

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000706-MR

ROBERT W. AMOS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 02-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Robert W. Amos appeals from a final judgment of the Montgomery Circuit Court wherein he was convicted of knowingly receiving stolen property valued at over \$300 and was sentenced to four years in prison. We affirm.

In the early morning hours on June 14, 2002, several burglaries occurred in Montgomery County. Two used car businesses were burglarized, and a store called Barryman's was also burglarized. Based upon their discovery of blood on some broken glass at the Barryman's burglary, police determined that the burglar had sustained a cut on his hand or arm.

During his investigation of the crimes later that day, Deputy Sheriff Shannon Taylor of the Montgomery County Sheriff's Department talked with Paul Mansfield, an employee working the morning shift at Town & Country Market in the Camargo area. Mansfield told Taylor that between 4:00 a.m. and 5:00 a.m. on that morning, an individual had come into the store with a cut on his arm. Mansfield related to Taylor that the individual stated he had been in a fight with some Mexicans and that they had cut him. Based on his conversation with Mansfield, Taylor viewed the film from the store video and saw the subject on the video with his arm bandaged. Taylor also observed the subject's vehicle, a red four-door Chevy or Buick, on the video film.

At approximately 7:00 p.m. that evening, Taylor saw the vehicle depicted in the video stopped at Fast Track. He did not activate his lights or siren and simply pulled beside the vehicle. Observing Amos seated in the passenger seat, Taylor asked him if he was in the Camargo area around 4:00 a.m. or 5:00 a.m. that morning. Amos denied being in the area and told Taylor that he was home at the time.

Taylor asked for and received consent from Amos to search the interior of the vehicle. Although Amos was hesitant to consent to a search of the trunk, he nevertheless consented after Taylor began the process of getting a warrant. Physical evidence taken from the burglaries was discovered in the trunk.

When Amos was later questioned by Detective Shane Barnes of the Montgomery County Sheriff's Department, he stated that he had purchased the items at 6:00 a.m. that morning. However, Amos refused to state from whom he had bought the items, explaining that he did not tell on people and was not going to be known as a "snitch." Amos also denied being at the Town & Country Market in the early morning hours of June 14, and he further related that he had let numerous people borrow his car on the night of June 13 and the early morning hours of June 14.

Although law enforcement officials suspected that Amos had burglarized the businesses, he was indicted only for the offense of knowingly receiving stolen property valued in excess of \$300. He was found guilty of the charge following a jury trial, and he was sentenced to four years in prison pursuant to the jury's recommendation. This appeal followed.

Amos's first argument is that the evidence seized from his trunk should not have been admitted as evidence against him at trial because it was the "fruit of the poisonous tree" resulting from an illegal stop of his vehicle. This argument is without merit for two reasons. First, Amos did not raise this issue in his suppression motion to the trial court. Rather, his motion was supported only by his argument that the search was unlawful because it was without his consent. As the Kentucky

Supreme Court noted in Gabow v. Commonwealth, Ky., 34 S.W.3d 63 (2000), "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Id. at 75, quoting Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

Second, assuming the testimony elicited at the hearing was consistent with the information provided in Amos's brief,<sup>1</sup> we conclude that Taylor had lawful grounds to approach the Amos vehicle and question Amos. Initially, it is important to note that this was not a traffic stop but that the officer merely approached the vehicle as it was parked. Further, with the information from the scene of one of the burglaries, together with the information received from the employee and the video at Town & Country Market, Taylor had reasonable suspicion to believe that Amos had committed a crime. In short, the officer did nothing wrong when he approached the Amos vehicle to question Amos.

Amos's second argument is that the trial court erred in denying his mistrial motion when the prosecutor commented on Amos's initial refusal to consent to the search of the trunk as substantive proof of guilt. Further in this regard, Amos asserts that the court erred by not curing the error with an

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<sup>1</sup> Amos did not produce a transcript or video tape of the suppression hearing for our review.

admonition. In support of his argument, Amos cites Barnes v. Commonwealth, Ky., 91 S.W.3d 564 (2002).

While Amos initially consented to the search of the interior of the vehicle, he consented to the search of its trunk with some hesitation. During his closing argument to the jury, the prosecutor stated, "Why would he have hesitancy about having someone search the trunk, or look in the trunk? It was because there was stolen property in it. These are all things that help us to see what his knowledge, what his intention was. He knew the stuff was stolen."

Amos's attorney did not object to the prosecutor's argument until after it was complete and the jury had been excused for deliberations. Further, although the court agreed that the comment was inappropriate, Amos's attorney did not move the court to grant a mistrial until after the jury had retired for deliberations. Also, Amos's attorney did not request an admonition to the jury.

"A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993), quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985). "The trial court has broad discretion in determining whether a mistrial is necessary." Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000). Under the

circumstances, we conclude the trial court did not abuse its discretion in refusing to grant a mistrial. Further, as an admonition was not requested, Amos cannot now claim it was an error for the court not to give one. See Barth v. Commonwealth, Ky., 80 S.W.3d 390, 396 (2001).

Amos's third argument is that the trial court erred in not declaring a mistrial when the prosecutor used Amos's invocation of his right to remain silent as substantive proof of guilt. During the police interrogation of Amos, he stated that he had purchased the stolen items from another person. However, he refused to state from whom the items had been purchased because he did not want to be known as a "snitch." The prosecutor made reference to this in his opening statement to the jury. Amos's attorney moved for a mistrial at the conclusion of the prosecutor's opening statement, but the motion was denied. Amos now argues that the trial court erred in not declaring a mistrial because of the prosecutor's alleged improper comment on Amos's right to remain silent.

On the other hand, the Commonwealth argues that the prosecutor's comment did not relate to Amos's right to remain silent. Noting that Amos advised the police as to how he had received the items, the Commonwealth argues that this issue must be analyzed as "a possible indirect comment on appellant's right to remain silent." Further, the Commonwealth asserts that

Amos's not wanting to reveal the name of the person he bought the property from "is certainly not the equivalent to invoking one's right to remain silent."

"The test concerning indirect comments is 'whether the comment is reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent.'" Crowe v. Commonwealth, Ky., 38 S.W.3d 379, 385 (2001), quoting Sholler v. Commonwealth, Ky., 969 S.W.2d 706, 711 (1998). We conclude that the prosecutor's comment did not meet the test. Furthermore, we agree with the Commonwealth that Amos's statement was not an attempt to invoke his right to remain silent. Therefore, we conclude that the trial court properly denied Amos's motion for a mistrial.

The judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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