

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000548-MR

DEREK W. MANN

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE ROBERT WILSON, JUDGE
ACTION NO. 03-CR-00043

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, Derek Mann (Mann), appeals the Russell Circuit Court verdict of guilty on the charge of Driving under the Influence, fourth offense, and Driving under the Influence with a suspended license, second offense. Mann also appeals the court's denial of his motion for a new trial. We affirm the trial court's rulings.

Mann was arrested on April 25, 2003, and charged with driving under the influence, in violation of KRS 189A.090 and

KRS 189A.010. Mann was stopped by Trooper Toby Young of the Kentucky State Police after the officer allegedly saw him driving erratically. When he was pulled over, Mann emerged from his vehicle holding a container of an alcoholic beverage. The officer administered field sobriety tests, and stated that Mann failed those tests. Mann was arrested and taken to the Russell County Jail. A breathalyzer test was administered at the jail, and the results indicated a blood alcohol content of .134.

After a jury trial, Mann was found guilty of the charged offenses, and sentenced to 5 years on the charge of Driving under the Influence, fourth offense, and 2 years for the charge of Driving under the Influence with a suspended license, second offense. The sentences were to run consecutively. Mann filed a motion for new trial. The motion was denied by the trial court.

Mann claims that the court was in error when it allowed introduction of the level of his intoxication at trial. Mann asserts that as he admitted being intoxicated, the court should not have permitted introduction of the extent of such intoxication. Mann objects to the trial court permitting the videotape of his field sobriety tests being played for the jury. Counsel for Mann objected to introduction of all portions of the videotape after Mann's arrest. Mann claims that this evidence

was calculated to inflame or prejudice the jury and that introduction of this evidence constitutes reversible error.

Rulings on admissibility of evidence are not disturbed on review absent a showing of an abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996). The Commonwealth may prove its case by competent evidence of its own choosing. Barnett v. Commonwealth, 979 S.W.2d 98 (Ky. 1998). We find no abuse of discretion in the court's determination that the videotaped evidence could be played for the jury.

Mann contends that it was error for the court to fail to dismiss the entire jury panel after a prospective juror made a disparaging remark about one of the defense witnesses in the presence of the entire jury pool. During voir dire, when the name of a defense witness was given to the prospective jurors, one such juror allegedly stated "I don't think I'd believe anything he said." Counsel for Mann moved for a mistrial due to that statement. Mann asserts that the statement tainted the jurors, and prejudiced his ability to get a fair trial with any of the prospective jurors present. He asserts that he was entitled to an impartial jury, pursuant to Tabor v. Commonwealth, 948 S.W.2d 569 (Ky. 1997).

After the disparaging statement, that prospective juror was dismissed by the court. The court then admonished the jury, stating "Ladies and Gentlemen, I would admonish you on

that last statement, that you not consider that if you are selected as a juror . . . that it not have any bearing on your decision, when you listen to the weight of that testimony." The trial court is in the best position to determine what effect such a statement may have on the jury panel. Gould v. Charlton Co., Inc., 929 S.W.2d 734 (Ky. 1996). The court gave an appropriate admonishment. Such an admonishment is a legally sufficient remedy. Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002).

Mann argues that the court erred when it permitted the Commonwealth to introduce documents and pleadings from earlier DUI convictions as such documents had not been provided to him during pretrial discovery. The parties agree that the Commonwealth provided defense counsel with a printout of Mann's driving history, including the earlier convictions, but did not provide actual copies of the convictions. The record shows that Mann was charged as a repeat offender, also giving notice regarding the earlier convictions to defense counsel. When questioned regarding this failure, the Commonwealth stated "why didn't you walk yourself over here and get them?" While we do not condone the Commonwealth's failure to provide full copies of the convictions, Mann received sufficient notice of the convictions so that he cannot claim surprise or prejudice resulting therefrom.

Mann claims that the Commonwealth made "theatrical outbursts" during a bench conference at trial. He asserts that these were improper, and prejudiced his right to a fair trial. The record shows that the Commonwealth made an audible snippy remark to defense counsel. Mann also claims that the Commonwealth made inflammatory statements during closing argument. Mann moved for a directed verdict due to prosecutorial misconduct. This motion was denied.

The question before this Court is whether the reasonable effect of the Commonwealth's actions improperly contributed to conviction. Jarvis v. Commonwealth, 960 S.W.2d 466, 471 (Ky. 1998). The rudeness of the Commonwealth at the bench conference does not rise to the level of error. Concerning the closing arguments, the law allows the Commonwealth reasonable leeway during his arguments before the jury. Houston v. Commonwealth, 641 S.W.2d 42 (Ky.App. 1982). The trial court's ruling on claims of error with regard to closing arguments is reviewed under an abuse of discretion standard. Hawkins v. Rosenbloom, 17 S.W.3d 116, 120 (Ky.App. 1999). There was no abuse of discretion.

Mann complains that during the penalty phase of the trial, the Commonwealth used the testimony of witness Jim Bundy to establish Mann's ineligibility for parole. Mann contends that the name of this witness had not been provided during

pretrial discovery, and that therefore, the jurors had not been given the name of that witness during voir dire. Mann argues that it is impossible to determine if the jurors had any prior knowledge of this witness such that the determination of the jury might have been improperly affected by Bundy's testimony.

The Commonwealth demonstrated to the court that the probation and parole employee listed as a witness had been unable to attend, and that the Commonwealth substituted a similarly situated probation and parole employee in his stead. Mann does not provide any evidence tending to show that having Mr. Bundy testify prejudiced his case. Where it cannot be shown that there is a substantial possibility that the result would have been different, such an irregularity does not constitute grounds for reversal. Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969).

Mann asserts that the jury was dismissed twice during the course of the trial without a proper admonition being given. It is uncontroverted that at earlier dismissals the court properly admonished the jury. RCr 9.70 requires an admonition each time the jury is adjourned. The Kentucky Supreme Court has held that despite this, where a jury has received earlier admonishments, failure to admonish the jury later in the trial does not create grounds for reversal of the conviction absent a

showing of impropriety by the jurors. Commonwealth v. Messex, 736 S.W.2d 341 (Ky. 1987). No such showing was made by Mann.

We further note that this issue was not raised before the trial court. Mann has not shown any impropriety resulting from the failure to admonish the jury. The court's failure in this regard is harmless, pursuant to RCr 9.24.

Lastly, Mann contends that he received ineffective assistance of counsel because defense counsel failed to challenge his earlier convictions with a Boykin motion. Mann also argues that defense counsel should have filed a motion in limine in an attempt to prevent the Commonwealth from introducing the level of his intoxication at trial. Mann has failed to show that counsel's alleged errors were so serious as to deprive him of a fair trial, as required by Taylor v. Commonwealth 63 S.W.3d 151, 160 (Ky. 2001). Counsel's defense was aggressive and well thought-out.

For the foregoing reasons, the conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew B. Dehart
Jamestown, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky