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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001478-MR

ANTOINE FEARRINGTON APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CR-002489

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Antoine Fearrington appeals from his conviction of first-degree trafficking in a controlled substance and possession of marijuana. Fearrington brings three issues to our attention on appeal; however, we find no error in Fearrington's conviction and affirm.

On January 1, 2008, a vehicle being driven by Melissa Frost was stopped in Jefferson County, Kentucky. Bridgette Cunningham was in the passenger seat and Fearrington was in the back seat. There is no dispute that the traffic stop was proper. Police officers believed a drug deal was being conducted in the car and asked for Frost's permission to search the vehicle. Permission was granted and a search found 16.4 grams of crack cocaine under the front passenger seat, but closer to the back seat. During a search of the vehicle's occupants, Fearrington was found with marijuana.

Fearrington was charged with first-degree trafficking in crack cocaine and possession of marijuana. Frost and Cunningham were charged with possession of a controlled substance. Frost and Cunningham entered into a plea agreement with the Commonwealth so that in exchange for their testimony against Fearrington, the felony charge of first-degree possession of cocaine would be amended down to criminal attempt to possess cocaine, a misdemeanor. After a jury trial, Fearrington was found guilty of both charges. He was sentenced to a total of ten years' imprisonment, probated for five years. This appeal followed.

Fearrington's first argument on appeal is that a mistrial should have been granted due to statements made by the bailiff to the jury panel. During a break in *voir dire* while the jury panel was waiting to be called back into the court room, the bailiff was asked by a member of the panel, "What do you do with all these people when you can't put them in jail?" In response, the bailiff said, "If the

jails are full and the prisons are full we could shoot them."[1] Defense counsel moved for a mistrial. The motion was denied. The particular bailiff also remained the bailiff through the remainder of the trial.

Fearrington argues that a mistrial was required because these statements tainted the jury pool. He also claims the trial court should have taken other steps, such as holding a hearing to determine how many jurors heard the statement, admonishing the jurors, or removing the bailiff from the case, but these were never requested of the court; therefore, we will focus on the mistrial issue. In support of his argument, Fearrington cites to *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966). We find, however, that *Parker* is distinguishable from the case at hand.

In *Parker*, a bailiff said to the members of a jury that the defendant was wicked and guilty. The bailiff also stated that if there was any mistake, the Supreme Court would fix it. The United States Supreme Court found that the bailiff's comments violated the Sixth Amendment to the Constitution because a defendant is guaranteed an impartial jury and to be confronted with the witnesses against him. However, the Supreme Court reversed the conviction in that case because the statements made by the bailiff were evidence that was not subject to cross-examination, meaning that the statements regarding the defendant's guilt were not subject to confrontation by the defense. In addition, a member of the jury

[1] This statement was brought to the trial court's attention by a juror member while *voir dire* was ongoing. The quoted statement is what the bailiff recounted to the trial judge when questioned. The juror also told the court what she remembered the bailiff saying, which was similar.

who sat on the case actually testified that the statement influenced her decision to convict. The statements made by the bailiff in *Parker* and those of the bailiff in the case at hand are drastically different. The statements made here were generic statements that had nothing to do with Fearrington or his case. The statements made in *Parker* attempted to convince the jury of the defendant's guilt.

"A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993), *citing Jones v. Commonwealth*, 662 S.W.2d 483 (Ky. App. 1983). "A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'" *Id.* at 204, *quoting Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985). As the Kentucky Supreme Court stated in *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky. 1999):

> Long ago, we joined the trend away from a strict or technical application of the rules forbidding conversations with or among jurors. A mistrial is not warranted if the conversation was "innocent" and matters of substance were not involved. "The true test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial."

Id. at 266 (citations omitted).

In the case at hand, the statement made by the bailiff was innocent and no matters of substance were discussed. It was a general and exaggerated statement about the prison population brought on by a question from a member of the jury panel. Fearrington does not discuss any prejudice suffered by him, other than his

conviction. No jury member stated that he or she was influenced by the bailiff's comment, the statement did not rise to the level of a confrontation clause violation discussed in *Parker*, and defense counsel could have, but did not seek a hearing or admonition. The trial court did not abuse its discretion in denying the motion for a mistrial.

Fearrington's second claim on appeal is that evidence produced at trial that he had previously sold drugs to his co-defendants was not admissible under Kentucky Rules of Evidence (KRE) 404(b). KRE 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

A trial court has the discretion to allow other instances of misconduct to be admitted so long as the evidence is "'relevant, probative and the potential for prejudice does not outweigh the probative value of such evidence.'" *Muncy v. Commonwealth*, 132 S.W.3d 845, 847 (Ky. 2004), *quoting Parker v. Commonwealth*, 952 S.W.2d 209, 213 (Ky. 1997). "[W]e will not reverse a trial court's decision regarding the admission of evidence absent a clear abuse of

discretion." *Id., citing Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994).

Prior to trial, the Commonwealth filed notice that it intended to introduce testimony at trial from Cunningham and Frost. The anticipated testimony would be that Fearrington had sold them drugs in the past.[2] This evidence was to be used to prove Fearrington's identity and intent to traffic cocaine. A hearing was held on the issue the morning of trial. The defense introduced a Federal 6th Circuit Case, *U.S. v. Bell*, 516 F.3d 432 (6th Cir. 2008), which suggested that the evidence seeking to be admitted by the Commonwealth was inadmissible. However, the trial court ruled that according to Kentucky case law, the evidence was admissible to show Fearrington's intent. The trial court cited to *Muncy v. Commonwealth*, 132 S.W.3d 845 (Ky. 2004), *Walker v. Commonwealth*, 52 S.W.3d 533 (Ky. 2001), and *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000). We find the cases cited by the trial court directly on point and find no error.

We will use the case of *Walker v. Commonwealth*, *supra*, as an example. In *Walker*, George Walker was convicted of first-degree trafficking in a controlled substance. The charge arose after police discovered him trying to flush crack cocaine down a toilet during a valid search of a residence. The Commonwealth then moved to introduce evidence of a prior controlled buy of

[2] At the time of the motion, the Commonwealth was going to elicit the KRE 404(b) evidence from both Cunningham and Frost; however, after the motion had been granted and during trial, Cunningham absconded and was unable to testify. Frost was the only witness to testify regarding Fearrington's prior drug transactions. The absence of Cunningham will be discussed *infra*.

crack cocaine from Walker. The trial court and Kentucky Supreme Court found that the evidence of the prior controlled buy was admissible to show Walker's intent to sell the crack cocaine he was attempting to flush.

Walker's defense at trial was that he was merely present at the scene and that the crack cocaine was not his. This is the same defense Fearrington utilized, that the drugs were not his. The Kentucky Supreme Court in *Walker* held that a prior instance of selling drugs was relevant to show intent when the defense disputed the intent to sell element of trafficking. The Court in *Walker* also stated that the prior instance of selling drugs made it more probable that Walker intended to sell the drugs in his possession.

This same reasoning can be used in the case *sub judice*. Fearrington denied the drugs were his. The testimony the Commonwealth was to elicit from Cunningham and Frost was that Fearrington had sold them drugs on many other occasions. As stated above, the Commonwealth must show that the KRE 404(b) evidence was relevant, probative, and not substantially prejudicial. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. The purported testimony was relevant because the prior drug transactions made it more probable that the drugs found in the car belonged to Fearrington and it was Fearrington's intent to sell the drugs to Cunningham and Frost.

To prove probativeness, there must be sufficient evidence that the other crime or wrong actually occurred and that the defendant was the actor. *Davis v. Commonwealth*, 147 S.W.3d 709, 724 (Ky. 2004). The testimony of prior drug transactions between Fearrington and his co-defendants was probative to show his intent to sell the drugs on the occasion in question and to rebut his defense that the drugs were not his. The Kentucky Supreme Court held in *Helm v. Commonwealth*, 2010 WL 5238640, 5 (Ky. 2010)[3] that because

> a jury could base a verdict solely on the eyewitness testimony and since a guilty verdict requires a finding of beyond a reasonable doubt, we must conclude that a trial court does not abuse its discretion in determining that uncorroborated eyewitness testimony is enough to support the lower evidentiary standard required to prove prior acts, i.e., evidence upon which the jury could reasonably conclude that the act occurred and that the defendant was the actor.

The testimony of the eyewitnesses to the prior bad acts, Frost and Cunningham, makes the KRE 404(b) evidence probative.

Finally, we must determine if the probative value is substantially outweighed by the danger of undue prejudice. KRE 403. "A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion." *Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994), *citing Rake v. Commonwealth*, 450 S.W.2d 527 (Ky. 1970).

> Even if the other-crime evidence is relevant for a proper purpose and is sufficiently probative, however,

[3] Unpublished cases are cited pursuant to Kentucky Civil Rule (CR) 76.28.

> such evidence is inherently prejudicial and should be excluded if the prejudice substantially outweighs its probative value. Factors bearing on this balance include the similarity between the other crime and the charged crime, the time between them, whether the other crime was particularly egregious, whether the Commonwealth has available to it other means of proof which would reduce the need for the other-crime evidence, and the nature of any limiting instruction provided by the trial court.

Plumb v. Commonwealth, 2005 WL 2323470, 4 (Ky. App. 2005) (citations omitted).

In the case at hand, Fearrington directly put his intent to traffic in dispute by denying that the drugs were his. Also, the KRE 404(b) evidence that was to be presented consisted of Fearrington's co-defendants testifying that he sold them drugs over the prior six months. Additionally, the other crimes were similar and not particularly egregious. Finally, the Commonwealth had little other proof with which to prove its case. Had the prior bad acts evidence been excluded, the evidence would have boiled down to Frost's testimony that the drugs were Fearrington's. It is also worth noting that the trial court could have given an admonition to the jury explaining how the prior bad acts evidence was to be utilized only to show intent on this particular occasion. In fact, the trial court stated during the KRE 404(b) hearing that it would give an admonition and the defense requested one at the close of the Commonwealth's evidence; however, no admonition was given. While this evidence would clearly be prejudicial to Fearrington, it does not substantially outweigh the probative value. Even without

the admonition, we find the trial court did not abuse its discretion in admitting this evidence.

Fearrington's final argument on appeal is that a mistrial was required after Cunningham failed to appear at trial. During the Commonwealth's opening statement, the prosecutor discussed how both Frost and Cunningham were in the car the night of Fearrington's arrest and that Fearrington had sold them drugs in the past. Also, during Frost's testimony she discussed Cunningham's addiction issues and that Cunningham would buy crack cocaine from Fearrington.[4] Cunningham was present the first day of trial, but failed to return on the second day. She had not yet testified pursuant to her plea deal. A bench warrant was issued, but she could not be located. At the close of the Commonwealth's evidence, the defense moved for a mistrial since the Commonwealth had discussed Cunningham during opening statements. The trial court overruled the motion, but stated it would give an admonition to the jury that opening statements were not to be considered as evidence; however, the court ultimately declined to give the admonition at the end of the trial because defense counsel discussed Cunningham's absence in his closing argument. We find no error in denying the motion for a mistrial.

> Where a prosecutor states that she will produce evidence or prove certain facts and fails to do so, the court must consider whether the prosecutor acted in bad faith and whether prejudice resulted to the substantial rights of the defendant. *Freeman v. Commonwealth*, 425 S.W.2d 575, 578 (Ky. 1967) (citations omitted) ("Counsel has the

[4] The defense did not object to any hearsay statements made by Frost concerning Cunningham or Cunningham's anticipated testimony. Any issues regarding Frost's statements attributable to Cunningham are therefore unpreserved.

> right to direct the attention of the jury to all facts and circumstances that he in good faith believes will be allowed to develop in the evidence."); *Decker v. Commonwealth,* 303 Ky. 511, 198 S.W.2d 212, 214 (1946) (no reversal because of inappropriate opening statement unless prejudice results); *Mullins v. Commonwealth*, 79 S.W. 258, 258-59 (Ky. 1904) (no grounds for reversal where Commonwealth failed to produce evidence to support its claim in opening statement that defendant killed victim to prevent him from testifying against him in another trial because there was no proof of misconduct on the part of the prosecutor that affected the substantial rights of the defendant).

Morton v. Commonwealth, 2004 WL 1907062, 5 (Ky. 2004). Nothing in the record indicates that the prosecution acted in bad faith. Cunningham had entered into a plea agreement in which she promised to testify against Fearrington. In addition, Cunningham was present in court on the first day of trial. Thus it was reasonable and in good faith that the Commonwealth mentioned Cunningham in her opening statement.

There was also no prejudice to Fearrington's substantial rights. Cunningham was mentioned in a 30-second part of the opening statement in which the prosecution stated Cunningham would testify and that she would tell the jury how she was addicted to crack cocaine and that Fearrington sold her drugs in the past. This is the same testimony that was ultimately given by Frost.

> It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of

> the trial which would prevent the presentation of all the evidence described in advance.

Frazier v. Cupp, 394 U.S. 731, 736, 89 S.Ct. 1420, 1423, 22 L.Ed.2d 684 (1969).

For the foregoing reasons we affirm Fearrington's conviction.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky