RENDERED: JULY 21, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001545-MR

KEVIN JACKSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-00428

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY[1] AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.[2]

ROSENBLUM, SENIOR JUDGE: Kevin Jackson (Jackson) brings this appeal from a "Final Judgment, Sentence of Imprisonment" of the Fayette Circuit Court, entered June 23, 2005, upon a jury verdict, adjudging him guilty of first-degree robbery[3] and

[1] Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] 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 Kentucky Revised Statutes 21.580.

[3] Kentucky Revised Statutes 515.020, class B felony.

possession of drug paraphernalia[4] and sentencing him to respective terms of imprisonment of ten years and six months, to run concurrently for a total of ten years' imprisonment.[5] We affirm.

Close to the noon hour on February 15, 2004, the victim checked out of her hotel at the Lexington Civic Center and walked to her parked car in the lot across the street. As she was unlocking and opening her car door, she felt a man at her back press her into the car. She identified the man as Jackson. She tried to honk the horn, and kicked and screamed. He told her to move over. She crawled between the two bucket seats and into the back seat, and attempted to claw the man's eyes. He struck her in the jaw and threatened to kill her. She reached to open the passenger door and the man demanded her keys, grabbing them from her. As the victim exited the car, a couple came by and helped her. Jackson told the couple that he had just tried to rob the victim.

The couple notified the police. Jackson remained at the scene, stating that he had been through this before and knew what to do. The victim was treated at the scene for facial cuts and bleeding. She declined to be taken to the hospital, but

[4] Kentucky Revised Statutes 218A.500, class A misdemeanor.

[5] The jury found Jackson not guilty of being a first-degree persistent felony offender. KRS 532.080.

photographs were taken. She experienced numbness and swelling to her jaw for about two weeks.

Jackson was arrested for first-degree robbery. He was also charged with possession of drug paraphernalia when his crack pipe was found in front of the victim's car. He told the transporting officer that he tried to rob the victim for drugs because he had a crack problem, and admitted that the crack pipe was his. At the jail, a cut to Jackson's hand was photographed, and a telephone conversation with his mother was recorded in which Jackson admitted trying to rob a lady for money to buy drugs.

Jackson testified that he was addicted to crack cocaine. On the day of the incident, he testified that he had made a deal with some drug dealers for some crack in exchange for them borrowing his mother's car. He was given more crack than he bargained for and told to sell the extra and bring the money back. Instead, Jackson testified that he smoked all the cocaine. When he saw the dealers close to the Civic Center, he feared he would be beat up, injured or murdered, so he tried to hide by jumping in the victim's car. He testified that he told her that he was not going to kill her, and that she was injured when she grabbed his face and he flailed his arms. He also testified that he told the couple to call the police. He did not run because he was afraid the dealers would find him by his

address on the identification he gave them, so he lied to the police about the robbery.

Before us, Jackson contends that the trial court erred in refusing to grant a mistrial when the Commonwealth's witness improperly implied that Jackson had previously committed robberies, in violation of Kentucky Rules of Evidence (KRE) 404(b) that disallows evidence of other crimes, wrongs, or acts introduced to prove the character of a person in order to show that his actions are in conformity with his character. During the direct examination of the victim, the following occurred:

> Prosecutor: All right, so what did the defendant do after he got out of the car?
> Victim: Well, the couple, pretty well – He sat down. I don't know if they told him to sit down or what. But he did sit down. And can I say what he said?
> Prosecutor: Sure.
> Victim: He said "I've been through this before." And –
> Defense attorney: Can we approach, please?
> Victim: He knew what to do.
> Defense attorney: That is a surprise to me and I think it's entirely inappropriate that that come in. I think that's prejudicing the jury and suggesting that he's been involved in robberies before and I think after the jury has heard that and has a chance to think even a minute about it it's going to be impossible for him to get a fair trial on the robbery issue and so I'm asking for a mistrial.
> Prosecutor: Judge I think that she just explained what he said. That statement was not in the police report so I didn't know what she was going to say. I thought she was going to repeat that . . .

Defense attorney: It is a surprise to me. There was nothing in the discovery that suggested anything about that. I'm not trying to blame (the prosecutor) in any way all I'm saying is I think it makes it impossible for him to have a fair trial in front of this jury.
Prosecutor: I disagree, Judge. I think you can admonish the jury if you want and if he's not testifying they're going to know he's a felon and suspect that he's been arrested before. So I don't think the harm -
Defense attorney: He's been convicted of child support, your honor, twice. I don't think that rises to the level of the implications in that statement.
Prosecutor: I don't see the harm – I don't see the prejudice to the defendant given the defense that's been laid out already but I will, guess, state for the record that his criminal history's got a lot more than child support on them - felonies – he's been arrested for rape and unauthorized use of a motor vehicle and a couple of other thefts I think.
Defense attorney: He's been arrested for those things but I mean he's never been convicted of rape. That's entirely inappropriate.
Prosecutor: But that means he knows what to do when the police show up is what - the point – the police will testify that he just sat there and they collected him basically.
Defense attorney: I don't think it is proper. I mean the impression I got from that statement allows the jury to conclude he's been involved in robberies before. I think that's extraordinarily prejudicial but even if someone were merely to draw the conclusion that he is experienced as a defendant in criminal cases that's entirely inappropriate for this phase of the trial – it's appropriate for a penalty phase if there's a conviction of a felony but the jury is getting even the lesser implication when it is entirely inappropriate.

> Prosecutor: I just think it means that he knows how to interact with the police, judge, I don't know that you can make the leap to a conviction at that point because people were there, they called the police, he knew what to do. So I don't think the prejudice is sufficient to warrant a mistrial.
> Trial court: I will overrule your objection and admonish the jury not to consider that statement.
> Defense attorney: For the record I want to make it clear that our position is that we don't think an admonition would be sufficient to erase the prejudice.
> Trial court: I understand.
> *******
> Trial court: Ladies and Gentlemen of the jury, I'm going to admonish you to disregard the last statement that was made about what the defendant said once he got outside the car. The court finds that it is just inappropriate for you to consider it in any way at this point. Okay?

As stated in Sherroan v. Commonwealth, 142 S.W.3d 7, 17 (Ky. 2004):

> A mistrial is unwarranted absent a "manifest" or "real necessity" for such an extraordinary remedy. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 82 (2000) (internal quotations omitted). This high standard results from the presumption that an admonition "can cure a defect in testimony." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993), *overruled on other grounds by* Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997). See also Price v. Commonwealth, Ky., 59 S.W.3d 878, 881 (2001). The presumption is overcome in only two situations: (1) when an overwhelming probability exists that the jury is incapable of following the admonition and a strong likelihood exists that the impermissible evidence would be

> devastating to the defendant; or (2) when the question was not premised on a factual basis and "was 'inflammatory' or 'highly prejudicial.'" Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 441 (2003) (citations omitted). This standard is the same where the movant waives the protections of an admonition due to oversight or as a matter of trial strategy. *If an admonition is offered in response to a timely objection but rejected by the aggrieved party as insufficient, the only question on appeal is whether the admonition would have cured the alleged error.* Graves v. Commonwealth, Ky., 17 S.W.3d 858, 865 (2000) (no error in refusing to grant mistrial because admission of impermissible evidence could have been cured by an admonition, which defendant did not request).

Emphasis added. Thus, the question before us is whether the admonition cured the alleged error.

In reliance upon Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003), it is difficult to conclude based on the evidence before the jury, specifically the victim's testimony that Jackson attacked her, pushed her into her car and grabbed her keys, and told the couple that he was trying to rob her; as well as his similar admissions to the police and to his mother that the jury was incapable of ignoring the brief reference to Jackson's comment that he had been through this before and knew what to do. It is also difficult to conclude that this comment was "devastating" to Jackson's defense that he was a crack addict who had dealt with the wrong people and was only trying to hide.

The second Johnson exception is inapplicable as well, as the remark was unsolicited, thus the requirement that the impermissible testimony originate from a question lacking a factual basis is unmet. There was no manifest necessity warranting a mistrial.

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

ALL CONCUR.

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