

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000117-MR

JOSEPH D. POWERS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 03-CR-00651

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

WINE, JUDGE: On November 25, 2003, a Hardin County grand jury indicted Joseph D. Powers on one count of first-degree assault and two counts of terroristic threatening. The matter proceeded to a jury trial in October 2005. At the conclusion of the evidence, the jury found Powers guilty on all three counts. The jury fixed Powers' sentence at a total of thirteen years' imprisonment, which the trial court imposed.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On appeal, Powers raises four allegations of error: (1) the trial court erred by denying his motion to disqualify the Commonwealth Attorney's office without a hearing; (2) the trial court erred by denying his motion to suppress a statement given to police following his arrest; (3) the trial court erred by denying his motion for a mistrial after a police officer introduced a portion of a statement that had previously been excluded; and (4) the trial court improperly allowed evidence of Powers' prior bad acts. We find no error or abuse of discretion in any of the trial court's rulings. Hence, we affirm.

The charges arose from an incident which occurred on September 16, 2003. Prior to that date, Powers had been dating Kirista Toro. The two had broken up, but Powers continued to contact Toro and he retained a key to her apartment. On September 16, 2003, Toro went out on a date with Victor Scott Webb. At dinner, Toro told Webb that someone had been stalking her, but she did not identify the person. When they went back to Toro's apartment, Toro asked Webb to check the apartment.

Webb went inside and began checking rooms. As Webb opened the bedroom door, Powers came from behind the door and began hitting him on the head with a hammer. When she saw Powers hitting Webb, Toro backed away, screamed, and yelled to Powers that she and Webb were only friends. After striking Webb several more times, Powers stopped and ordered Webb and Toro to sit down. Powers was waving the hammer around and stated that he should just kill Webb. Webb asked to leave and promised not to call the police. Powers let him go but told him that if he did, he would kill both Webb and Toro.

Webb left the apartment and flagged down a passing police car. Back in the apartment, Powers told Toro, “Now, b**ch, it's your turn.” He pulled out a knife and forced her to leave the apartment. As they were walking toward a trailer park, the police arrived and Powers ran away. As the police were chasing him, Powers kept the hammer in his hand. Powers also told the pursuing officers to shoot him or he was going to kill them. When the officers finally caught Powers, he was still carrying the hammer and the knife. Powers later gave a statement to the police admitting to the attack on Toro and Webb.

Powers first argues that the trial court improperly denied his motion to disqualify the Commonwealth Attorney's office from prosecuting the case. Toro was also indicted on charges arising out of the incident, apparently as a complicitor. She was represented by Jeffrey England. Thereafter, the indictment against Toro was dismissed. Subsequently, Mr. England left private practice and started working for the Hardin County Commonwealth Attorney's office. Mr. England was not involved in the prosecution against Powers. Toro testified against Powers at his trial, but there was no evidence that she testified pursuant to an agreement with the Commonwealth.

Powers contends that the Hardin County Commonwealth Attorney's office should have been disqualified based upon Mr. England's prior representation of Toro. We disagree. In the motion to the trial court, Powers relied on KRS 15.733(2)(c), which requires a prosecuting attorney to disqualify himself in which he has an interest that could be substantially affected by the outcome of the proceeding. Powers also referred to KRS 15.733(3), which provides that “[a]ny prosecuting attorney may be disqualified by the

court in which the proceeding is presently pending, upon a showing of actual prejudice.” Powers' trial counsel stated that she may have had conversations with Mr. England about the case while he was representing Toro. In addition, counsel also stated that Mr. England was present during earlier plea negotiations between the Commonwealth and Powers. However, counsel expressly disclaimed any argument that Mr. England had violated any of the Rules of Professional Conduct, or that Mr. England had a conflict of interest.

The trial court concluded that none of these allegations were sufficient to support a finding of prejudice or to warrant disqualification of the entire Hardin County Commonwealth Attorney's office. We agree. Generally, the trial court must conduct an evidentiary hearing to weigh the evidence suggesting bias on the part of the prosecutor's entire office. *Whitaker v. Commonwealth*, 895 S.W.2d 953, 955 (Ky. 1995). But the focus of the inquiry must be on the relationship between the attorney and the client. *Id.* at 956. Mr. England was counsel for Toro, not for Powers. As the trial court noted, Powers did not allege that Mr. England's obligations to Toro would implicate an interest which would be substantially affected by the outcome of the proceeding against Powers, as required by KRS 15.733(2)(c).

On appeal, Powers also cites to KRS 15.733(2)(e), which requires disqualification of an attorney who has served in private practice as an attorney or has rendered a legal opinion in the matter in controversy. However, he did not present this section to the trial court. Consequently, this argument is not preserved for appeal. *Neal v. Commonwealth*, 95 S.W.3d 843, 848 (Ky. 2003).

And even if Mr. England were disqualified from prosecuting the case for the Commonwealth, his disqualification would not extend to the entire Commonwealth Attorney's office. The mere possibility of the appearance of impropriety is not sufficient to disqualify the entire staff of the Commonwealth Attorney's office from further prosecution of the case. *Summit v. Mudd*, 679 S.W.2d 225, 225-26 (Ky. 1984). Rather, Powers must show actual prejudice to him resulting from Mr. England's prior representation of Toro. KRS 15.733(3). Powers did not allege any bias or prejudice to him. Moreover, Powers did not allege that Mr. England acquired any confidential information about his defense while he was representing Toro. *See Commonwealth v. Maricle*, 10 S.W.3d 117 (Ky. 1999). Indeed, Powers does not explain how he had been prejudiced by Mr. England's participation in early plea negotiations on Toro's behalf. Under the circumstances, the trial court did not err by denying Powers' motion without a hearing.

Powers next raises several issues relating to the admission of the statement which he gave to police following his arrest. He first contends that the statement should have been suppressed because it was not knowingly and voluntarily made. In reviewing a trial court's ruling on a motion to suppress, this Court's first role is to determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. RCr 9.78. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as matter of law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002).

At the suppression hearing, Officer Jason Vance of the Radcliff Police Department testified that he interviewed Powers following his arrest. Officer Vance testified that he advised Powers of his *Miranda* rights. Thereafter, Powers signed a form waiving his rights. He then gave his statement to Officer Vance. Officer Vance then wrote out the statement. Powers initialed each paragraph of the statement, signed the statement, and he later added another page to the statement in his own handwriting.

Powers testified that he told Officer Vance that he wanted a lawyer. According to Powers, Officer Vance replied that if Powers got a lawyer, then he would make sure that Powers was charged with attempted murder. Powers testified that he was very upset during the interview, and that Officer Vance's threat coerced him into signing the waiver form and making the statement without counsel.

Based on his own testimony, Powers contends that his statement was coerced and should have been suppressed. However, Officer Vance expressly denied that Powers requested an attorney or that he threatened to “throw the book” at Powers unless he made a statement without an attorney. The trial court found Officer Vance's testimony to be more credible than Powers' testimony. The trial court is in the best position to make such determinations. *Commonwealth v. McManus*, 107 S.W.3d 175, 179 (Ky. 2003). This Court must defer to the trial court's findings since they are supported by substantial evidence.

Powers also contends that the trial court erred by denying his motion for a mistrial after Officer Vance read a portion of his statement that had been excluded. Powers' original statement included the line, “I don't know why I do things like this.”

Powers moved to redact that portion of the statement, arguing that it suggested prior bad acts on his part. The parties agreed that the statement would be read to the jury as, “I don't know why I did this.”

But in his testimony, Officer Vance read the statement to the jury as originally written. The prosecutor corrected Officer Vance after realizing the mistake, but Powers moved for a mistrial. The trial court denied the motion for a mistrial, but instructed the jury that the sentence should have been read, “I don't know why I did this.”

Powers contends that Officer Vance's testimony created a manifest necessity warranting a mistrial. We disagree. 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 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. *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

This is the type of error that is easily cured by an admonition. *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky. 2000). A jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error. *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999). Moreover, the sentence at issue was a small portion of Powers' statement and, as originally written, did not refer to any other specific acts. Furthermore, the error was immediately corrected and the trial court's admonition did not draw undue attention to the excluded evidence. And finally, there is no indication in the record that Officer Vance intentionally read the original portion of

the statement. We cannot find that the unedited statement was so inflammatory or unfairly prejudicial that an admonition would not cure the error. Consequently, the trial court did not abuse its discretion by denying Powers' motion for a mistrial. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004).

Finally, Powers contends that the trial court improperly allowed evidence of his prior bad acts. Before Toro took the stand, Powers made a motion *in limine* to exclude any evidence of his behavior toward Toro during their relationship. The trial court granted the motion, noting that the Commonwealth had not given notice pursuant to KRE 404(c) of its intention to introduce such evidence. On direct examination, Toro did not discuss any specific incidents of violence by Powers during their relationship. But during cross-examination, Powers' counsel asked Toro about statements she originally gave to police which were inconsistent with her trial testimony. Counsel also asked Toro why she did not initially tell police that Powers had a key to her apartment, or whether she had ever filed any domestic violence petitions against Powers. Counsel then proceeded to question Toro about letters she had written to Powers and her visits with Powers when he was in jail following his arrest.

On re-direct examination, the Commonwealth informed the trial court that it intended to ask Toro about previous acts of violence by Powers during their relationship. Powers objected, noting the court's prior ruling. The trial court concluded that the questions on cross-examination had opened the door for the Commonwealth to ask Toro about her relationship with Powers. On re-direct, Toro testified that there had been some violence during their relationship and that this was the basis for her fear of

Powers. She also stated that she had gone to the prosecutor's office to ask about a domestic violence petition, but she dropped the matter after she was told that Powers may not be jailed. Finally, Toro explained that she wrote letters to Powers and visited him in jail because she was afraid of him and wanted to pacify him in case he was released on bond.

As Powers correctly notes, evidence of prior bad acts is not admissible to prove the character of a person in order to show action in conformity therewith. KRE 404(b). But it may be admissible if it is probative of another issue and where the probative value of, and need for, the evidence outweighs its unduly prejudicial effect. *Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1994). In this case, the evidence of prior bad acts was not offered to prove Powers' character or to show prior conduct consistent with the charged conduct. Rather, the Commonwealth elicited the testimony in response to specific questions about Toro's credibility. *See Muncy v. Commonwealth*, 132 S.W.3d 845 (Ky. 2004).

Furthermore, we cannot find that the prejudicial effect of the evidence substantially outweighed its probative value. Powers' counsel attempted to challenge Toro's credibility by asking her about her inconsistent statements to police and her apparently favorable disposition toward Powers after his arrest. Toro explained that her behavior was motivated by her fear of Powers. Toro was entitled to briefly set out the reasons for her fear. Similarly, Powers' counsel specifically asked Toro whether she had filed a domestic violence petition. Toro was entitled to explain that she had attempted to do so, but dropped the matter based on her fear of Powers. Toro's responses were

relevant to the questions raised about her credibility and her limited testimony on these matters was not unduly prejudicial to Powers. KRE 403. Therefore, the trial court did not abuse its discretion by admitting the testimony regarding the relationship between Toro and Powers.

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

ALL CONCUR.

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