

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001889-MR

CHRISTOPHER BERRY

APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
INDICTMENT NO. 01-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

DYCHE, JUDGE: Christopher Berry appeals from a judgment of the Lincoln Circuit Court wherein he was convicted of five counts of second-degree criminal possession of a forged instrument, in violation of Kentucky Revised Statutes (KRS) 516.060, and sentenced to fifteen years in prison. We affirm.

On April 27, 2001, Berry was indicted on nineteen counts of criminal possession of a forged instrument in the second degree. This indictment stemmed from an investigation

conducted by the Lincoln County Sheriff's Department finding Berry to be in possession of nineteen forged checks drawn on the dormant account of Griffin Concrete Products. These checks were made payable to either Chris Berry or Chris Bowen¹ in various amounts for Acontract labor.@

At trial, Elroy Griffin, the owner of Griffin Concrete, testified that the checks at issue herein had been stolen. Griffin confirmed that he did not write, authorize, or sign these checks. Further, Griffin stated that he never hired Chris Berry or Chris Bowen to perform contract labor for Griffin Concrete.

Brent Meeks and James Smith, employees of a Lincoln County Somerset Oil service station, testified that Berry presented fifteen² checks to them for payment. Meeks and Smith cashed the checks, believing these checks to be payroll checks. Meeks was able to identify five of the fifteen checks Berry presented for payment because Meeks wrote his initials in the upper left corner of the instruments. Neither Meeks nor Smith, however, could identify the remaining checks. Based upon this testimony, the trial court entered a directed verdict on ten counts of the indictment and permitted the jury to consider Berry's guilt as to five counts only. Additionally, the trial court instructed the jury not to consider Smith's testimony in

¹ The handwriting on several of these checks is not clearly legible.

² The trial court severed one count of the indictment. The record fails to reveal the status of the remaining counts.

its deliberations. The jury found Berry guilty of all five counts and fixed his punishment at a total of fifteen years= imprisonment. This appeal follows.

Berry presents several arguments for our review. First, Berry asserts that the trial court erred by denying his motion to exclude Meeks's testimony because Meeks did not possess first-hand knowledge that Berry actually passed five forged checks. We reject this argument.

Kentucky Rules of Evidence (KRE) 602 requires that a witness must possess first-hand or personal knowledge of the facts of a matter as to which he will testify. In other words, a lay witness's testimony must be based upon his own knowledge or perceptions. Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001). In the case at hand, Meeks testified that he thought Berry passed the five checks Meeks initialed. Meeks based this testimony upon his belief that Berry's name was written on the payee line. Meeks also confirmed that, while he did not know Berry on a personal basis, he knew Berry by name and first met him on the day that Berry brought the first check. Meeks also identified Berry as a regular customer who would purchase gasoline from the station. When Berry presented the five checks at issue, Berry came to the business alone, driving a white truck. Upon cross-examination, however, Meeks admitted that, at one time, he checked Berry's operator's license. Based upon these facts, we believe that the trial court properly concluded that Meeks based

his testimony upon personal knowledge. Any contradictions in Meeks's identification of Berry were matters to be weighed by the jury in assessing Meeks's credibility. Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160 (2001).

Berry also argues that the trial court improperly denied his motion for a directed verdict of acquittal as to five counts of the indictment because Meeks's testimony was not sufficient to identify Berry as the perpetrator of the subject crimes. Again, we disagree.

The Commonwealth correctly points out that the appropriate directed verdict standard is set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). In Benham, the Kentucky Supreme Court held:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable jury to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilty, only then is the defendant entitled to a directed verdict of acquittal.

Id. at 187; Jordan v. Commonwealth, Ky., 74 S.W.3d 263, 267 (2002).

Using the above standard, we believe that it would not be clearly unreasonable for the jury to find Berry guilty based upon the evidence as a whole. As mentioned earlier, Meeks identified Berry as the individual who presented the five checks for payment. While Meeks's personal knowledge of Berry was placed in doubt during cross-examination, his testimony was not incredible or unduly uncertain. Thus, Berry's motion for directed verdict was properly denied.

For his third assertion of error, Berry argues that the trial court erred in denying his motion for a directed verdict because the five checks submitted to the jury were not endorsed by the payee, making these checks incomplete written instruments that were not fully negotiable under the Uniform Commercial Code. We find this argument to be totally without merit.

KRS 516.060(1) provides as follows:

A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified by KRS 516.030.

In Perkins v. Commonwealth, Ky. App., 694 S.W.2d 721 (1985), a panel of this Court interpreted the above statute. According to Perkins, in order to find a defendant guilty under KRS 516.060, the jury must find beyond a reasonable doubt that Berry possessed a written instrument purporting to be a check authorized or signed by Griffin for money; that Griffin did not

sign or authorize these checks; that Berry knew that Griffin did not sign or authorize these checks; and that Berry possessed these checks with the intent to defraud, deceive or injure another. Id. at 722. Thus, pursuant to KRS 516.060 and Perkins, Kentucky law does not require that the subject checks be complete written instruments or be negotiable under the Uniform Commercial Code. Here, Berry possessed five checks bearing Griffin's signature which were never signed or authorized by Griffin. Despite this knowledge, Berry passed these checks to Meeks with the intention of defrauding Somerset Oil. Since Berry's conduct satisfied the required elements of KRS 516.060, the trial court properly denied his directed verdict motion.

Next, Berry argues that he was denied due process because the Commonwealth failed to disclose allegedly exculpatory evidence that Meeks did not know Berry personally. Berry concedes that this claim of error was not preserved for our review, but asks that we consider it as palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. We decline this opportunity because the record clearly reveals that, at all times, Meeks asserted that he knew Berry as a customer and cashed the forged checks based upon that knowledge. Further, Berry's trial counsel possessed information that Meeks informed a Lincoln County deputy sheriff that he checked Berry's driver's license. While checking Berry's identification may indicate that Meeks did not personally know Berry, this information was provided to the

defense and was used at trial. Thus, we cannot find that the Commonwealth failed to disclose exculpatory information to the defense in violation of its duty to do so under Brady v. Maryland, 373 U.S. 83 (1963).

Berry's final arguments involve Smith's testimony. Berry claims the trial court should have held a hearing to determine if Smith possessed first-hand knowledge that Berry passed forged checks to Smith, as alleged in ten counts of the indictment. Moreover, Berry believed that the trial court should have declared a mistrial following Smith's testimony since the trial court granted Berry a directed verdict on those counts of the indictment. Again, Berry did not preserve these alleged errors for our review and requests that we consider these arguments under RCr 10.26. Finding no palpable error, we reject these assertions.

As discussed earlier, KRE 602 and Young require a witness to possess personal knowledge of the facts as to which he will testify. Smith recognized Berry because Berry presented a Griffin Concrete check on a Friday evening. Smith cashed the check after Berry purchased gasoline. Smith also cashed another Griffin Concrete check Berry presented to him. Finally, Smith gave a comprehensive description of Berry to a Lincoln County deputy sheriff. Berry cannot argue that this testimony did not come from Smith's personal knowledge of this matter. Thus, the trial court properly denied Berry's request for a hearing.

It is uncontested that Smith's testimony was insufficient to convict Berry as to ten counts of the indictment because Smith was unable to identify those checks. The issue now before us is whether Berry was entitled to a mistrial. A mistrial should be granted only where there is a manifest necessity for such action or an urgent or real necessity for such, with the trial court retaining broad discretion in determining when a mistrial is necessary. Gosser v. Commonwealth, Ky., 31 S.W.3d 897 (2000). Even though the trial court has discretion to grant a mistrial, it should do so only under urgent circumstances and for very plain and obvious reasons. Commonwealth v. Scott, Ky., 12 S.W.3d 682 (2000).

After denying Berry's motion for a mistrial, the trial court informed the jury that ten counts of the indictment were dismissed due to insufficient evidence while saying nothing relative to the sufficiency of the evidence on the remaining counts. Further, during its deliberations, the jury asked the trial court whether it could consider Smith's testimony with respect to the remaining five counts. Berry's objection was sustained and the trial court admonished the jury not to consider Smith's testimony. It is the general rule in this Commonwealth that an admonition by the trial judge after sustaining an objection to improper testimony is sufficient to avoid any resulting prejudice. Willoughby v. Commonwealth, Ky., 510 S.W.2d 11 (1974). A jury is presumed to follow an instruction to

disregard inadmissible evidence unless there is an overwhelming probability that the jury will be unable to follow the court's admonition and the inadmissible evidence is likely to be devastating to the defendant. Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997).

Our review of the record disclosed no overwhelming probability that the jury was unable to follow the trial court's clear admonition. We also fail to perceive any likelihood that the effect of Smith's testimony would be devastating to Berry's defense. Because the admonition was sufficient to cure any error, the trial court properly denied Berry's motion for a mistrial.

The judgment of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

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