

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001764-MR

JERRY INGRAM

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 06-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Appellant, Jerry Ingram, was convicted of theft by unlawful taking over \$300.00 and of being a first-degree persistent felony offender (PFO) following a jury trial in Jessamine Circuit Court. He received a total sentence of eighteen years' imprisonment. On appeal, Ingram argues: (1) the trial court erred by failing to exclude evidence of a statement he made concerning a theft at another store; and (2) he

---

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

was deprived of a fair trial because of three separate instances of prosecutorial misconduct. We affirm.

On November 9, 2005, Ingram entered Kohl's Department Store in Jessamine County, Kentucky. Kelli Hatch, the store's loss prevention supervisor, noticed a female shopper acting suspiciously. Hatch observed the female shopper from her office using video surveillance equipment. Periodically, Ingram and the woman would meet and talk and then separate. The woman handed several items to Ingram. Eventually, Ingram attempted to leave the store and was approached by Hatch in the parking lot. Ingram was cooperative and handed Hatch some jewelry and a bottle of cologne from his pockets and returned to her office.

Hatch brought two other women into her office. One of the women was the shopper Hatch had previously observed interacting with Ingram and the other woman was a shoplifter who had placed a pair of shoes in her purse. Lieutenant Ronnie Fuller of the Nicholasville Police Department responded to the scene and requested the assistance of other officers. When Officer Keith Brown arrived, the two women and their children were removed from the office. With Officer Brown present, Lieutenant Fuller then conducted a search of Ingram's person and recovered a shirt, a wristwatch, and more jewelry. When police removed a bracelet from Ingram's wrist, he stated that he could not be charged with that crime because he had stolen the item from another Kohl's store in Lexington. Hatch made a list of the items and the corresponding prices for the police. The items were calculated using both the lowest ticketed price and the sale price for the

day in question. The value of the items amounted to \$1,098.48 and \$489.51, respectively. Ingram was arrested and ultimately convicted of theft by unlawful taking over \$300.00. He was also found guilty of being a PFO. This appeal followed.

Ingram first argues that the trial court should have excluded testimony regarding his statement about stealing the bracelet from another Kohl's store in Fayette County. Ingram argues that this was impermissible character evidence and should have been excluded pursuant to KRE 404(b). In Ingram's motion to suppress this statement, the issue was framed as one of voluntariness and the motion was denied because the trial court found the statement to be voluntary. Prior to trial, Ingram renewed the motion and asserted that the probative value of the statement was outweighed by its prejudicial effect.

KRE 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This list is illustrative rather than exhaustive. *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky.1998). Trial courts undergo a three-part analysis to determine whether evidence of prior bad acts should be admitted pursuant to KRE 404(b). *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky.1994). First, the court inquires whether the proposed evidence is relevant for some other purpose than to prove the defendant's criminal predisposition. *Id.* Second, the court inquires whether the evidence of the prior act is sufficiently

probative of its commission. *Id.* Third, the court must balance the probative value of the evidence against the potential for undue prejudice. *Id.*

The statement was not offered to prove a prior bad act as evidenced by the Commonwealth charging Ingram with the theft of the bracelet in Jessamine County. The statement tended to demonstrate Ingram's knowledge that the bracelet was stolen. The admission of the statement was proper on this basis pursuant to KRE 404(b). There was no abuse of discretion.

Ingram next asserts that he was deprived of a fair trial because of numerous instances of prosecutorial misconduct. This alleged misconduct included comments upon his silence, informing the jury that he was represented by a public defender, and requesting that the jury “send a message” to Ingram. We will examine these issues in turn.

During closing arguments, Ingram argued that several of the stolen items attributed to him were actually stolen by the other two women. The Commonwealth stated “where are these women? How come the defense didn't put these women on the stand?” Ingram did not object to these comments and asks this Court to review for palpable error.

RCr 10.26 states:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be

granted upon a determination that manifest injustice has resulted from the error.

On appellate review, the analysis of alleged prosecutorial misconduct centers on the overall fairness of the trial. *Dean v. Commonwealth*, 844 S.W.2d 417, 421 (Ky. 1992). A conviction will not be reversed unless the alleged misconduct is so egregious as to render the entire trial fundamentally unfair. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Prosecutors are permitted wide latitude during closing arguments and are entitled to draw reasonable inferences from the evidence as well as respond to matters raised by the defense. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005). In this instance, the Commonwealth was merely responding to Ingram's argument that the other women had actually stolen some of the items that he was charged with unlawfully taking. There was no comment upon his silence and there was no manifest injustice.

Next, Ingram argues that he was entitled to a mistrial when the prosecutor mentioned that he was represented by a public defender during voir dire. The comments were made during the prosecutor's introduction to the prospective jurors. He stated that Ingram's attorney worked for the Department of Public Advocacy and asked if any of the potential jurors had ever been represented by her. Ingram objected and requested a mistrial. The court overruled the objection and denied the motion for a mistrial. Ingram requested no further relief, but renewed the motion for a mistrial at the close of the Commonwealth's case. The court again denied the motion.

The decision to grant a mistrial is committed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Bray v.*

*Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005). “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.” *Id.* “The error must be 'of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial].” *Id.* (quoting *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996)).

In the present case, the comment about the public defender was an isolated remark that was made to ascertain whether any jurors knew the defense counsel. The prosecutor's remarks did not carry a negative implication about Ingram's indigence. The statement was not of such a magnitude as to render the trial fundamentally unfair. Moreover, Ingram could have requested a curative admonition or questioned the potential jurors regarding any possible prejudice. He did neither. There was no manifest necessity for a mistrial.

Finally, Ingram argues that he was denied a fair trial because of the following statements at the conclusion of the Commonwealth's closing argument:

We've protected his rights and given him his opportunity to be here in court. Now it is time for you to do your job. I guess this is a serious situation. Deserves your serious attention, but it is a simple case. So I want you to send a message to this defendant and return a guilty verdict for theft by unlawful taking over \$300.00.

Ingram did not object to this statement at trial. While “send a message” arguments are generally viewed with disfavor regardless of whether the message is to the defendant or

the community, we cannot conclude the comments in this case were so flagrant as to render the entire trial unfair.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

James C. Shackelford  
Assistant Attorney General  
Frankfort, Kentucky