IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-2055-2009**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
KEVIN WEBSTER,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's judgment of sentence dated August 31, 2011. The relevant facts follow.

On December 10, 2009, Appellant was arrested and charged with numerous counts each of conspiracy, criminal use of a communication facility, and violations of the Controlled Substance, Drug, Device and Cosmetic Act arising out of his involvement in sales of narcotics to a confidential informant on October 13, 2009, November 3, 2009, November 10, 2009, and December 3, 2009, and a search of his residence on December 10, 2009 pursuant to a search warrant.

A jury trial was held on April 19-20, 2011. The jury found Appellant guilty of all the charges.

On August 31, 2011, the Court imposed an aggregate sentence of 7 to 14 years incarceration in a state correctional institution followed by a five year term of probation under the supervision of the Pennsylvania Board of Probation and Parole.

Appellant filed a timely appeal.

Appellant first asserts that the court erred in denying his motion to suppress physical evidence. The Honorable Nancy L. Butts addressed this motion in an Opinion and Order docketed August 3, 2010, which the Court relies upon and incorporates by reference.

Appellant next claims the trial court erred when it denied a mistrial based upon the prosecution's prejudicial closing argument, during which she referred to Appellant as a "parasite," asserted that the needles found at the residence and attributable to Appellant fostered the spread of AIDS, and otherwise appealed to the juror's concern for public safety.

> It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. 'An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will…discretion is abused.' A trial court may grant a mistrial only 'where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.' A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011)(citations omitted). Furthermore, not every unwise, intemperate or improper remark by a prosecutor justifies the grant of a mistrial or a new trial. Commonwealth v. Chmiel, 30 A.3d 1111, 1181 (Pa. 2011).

> A prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks. Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made.

Id., citing Commonwealth v. Cox, 603 Pa. 223, 983 A.2d 666, 687 (Pa. 2009).

In his closing, Appellant's counsel argued that several of the Commonwealth witnesses should not be believed because they were being paid to make controlled buys, they

were doing whatever they could to keep themselves from going to jail on drug charges and they were not the type of people the jurors would rely on when making decisions in their private affairs. N.T., April 20, 2011, at pp. 252-261.

In response to Appellant's counsel's closing argument, the prosecutor argued that the defendant and others like him were parasites who feed on addicted people. When those addicted people get arrested because they are fronting drugs for the dealer to support their habit, it is not a bad thing that they cooperate with the government and try to get Drug Court to avoid jail as argued by Appellant's counsel, but a good thing because they are trying to get rid of their addiction and they are helping the Commonwealth enforce the law and protect the public. See N.T., April 20, 2011, at pp. 276-77. Appellant's counsel did not immediately object to the prosecutor's argument.

Later in her closing argument, when the prosecutor was arguing the evidence that showed the controlled substances found in Appellant's residence were possessed with the intent to deliver them, the prosecutor stated the following:

> The trooper testified that the quantity of crack is significant, not just that is was crack, but the quantity, because a normal user, regular user, is not going to have – that quantity is not going to be packaged that way. When you add in the surveillance system – the surveillance system, the little rubber bands, the syringes, the packaging in the drawer, these little bags ready to be filled with crack cocaine, the fact that they're dealing two controlled substances – actually three: powder cocaine, crack and heroin. They're a one-stop shop. That's why they have this box of syringes. Oh, you need a new syringe? I'm sure you've heard in the news of people getting AIDS because of using syringes over and over in elicit drugs. That's why they have these, in case they need a clean one.

N.T., April 20, 2011, at pp. 283-84. At this point, Appellant's counsel objected and moved for a mistrial on two grounds: (1) there was no evidence that Appellant was distributing needles; and (2) putting the fear of AIDS into the jury's mind was outrageous and highly

prejudicial. Id. at 284-85. He then added that there was an earlier statement about protecting the community from parasites like Appellant, which also was not proper closing argument. Id. at 285. The Court replied that it questioned the parasite comment but thought that it was fair comment. The Court then found the AIDS statement was beyond what would be proper, but it did not require a mistrial and could be cured with a cautionary instruction. Id. at 285-286. At the completion of the sidebar conference, the Court immediately instructed the jury as follows:

> "Ladies and gentlemen, in the context of representing their respective positions and their respective clients passionately, vigorously and zealously, which attorneys are ethically obligated to do, sometimes they go a little far afield. My job as judge is to bring 'em back a little bit. Please take no negative inference to Ms. Kilgus, but disregard the statement about the epidemic of AIDS."

Id. at 286-287.

Since the prosecutor's initial "parasite" comment was not immediately objected to and was in fair response to the closing argument of Appellant's counsel, it should not form the basis for the grant of a mistrial. The AIDS comment also does not justify the grant of a mistrial because the cautionary instruction was sufficient to overcome any prejudice, and the law presumes that the jury will follow the instructions of the court. Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 961, 971 (2001).

Appellant also contends the trial court erred in permitting the testimony of Commonwealth witness Russ Hollinger regarding prior alleged drug activity of Appellant where such testimony was unduly prejudicial, was without any required notice and otherwise violated Rule 404(b) of the Pennsylvania Rules of Evidence.

Appellant's claim is belied by the record. Appellant was given notice. In a

Notice dated November 19, 2010, the prosecutor informed Appellant that it intended to call Mr. Hollinger as a witness at trial. The Notice indicates that Mr. Hollinger would testify that he "regularly purchased crack from the defendant at the Locust St. [sic] for 18 months ending in December 2009" and he "would often pay for his crack by check."

In the end, however, the Court did not permit the jury to consider any testimony from Mr. Hollinger. Although the Court initially ruled that Mr. Hollinger's proposed testimony was admissible to show that Appellant possessed the crack discovered in his residence with the intent to deliver it and gave the jury a cautionary instruction about the proper use of this type of testimony immediately before the prosecutor began to question Mr. Hollinger (N.T., April 20, 2011, at 6-14, 105-107), it became apparent after a few questions that Mr. Hollinger did not purchase the drugs at Appellant's residence, but rather Mr. Hollinger had Appellant deliver the drugs to Mr. Hollinger's home (N.T., at 109). At that point Appellant's counsel requested, in a sidebar conference, that the Court instruct the jury to disregard Mr. Hollinger's testimony. Id. at 109. The Court ultimately found that this difference changed the value of the evidence such that its probative value no longer outweighed it potential for prejudice. Id. at 142-143. Immediately following the lunch recess, the Court instructed the jury that it was striking all of Mr. Hollinger's testimony and that the jury could not consider any of it. Id. at 144-145.

Appellant next alleges the trial court erred by permitting expert testimony from Trooper Brett Herbst that the controlled substances were possessed with the intent to deliver them, where such testimony violated the notice and expert report rules set forth in Rule 573 of the Pennsylvania Rules of Criminal Procedure.

Rule 573 states, in relevant part:

> **(B) Disclosure by the Commonwealth.**
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> (1) *Mandatory*. In all court cases, on request of the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit defendant's attorney to inspect and copy or photograph such items.
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> (e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;
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> (2) *Discretionary with the Court.*
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> (b) If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the ground for each opinion.

Pa.R.Cr.P. 573(B). With respect to expert opinions, the comment to the Rule states:

> Pursuant to paragraphs (B)(2)(b) and (C)(2), the trial judge has discretion, upon motion, to order an expert who is expected to testify at trial to prepare a report. However, these provisions are not intended to require a prepared report in every case. The judge should determine, on a case-by-case basis, whether a report should be prepared. For example, a prepared report ordinarily would not be necessary when the expert is known to the parties and testifies about the same subject on a regular basis. On the other hand, a report might be necessary if the expert is not known to the parties or is going to testify about a new or controversial technique.

Pa.R.Cr.P. 573, comment.

In this case, Appellant filed a written request for formal discovery that included requests for expert discovery. Request for Pretrial Discovery, paras. 5-7. If no

written report or record existed, Appellant sought "a complete description of the opinions and subject matters to which each such expert is expected to testify." Request for Pretrial Discovery, para. 7. The Commonwealth typically calls a municipal police officer or a Pennsylvania State Trooper to offer expert opinion testimony that a defendant possessed controlled substances with the intent to deliver them. In this case, that law enforcement officer was Trooper Brett Herbst. As is also typical, Trooper Herbst never prepared any kind of written document stating that opinion or the basis therefor. At trial, Appellant's counsel argued that Trooper Herbst's testimony should be precluded because he never received any notice that he would be called as an expert or what his expert opinion testimony would be, in violation of Rule 573. The Court denied Appellant's request to preclude Trooper Herbst's testimony, but offered to recess the jury so Trooper Herbst could provide an offer of proof as to what his expert opinion would be. Appellant's counsel declined the Court's offer.

The Court finds that, reading Rule 573 as a whole, the Commonwealth is only required to provide an expert report to the defense if their expert has produced some sort of written report or document stating their opinion. See Pa.R.Cr.P. 573(B)(1)(e). Since no such report or document was ever prepared in this case, there was nothing within the possession or control of the attorney for the Commonwealth that could be provided to defense counsel.

When the expert has not generated any written document, the situation is governed by Rule 573(B)(2)(b). This portion of the rule did not require preclusion of Trooper Herbst's testimony for several reasons. First, Appellant's counsel never filed a motion to require the expert to prepare a report. Second, disclosure under paragraph (2) is discretionary with the Court. Third, this is precisely the type of situation contemplated in the Comment to Rule 573 where a prepared report ordinarily would not be necessary.

Although Appellant's counsel may not have known the name of the law enforcement officer who would testify as an expert in this case, he fully expected such an expert to be called as a witness and for the expert to render an opinion that the controlled substances were possessed with the intent to deliver them. In fact, counsel admitted as much twice in the record: first, when the Court offered to take a recess so he could get an offer of proof from Trooper Herbst, counsel stated: "Well, we all know what his opinion's going to be" and second, when he said in his closing argument: "this is a guy who's testified exclusively for the government. This is what he does. Never has testified for defense. It came as no surprise to me that's what he was going to say. I knew he was going to say that. That's what I expected him to say." N.T., April 20, 2011, at 193, 265. Therefore, under the facts and circumstances of this case, the Court did not err when it permitted Trooper Herbst to testify as an expert, despite never providing an expert report or a summary of his opinion and the basis therefor to the defense prior to trial.

Finally, Appellant avers that the trial court erred in permitting the introduction of Appellant's bank records where the Commonwealth obtained those records by an illegal use of a subpoena. Appellant filed a motion in limine seeking to preclude the introduction of Appellant's bank records, because the Commonwealth issued a subpoena to produce the records to the District Attorney's office instead of to a court hearing or proceeding. The Court prohibited the Commonwealth from using the copies of the records that were improperly subpoenaed. At the time of trial, however, the Commonwealth had properly issued another subpoena on the credit union for one of their employees to testify at trial and to bring the original records with her. See, N.T., April 20, 2011, at 22-23. The Court found this second, properly issued subpoena rendered the procedural defects of the original

subpoena moot, so the Court permitted the Commonwealth to call the credit union employee to testify and to introduce into evidence the two or three bank records that she testified about. The employee, Kelly Maneval, gave very brief testimony regarding an account card and owner sheet for Appellant's joint savings account with an individual named Davonna Stevens and a check that was returned due to a stop payment made out to Appellant, but Ms. Maneval could not tell who wrote the check. Id. at 98-105.

Even if the Court improperly permitted this evidence, it was harmless error. The Commonwealth believed it would be introducing the testimony of Russ Hollinger to show that the check was written by him to pay for a drug transaction where he purchased crack from Appellant to show that the crack found in Appellant's residence was possessed with the intent to deliver it. As previously discussed, however, the Court ultimately did not permit Mr. Hollinger to testify. Therefore, although the bank records may not have been relevant at that point, they also were not prejudicial to Appellant's case.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: District Attorney
Edward J. Rymsza, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)