically reversible error." *Moss v. Commonwealth*, 949 S.W.2d 579, 582–83 (Ky. 1997). In *Shegog v. Commonwealth*, after potential jurors saw the defendant in handcuffs escorted by a deputy, we reiterated that "it would be impossible as a practical matter to conduct a trial without the jury seeing some sign that the defendant [is] not entirely free to come and go as [he] please[s]." 142 S.W.3d 101, 109 (Ky. 2004) (citation and quotation omitted). Based on our previous decisions, we find that the presence of one deputy opening a door and escorting Bates—dressed in

[5] Kentucky Rules of Criminal Procedure.

plain clothes and no restraints—into the courtroom did not affect Bates' right to a fair trial. Thus, a mistrial was not warranted.

IV. Conclusion.

For the foregoing reasons, this Court finds no error in the issues presented to us. As a result, the judgment of the trial court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Aaron Reed Baker
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY

COUNSEL FOR APPELLEE:

Daniel Jay Cameron
ATTORNEY GENERAL OF KENTUCKY

Mark Barry
ASSISTANT ATTORNEY GENERAL