

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000094-MR
AND
NO. 2002-CA-000095-MR

ROBERT MATTIE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NOS. 99-CR-00099 & 99-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BAKER, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant Robert Mattie appeals the Pulaski Circuit Court conviction of wanton endangerment; felony theft by unlawful taking; and being a second degree persistent felony offender. Mattie was given an enhanced sentence of ten years imprisonment. Mattie was indicted for two separate offenses. The offenses were tried together, and concurrent sentences were entered against him.

Mattie was a construction worker at a hospital addition site in Somerset, Kentucky. Mattie became intoxicated after work, and was not picked up by his sister as they had previously agreed. Mattie began to walk home, having notified a friend that he was on the way, and needed to be picked up. Mattie claims that he accepted a ride in an air-conditioned truck from a female acquaintance. He asserts that he fell asleep in the vehicle, and did not awaken until they were in the middle of a police chase. Mattie asserts that he did not know that the truck was a stolen vehicle, and that he was not operating the vehicle during the chase. When the truck was stopped by the officers, the only occupant found was Mattie. No woman was seen during the chase or after the truck was stopped.

Mattie was charged with theft of the vehicle, and with being a persistent felony offender. Mattie was also charged with wanton endangerment, as the truck struck a police car during the chase. The truck's owner testified that she left her truck at the construction site unlocked and with the air conditioner running while she ran a quick errand. When she came back outside, her truck was gone.

Mattie asserts that the court was in error when it refused to instruct the jury on the defense of voluntary intoxication and the offense of unauthorized use of a motor vehicle. A trial court is required to give instructions on

"every state of the case covered by the indictment and deducible from or supported to any extent by the testimony." Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987). The requested instructions were not supported by the record. We affirm the trial court's ruling.

Unlawful taking occurs when a person "unlawfully takes or exercises control over movable property of another with intent to deprive him thereof." KRS 514.010(1). Unauthorized use of a motor vehicle occurs when a person "knowingly operates, exercises control over, or otherwise uses such vehicle without the consent of the owner. . . ." KRS 514.100. There is no intent requirement to the offense of unauthorized use of a motor vehicle. Commentary to KRS 514.100.

The Commonwealth argues that as Mattie did not admit to taking or using the truck and was unaware that the truck was stolen, he provided no evidence in support of the requested instruction. At no point in the trial did Mattie claim to have been the driver of the vehicle, or to having taken the truck from its parking spot. The offense of unauthorized use of a motor vehicle requires that the use be "knowingly."

Nothing was provided at trial by Mattie that he had taken the truck knowingly. On the contrary, Mattie testified that he did not take the truck at all, and was merely an innocent passenger. Under such circumstances, no evidence can

be found supporting the requested instruction. See: Logan v. Commonwealth, Ky. App., 785 S.W.2d 497 (1989), holding that where the defendant's defense to a theft of motor vehicle claim was that he was not the driver, he was not entitled to an instruction on unauthorized use of a motor vehicle.

Mattie asserts that he was voluntarily intoxicated at the time of the charged offense. Voluntary intoxication is a defense to a crime which requires culpable intent. Commentary to KRS 501.080. In order to be granted an instruction on the defense of voluntary intoxication, a defendant must show that "he was so drunk that he did not know what he was doing." Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 118 (1990). A defendant who provides evidence showing voluntary intoxication to the extent that he was unable to form the requisite intent for an offense is entitled to an instruction on voluntary intoxication. Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999).

Mattie's testimony indicated that he was intoxicated at the time of the charged offense. Mattie did not testify that he was so intoxicated as to be unable to form the intent to commit the offense. See: McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 934 (1994). The Commonwealth argues that Mattie's testimony is the only evidence of intoxication. To counter this assertion Mattie points us to the investigating officer's

testimony that he (Mattie) was not making sense, or in full capacity at the time he was interviewed, and was clearly intoxicated. Mattie must provide both evidence of intoxication, and evidence that he was so intoxicated that he did not know what he was doing to support the requested instruction. Jewell v. Commonwealth, Ky., 594 S.W.2d 807, 812 (1977). As Mattie did not make such a showing, he was not entitled to a voluntary intoxication defense.

Mattie asserts that reversible error occurred when a juror was improperly segregated from the other jurors during deliberations. During deliberations, one of the jurors became agitated and distressed, and insisted on going outside for a short time. The judge permitted the juror to leave the jury room with the bailiff. The bailiff remained with the juror at all times, and returned him to the jury room. The record shows that nobody communicated with the juror during the time he was outside the jury room, and that nobody communicated with the remaining members of the jury while that juror was outside. Mattie argues that the court failed to keep the jury sequestered, as required by KRS 29A.320.

Mattie admits that the Kentucky Supreme Court has permitted temporary separation of the jury, for such things as "a smoking break," where the jurors are not permitted contact with any outside party, and remain under the supervision of a

bailiff at all times. Grabow v. Commonwealth, Ky., 34 S.W.3d 63, 64 (2000). Mattie argues, however, that in Grabow, counsel agreed to the temporary breaks, while in the present case, counsel did not know of the break beforehand, and had not consented to it. The trial court exercised reasonable discretion in permitting a claustrophobic juror to briefly exit the building, under the supervision of a bailiff. No improper separation of the jury occurred, and no reversible error occurred.

Prior to trial, Mattie filed a *pro se* motion for a continuance, to permit him to retain new counsel. Mattie argued that he did not have confidence in the court-appointed counsel, and did not feel that counsel could adequately represent his interests at trial. The trial court denied Mattie's motion, and held that as witnesses had been called, and the case had been pending for some time, Mattie was required to go forward with the trial.

A determination on a motion for continuance is based on the sound discretion of the trial court. Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991). The trial court's discretion in ruling shall not be lightly overturned. Pelphrey v. Commonwealth, Ky., 842 S.W.2d 524 (1993). An appellant must show an abuse of such discretion in order to claim reversible error. Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 339

(1995). No abuse of discretion is shown by Mattie. The trial court's denial of the motion for continuance was proper.

Lastly, Mattie argues that his conviction should be reversed because the prosecution referenced Mattie's status as a convicted felon during closing arguments and asserted that in order to believe Mattie, the jury would have to believe that the police officers committed perjury. Mattie made a contemporaneous objection, which was sustained, and a request for an admonishment, which was denied.

The record shows that the Commonwealth mentioned Mattie's status as a convicted felon during cross-examination of Mattie, and that the trial court gave an admonishment at that time. The Commonwealth asserts that the court was not required to admonish the jury the second time the prosecutor made that statement. The prosecutor is permitted reasonable latitude in making his closing argument. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 486 (1991). Statements related to the testimony already before the court, and inferences thereon, are permissible. Lucas v. Commonwealth, Ky. App., 840 S.W.2d 212, 214 (1992). A defendant must show that the statements made in the closing statement had the potential to inflict manifest injustice in order to be entitled to reversal of his conviction. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 81 (2000). Mattie has made no such showing. His conviction is affirmed.

ALL CONCUR.

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