

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000160-MR

CHRISTOPHER GARDNER

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 05-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND WINE, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Christopher Gardner appeals from a final judgment of the Logan Circuit Court sentencing him, following a jury trial, to ten years in prison upon his conviction for possession of a handgun by a convicted felon and for being a second-degree persistent felon. Gardner was originally indicted for attempted murder, assault, persistent felony offender in the first degree, and possession of a firearm by a convicted felon.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Gardner assigns two errors on appeal. First, that the trial court erred when, after declaring a mistrial as to the assault and attempted murder charges, the court continued the trial on the possession of a firearm by a convicted felon (“firearm possession”) charge without empaneling a new jury. Although not preserved for appellate review, Gardner’s second issue on appeal is that the cumulative effect of the court’s error deprived him of his Constitutional right to a fair trial constituting palpable error. For the reasons stated herein, we affirm.

The charges against Gardner arose from the shooting of Chris Washington (“Washington”) on August 27, 2004, in Logan County. Gardner and his cousin, Curry Petrie (“Petrie”), were parked in Petrie’s car at Hampton Park. Gardner was in the passenger seat and Petrie was behind the wheel of the vehicle. Martisha Bertha was in the backseat of the car. Washington’s girlfriend, Angela Kennedy (“Kennedy”), approached the vehicle and was talking with Gardner. After Kennedy walked away from the car, the victim, Washington, approached the vehicle with a beer in his hand. The two men argued; Washington sprayed his beer in Gardner’s face; and then Washington hit Gardner in the head with the beer bottle. Gardner pulled out a gun that was under his seat and fired at Washington from inside the vehicle. Gardner then got out of the car and claims he fired more shots in the air because he wanted to scare Washington’s friends who were then approaching the vehicle. Washington was shot in the forearm, the abdomen and the left hand. Gardner got back in the car and Petrie drove away.

Gardner initially told police that the gun was his. At trial, however, Gardner claimed that the gun belonged to Petrie and that he was only trying to protect Petrie when he claimed ownership. Gardner contends he pulled out the gun to defend himself against Washington. Conversely, Washington asserts he hit Gardner with the beer bottle because he saw him reaching for some “chrome” between the front seats, and because he believed Gardner was going to kill him. Petrie testified at trial that the gun belonged to Gardner.

The trial court held a bifurcated trial on August 29 and 30, 2005. The jury deadlocked on the attempted murder and assault charges so the trial court declared a mistrial. However, the court allowed the jury to proceed with the firearm possession and persistent felony offender charges. This appeal followed.

Gardner claims that the trial court erred in going forward with the firearm possession charge after the jury deadlocked as to his assault and attempted murder charges. Specifically, Gardner argues that the charges were so intertwined, the court might as well retry the case in its entirety. However, in the interest of judicial economy, the trial court decided to proceed with the firearm possession charge.

A trial court should grant a mistrial only for manifest necessity. *Turpin v. Commonwealth*, 780 S.W.2d 619, 621 (Ky. 1989), *abrogated on other grounds in Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993). “For the purpose of appellate review, the trial judge is recognized as the person best situated to properly evaluate . . . when a mistrial is required.” *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001).

Thus, a trial court's decision to declare or deny a mistrial should not be disturbed absent an abuse of discretion. *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993). Under the circumstances of this case, we cannot find that manifest necessity compelled a mistrial on the firearm possession charge.

Gardner argues that the trial court violated RCr 9.16 and the rule of severance set out in *Hubbard v. Commonwealth*, 633 S.W.2d 67 (Ky. 1982), when it failed to issue a mistrial on the firearm possession charge. Specifically, Gardner contends that the jury was prejudiced as a result of its knowledge of his previous conviction. In *Hubbard*, the Kentucky Supreme Court held that the defendant's charge of possession of a handgun by a convicted felon should have been severed for trial from his charges of theft and burglary because evidence as to a prior conviction "is no longer relevant or competent during the guilt phase of a bifurcated trial unless, of course, it should become relevant for impeachment purposes." *Hubbard, supra*, 68. Thus, pursuant to *Hubbard*, the admission of evidence relating to the attempted murder and assault charges would unfairly prejudice the jury's consideration of the handgun charge in normal circumstances. However, here, Gardner admitted to both the handgun possession and the prior felony conviction elements in the first phase of the trial. Moreover, after the mistrial was granted, Gardner did not ask to introduce additional proof on the handgun possession charge even though invited by the trial court to do so. Therefore, unlike the trial court in *Hubbard*, here the trial court did bifurcate the trial and properly reserve Gardner's firearm possession charge for the second phase of the trial.

The purpose of a bifurcated trial is to keep the jury, which is considering the criminal charges, from learning the defendant has a prior criminal history. *See Hubbard, supra*. In this case, Gardner opened the door to questions about his prior felony conviction when he elected to testify on his own behalf. Once Gardner admitted on the stand he had a criminal history, the Commonwealth could have moved to amend the trial court's interlocutory order of bifurcation and allowed it to reopen its case. The jury would have immediately heard all the charges and the facts surrounding them. The trial court's decision to proceed with the second phase of the trial and have the jury deliberate on the firearm possession charge has the same result. Gardner's prior felony conviction and the elements of handgun possession were properly admitted in the first phase of the trial.

Moreover, Gardner has failed to show how he was prejudiced because the jury knew he was charged with attempted murder and assault. The trial court did not preclude the defense from putting more facts into evidence. Once Gardner disclosed his felony record, all the facts were in evidence at that point. Thus, we find no error.

Gardner further submits that his right to confront witnesses was violated because evidence that he possessed the gun was only presented during the portion of the case which was mistried. The Commonwealth called two witnesses to establish its case for the firearm possession by a convicted felon charge against Gardner during the second phase of the trial. The Commonwealth called a deputy clerk of the Logan County Circuit Court Clerk's Office who testified as to Gardner's conviction for second-degree burglary,

and Detective Edmonds who testified as to Gardner's identity as the one named in the indictment. The jury was free to consider Gardner's statement made during the first phase of the trial when he admitted under oath he possessed the firearm. However, Gardner refused the opportunity to introduce additional evidence when the trial court submitted the firearm possession charge to the jury.

Gardner's complaint further fails because the Commonwealth's witnesses were available in the first phase of the trial for cross-examination. Also, Gardner failed to raise any objections as to the unavailability of witnesses or the right to confront witnesses at trial. A new theory of error cannot be raised for the first time on appeal. *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999); *Ruppee v. Commonwealth*, 821 S.W.2d 484, 486 (Ky. 1991).

Gardner contends that the choice of evils was a crucial part of his defense and he offers that he was denied the opportunity to present that defense. A defendant who admits being in possession of a handgun as a convicted felon may seek to exonerate himself on grounds of justification under KRS 503.030 provided the accused shows a threat of injury to himself or imminent peril making the possession of a handgun necessary. *See Senay v. Commonwealth*, 650 S.W.2d 259 (Ky. 1983). Gardner argues that every time he went out, Washington would threaten him. However, the assertions of peril cannot be a general fear posed by a single threat communicated through a third person, but requires "a choosing on the part of the defendant which is sufficiently

contemporaneous with the offense sought to be justified so as to be considered a part of the res gestae.” *Duvall v. Commonwealth*, 593 S.W.2d 884, 886 (Ky.App. 1979).

Considering that the trial court properly instructed the jury on the choice of evils and the defense had every opportunity to introduce additional evidence, we find no error.

A bifurcated trial does not mean, as suggested by Gardner, that the second phase of the trial is decided by a different panel of jurors as the first phase. The trial court, having bifurcated the proceedings, fully protected Gardner from any prejudice that his criminal background might have tainted. Gardner elected to testify on his own behalf. In doing so, the Commonwealth was entitled to ask him whether he had been previously convicted of a felony. In this case, Gardner answered in the affirmative and the Commonwealth’s inquiry was over. The Commonwealth can only introduce details of a prior conviction if the defendant denied his conviction. *Hodge v. Commonwealth*, 17 S.W.3d 824, 848 (Ky. 2000), *citing Commonwealth v. Richardson*, 674 S.W.2d 515 (Ky. 1984). By electing to testify, Gardner opened the door to questions about his prior felony conviction during the first phase of his trial on the charges of assault and attempted murder.

Therefore, finding no error, we affirm the Logan Circuit Court.

ALL CONCUR.

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