

RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000687-MR

TAURUS HOLLINS

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CR-00236

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Taurus Hollins has appealed from a final judgment and sentence of imprisonment from the Logan Circuit Court entered on March 9, 2004, convicting him of three counts of trafficking in a controlled substance in the first degree¹ and being a persistent felony offender in the second degree (PFO II)² and sentencing him to prison for 15 years. Having concluded that the trial court did not abuse its discretion by denying

¹ Kentucky Revised Statutes (KRS) 218A.1412.

² KRS 532.080(2).

Hollins's motion for a mistrial after a witness testified regarding other uncharged crimes allegedly committed by him, that evidence of laboratory results regarding the controlled substances should not have been suppressed due to delay in production of the lab report, that Hollins was not entitled to a directed verdict of acquittal based upon insufficient evidence, and that the Commonwealth's Attorney's closing argument was not improper, we affirm.

The evidence from the Commonwealth showed that in 2002 Pam Jolicoeur was working for the Russellville Police Department as a confidential informant for the purpose of making controlled purchases of narcotics. Officer Todd Raymer testified that Jolicoeur had been working as an informant for three or four months prior to May 2002, when she purchased crack cocaine from Hollins. Officer Raymer testified that before Jolicoeur would leave to attempt a controlled buy her vehicle and person were searched and a wire transmitter was placed in her vehicle to allow the officers to hear the transaction as it occurred. A tape recording was also made of the transaction. However, the officers did not maintain constant surveillance of Jolicoeur as she attempted to carry out a controlled substance purchase.

After Jolicoeur would complete a transaction, Officer Raymer testified that she would return to a pre-arranged meeting place, hand the controlled substance to the officers, and her

vehicle and person would be searched for a second time.

Jolicoeur was then paid \$100.00 by the Russellville Police Department for each successful purchase of a controlled substance.

Jolicoeur testified that on May 22, 2002, she made three controlled purchases of crack cocaine from the Hollins. On the first occasion, she claimed that she drove to a local park with the intention of purchasing crack cocaine from another person she had called shortly after meeting with the Russellville police officers. She testified that after arriving at the park and waiting for the person she had called to arrive she encountered Hollins and instead purchased crack cocaine from him for \$20.00. After the purchase, she returned to meet the officers and delivered the controlled substance to them. The officers then asked her to return to meet with them approximately one hour later to attempt another purchase. Jolicoeur testified that she did as the officers instructed.

For the second purchase, Jolicoeur testified that she again met with the officers and was searched and wired before leaving to locate Hollins. She testified that she encountered Hollins at a house located at Fifth and Caldwell Street in Russellville and purchased additional crack cocaine from him for \$20.00. Again, following this purchase, she returned to the pre-arranged meeting place and turned the controlled substance

she had purchased over to the officers. The officers then searched her person and vehicle and paid her \$100.00 for executing the purchase. The officers requested that she meet with them later in the evening to attempt a third purchase.

Jolicoeur testified that for the third purchase she again met Hollins at the house located on Fifth Street and purchased some more crack cocaine from him for \$20.00. She then returned to meet the officers, where she gave the officers the controlled substance and was searched again. The substances Jolicoeur purchased were taken to the Kentucky State Police laboratory for testing and were confirmed to contain cocaine, a controlled substance.

Hollins was indicted by a Logan County grand jury on October 9, 2002, and charged with three counts of trafficking in a controlled substance in the first degree within 1,000 yards of a school,³ and with being a PFO II. A jury trial was held on January 29, 2004, and February 5, 2004, in the Logan Circuit Court. Hollins was convicted on all three counts of trafficking in a controlled substance in first degree. Before the sentencing phase of the trial began, Hollins accepted the Commonwealth's offer to plead guilty to being a PFO II in exchange for a 15-year sentence on each trafficking conviction to run concurrently with the others. On March 9, 2004, Hollins

³ On September 3, 2003, the indictment was amended to remove the element of being within 1,000 yards of a school.

was sentenced to prison for a term of 15 years. This appeal followed.

Hollins claims he is entitled to a new trial because the trial court erred in denying his motion for a mistrial when Jolicoeur testified during direct examination by the Commonwealth's Attorney regarding other uncharged crimes allegedly committed by him. Shortly after being called as a witness on behalf of the Commonwealth, Jolicoeur gave the following testimony:

"Q: I guess, ugh, the big question is how do you [know] it's this person [pointing at Hollins] that you bought from?

A: Well, I, I used to buy from him all the time.

Q: So, you were familiar with him?

A: Yes, sir."

Hollins's counsel objected and requested a bench conference, whereupon he moved for a mistrial on the basis that the testimony was inadmissible under KRE 404(b)⁴ and unduly prejudiced Hollins's right to a fair trial. The Commonwealth argued that the testimony was admissible under KRE 404(b)(1) because it was relevant for the purpose of Jolicoeur's identification of Hollins.

⁴ Kentucky Rules of Evidence.

The Commonwealth requested that the jury be admonished regarding the limited purpose of Jolicoeur's statement and Hollins's counsel agreed to the admonition. The trial court admonished the jury as follows:

You've heard this witness's testimony about knowing this defendant from prior transactions. You are to use that testimony only as it might be relevant to her ability to identify him as a person, as the person who made the transactions on the day alleged. You are not to use that evidence as evidence that he in fact engaged in transactions on the date alleged. It's only for identification purposes or for her ability to identify this defendant.

No further admonition was requested by Hollins. On appeal, Hollins argues that he is entitled to a new trial because Jolicoeur's testimony unduly prejudiced the jury and denied him a fair trial. We disagree.

The decision to grant or to deny a mistrial is left to the discretion of the trial court and "its decision should not be disturbed absent an abuse of discretion" [citation omitted].⁵ An abuse of discretion implies that the judicial power has been carried out arbitrarily or capriciously, producing an unreasonable and unfair decision.⁶ In this case, the trial court did not abuse its discretion by denying Hollins's motion for a mistrial.

⁵ Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky.App. 1993).

⁶ Kuprion v. Fitzgerald, 888 S.W.2d 679 (Ky. 1994).

As the Commonwealth correctly argues, Jolicoeur's testimony concerning Hollins's involvement in other uncharged crimes was relevant to the issue of her ability to identify Hollins as the person who sold her crack cocaine on May 22, 2002. As such, the testimony was admissible under KRE 404(b)(1). Further, the trial court correctly admonished the jury regarding the limited purpose of Jolicoeur's testimony. There was no objection to the admonition that was given, and it is presumed that the jury followed the trial court's admonition and considered the evidence for its limited purpose.⁷

Hollins also argues that he was not given notice of the Commonwealth's intent to present evidence of other uncharged crimes against him. However, Hollins's trial counsel did not object to the testimony on the basis of notice. The entire objection and bench conference concerned the prejudice of the testimony to Hollins; no mention was made of lack of notice. As such, this issue is not preserved for review.⁸ The trial court's decision to deny Hollins's motion for a mistrial was proper.

Hollins further claims that he was entitled to suppression of the crime lab results showing that the substances Jolicoeur purchased on May 22, 2002, contained cocaine, a controlled substance. Hollins filed a pro se motion to suppress

⁷ Johnson v. Commonwealth, 105 S.W.3d 430 (Ky. 2003).

⁸ West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989).

this evidence on September 4, 2003, based on alleged delay by the Commonwealth in producing the results. However, there is no indication in the record that the trial court ever ruled on this motion. "Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived" [footnote omitted].⁹ Because Hollins failed to insist on a ruling on his motion to suppress the crime lab report, this claim of error is waived.

Hollins also argues that he was entitled to a directed verdict of acquittal on the basis that the Commonwealth's evidence was insufficient. In considering a motion for a directed verdict of acquittal, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth, assuming that the evidence is true and reserving questions of credibility and weight for the jury.¹⁰ Our review of a denial of a directed verdict is to determine "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal" [citation omitted].¹¹

⁹ Thompson v. Commonwealth, 147 S.W.3d 22, 40 (Ky. 2004).

¹⁰ See Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

¹¹ Id. at 187.

Hollins makes three arguments that the evidence was insufficient, all of which center on his contention that Jolicoeur's testimony was not corroborated by other evidence. He asserts that the audio tapes of the transactions with Jolicoeur were inaudible, that Officer Todd Raymer did not testify regarding what he heard during the transactions, and that Jolicoeur recanted, by way of an affidavit, her claims that Hollins sold her the drugs on May 22, 2002.

Our Supreme Court has held that the testimony of a single witness is sufficient to support a conviction, even if the testimony is contradicted by other testimony, if the jury assigns it greater weight.¹² Jolicoeur, on direct examination, identified Hollins as the person who sold her crack cocaine on three different occasions on May 22, 2002. This testimony alone, considered in the light most favorable to the Commonwealth, was sufficient for the trial court to deny Hollins's motion for a directed verdict of acquittal and to permit the jury to determine if Jolicoeur was a credible witness.

As for Officer Raymer's testimony, Hollins's trial counsel objected to his testifying in regard to what he heard during the transactions with Jolicoeur. This appears to have

¹² Commonwealth v. Suttles, 80 S.W.3d 424 (Ky. 2002); Cobb v. Commonwealth, 105 S.W.3d 455 (Ky. 2003).

been trial strategy on the part of Hollins's counsel to allow the tape recordings to speak for themselves.¹³ Counsel did not object to the introduction of the audio tapes on the basis that they were inaudible, and this appears to have also been a strategy that the jury would give them little weight due to poor quality. Finally, in regard to Jolicoeur's recantation that she purchased drugs from Hollins, the testimony of Hollins's former trial counsel was admitted concerning the affidavit Jolicoeur signed that stated she did not purchase drugs from Hollins. Based on the evidence presented by the Commonwealth as a whole, it was clearly reasonable for the jury to find Hollins guilty.¹⁴ The trial court correctly denied the motion for a directed verdict of acquittal.

Hollins next argues that the Commonwealth's Attorney's closing argument was improper because it shifted the burden of proof to Hollins when he stated that there was no evidence of anyone else being called "Bull."¹⁵ At Hollins's request, the trial court admonished the jury that Hollins bore no burden of proof. When reviewing a claim of prosecutorial misconduct, we

¹³ While we question the correctness of the trial court's ruling in this regard, any error it made was invited by Hollins, and thus he is not entitled to relief. See United States v. Wells, 519 U.S. 482, 487, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997).

¹⁴ Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996); Commonwealth v. Smith, 5 S.W.3d 126 (Ky. 1999).

¹⁵ In her testimony, Jolicoeur testified that Hollins was known to her by the nickname "Bull."

must focus on the overall fairness of the trial,¹⁶ and "determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law" [citation omitted].¹⁷ The Commonwealth may comment on the evidence during its argument, and we see nothing improper with the argument herein. The evidence was that Hollins was known as "Bull" to Jolicoeur and there was no evidence presented to suggest anyone else was known as "Bull." This was a proper argument and the trial court correctly instructed the jury that the defense had no burden of proof.

Based on the foregoing, the judgment of the Taylor Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Lisa Bridges Clare
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky

¹⁶ Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987).

¹⁷ Slaughter, 744 S.W.2d at 411.