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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000934-MR

ROBERT J. YOUNG APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 06-CR-01339

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, WINE, JUDGES.

CAPERTON, JUDGE: Robert J. Young (Defendant) appeals as a matter of right the judgment from the Fayette Circuit Court, the Honorable Gary D. Payne, presiding, wherein defendant was convicted of three counts of trafficking in the first degree and sentenced to three concurrent ten year terms of imprisonment. On appeal Defendant argues that the trial court erred in failing to give a requested

admonition after the denial of the motion for mistrial and that the trial court erred in excluding evidence of impeachment by contradiction. After careful review, we affirm the judgment in the Fayette Circuit Court.

Defendant's jury trial was held February 22, 2007. In the opening statement the Commonwealth informed the jury how the police used confidential informants (CI) to buy drugs. The Commonwealth explained that one of their witnesses, Duchess Young (Duchess)[1], was the CI that bought cocaine from defendant. Further the Commonwealth Attorney stated that "Young is a drug dealer; Duchess Young bought crack cocaine from the defendant on three separate occasions." Counsel for defendant objected. At the bench conference counsel made a motion for a mistrial since he thought that the jury could believe that defendant had previously been convicted of prior drug charges. The court denied the motion for a mistrial finding that the statement could be explained to the jury, i.e., that the Commonwealth believed that the evidence will show that defendant was a drug dealer who sold crack cocaine to Duchess on three separate occasions. Defendant's counsel then asked if an admonition would be given. The Commonwealth Attorney stated that she could explain that the drug dealer statement was applicable only to the present case. The bench conference then ended and the Commonwealth Attorney explained her statement to the jury. No further objection or request for an admonition occurred.

[1] Duchess Young and Robert Young are not related.

Defendant's first claim of error is that the court should have given an admonition after one was requested. The Commonwealth contends that the admonition was not requested, only inquired about, and that Defendant should have voiced a complaint if the explanation to the jury was not satisfactory.

We first note that whether or not to grant a mistrial is within the sound discretion of the trial court, and the trial court's ruling will not be disturbed unless its ruling constitutes an abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004). Moreover, a mistrial is an extreme remedy and should be utilized only when there appears in the record a manifest necessity for such action. *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky.App. 1993). 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 granting a mistrial]." *Gould v. Charlton Co., Inc*., 929 S.W.2d 734, 738 (Ky. 1996).

Any confusion of the jury from the statement "Young is a drug dealer" was cured with the explanation given by the Commonwealth, i.e., that the evidence will show that Duchess bought crack cocaine from the defendant on three separate occasions. Therefore, there was no abuse of discretion in denying the motion for mistrial.

Contrary to the Commonwealth's position, Defendant did request an admonishment to the jury based on his inquiry. *Cane v. Commonwealth,* 556 S.W.2d 902(Ky. App. 1977), held that a liberal construction should be given to the requirement of RCr 9.22, that "an attorney making an objection must indicate to

the court the action which he desires the court to take or he must object to the action being taken by the court." *Id.* at 907. Otherwise, the issue is waived. *Bell v. Commonwealth,* 473 S.W.2d 820(Ky. 1971). However, when a defendant by his own action accepts the trial court's curative action as adequate by not requesting additional curative measures, the defendant cannot complain that the trial court erred. *See Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003).

In the case sub judice, Defendant did request an admonition. The trial court at the bench conference suggested the Commonwealth could explain the statement. The Commonwealth by way of explanation told the jury that the defendant had sold crack cocaine to Duchess on three separate occasions. Thereafter, the defendant failed to request any additional curative actions by the court. Defendant cannot now complain that the explanation failed to correct the problem. Further, "[u]nder the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000). We cannot say that the alleged error arising from the Commonwealth's statement combined with the explanation offered rises above harmless error.

Defendant's second argument is that the court erred in not allowing the jury to hear extrinsic evidence offered to impeach the Commonwealth's witness, Duchess. More specifically, Duchess's testimony was that she never used drugs and, in fact, had not used drugs in front of the specific people whom defense

counsel referenced in their cross-examination of her. Defendant contends that this extrinsic evidence was offered to impeach by contradicting specific testimony, not to impeach Duchess's credibility in terms of general veracity. The Commonwealth argues that under KRE 608 the trial judge properly excluded extrinsic evidence of Duchess's particular wrongful acts that were not relevant and amounted to collateral facts.

Defendant cites this Court to *United States v. Castillo,* 181 F.3d 1129 (9th Cir. 1999) and *United States v. Green,* 648 F.2d 587 (9th Cir. 1981) to support the argument that impeachment by contradiction should have been allowed in this case. While the cases cited are persuasive, Kentucky case law holds differently.

Our courts have routinely held that KRE 608 limits the use of specific instances of wrongful conduct. Wrongful conduct may be used for impeachment purposes when the credibility of a witness is attacked or when supported by evidence in the form of opinion or reputation in the community. *Purcell v. Com*. (Ky. 2004) 149 S.W.3d 382.

Impeachment by contradiction regarding a collateral fact is prohibited. *Eldred v. Commonwealth*, 906 S.W.2d 694, 705 (Ky. 1994)(citing Lawson, The Kentucky Evidence Law Handbook (3d Ed.1993) § 4.10) abrogated on other grounds by *Commonwealth v. Barroso*, 122 S.W.3d 554, 563-64 (Ky. 2003), *see also Rowe v. Commonwealth,* 50 S.W.3d 216 (Ky. App. 2001) and *Neal v. Commonwealth,* 95 S.W.3d 843 (Ky. 2003); *Slaven v. Commonwealth,* 962 S.W.2d 845 (Ky. 1997).

"A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness." *Simmons v. Small*, 986 S.W.2d 452, 455 (Ky. App. 1998)(quoting *United States v. Beauchamp*, 986 F.2d 1, 4 (1st Cir. 1993)).

The purpose of the doctrine against impeachment by contradiction on collateral facts is to minimize confusion of the fact-finder by avoiding proliferation of side issues. *Simmons* at 455 (quoting Lawson, § 410 at 177); *Baker Pool Co. v. Bennett*, 411 S.W.2d 335, 338 (1967).

Thus, the courts generally have analyzed issues of impeachment by contradiction under the collateral facts doctrine by a balancing test weighing the probative value against its prejudicial or harmful effect under evidentiary rule 403. *See*, *Simmons* and *Lawson, supra*. The standard of review is whether the trial court abused its discretion in either admitting or denying impeachment by contradiction. *Simmons* at 455. *See also* KRE 611.

The specific instances referenced by defense counsel in his cross examination of Duchess as to her drug usage are specific instances of wrongful conduct that are collateral to the issue of whether defendant sold drugs to Duchess. Given Kentucky law, we cannot find that the trial court abused its discretion in refusing to admit extrinsic evidence to impeach by contradiction. Defense counsel properly called one witness to testify to Duchess's reputation in the community as untruthful. Further, defense counsel inquired on cross examination whether

Duchess had used drugs. Unfortunately, defense counsel was bound by the answer given in that he could not use extrinsic evidence to impeach on collateral issues.

For the aforementioned reasons, we affirm the judgment of the Honorable Gary D. Payne, Circuit Judge, Fayette Circuit Court.

ALL CONCUR.

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