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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000804-MR

MICHAEL RISON — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 01-CR-00072-003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BAKER, JUDGE: Michael P. Rison brings this appeal from the March 26, 2002, judgment of the Montgomery Circuit Court. We affirm.

The facts are these: On May 11, 2001, the Montgomery County Grand Jury charged Michael P. Rison with committing Complicity to Second Degree Burglary, pursuant to Kentucky Revised Statutes (KRS) 502.020 and 511.030. After a jury trial, where he was tried with co-defendant Anthony Garrett, Rison was

found guilty of the charge against him, and he was sentenced to seven years' imprisonment. This appeal follows.

Rison sets forth four main arguments. First, Rison argues that the trial court erred when it allowed his April 27, 2001, statement to Montgomery County Sheriff Department Detective Shane Barnes to be admitted into evidence at trial. Rison contends that his statement was not made voluntarily, knowingly, and intelligently, in violation of his Fifth Amendment rights. On April 27, 2001, Rison came to Detective Barnes' office to answer questions concerning a burglary investigation. At the time, Rison was incarcerated in the Montgomery County jail for an offense unrelated to the burglary investigation. Rison requested that he be transported to Barnes' office so that the other prisoners would not see him talking to police. Before Barnes interviewed Rison, he read him his Miranda rights and Rison signed a paper acknowledging that he understood these rights, that he did not want an attorney present during questioning, and that he was making any statements of his own free will.

A suspect may waive his Fifth Amendment privilege to not testify against himself provided the waiver is made voluntarily, knowingly and intelligently. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The inquiry has two distinct dimensions. Colorado v. Spring, 479

U.S. 564, 573, 107 S. Ct. 851, 93 L. Ed. 2d. 954 (1987). First, the relinquishment of the right must have been voluntary in the sense that it was a product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may we properly conclude that the Miranda rights have been waived. Id.

The record indicates no evidence that Rison's waiver was made under coercion or duress. While Rison could not leave Detective Barnes' office on his own because he was in state custody, he could have terminated the questioning at any time and have requested the officers to return him to the jail.

Furthermore, the evidence does not suggest that Rison had anything less than a full understanding of the nature of the right he was abandoning. Rison posits that it was necessary for him to know the exact offense that he was under suspicion of committing before his waiver could be "knowing." This is incorrect. A suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege. Id. at 577.

Thus, Rison waived his rights, and the trial court was correct to allow the statement into evidence.

It is not clear from Rison's argument whether he also alleges violations of his Sixth Amendment right to counsel and his right to due process under the Fourteenth Amendment. We will assume he raised these issues, but we are of the opinion that neither right was violated. The Sixth Amendment right is offense specific and cannot be invoked once for all future prosecutions, and it does not attach until a prosecution is commenced. McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). Rison was being held on charges unrelated to the subject of the questioning, and no proceedings as to burglary had been commenced against him. Thus, his Sixth Amendment rights had not yet attached.

Under the Fourteenth Amendment's Due Process Clause, the question of a confession's voluntariness turns on the presence or absence of coercive police activity. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 481 (1999). As noted above, the record is devoid of any evidence of coercion. Thus, no violation of Rison's due process rights occurred.

Rison’s second argument is that he was under the influence of cocaine and could not form the intent required by complicity to commit second degree burglary. Thus, he posits that the court should have instructed the jury on voluntary

intoxication and on the lesser included offenses of first, second, and third degree trespass, which require a lesser degree of intent than complicity to commit second degree burglary. Error on appeal cannot be considered in the absence of a proper objection to preserve that error for appellate review. Todd v. Commonwealth, Ky., 716 S.W.2d 242, 248 (1986). To preserve any error relating to the failure to give an instruction, there must be an objection in the record stating specifically the matter to which the party objects and the ground therefore. Grooms v. Commonwealth, Ky., 756 S.W.2d 131, 139-40 (1988). Rison failed to object and, thus, failed to preserve this issue. Because Rison failed to preserve this issue, we look to see if a palpable error has occurred which affected Rison's "substantial rights" and resulted in "manifest injustice." RCr 10.26; Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

A voluntary intoxication instruction is justified only when there is evidence that the defendant was "so drunk that he did not know what he was doing," or when the intoxication negatives the existence of an element of the offense. Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 43 (2002). Mere drunkenness will not raise the defense of intoxication. There must be something in the evidence reasonably sufficient to support a doubt that the defendant knew what he was doing. Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977).

There was only one reference during the trial to Rison being under the influence of drugs. On cross-examination by Anthony Garrett's attorney, Montgomery County Sheriff Department Detective Shane Barnes stated that Rison had told him that he was smoking crack the night of burglary. Barnes also stated that Rison's consumption of the drug could have had some effect on his ability to recount the events of the night, depending on how much of an influence he was under. (Barnes at Trial TR Vol. II, 4-5). The paucity of evidence establishing Rison's alleged intoxication does not allow us to conclude that he did not know what he was doing or that his intoxication negated any element of the offense against him. Moreover, since Rison's theory for instructing on lesser-included offenses was predicated his voluntary intoxication argument, there was no need for the trial court to give such instructions. Thus, there was no error that affected Rison's substantial rights or that caused manifest injustice.

Rison's third argument is that he was "substantially harmed" when he was tried jointly with his co-defendant, Anthony Garrett. Separate trials are required under Ky. R. Crim. P. 9.16 only when it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of the offenses or the defendants at trial. Severance is a matter of judicial discretion. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 699

(1987). The decision of the trial judge in such a situation will not be reversed unless the reviewing court is clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated that failure to grant severance was an abuse of discretion. Brown v. Commonwealth, Ky., 780 S.W.2d 627, 629 (1989).

Rison argues that Anthony Garret, his co-defendant, and George Garrett, a witness for the Commonwealth, combined to portray him as "the brains of the outfit." (Rison Brief at 11). He also argues that the testimony of Tammy Hawkins concerning a conversation with Anthony Garrett indirectly incriminated him.

Neither antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice. Ware v. Commonwealth, Ky., 537 S.W.2d 174, 177 (1976). Even if the cross-examination of witnesses by Anthony Garrett's attorney and the testimony of George Garrett could be construed as painting Rison as "the brains of outfit," this in no way prejudiced Rison. Rison stated his role in the burglary to Detective Barnes and this admission was, as stated above, properly entered as evidence. George Garrett's testimony and cross-examination of witnesses by Anthony Garrett's attorney did not introduce any evidence that somehow prejudiced Rison. Also, Hawkins referred only to "they" in her testimony, never referring to Rison by name. Her

testimony in no way prejudiced Rison. Thus, we are not clearly convinced that any prejudice occurred. The trial court did not abuse its discretion by refusing to grant Rison a separate trial.

Rison's fourth argument is that his Sixth Amendment right to confrontation was violated when the trial court permitted hearsay testimony of a non-testifying co-defendant. A witness, Tammy Hawkins, testified concerning statements made to her by Rison's co-defendant, Anthony Garrett. Rison failed to preserve this issue. Thus, we will overturn the trial court only if a palpable error exists. McIntosh, Ky., 646 S.W.2d at 45. We must determine if, on the whole, there is a substantial possibility that the result would have been different if the evidence had not been introduced. Id.

Hawkins' testimony referred only to "they" and never mentioned Rison directly. A defendant's Sixth Amendment right to confrontation is not violated when a co-defendant's testimony is not facially incriminating, but incriminating only when it is linked with other evidence introduced at trial. Richardson v. Marsh, 481 U.S. 200, 208-09 107 S. Ct. 1620, 95 L. Ed. 2d 176 (1987). Hawkins referred only to "they" in her testimony and did not directly incriminate Rison. Furthermore, the jury heard Rison's own statement that he had been involved with the burglary. We cannot say that the result of the trial would have

been different if Hawkins' testimony had not been introduced. Therefore, the trial court did commit error.

For the foregoing reasons, we affirm the judgment of the Montgomery Circuit Court.

ALL CONCUR.

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