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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000751-MR

WALTER HARPER, JR. — APPELLANT

V.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
INDICTMENT NO. 03-CR-00244

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Walter Harper, Jr. was charged with receiving stolen property over $300 and being a second-degree persistent felony offender. A jury found him guilty, and he was sentenced to a maximum of ten years' imprisonment. The question before us on appeal is whether a comment made by the Commonwealth at trial regarding Harper's alleged prior bad acts created undue prejudice. We believe the prosecution's statement was

inappropriate, but the court's admonition to the jury cured any negative effect the comment may have had. So we affirm.

On August 30, 2003, a horse trailer was stolen from a farm in Jessamine County and sold to a used car dealership in Lexington for $250. The proprietor of the dealership, Bobby Russell, purchased the trailer from Harper; Russell paid Harper with a check, which Harper later cashed at a local bank.

At trial, two disparate versions of the events leading up to the sale of the trailer were offered. Harper claimed that he believed the horse trailer that he sold to Russell belonged to an acquaintance, Jason Hensley, and that Hensley had given Harper the trailer in exchange for money Hensley owed him. But Hensley claimed that Harper told him he was "dope sick" and needed money for oxycontin; therefore, Hensley alleged Harper knowingly stole the horse trailer and then sold it to Russell for drug money.

At trial, Harper took the stand to testify on his own behalf. During cross-examination, the Commonwealth questioned Harper about his relationship with Russell. The Commonwealth's specific line of questioning was as follows:

Commonwealth:	You sold any other trailers to Bobby Russell?
Harper:	Yes, I have.
Commonwealth:	What kind of trailer was that?

Harper: That was a trailer that belonged to me several years ago in the stone business.

Commonwealth: Uh-huh. When did you sell that to Bobby Russell?

Harper: Oh, gosh. Four months prior to this.

Commonwealth: Isn't it true that that trailer came up stolen, and he lost it as well?

Harper: Excuse me?

Following the Commonwealth's question, defense counsel immediately objected and asked to approach the bench. Defense counsel claimed that the Commonwealth had intentionally injected prejudicial and unsubstantiated information into the trial by insinuating that Harper had previously sold a stolen horse trailer to Russell; therefore, counsel moved for a mistrial. The Commonwealth responded by stating that he thought Harper had "opened the door" by "mentioning" his relationship with Russell and that he considered the line of questioning proper. The trial judge sustained defense counsel's motion; but, rather than declare a mistrial, the judge admonished the jury that it was to ignore the Commonwealth's question.

Thereafter, the Commonwealth concluded Harper's cross-examination and court took a recess. Later, defense counsel renewed her motion for a mistrial, alleging that the Commonwealth's line of questioning was inflammatory and that the

judge's admonition was insufficient to cure the error. The judge disagreed. The motion for a mistrial was again denied, and the jury found Harper guilty of the indicted offenses. This appeal follows.

Harper argues that "the trial court erred to [his] substantial detriment by allowing the Commonwealth to use evidence of a prior bad act that was unduly prejudicial and not noticed to defense counsel in writing." We disagree.

The Kentucky Rules of Evidence state that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[1] The rule offers two exceptions. Evidence of prior acts may be admissible if, first, it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident";[2] or, second, it is "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."[3]

The statement made by the Commonwealth does not fit into either of the rule's exceptions. The evidence was clearly

[1] Kentucky Rules of Evidence (KRE) 404(b).

[2] KRE 404(b)(1).

[3] KRE 404(b)(2).

not introduced "for some other purpose," such as proving a common scheme or plan, or identifying Harper as the culprit. Moreover, there is nothing to indicate that evidence of the alleged prior bad act was "so inextricably intertwined" with the Commonwealth's other evidence that separation of the two facts was impossible.

It is well settled in this Commonwealth that "the prosecution cannot deliberately inject into the case, via a question, material prejudicial to the rights of the defendant without some reasonable basis to believe there will be an affirmative answer."[4] Upon review of the record, it is clear to this Court that the only purpose behind the Commonwealth's line of questioning was to "impart[] or suggest[] prejudicial information to the jury that could not be introduced in evidence . . . ."[5] There is nothing in the record indicating that Harper had, in fact, previously sold stolen goods to Russell; moreover, there is nothing to indicate that the Commonwealth put defense counsel on notice that such information would be revealed at trial. Therefore, the Commonwealth's comment constituted inadmissible evidence under KRE 404(b).

Nonetheless, it is similarly well established that "[a] jury is presumed to follow an admonition to disregard

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[4] Bowler v. Commonwealth, 558 S.W.2d 169, 171 (Ky. 1977).

[5] Alexander v. Commonwealth, 463 S.W.2d 334, 339 (Ky. 1971).

evidence and the admonition thus cures any error."[6] There are two rather limited exceptions to this rule. In Johnson v. Commonwealth, the Kentucky Supreme Court held that the "presumptive efficacy of an admonition falters:"

> (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial.[7]

Though rare, there are situations where the courts have held that an admonition was insufficient. For instance, in Bruton v. United States, the United States Supreme Court held that the introduction of "powerfully incriminating extrajudicial statements of a codefendant" could not be cured by an admonition to the jury because the statements denied the defendant his Sixth Amendment right to confrontation.[8] Likewise, in Brison v. Commonwealth, the Court held that repeated prejudicial remarks made by a sheriff during trial, including the statement that the defendant "lied to us like a dog," could not be overcome with an admonition.[9] And, in Brown v. Commonwealth, the Kentucky Supreme

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[6] Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).

[7] *Id.; see also*, Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999).

[8] 391 U.S. 123, 135, 88 S.Ct. 1620, 1627-1628, 20 L.Ed.2d 476 (1968).

[9] 519 S.W.2d 833, 837 (Ky. 1975).

Court held that the introduction of the substance of anonymous telephone conversations denied the defendant his rights of confrontation and due process and, thus, could not be cured.[10]

We do not believe that the comments made by the Commonwealth during Harper's cross-examination can be likened to the situations in Bruton, Brison, and Brown. Moreover, the statement does not implicate either of the exceptions elucidated in Johnson. Although the statement made by the Commonwealth was clearly inappropriate and without a factual basis, we do not think it was so "highly prejudicial" that it precluded the jury from following the admonition. Likewise, the Commonwealth's comment was not so inflammatory as to be "devastating" to Harper.

We conclude that the comment made by the Commonwealth was inadmissible under KRE 404(b). But because the trial court immediately and unequivocally admonished the jury to ignore the Commonwealth's question, we believe any error created by the Commonwealth's statement was cured. Therefore, the decision of the Jessamine Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

[10] 892 S.W.2d 289, 290 (Ky. 1995).

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