

RENDERED: July 30, 2004, 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001477-MR

JAMES EARL MCCONNELL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CR-00218

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, SCHRODER AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant, James Earl McConnell, appeals the judgment of the Fayette County Circuit Court sentencing him to five (5) years enhanced to ten (10) years imprisonment. On June 24, 2003, the jury returned a verdict finding appellant guilty of second degree assault. Appellant waived jury sentencing and in agreement with the Commonwealth, entered a plea of guilty to second degree persistent felony offender ("PF0"). For the reasons stated hereafter, we affirm.

On November 24, 2001, appellant and Kimberly Kay McConnell¹ ("Kimberly") were house sitting in Lexington, Kentucky. Appellant and Kimberly had been drinking heavily and smoking crack cocaine until a violent fight arose. Kimberly, who is five feet tall, weighing approximately ninety pounds, testified that appellant lifted her over his head and threw her to the ground for a total of three times. Appellant subsequently struck the side of Kimberly's head with his fist thereby causing serious physical injury. Paula Lewis ("Paula") witnessed the assault and assisted Kimberly out of the house.

Despite becoming very ill as a result of the assault, Kimberly waited sixteen days before going to the hospital because there was an outstanding warrant against her. Kimberly was diagnosed with a blood clot injury to the brain. Life threatening surgery was subsequently performed to Kimberly's brain.

On February 25, 2002, the grand jury returned an indictment against appellant for one count of first degree assault and one count of first degree PFO. Appellant's first trial resulted in a mistrial when Kimberly unintentionally revealed aspects of appellant's prior criminal proceedings. Appellant's second trial was held on June 24, 2003. This appeal followed.

¹ Appellant and Kimberly Kay McConnell were married in 1996, but divorced in 1999. Apparently, in November 2001, appellant and Kimberly had reconciled.

Appellant first argues that the trial court erred in prohibiting him from questioning Kimberly about a specific instance of untruthfulness. Appellant contends that Kimberly lied to appellant about the paternity of her unborn child. On cross-examination, appellant's counsel asked Kimberly if she fabricated this story so that appellant would marry her. The trial court sustained the Commonwealth's objection because the alleged paternity fabrication was irrelevant to the present assault charge.

Here, appellant contends that the evidence is admissible under KRE 608(b),² as it is probative of Kimberly's character for untruthfulness and establishes a pattern of lying.³ At the time of this trial, KRE 608 permitted opinion or reputation evidence of character only as to "general reputation

² Effective July 1, 2003, Kentucky Rule of Evidence ("KRE") 608(b) states: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. . . ."

³ Appellant testified that on the night in question the fight erupted after appellant suggested that Kimberly, Paula, and he do a "three-some." Appellant contends that Kimberly testified differently stating that the fight erupted when appellant wanted to leave and buy more drugs. Appellant argues that he could have proven Kimberly's character for untruthfulness since she lied about (1) the paternity of her unborn child and (2) the events leading up to the assault. However, upon a careful review of Kimberly's testimony, she did in fact state that the fight erupted after appellant suggested a "three-some." Thus, the testimonies do not conflict. See Tape No.A-1, 6/24/03; 13:30:00. Also, we note that appellant failed to state on avowal that if admissible, Kimberly would have admitted to the fabrication.

in the community." Thus, appellant requests that we apply KRE 608(b) retroactively.

Kentucky law prohibits retroactive application of a statute to an event which occurred prior to the effective date of the statute, unless the statute expressly provides for retroactive application. KRS 446.080(3). *Commonwealth Dept. of Agriculture v. Vinson*, Ky., 30 S.W.3d 162, 168 (2000). Similarly, we will not apply a Rule of Evidence retroactively, as it would engender chaos in the courtroom and demand that trial judges apply rules before effective dates. As such, the trial court did not err.⁴

Next, appellant contends that the trial court should have declared a mistrial concerning improperly admitted statements about appellant's prior criminal proceedings. The Commonwealth asked Kimberly to read portions of the letters that appellant wrote to her from prison. Given that appellant's first trial was declared a mistrial after portions of these letters were inadvertently admitted, the trial court carefully advised both parties that Kimberly could not read the portions concerning appellant's prior criminal trials, his drug use, or previous arguments between appellant and Kimberly.

⁴ Appellant suggests that "manifest injustice" occurred based on *Commonwealth v. Pace*, Ky., 82 S.W.3d 894 (2002); however, appellant's reliance on *Pace* is misplaced, as it involves failure to properly object. And here, the Commonwealth, not appellant, made the objection.

In reading the letters, appellant objected to the statement, "the state will try to give me ten to twenty years," because it suggests that appellant was a persistent felony offender. Appellant also objected to the statement, "I know I will lose, I always do," as it implied prior criminal proceedings. The trial court overruled both objections finding that the statements were general and did not imply prior criminal involvement. Appellant subsequently moved for a mistrial on the grounds that the statement "I know I will lose, I always do" was prejudicial.

A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672, 678 (1985) (quoting *Wiley v. Commonwealth*, Ky.App., 575 S.W.2d 166, 168 (1978)). A trial court has discretion in deciding whether to declare a mistrial, and its discretion should not be disturbed absent an abuse of discretion. *Jones v. Commonwealth*, Ky.App., 662 S.W.2d 483, 484 (1983) ("Here again we must rely upon the good sense of the trial court in declaring a mistrial unless a matter of substance is involved").

Here, the trial court denied appellant's motion for a mistrial because the statement was "generic enough" so that appellant was not prejudiced. The portion Kimberly read specifically stated: "Jimbo told me the prosecutor wants me bad

and all they need is you to testify at the grand jury. Honey I am still scared because I know I will lose I always do!"⁵ Upon a careful review, we find that the statement did not present the trial court with an urgent or real necessity to declare a mistrial. Taken as a whole, the statement was "generic" and broad. Therefore, the trial court did not abuse its discretion.

Despite appellant's contention, he did not move for a mistrial regarding the statement "they will try to give me ten to twenty years." Appellant merely objected to the statement. A party's failure to move for a mistrial following a concluded objection from the court indicates that satisfactory relief was granted and thus, the issue may not be raised on appeal. *West v. Commonwealth*, Ky., 780 S.W.2d 600, 602 (1989). *See also Jenkins v. Commonwealth*, Ky., 477 S.W.2d 795 (1972) (if a party claims entitlement to a mistrial, he must timely ask the court to grant him such relief). As such, the second statement is not preserved for our review.

Accordingly, the judgment is affirmed.

ALL CONCUR.

⁵ "Jimbo" referred to the name of appellant's attorney during arraignment. However, at trial the attorney's first or last name was not mentioned and the Fayette County Legal Aid, Inc. represented appellant.

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