

RENDERED: July 15, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001036-MR

BRUCE EDWARD BEAVERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 03-CR-00909

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Bruce Edward Beavers has appealed from the May 6, 2004, final judgment and sentence of imprisonment of the Fayette Circuit Court which convicted him of one count of receiving stolen property more than \$300.00¹ and one count of being a persistent felony offender in the first degree (PFO I)

¹ Kentucky Revised Statutes (KRS) 514.110.

and sentenced him to ten years' imprisonment.² Having concluded that the trial court did not commit reversible error, we affirm.

On June 15, 2003, Patricia Adams reported to Lexington police that her home had been burglarized between 1:00 p.m. and 4:30 p.m. on that day. Adams had been home between 12:30 p.m. and 1:00 p.m., and the burglary had not occurred at that time. Upon returning to her home at approximately 4:30 p.m., Adams noticed that her back door was open and broken glass was on the floor. Adams discovered that her two compact disc (CD) towers, containing approximately 300 or more CD's, were missing.

At approximately 4:30 p.m. on the same day, Beavers attempted to sell a large number of CD's at CD Warehouse, located on Rose Street in Lexington, Fayette County, Kentucky. In his possession were two large CD towers, containing 250-350 CD's. Hunter Correll, who was working at CD Warehouse at that time, told Beavers to leave the CD's and to come back in about an hour so that Correll would have time to determine which of the CD's he would purchase and the prices he would pay for them. When Beavers returned, Correll purchased approximately one-third of the CD's for \$208.00. Before Correll paid Beavers for the CD's, he recorded Beavers's name, telephone number, and driver's license number. The store's video surveillance system recorded Beavers throughout the transaction.

² KRS 532.080(3).

After giving her statement to the Lexington police, Adams called CD Warehouse to inquire whether someone had attempted to sell a large number of CD's that day. Adams spoke to Correll, who told her that someone had tried to sell items matching the description she gave. Adams then went to CD Warehouse at approximately 5:45 p.m., and identified a number of CD's on the counter as belonging to her. The CD's were taken into police custody until trial.

On June 24, 2003, Officer Brian Tolson of the Lexington Police Department arrested Beavers on an outstanding warrant for burglary in the second degree of Adams's house. On July 29, 2003, a Fayette County grand jury indicted Beavers on one count of receiving stolen property more than \$300.00 and one count of being a PFO I. Beavers was not indicted for the burglary. On April 5, 2004, a jury found Beavers guilty on both counts. On May 6, 2004, the trial court followed the jury's sentencing recommendation and sentenced him to prison for 10 years. This appeal followed.

Beavers claims the trial court erred: (1) by permitting the Commonwealth to argue that he was the person who stole the CD's and therefore knew the property was stolen; (2) by denying his motion for a mistrial; (3) by denying his motion for a directed verdict of acquittal; (4) by allowing the Commonwealth's Attorney to commit flagrant misconduct in his

closing argument; and (5) because the cumulative effect of the above errors had the effect of denying him due process and a fair trial. We find no merit in any of these arguments.

Beavers claims that it was improper for the Commonwealth to be permitted to argue that he was the person who stole the CD's, and that he therefore knew the CD's were stolen, even though knowledge is an element of the crime of receiving stolen property.³ Beavers also contends that impermissible evidence that he committed the burglary was introduced on two occasions: (1) Officer Tolson's testimony that he had arrested Beavers on an outstanding warrant for burglary in the second degree; and (2) the Commonwealth's Attorney's closing argument that Beavers was the person who broke into Adams's home and stole the CD's.

Beavers argues that this issue is preserved for our review by his motion in limine. The record shows that Beavers's motion in limine addressed only whether the witnesses for the Commonwealth would be permitted to definitely state that the CD's taken from CD Warehouse were the same CD's taken from Adams's home as opposed to it being their belief of same. The

³ KRS 514.110(1) states as follows:

A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

motion did not address whether the Commonwealth would be permitted to introduce evidence that Beavers committed the burglary. Immediately following the trial court's ruling on Beavers's motion in limine, the Commonwealth's Attorney, of his own accord, asked the trial court if it would be permissible for the Commonwealth to argue that Beavers was the person who stole the CD's, and thus, knew they were stolen. Beavers objected on the grounds that to do so would allow the introduction of evidence of another crime (the burglary), and that pursuant to KRE⁴ 404(c), the Commonwealth had failed to give notice it would be presenting that evidence at trial. The Commonwealth's Attorney responded that the Commonwealth would not be presenting evidence, but merely "argument." The trial court then overruled Beavers's objection.

Despite language in KRE 103(d)⁵ to the contrary, our Supreme Court had held that even when a trial court has previously ruled on the admissibility of evidence in a motion in limine, a contemporaneous objection is required to preserve an

⁴ Kentucky Rules of Evidence

⁵ KRE 103(d) provides:

Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

objection to specific evidence which is later admitted.⁶ When Officer Tolson testified, he stated that he had arrested Beavers on an outstanding warrant for burglary in the second degree. He then withdrew this statement indicating that he did not remember, that the warrant may have been issued for stolen property. Beavers made no contemporaneous objection to Officer Tolson's testimony. After Officer Tolson was dismissed, the Commonwealth rested its case, and the trial was recessed for lunch. After the jury had left the courtroom, the trial court, sua sponte, expressed concern about Officer Tolson's statement that Beavers had been arrested for burglary. It was at this time that Beavers first expressed any objection to Officer Tolson's testimony, saying then that he had not raised an objection at the time because he did not wish to draw attention to it. Similarly, Beavers raised no objection to the Commonwealth's Attorney's closing argument that Beavers was the person who stole the CD's.

Even though there is serious question as to whether this issue was properly preserved, we nonetheless will address this argument and we conclude it is without merit. When an improper statement has been made, a court may admonish the jury

⁶ Garland v. Commonwealth, 127 S.W.3d 529, 541 (Ky. 2003) (citing Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996)).

to disregard that statement.⁷ Since juries are presumed to follow admonitions from the trial court, admonitions generally cure any error.⁸

There are only two circumstances in which 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" [citations omitted].⁹

After the lunch recess, the trial court determined that Officer Tolson's statement could be cured by an admonition to the jury by engaging in a "fiction." The trial court then admonished the jury, saying that Officer Tolson's testimony that Beavers was arrested on an outstanding warrant for burglary was a "misstatement." The trial court instructed the jury that Beavers was not on trial for burglary, but had been charged only with receiving stolen property, and that there was no separate burglary charge for which Beavers had been arrested. We conclude that any prejudice resulting from Officer Tolson's

⁷ Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky. 2001) (citing Knuckles v. Commonwealth, 261 S.W.2d 667, 671 (Ky. 1953)).

⁸ Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).

⁹ Johnson, 105 S.W.3d at 441.

testimony that Beavers was arrested for burglary was sufficiently cured by the trial court's admonition to the jury.

Beavers also argues that the trial court erred by allowing the Commonwealth to introduce evidence that Beavers was the person who broke into Adams's home and stole the CD's "by arguing that 'evidence' in his closing statement to the jury[,]" and that the Commonwealth's Attorney's closing argument that Beavers stole the CD's was prosecutorial misconduct, because it had "flagrant influence over the jury." A prosecutor is permitted in his closing argument to "draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt."¹⁰

In his closing argument, the Commonwealth's Attorney did not make any reference to evidence not presented at trial, and he did not represent to the jury that he had any personal knowledge that Beavers had committed the burglary. The Commonwealth's Attorney merely argued that due to the short period of time between the burglary and Beavers's attempt to sell the CD's, he "probably" was the person who stole them. However, the Commonwealth's Attorney was clear that the jury could find Beavers guilty of knowingly receiving stolen property without finding that he had stolen the CD's. We conclude that

¹⁰ Tamme v. Commonwealth, 973 S.W.2d 13, 39 (Ky. 1998). See also Maxie v. Commonwealth, 82 S.W.3d 860, 866 (Ky. 2002).

the Commonwealth's Attorney simply argued reasonable inferences from the evidence and that his argument was within the bounds of a proper closing argument.

Thus, Beavers's first claim is without merit because the trial court properly admonished the jury regarding Officer Tolson's testimony, and because the Commonwealth's Attorney's argument that Beavers was more than likely the person who stole the CD's was within the proper bounds of a closing argument. Accordingly, there was no violation of KRE 404(c) and the Commonwealth's Attorney's closing argument was proper.

Beavers also argues that the trial court should have granted his motion for a mistrial based on Officer Tolson's testimony that Beavers was arrested for burglary. While the Commonwealth argues that the issue is not preserved, in light of the trial court's raising of the issue sua sponte, we will address the issue on its merits.

Once Officer Tolson's testimony was concluded, the Commonwealth rested its case. After the jury left the courtroom, the trial court expressed concern over Officer Tolson's statement that Beavers had been arrested for burglary. Beavers then asked for a mistrial based on that statement, arguing that the statement would influence the jury to convict him based on the burglary, and not on receiving stolen property, and that an admonishment would not cure the error. The trial

court denied the motion, and admonished the jury that Officer Tolson's testimony that Beavers was arrested on a warrant for burglary was a "misstatement," and that there was no additional charge against Beavers.

A trial court's decision to deny a motion for a mistrial will not be disturbed absent a manifest error or an abuse of discretion.¹¹ Furthermore, "a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice[,]""¹² and "[t]he record must reveal a manifest necessity for a mistrial before such an extraordinary remedy will be granted."¹³ Again, when determining whether the presentment of inadmissible evidence warrants a mistrial, an admonition to the jury is presumed to cure any error, unless there is an overwhelming probability that the jury will be unable to follow the admonition and there is a strong possibility that the inadmissible evidence will be devastating to the defendant's case.¹⁴ In this case, Officer Tolson's statement that Beavers was arrested for burglary does not rise to the level of a fundamental defect in the proceedings, and no

¹¹ Gould v. Charlton Co. Inc., 929 S.W.2d 734, 741 (Ky. 1996).

¹² Id. at 738.

¹³ Maxie, 82 S.W.3d at 863.

¹⁴ Johnson, 105 S.W.3d at 441. See also Gould, 929 S.W.2d at 740.

manifest injustice resulted.¹⁵ Nor is there a probability that the statement was devastating to Beavers's case, considering the fact that Officer Tolson withdrew his testimony on the stand. Furthermore, we conclude that the admonition given by the trial court was sufficient to cure any error. Therefore, the trial court did not err in denying Beavers's motion for a mistrial.

Third, Beavers argues that his motion for a directed verdict of acquittal should have been granted. Beavers contended that the evidence was insufficient to prove beyond a reasonable doubt that the CD's which Beavers tried to sell were in fact the same CD's that were stolen from Adams's home. In addition, Beavers now argues that the evidence was insufficient to prove beyond a reasonable doubt that the CD's were valued at over \$300.00. Because sufficient evidence was presented to prove both of these elements of the charge, neither argument has merit.

Adams testified that the CD towers taken from her home contained over 300 CD's at the time they were stolen. She estimated the average cost of the CD's to be between \$12.99 and \$21.00-\$22.00 each, and claimed the CD's were in good condition. Adams also testified that the CD towers were valued at between \$20.00 and \$30.00 each. Adams testified that when she went to

¹⁵ Gould, 929 S.W.2d at 738.

CD Warehouse on the day the CD's were stolen, she identified a number of CD's on the counter as belonging to her.

While Adams was on the witness stand, the Commonwealth introduced Exhibit #1, a box which contained the 83 CD's that had been recovered from CD Warehouse. Adams testified that all the CD's in the box belonged to her. The Commonwealth then introduced Exhibit #2, a list prepared by Adams which showed 285 CD's that she testified had been stolen. Adams also testified that there could be between 80 and 100 additional CD's which were stolen that she had been unable to list. Some of the CD's in Commonwealth's Exhibit #1 were on the list, and others were not.

Next, Correll testified and identified Beavers as the person who had brought two CD towers containing 250 to 350 CD's into CD Warehouse on June 15, 2003. Correll stated that he had purchased approximately one-third of those CD's from Beavers. Correll said he had determined the price he would pay for a CD based on the condition of the CD, how popular the CD in question was, and how many of the particular CD the store already had in stock. Correll testified that the CD's which Beavers brought into the store were in good or very good condition.

The test for granting a directed verdict of acquittal is well-established:

"On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony."

On appellate review, the test of a directed verdict is, 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.¹⁶

From the evidence presented at trial, a juror could have reasonably believed Adams's testimony that the 83 CD's introduced in Commonwealth's Exhibit #1, which Beavers sold to CD Warehouse, had been stolen from her home. Furthermore, the jury had adequate testimony from both Adams and Correll to enable them to reasonably determine that the CD's and CD towers were worth more than \$300.00 at the time they were in Beaver's possession. After drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we conclude the evidence was sufficient for a juror to find Beavers guilty beyond a reasonable doubt. Accordingly, the trial court

¹⁶ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)).

properly denied Beavers's motion for a directed verdict of acquittal.

Fourth, Beavers argues that the Commonwealth's Attorney committed flagrant misconduct in his closing argument when he submitted that defense counsel would have the jury believe that Adams was lying. The Commonwealth's Attorney said "what the defense attorney is asking you to believe is that Patricia Adams came in this room and lied to you under oath[.]" Beavers objected and told the trial court in a bench conference that he had not said that Adams was lying, and that he had not tried to impeach her credibility. The Commonwealth's Attorney then pointed out that Beavers had questioned Adams's testimony that the CD's taken from CD Warehouse were, in fact, hers. He argued that defense counsel had opined to the jury that the reason some of the CD's taken from CD Warehouse were not on Adams's list was because she had "jumped to conclusions," and that she did not own some of the CD's taken from CD Warehouse. The trial court overruled Beavers's objection, and the Commonwealth's Attorney proceeded with his closing argument.

As we have already stated, a prosecutor may draw all reasonable inferences from the evidence, and may present his interpretation of the evidence and why it supports a finding of

guilt.¹⁷ In addition, he may make reasonable argument in response to matters raised by the defense.¹⁸ Beavers's argument that Adams had not owned all of the CD's taken from CD Warehouse was an attempt to discredit her testimony, whether implying she was lying or simply mistaken. The Commonwealth's Attorney's response was reasonable in addressing the defense's contention that Adams was incorrect in her testimony, and we find no error in the trial court's denial of the objection. The Commonwealth's Attorney's argument was proper and did not constitute prosecutorial misconduct.

Finally, Beavers argues that the cumulative effect of the above errors require reversal. Since we have not found any basis for the errors claimed by Beavers, this claim also lacks merit.

Based on the foregoing reasons, the judgment of conviction and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

¹⁷ Tamme, 973 S.W.2d at 39; Maxie, 82 S.W.3d at 866.

¹⁸ Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971).

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