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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001440-MR

HAROLD WAYNE PARRIGIN

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 04-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

SCHRODER, JUDGE: Harold Wayne Parrigin appeals from a judgment of the Clinton Circuit Court convicting him of trafficking in a controlled substance and sentencing him to ten years' imprisonment. As the trial court did not abuse its discretion in denying appellant's motion for a mistrial, we affirm.

In an indictment returned November 1, 2004, appellant was charged with first-degree trafficking in a controlled

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

substance. The charge stemmed from appellant's allegedly having sold ten Oxycontin pills to a confidential informant, pursuant to a controlled drug buy. A jury trial was held on May 31, 2005. At trial, the Commonwealth presented evidence that on July 9, 2003, Bobby Blevins, a paid confidential informant, was working with police officers Danny Burton and David Tucker, of an area drug task force, on a controlled buy. Blevins and his vehicle were searched, and Blevins was given \$400 in cash, based on information provided to the officers by Blevins that appellant had ten Oxycontin pills to sell at \$40 each. Blevins was also equipped with a recording device. Officers Burton and Tucker followed Blevins in a separate vehicle, and observed Blevins stop at appellant's home. The officers continued past the home for a mile or two, then turned around, and drove back by the home. As they passed, they observed Blevins exiting the home walking towards his vehicle. The officers drove slowly, allowing Blevins to catch up, then continued back to their original location. Blevins handed the officers ten pills. The KSP lab confirmed that the pill tested contained oxycodone.

Blevins testified as to his role in the controlled buy. Blevins testified that he purchased the ten Oxycontin pills from appellant by telling appellant that he wanted to go 40 miles per hour ten times, which was slang meaning he wanted to buy ten 40 milligram Oxycontin pills. Appellant told him the

price was \$400, but agreed to give \$5 back to Blevins for gas money. An audiotape of the alleged transaction was played for the jury.

The defense's theory of the case was that Blevins had a motive to set up appellant, because he blamed appellant for criminal charges which had been placed upon him (Blevins) over a bad check. As proof, defense counsel elicited from Blevins on cross-examination that he had once attempted to purchase a vehicle from appellant, with a check that bounced. As a result of the bad check, Blevins faced criminal charges. Blevins accused appellant and his wife, Patricia, of having altered the check. Blevins admitted that he was angry at appellant and Patricia because of this. When asked if he (Blevins) had told Patricia Parrigin that he would "get them" for this, he denied making such a statement.

Defense counsel had reserved her opening statement until after the Commonwealth had presented its case-in-chief. In a brief opening statement, defense counsel explained to the jury her theory that Bobby Blevins had motive to set up appellant, because he was upset with appellant as a result of the bad check, and the criminal charges filed against him (Blevins). Counsel then called Patricia Parrigin as the first witness, at which point the prosecutor immediately asked to approach the bench. At the bench, the prosecutor informed the

court and defense counsel that Patricia Parrigin was currently under indictment, was alleged to have also trafficked drugs to Bobby Blevins, and would be served with an arrest warrant as soon as she testified. The prosecutor claimed he did not know about the indictment until "two minutes ago". Defense counsel said she felt "sandbagged", to which the prosecutor responded that he did not know that Patricia was going to testify. Defense counsel responded that, as required by the court, she had announced that morning who her witnesses were going to be.

The trial court explained to the jury that a matter of law which he must consider had just been brought to his attention, and had the jury retire to the jury room. Defense counsel moved for a mistrial, based on the new information. When the prosecutor criticized defense counsel for not knowing the record of her witness, the court reminded the prosecutor that he said he had just learned about the indictment as well. The prosecutor then stated that "Mr. Murphy" had just told him about it "three minutes" ago. The court identified Mr. Murphy, who was sitting behind the prosecutor, as "Eddie Paul Murphy who's with the Commonwealth Attorney's office." Murphy explained that he saw Patricia Parrigin in the hallway and did not know that she was going to be there. In the ensuing discussion with the prosecutor, the court ascertained that the indictment was a sealed indictment, that it charged Patricia

Parrigin with trafficking in methamphetamine, and that the trafficking allegedly occurred at appellant's residence and also involved Bobby Blevins as the informant. The prosecutor denied previous knowledge of the indictment, claiming that another prosecutor had handled the grand jury on the sealed indictments. An outside attorney was brought in to consult with Patricia Parrigin. After consulting with counsel, Patricia elected to exercise her right not to testify. Defense counsel again moved for a mistrial, based on the Commonwealth's actions in waiting until she had actually called Patricia to inform the defense about the indictment, and the prejudice which resulted to appellant. The court accepted the prosecutor's explanation that he did not previously know about the sealed indictment, and overruled the motion for a mistrial, on grounds that there was no intentional violation.

The defense had planned to call Patricia to testify that Blevins had threatened her and appellant over the criminal charges he (Blevins) faced as a result of the bad check incident. With Patricia's decision not to testify, the sole witness called by the defense was Anna Armstrong. Concerning the incident involving the check, Armstrong testified that she heard Bobby Blevins tell Patricia Parrigin, "You're going to get paid back for this, b-i-t-c-h."

The jury found appellant guilty of first-degree trafficking in a controlled substance. Appellant was sentenced to ten years' imprisonment. This appeal followed.

On appeal, appellant argues that the trial court abused its discretion in denying his motion for a mistrial. Appellant contends that the Commonwealth's conduct of waiting until Patricia was called as a witness to inform the defense that she was under indictment constituted prosecutorial misconduct, and that the resulting prejudice required the trial court to order a mistrial.

"A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005). "[F]or a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002). A trial court's decision denying a motion for a mistrial is reviewed under an abuse of discretion standard. Id.

As to the issue of prosecutorial misconduct, the trial court found that the prosecutor did not have previous knowledge of the Patricia Parrigin indictment. The only evidence before this court as to this issue consists of the exchanges between

the prosecutor and the court contained on the trial videotape, from which we cannot say the trial court erred in this finding. Appellant further argues that he sustained undue prejudice by the fact that the jury heard Patricia's name called as a witness. We disagree. The prosecutor asked to approach immediately after Patricia's name was called, and Patricia never took the stand. The judge explained to the jury that a matter of law had been brought to his attention that he needed to consider. The judge's explanation was equivalent to an admonition. It explained away any prejudice that would have occurred to appellant or any indicia of guilt as a result of the event. See Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (Juries are presumed to follow admonitions from the trial court, therefore admonitions generally cure any error.) The jury was not made aware that Patricia was under indictment nor that she invoked her right against self-incrimination. See Bush v. Commonwealth, 839 S.W.2d 550, 553 (Ky. 1992). Accordingly, we see no undue prejudice.

For the foregoing reasons, the judgment of the Clinton Circuit Court is affirmed.

ABRAMSON, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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