

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-001940-MR

DAVID STRANGE

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA H. ADAMS, JUDGE
ACTION NO. 00-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, AND McANULTY, JUDGES; AND MILLER, SENIOR JUDGE.¹
McANULTY, JUDGE. Appellant David Strange appeals his conviction
in the Clark Circuit Court for two counts of burglary in the
third degree for which he was sentenced to one year on each
count to be served consecutively. Appellant raises numerous
claims of error at his trial. We have reviewed his claims and
the record in this case, and we reverse and remand.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

On the night of February 17, 2000, appellant, his friend Keith Townsend and Townsend's younger brother, Tim Stamper, a juvenile, were observed by a night watchman looking into and trying to enter vehicles in a truck lot. The three were detained and the sheriff's department was called. The sheriff's deputy arrived and observed what he subsequently learned were stolen items in appellant's vehicle. Townsend and Stamper later confessed to the crime spree they embarked on that night.

At trial, Townsend testified all three played a part in breaking into the clubhouse of the Kentucky Coon Hunters' Club and stealing a number of empty soft drink bottles. He said they broke into a newspaper vending machine and a soft drink vending machine at a store. They took out quarters which they split three ways. He testified that they broke into the Winchester Flea Market and took books and magazines. Stamper also testified at trial about their actions when the three of them committed the break-ins and burglaries that night.

Appellant first contends that the record on appeal is not sufficient for meaningful appellate review. Specifically, the audio portions of the majority of bench conferences were muted by the trial court upon the attorneys' approach to the bench, and are completely inaudible. On appeal, appellant submitted a narrative statement pursuant to CR 75.13(1) using

the recollection of appellant's counsel at trial as to the bench conferences which were inaudible.² Nevertheless, appellant argues that the record remains inadequate for review because at the outset of the narrative statement his trial counsel professed that he did not remember specific conversations. He asserted that his narrative statement was only "speculation" about what took place in the bench conferences. Appellant argues that he should not have to present his appeal based on mere speculation, and his narrative statement is insufficient to cure the defects in the record on appeal.

We agree with the Commonwealth that the issue of a lack of exactness in the narrative statement was settled by the Kentucky Supreme Court's opinion in Simpson v. Commonwealth, Ky., 759 S.W.2d 224, 228 (1988). The court stated, "Without a showing of prejudicial error, we are unwilling to hold that the absence of specific objections and rulings creates an inadequate record which denies appellant his constitutional right of appeal." Id. We find this holding particularly apt since herein appellant primarily is arguing about the lack of a record as to objections.

² CR 75.13(1) states in pertinent part: "[i]n the event no videotape, mechanical or stenographic record of the evidence or proceedings at a hearing or trial was taken or made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient mechanical recording."

Appellant has raised ten claims of error on appeal, two of which we reverse on, so we cannot agree that appellant was prejudiced in any way. Moreover, we do not believe that the failure of trial counsel to recall the exact or entire conversations of the bench conferences is unusual or unexpected. Despite his inexact memory, the trial counsel was able to fashion an approximation of what was said at various times at the trial, which is sufficient for our review.

Appellant next argues that his due process rights were violated when a deputy sheriff who served as a witness for the prosecution was placed in charge of the jury. There is no record of appellant having objected to this arrangement at trial, and no mention of it in appellant's narrative statement on appeal. Therefore, we conclude that it is not preserved for appellate review. Appellant argues that the defect is structural in nature and constitutes palpable error. RCr 10.26.

The Kentucky Supreme Court has held that it is a violation of the principle of separation of witnesses to place the jury in the custody of a sheriff who had been an important prosecution witness. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 547 (1988). The Court in Sanborn cited Turner v. Louisiana, 379 U.S. 466, 473, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965), in which the United States Supreme Court found a due process violation when a jury, during a three day trial, was

placed in the custody and "continual association" of two deputies who were "key prosecution witnesses."

However, in a case which predated Turner, Kentucky's highest court held that it was not reversible error for the jury to be placed in the custody of a sheriff who was not deemed a key witness in the case. The court noted that the sheriff's testimony served only to place in evidence a bullet which had been delivered to him. Carson v. Commonwealth, Ky., 382 S.W.2d 85, 95 (1964). The evidence was not challenged by the defense and was not a significant part of the case. The Court, therefore, found no merit in the claim of error. Id.

Later, in Kiper v. Commonwealth, Ky., 415 S.W.2d 92 (1967), the Court denied a defendant's RCr 11.42 motion to vacate his conviction on the ground that the jury was placed in the custody of the sheriff and his deputies who were material witnesses for the Commonwealth. The defendant therein had not objected. The court held that under the circumstances of the case the jury should not have been placed in the custody of the sheriff or deputies who were material witnesses. However, the Court believed the trial judge should have been given an opportunity to correct the situation, and denied the motion to vacate in the absence of any claim or proof of misbehavior by the Sheriff, his deputies or a juror. Id. at 94.

From the foregoing cases, it is clear that placing a jury in the custody of a sheriff or deputy who is more than a minor witness is improper. Also, it should be brought to the attention of the trial court. The decisive factors are the amount of the custodian's involvement with the jury and whether the custodian was a key witness regarding matters which were of consequence to the decision in the case.

Despite the lack of objection in this case, under Turner and Carson we consider the occurrence to be error. The witness had more than a secondary role in the investigation of the case. At trial, the deputy who was placed in charge of the jury testified that he was called to the trucking company where appellant, Keith Townsend and Tim Stamper were detained. The witness identified the stolen items which he observed in their vehicle. The witness testified that, after leaving the lot, he investigated the break-in at the Winchester flea market. He testified that appellant made statements to him. He stated that he took appellant to be processed at the county jail, and testified to the "unusual amount" of change removed from appellant's pockets.

The deputy was placed in charge of the jury at the close of the proof. At that time, the jury was instructed that the deputy was there to serve them and any questions for the court were to be delivered to the deputy who would bring the

question to the attention of the court. The jury was further instructed that if they had any needs during their deliberations to write them down and notify the deputy, who would tend to those needs.

We conclude that this witness was more than a minor participant in this case. In Carson, the witness only provided the chain of custody for a piece of evidence. The deputy in the case at bar investigated the offense and by his testimony connected appellant to the coins and stolen property items from the burglaries described at trial. We conclude that it was error for this deputy to have been placed in charge of the jury during their deliberations.

Next, appellant argues that the trial court improperly admitted "other crimes" evidence pursuant to KRE 404(b). KRE 404(b) precludes evidence of other bad acts only if the evidence is offered to prove the character of a person in order to show that he acted in conformity therewith. Such evidence is admissible if it is relevant for another legitimate purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). Appellant asserts there were three instances of improper "other acts" evidence: testimony that appellant was apprehended while he was attempting to gain access to vehicles in a lot; evidence that appellant broke into vending machines

the same night as the charged burglaries; and Townsend's testimony of an attempt by appellant to bribe him to change his testimony.

The trial court denied appellant's motion in limine, finding that the evidence met the criteria of KRE 404(b). We agree that the evidence of the earlier newspaper vending machine break-in and the later attempt to enter the vehicles was admissible as showing a continuing course of conduct. It was also admissible as showing the intent to break and enter, and to steal.

A different case is presented with regard to the evidence of attempt to bribe. The Commonwealth does not respond to this allegation of error. Bribery is an offense quite different from the burglaries and break-ins, and it cannot be said to be part of a common scheme. Nevertheless, we conclude that this evidence was admissible "for some other purpose" than to prove character under KRE 404(b). Evidence of an attempt to suppress a witness' testimony by the accused, whether by persuasion, bribery, threat, inducement not to appear at the trial or to swear falsely, is "evidence tending to show guilt," and is "relevant and admissible as evidence inconsistent with a defendant's innocence, thus akin to an admission of guilt." Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 29-30 (1998).

Therefore, the evidence was properly admissible for a purpose other than to show criminal disposition.

Appellant's next claim of error is that he was denied due process when the Commonwealth was permitted to bolster the testimony of one of its witnesses. The charge of bolstering in this case comes from the testimony of a sheriff's detective who recalled the substance of statements made to him by the juvenile, Tim Stamper. The Commonwealth argues that the testimony was merely cumulative because Stamper had previously testified. The courts of the Commonwealth have repeatedly condemned this type of bolstering evidence as investigative hearsay, which is impermissible. Daniel v. Commonwealth, Ky., 905 S.W.2d 76 (1995); Bussey v. Commonwealth, Ky., 797 S.W.2d 483 (1990). Furthermore, the error is not excused when it is repetitive of another witness's testimony since the fact that the evidence comes from an investigating officer may lend credence to the testimony of the other witness. LaMastus v. Commonwealth, Ky. App., 878 S.W.2d 32, 34 (1994). In this case, moreover, the detective repeated some of the things Stamper said, but he went further in giving details which were not testified to by Stamper.

We believe that this testimony likely possessed a bolstering effect since Stamper was not a wholly reliable witness due to his youth, general lack of articulateness, and

the fact that the defense had elicited from Townsend that Stamper was known to lie. The detective testified that Stamper gave him the details of the burglary of the Coon Hunters Club and added that he was able to verify all of the information Stamper gave him. Yet, the actions of the officer were not at issue in the case. We conclude that the evidence was improper. As a result, we reverse on this issue.

Appellant next argues that the trial court erroneously instructed the jury by denying his tendered instruction on receiving stolen property. We disagree. Receiving stolen property is a separate offense and not a lesser included offense of burglary. Macklin v. Commonwealth, Ky. App., 687 S.W.2d 540, 542 (1984). Further, if the evidence points only to the conclusion that the accused is guilty of one offense, it is not necessary or proper to give an instruction on an alternative offense. Cox v. Commonwealth, Ky., 491 S.W.2d 834, 836 (1973). There was no evidence in this case to indicate that appellant was anything but a participant in the burglaries. There was also no evidence indicating that he only received the property taken in the offenses committed in this case. Denial of the tendered instruction was proper.

Next, appellant argues that the prosecutor committed misconduct during closing arguments. We conclude that the arguments of counsel regarding Townsend's agreement to testify

for the Commonwealth were responsive to the issues appellant's counsel raised at trial and in closing argument. Therefore, we do not conclude that it was error. Appellant did not object to the prosecution's argument regarding the cross-examination of Tim Stamper, and we do not believe it was palpable error. Finally, we do not consider the prosecutor's statements in argument that the defendants in this case crossed county lines to commit their offenses to have been inflammatory. However, on retrial we think the prosecutor must take care to avoid possible incitement of regional prejudices. Taulbee v. Commonwealth, Ky., 438 S.W.2d 777 (1969).

Finally, appellant argues that he was denied due process in the sentencing phase when the court informed the jury of his parole eligibility. Appellant argues that it was inadmissible hearsay evidence. We disagree. The Commonwealth correctly notes that KRS 532.055(2)(a)1 provides that in the sentencing hearing the Commonwealth may offer evidence of minimum parole eligibility as relevant to sentencing. The evidence is admissible under the public records exception to the rule against hearsay. KRE 803(8). There was no error.

Appellant also raised issues as to the selection of the jury. Because we reverse and remand, we regard these issues as moot. For the foregoing reasons, we reverse and remand

appellant's conviction in the Clark Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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