

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002401-MR

EARL BRENT KIRBY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 00-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, JOHNSON, AND KNOFF, JUDGES.

KNOFF, JUDGE: Earl Brent Kirby appeals from a judgment of conviction by the Madison Circuit Court which imposed a jury verdict finding him guilty of driving under the influence (DUI), fourth or subsequent offense,¹ operating a motor vehicle while license is suspended for DUI, fourth or subsequent offense,² assault in the fourth degree,³ and failure to maintain

¹ KRS 189A.010; a class D felony.

² KRS 189A.090; a class D felony.

³ KRS 508.030; a class A misdemeanor.

insurance.⁴ Kirby argues that the trial court erred by denying his motion for a mistrial after the prosecutor attempted to impeach one of his witnesses based upon a stale conviction. Although we agree with Kirby that the question was improper, we also find that the circumstances did not mandate a mistrial, nor were Kirby's substantial rights prejudiced by the error. Hence, we affirm.

On January 20, 2000, a Madison County grand jury indicted Kirby on the charges listed above.⁵ The charges arose from an automobile collision which occurred on December 18, 1999. Kirby's vehicle was involved in a collision with a vehicle driven by Franklin Young and occupied by his wife Tonya Young and their daughter Kayla. After the impact, Kirby's vehicle left the road and went over an embankment. It came to rest standing on its front end with the passenger side of the vehicle against the ground. Kirby was found alone in the car. Subsequent tests showed that Kirby had a blood-alcohol content of .10 and he was under the influence of several prescription drugs.

Kirby admitted that he was in the car and that he was intoxicated, but he denied that he was the driver of the vehicle. Kirby did not testify at trial. However, several witnesses testified that when they arrived at the scene, they found Kirby

⁴ KRS 304.39-080; failure to maintain insurance is punishable by a fine of not less than \$500.00 nor more than \$1,000.00, or a sentence of not more than 90 days in jail, or both. KRS 304.99-060.

⁵ The grand jury also indicted Kirby on the charge of second degree assault. KRS 508.020; a class C felony. The jury found Kirby not guilty on this charge, and convicted him of the lesser-included offense of fourth degree assault.

in the passenger seat tangled in the seat belt. Kirby also called several other witnesses who reported seeing an unknown person running from the scene of the accident.

Nevertheless, the jury found Kirby guilty and fixed his sentence at twelve months and a \$500.00 fine for the assault conviction; five years for the DUI conviction; twelve months and a \$500.00 fine for operating a motor vehicle while his license was suspended for DUI; and ninety days and a \$1,000.00 fine for failure to maintain insurance. The trial court imposed the jury's recommended sentence, and directed that his terms of imprisonment run concurrently. This appeal followed.

Kirby argues that the trial court erred when it denied his motion for a mistrial. At trial, Kirby called Tommy McHone to testify on his behalf. McHone lived near the accident scene and he testified that he was one of the first individuals to arrive at the car where Kirby was found. He assisted in putting out a fire and extracting Kirby from the wreck. McHone also testified that he had seen an unknown person run away from the accident scene. On cross-examination, the prosecutor asked McHone if he had ever been convicted of a felony. McHone replied that he had been some twenty or more years earlier.

Kirby's counsel immediately moved for a mistrial, arguing that the Commonwealth was not entitled to impeach a witness's credibility based upon a felony conviction which is more than ten years old. The trial court overruled the objection, and admonished the jury that it could consider the fact that McHone had been convicted of a felony only to the

extent that it reflected on his credibility. Kirby argues that KRE 609 prohibits the Commonwealth from using a prior conviction to impeach the testimony of a witness when the conviction is more than ten years old. Consequently, he contends that the trial court should have granted his motion for a mistrial after the Commonwealth asked McHone if he had been convicted of a felony.

We agree with Kirby that the trial court erred by overruling his objection to the Commonwealth's question. Under KRE 609(1), a witness may be asked if he has been previously convicted of a felony. If his answer is "yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "no" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions.⁶ However, KRE 609(2) further provides that evidence of a conviction is not admissible if more than ten years has elapsed since the date of the conviction "unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect." While a trial court has some discretion to admit evidence of a conviction older than ten years,⁷ the Commonwealth made no attempt to argue that McHone's twenty-year-old conviction was relevant, nor did the

⁶ See also Commonwealth v. Richardson, Ky., 674 S.W.2d 515, 517-18 (1984).

⁷ McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 528 (1994), *overruled on other grounds* Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998).

trial court find that the probative value of his conviction substantially outweighed its prejudicial effect.

Furthermore, the trial court's admonition did not cure the error. Rather, the court advised the jurors that they could consider his prior conviction to the extent that it was relevant to McHone's credibility. To the contrary, without making a finding of relevance, the court should have told that jury to disregard McHone's prior conviction because it was more than ten years old. However, Kirby's counsel did not object to the trial court's admonition, nor did Kirby's counsel request a different admonition.

Rather, Kirby contends that he was entitled to a mistrial. A trial court need not grant a mistrial unless there appears in the record a manifest necessity for such action.⁸ Manifest necessity has been described as an "urgent or real necessity."⁹ The propriety of granting a mistrial is determined on a case by case basis and is committed to the sound discretion of the trial court.¹⁰ On appeal, that discretion will not be disturbed except for abuse.

Essentially, Kirby argues that a mistrial was necessary because the prosecutor deliberately sought to introduce evidence which he knew to be inadmissible. However, there was no evidence in the record that the prosecutor knew that McHone's conviction was more than ten years old when he asked McHone about his prior

⁸ Turpin v. Commonwealth, Ky., 780 S.W.2d 619, 621 (1989).

⁹ Miller v. Commonwealth, Ky., 925 S.W.2d 449, 453 (1995).

¹⁰ Commonwealth v. Scott, Ky., 12 S.W.3d 682, 684 (2000).

felony convictions. Nor was there any evidence of an attempt by the prosecution to mislead the jury or any indication that the jury was in fact misled.¹¹ While Kirby would have been entitled to the proper admonition had he asked for it, the prosecutor's reference to McHone's prior conviction did not require the trial court to declare a mistrial.

Moreover, the conduct of the prosecutor was not so serious as to render the entire trial fundamentally unfair.¹² The prosecutor briefly asked McHone if he had been convicted of a felony. McHone replied that he had - twenty years earlier. The jury was not told of the nature of his prior conviction, nor did the prosecutor focus on that fact. Furthermore, two other witnesses also testified that they had seen an unidentified person running from the scene shortly after the accident. We cannot agree with Kirby that the prosecutor's reference to McHone's prior conviction "tainted" their testimony as well. Although the evidence was conflicting and the jury could have chosen to believe that Kirby was not driving the vehicle, we conclude that the error in admitting McHone's conviction was not so egregious as to affect Kirby's substantial rights.¹³

Accordingly, the judgment of conviction by the Madison Circuit Court is affirmed.

ALL CONCUR.

¹¹ Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 76 (2001).

¹² Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

¹³ *See* RCr 9.24.

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