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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000815-MR

JEWELL EDWIN HALL

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CR-00125

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. On March 17, 2001, the appellant, Jewell Edwin Hall (Hall), shot Lavelle Buford (Buford) in the parking lot of the B-Bone Club in Paducah, Kentucky. A McCracken County Grand Jury indicted Hall on one count of criminal attempt to commit murder and one count of possession of a handgun by a minor. Hall proceeded to jury trial, and, on February 5, 2002, the jury convicted Hall on both counts. On April 17, 2002, the McCracken

Circuit Court sentenced Hall to a total of seventeen (17) years and six (6) months in the state penitentiary.

On appeal, Hall raises five claims of error.

First, Hall claims the McCracken Circuit Court erred when it refused to strike jurors for cause. During voir dire but before a discussion on the presumption of innocence, Hall's trial counsel initially asked how many of the jurors could find Hall not guilty "right now." Initially, no jurors raised his or her hand. Hall's counsel repeated the question and the jurors raised their hands. Hall's counsel commented that the jurors had suddenly decided to raise their hands. In response, a female juror asked, "with or without evidence?" Hall's counsel told the juror that the juror could not find Hall not guilty. The juror responded, "not without any discussion." Hall's attorney asked if other jurors felt the same. One juror said he would have to have evidence one way or the other, and another juror stated he could find Hall neither guilty nor not guilty at that point. Hall's counsel then questioned individual jurors whether they could find Hall not guilty "right now." Hall's counsel accused one juror of not believing Hall was presumed innocent until the Commonwealth had proved Hall guilty beyond a reasonable doubt. The juror responded that Hall was innocent until proven guilty but stated that Hall was on trial for some reason and that the juror had yet to hear evidence one way or

the other regarding guilt. Hall's counsel asked if any other jurors agreed with these statements. She identified those jurors who did by name and then moved to another issue. Subsequently, she asked if Hall had to prove something. No juror agreed with that proposition. Further, she asked if any juror would hold Hall's refusal to testify against him and none said they would.

After voir dire when the court took up peremptory challenges, Hall's counsel challenged for cause those jurors she felt refused to find Hall not guilty "right now." The circuit court stated that Hall's counsel had confused the jury since her questions did not directly relate to the presumption of innocence and denied her challenges for cause.

On appeal, Hall argues that these jurors failed to understand and adhere to the presumption of innocence and should have been struck for cause. Hall points out that he exhausted his peremptory challenges in order to remove as many of these jurors as possible. Hall argues that a juror who clearly shows prejudice cannot be rehabilitated by simply being asked to put aside his or her personal views and knowledge. Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 717 (1991). Hall argues that these jurors were unable to adhere to the presumption of innocence, thus, could not be rehabilitated. Hall likens them to the juror in Humble v. Commonwealth, Ky. App., 887 S.W.2d 567

(1994), wherein one juror stated that he would require the defendant to take the stand if things looked bad in order for the juror to find the defendant not guilty, even if the prosecution had failed to prove guilt beyond a reasonable doubt. In Humble, the trial court failed to strike the juror for cause, and this Court held that the juror should have been stricken.

Hall argues that the circuit court abused its discretion when it refused to strike the jurors for cause. Hall points out that we must presume prejudice and must reverse when a criminal defendant has been forced to exhaust his peremptory challenges on jurors who should have been stricken for cause. Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 373 (2002).

We recognize that striking a juror for cause rests soundly within the trial court's discretion and we will not reverse absent a clear abuse of that discretion. Barth v. Commonwealth, Ky., 80 S.W.3d 390, 398-399 (2001). The Supreme Court of Kentucky noted that "[i]mpartiality is not a "technical conception" but is a "state of mind," a "mental attitude of appropriate indifference." Montgomery, 819 S.W.2d at 718, quoting United States v. Wood, 299 U.S. 123, 145-146, 57 S. Ct. 177, 185, 81 L. Ed. 78 (1936). The Supreme Court stated that when reviewing a trial court's decision regarding impartiality, it must review the totality of the circumstances. Id.

After reviewing the record, we agree with the circuit court that Hall's counsel confused the jury when she immediately, without preamble, commanded those jurors, who could find Hall not guilty "right now," to raise their hands. Immediately prior to this, the Commonwealth had been discussing with the jury its responsibility to weigh the evidence and be impartial. Given the circumstances, Hall's counsel confused the jury and no juror raised his or her hand. Hall's counsel again commanded the jurors to raise their hand if they could find Hall not guilty. The jurors complied and at least two jurors stated that Hall was innocent until the Commonwealth proved him guilty. But others stated that they had yet to see any evidence and could not find him either guilty or not guilty. Hall takes particular umbrage with the statements of one juror, Mr. Walthen. Walthen adamantly stated twice that Hall was presumed innocent according to the law but that Hall was in court for a purpose. Walthen stated that he had yet to see evidence one way or the other regarding guilt or innocence. Hall contends that Walthen lacked the appropriate mental attitude of indifference. However, after examining the record, Walthen appeared to firmly grasp the presumption of innocence and to be impartial. We find that the McCracken Circuit Court did not abuse its discretion when it denied Hall's challenges for cause.

Second, Hall argues that the Commonwealth violated the test promulgated in Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), for the introduction of an in-court identification of a defendant by a witness. According to Biggers, 409 U.S. at 199,

the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

According to Hall, the Commonwealth failed to ask the victim, Buford, or any other witness, to make an in-court identification of the shooter as Hall. Hall argues that the Commonwealth did not ask for an in-court identification because it knew it could not meet the Biggers test. Thus, Hall contends the circuit court erred in allowing the Commonwealth to put on evidence that was the equivalent of an in-court identification which did not meet the Biggers test.

Hall points to the testimony of Daryl Strickland (Strickland). According to Hall, Strickland testified that he saw the shooter leave the club, saw the shooter retrieve a gun from an unknown person and saw the shooter shoot Buford twice. Strickland testified that he heard someone say, "Jewell ain't a

punk." Hall argues that the Commonwealth should have asked Strickland if he saw the shooter in the courtroom. Hall argues that at the time of the shooting, it was dark, thus, Strickland failed to get a good look. Hall points out that almost a year had passed since the shooting and Strickland could not have had a high level of certainty.

Hall points to the testimony of another of the Commonwealth's witnesses, Hamed Taleban (Taleban). According to Hall, Taleban testified that while sitting in a vehicle, he saw the shooter shoot Buford twice and heard the shooter say, "Y'all can't fuck with Jewell." Taleban did not make an in-court identification. Hall argues Taleban's testimony allowed the jury to infer that the shooter was in fact Hall. Furthermore, Hall argues Taleban's testimony is not credible since, when shown a photo line-up, he said he was fifty percent sure that the shooter was a light-skinned African-American, not Hall, who is a dark-skinned African-American. Hall insists this shows that the Commonwealth could not have had Taleban make an in-court identification because it could not meet the Biggers test.

The Commonwealth argues that there is simply no Biggers issue in the case *sub judice*. The Commonwealth argues that there was sufficient direct and circumstantial evidence to convict Hall. The Commonwealth points out that the victim, Buford, saw Jewell Hall raise his arm, and then after turning to

flee, felt two bullets strike him. The Commonwealth points out that Jean Phill (Phill), the manager of the B-Bone Club testified that he saw Hall that evening and that Hall was wearing an orange-colored shirt. In fact, Phill testified that he personally knew Hall. Both Strickland and Taleban testified that they saw an African-American male, who was wearing an orange shirt with the logo "Sean John" on it, shoot Buford. The Commonwealth argues that there was simply no in-court identification issue present, thus, no need to apply the Biggers test. The Commonwealth argues that it can use circumstantial evidence at trial and that it properly used circumstantial evidence in the case *sub judice*. Smith v. Commonwealth, Ky. App., 41 S.W.3d 458, 461 (2001). The Commonwealth points out that Hall did not preserve this issue. In fact, the Commonwealth refers to Hall's in-court identification argument as a non-issue.

While Hall claims that the Commonwealth violated Biggers and the circuit court allowed this, Hall is actually arguing the sufficiency of the evidence. We agree with the Commonwealth that the evidence is sufficient. Buford testified that he had an altercation with Hall while inside the club. Buford testified that as Hall was exiting the club, he went up to Hall and struck Hall twice in the face. Buford testified that he saw Hall walk toward Hall's vehicle and then saw Hall

raise his arm. Buford testified he was then struck twice by gunfire. Both Strickland and Taleban testified that an African-American male in an orange shirt with the "Sean John" logo shot Buford. Strickland testified that, contemporaneous with the shooting, he heard someone say, "there weren't any punks in Paducah." He then heard someone yell, "Jewell ain't a punk." Taleban testified that after the shooter fired, he heard, "Y'all can't fuck with Jewell." Phill, the club manager, testified he knew Hall, that Hall was wearing an orange shirt on the night of the shooting, and when Hall arrived, Phill frisked him and felt a small caliber handgun on Hall's person. He turned Hall away because of the handgun. Hall returned without the handgun, and Phill permitted him to enter the club. Given the evidence on the record, we find that the circuit court did not err.

Third, Hall argues that the circuit court erred when it denied his motion for directed verdict regarding the charge of possession of a handgun by a minor. Hall argues that Phill, the manager of the B-Bone Club who frisked Hall when he first arrived at the club, testified that he only felt the handle of a small caliber handgun. Hall points out that Phill never saw Hall with a handgun; thus, Phill merely opined that Hall had a handgun. Hall argues that Phill may have been mistaken. Hall argues that none of the eyewitnesses identified him as the shooter. Considering the above, Hall argues that the

Commonwealth failed to prove beyond a reasonable doubt that Hall possessed a handgun; thus, the circuit court erroneously denied his motion for directed verdict even if the evidence was viewed in a light most favorable to the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Hall argues that the jury could not have reasonably convicted Hall of possession of a handgun based solely on Phill's testimony.

The Commonwealth argues that Hall, at the close of the Commonwealth's case, made a general motion for directed verdict. However, when Hall renewed his motion for directed verdict at the close of all the evidence, he only renewed the motion as to the attempted murder charge, not the possession charge. Thus, the Commonwealth argues Hall failed to preserve the issue, and therefore this Court should not consider it. Graves v. Commonwealth, Ky., 17 S.W.3d 858, 866 (2000). The Commonwealth argues that even if this Court does address the merits, sufficient evidence existed to convict Hall.

We must agree with the Commonwealth. According to the Supreme Court, "[w]hen there are multiple counts, the proper procedure for challenging the sufficiency of evidence on one particular count is to object to the giving of an instruction on that count." Graves, 17 S.W.3d at 866. In the case *sub judice*, Hall failed to object to the instruction on the possession charge, thus, failed to preserve the issue for appellate review.

However, even if Hall had preserved the issue, we conclude sufficient evidence existed to convict Hall of the possession charge. "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 guilt, only then the defendant is entitled to a directed verdict of acquittal." Benham, 816 S.W. 2d at 187.

In the case *sub judice*, Phill testified that he felt the handle of a small caliber handgun on Hall's person. He also testified that Hall was wearing an orange shirt. Strickland and Taleban testified that the shooter, who wore an orange shirt with the "Sean John" logo on it, shot Buford with a small chrome pistol. Strickland testified that he heard someone yell, "Jewell ain't a punk." Taleban testified he heard the shooter say, "Y'all can't fuck with Jewell." Given this evidence, the jury reasonably concluded that Hall was in fact the shooter and necessarily possessed a handgun when he shot Buford. We conclude the circuit court did not err.

Fourth, Hall argues that the circuit court erred when it overruled his objection to Charlotte Wallace's testimony. Charlotte Wallace (Wallace) was Buford's charting nurse subsequent to the shooting. She testified that she asked Buford who shot him. She testified that Buford answered through his aunt that Jewell had shot him and she noted this in Buford's

chart. Hall argues that the statements Wallace solicited from Buford were neither for treatment nor diagnosis; thus, the statements did not fall under the medical records exception found in KRE 803(4). Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6 (1998).

The Commonwealth argues that Wallace was presented as a witness to rebut Hall's insinuation that Buford's aunt had suggested to Buford that Hall was the shooter. The Commonwealth points out that the prosecution laid a detailed foundation regarding Buford's statement to Wallace and only after laying the proper foundation did the prosecution elicit Buford's statement from Wallace that the shooter was "Jewell." The Commonwealth also argues that Buford's statement to Wallace was admissible under KRE 801A(a)(2) as a prior consistent statement to rebut Hall's insinuation that Buford had lied on the stand. The Commonwealth also argues the statement was admissible under KRE 801A(a)(3) regarding the identification of a person that Buford had perceived.

On cross-examination of Buford, Hall's trial counsel asked Buford if it were true that "someone" had suggested to him that Hall was the shooter, and implied that this person was his aunt. Buford denied this and insisted that his aunt did not tell him Hall was the shooter. Hall's counsel clearly implied that Buford was lying. Thus, the prosecution properly called

Wallace to testify to the statement she elicited from Buford to rebut Hall's allegation of recent fabrication. The circuit court did not err in overruling Hall's objection and admitting Wallace's testimony.

Finally, Hall argues that the circuit court erred when it allowed the prosecutor, Chris Hollowell (Hollowell) to ask improper questions on re-direct examination that shifted the burden of proof from the Commonwealth to the defense. Hall did not object to Hollowell's questions at trial and requests this Court to consider his argument as palpable error pursuant to RCr 10.26. Hall points out that during the Commonwealth's re-direct examination of Jean Phill, Hollowell asked if Phill knew Dealo Starks. Phill answered affirmatively. Hollowell asked if Starks was out in the hallway. Phill answered, "yes." Hollowell asked Phill if Hall's trial counsel so wished, she could call Starks as a witness. Phill answered that she could. Hall argues that when Hollowell asked these questions, he shifted the burden of proof to Hall to prove that someone else beside himself was the shooter. Hall argues that the prosecution challenged him to prove an affirmative defense. Hall argues that his trial counsel had attempted to show that others were present at the B-Bone Club who had both the motive and opportunity to shoot Buford. However, Hall contends that such an attempt did not rise to the level of an affirmative

defense that would require the defense to prove anything. Hall argues the prosecution, through Hollowell's questions, told the jury, which Hall insists was already biased, that Hall had to prove someone else was the shooter. Hall contends this was palpable error that resulted in manifest injustice that the jury convicted him of attempted murder.

The Commonwealth concedes that the prosecution should not have phrased its questions in such a way to suggest that Hall could present certain proof as such questions might imply that Hall must present evidence. However, the Commonwealth maintains that this did not happen since at trial, Hall attacked Buford's identification of Hall as the shooter as the theory of his defense. The Commonwealth argues that the prosecution's unfortunate questions to Phill did not negate Hall's defense that Buford could not credibly identify Hall as the shooter.

The Commonwealth argues that the case *sub judice* is like Kirk v. Commonwealth, Ky., 6 S.W.3d 823 (1999). In Kirk, the trial judge remarked that once the prosecution was finished, the defense would have to rebut the Commonwealth's case. The Supreme Court noted that at the conclusion of the case the judge accurately instructed the jury regarding the presumption of innocence and placed the burden of proof on the Commonwealth to prove every element of the offense. Id. at 829. The Supreme Court held that the correct instructions cured any prejudice

caused by the judge's remarks. Id. The Commonwealth argues that in the case *sub judice*, the circuit court instructed the jury as to the elements of each offense and that proof beyond a reasonable doubt was required.

After reviewing the instructions, we find that the circuit court correctly instructed the jury regarding the presumption of innocence and instructed the jury that each element of the offense must be proved beyond a reasonable doubt. In light of Kirk, we find that any prejudice caused by the prosecution's questions to Phill was cured by the circuit court's instructions to the jury; thus, we adjudge no palpable error resulted in a manifest injustice to Hall.

For the foregoing reasons, we affirm Hall's conviction for attempted murder and possession of a handgun by a minor.

JOHNSON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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