

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001960-MR

JOSHUA HOWARD; PAUL DAVID HOWARD;
and JOHN DOUGLAS HOWARD

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-00737-01

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

EMBERTON, CHIEF JUDGE. Joshua Howard, Paul David Howard and John D. (Doug) Howard were convicted on three counts of bribery of a public official. They appeal alleging that: (1) the trial court improperly limited time to present their defense; (2) a prosecution witness provided false testimony to the jury; (3) the jury instruction on conspiracy did not require the jury to find all elements beyond a reasonable doubt; (4) the trial court

erred when it permitted the Commonwealth to define legal terms to the jury; (5) racial remarks made by them on tapes introduced by the Commonwealth should have been deleted; and (6) the trial court erroneously denied their motions for directed verdicts. We affirm.

In October 2000, Josh Howard, a student at Eastern Kentucky University, opened a bar called Club South in Richmond, Kentucky. In preparation for the opening he met with Ed Robinson, an Alcohol Beverage Control officer, and after obtaining the necessary documents, the club opened in January 2001.

On February 8, 2001, Robinson and five other ABC officers, including Phillip Woodall and Steve Payton, Robinson's supervisor, made an official visit to the club. Several patrons were cited, as well as Club South for underage drinking. Josh testified that on that evening he and Robinson met in a back room of the club where Robinson instructed Josh to call him the following day. Josh complied. Although Josh denies he suggested a payoff arrangement, Robinson testified that during the conversation he became suspicious and informed Woodall and Payton of his suspicions.

On February 17, 2001, Robinson and Woodall returned to Club South and arranged a meeting to be held on February 22, 2001. A detective with the Kentucky State Police arranged for

video and audio recordings of the meeting. At the meeting, attended by Robinson, Woodall, Josh, and Doug Howard, no money exchanged hands, but Doug told Robinson that the Howards were prepared to help Robinson. Josh testified that he left the meeting believing that Robinson was seeking a bribe.

A subsequent meeting was held on March 5, 2001. Josh, Jeremy Howard, Paul David, Doug, Robinson and Woodall attended and there is no dispute that at that meeting Doug gave Robinson \$1,000.¹ At two subsequent meetings, one on April 11, 2001, and on May 10, 2001, \$1,000 payments were again made to Robinson.

It is the Howards' initial contention that the trial court deprived them of the right to be heard under Section 11 of the Kentucky Constitution and the Fifth, Sixth, and Seventh Amendments to the United States Constitution. Every litigant is entitled to the time and opportunity to present his case. "This is most emphatically true in the trial of criminal prosecutions."² However, the trial court has the authority to control the length of a trial, and absent a showing of actual prejudice, no reversible error will be found. As stated in Lewis v. Commonwealth:³

Appellant cites no instance where these alleged "Draconian time constraints"

¹ Jeremy Howard is not a party on appeal.

² Chenault v. Commonwealth, 282 Ky. 453, 138 S.W.2d 969, 972 (1940).

³ Ky., 42 S.W.3d 605, 613 (2001).

affected his ability to present his defense. He does not claim that the trial judge cut short his examination or cross-examination of any witness or otherwise precluded him from presenting evidence. It is axiomatic that a trial judge has wide latitude in controlling the length of a trial, and, absent some showing of prejudice, no abuse of discretion will be found. (Citations omitted.)

Pretrial, counsel for the Howards and the Commonwealth conferred with the trial court and it was agreed that three days would be scheduled for the trial. However, at the end of the first day, when it became apparent that three days would be insufficient, defense counsel suggested that a fourth day, Monday, August 19, 2002, be added. The trial court stated that the jurors had already been excused for that day. However, when the trial reconvened on the second day, the trial judge informed the parties that the jury would be available on Monday to hear closing arguments, but that she would have to leave by 3:30 p.m. At the close of the third day of trial defense counsel stated that the defense would take five or six hours. Again concerned that four days of trial would be insufficient, the court added a fifth day, Tuesday, August 20, 2002, with closing arguments to be conducted on that date.

On Monday, August 19, 2002, the court, knowing the time constraints, expressed concern over the Commonwealth's request for a recess. Defense counsel made no objection and

expressed that it had voluntarily decided not to call some witnesses. Later in the same day, after defense counsel advised that they wanted to present witnesses the following morning, the trial court reminded counsel that two extra days had already been allotted for the trial. The discussion concluded and the trial resumed. After counsel for Joshua and Jeremy advised that no more witnesses would be presented, counsel for Paul David and Doug Howard expressed concern over the imposed time limits, stating they needed sufficient time for their expert to testify by deposition. The court permitted the testimony of the expert and no further objection was made regarding the time limitation.

Although the Howards now complain that even with the two day time extension they were unconstitutionally denied the right to present their case. There is no suggestion as to which, if any, witnesses were not called because of the time limitation or what their testimony might have been. Absent a showing of prejudice, this court will not reverse the trial court's decision to control the length of a trial.⁴

The Howards next complain about alleged "false" testimony given by Robinson. In his closing argument the prosecutor argued that it was not Robinson's fault that not all conversations with Josh were recorded, but that Robinson's supervisor, Payton, should have told him to record the

⁴ Id.

conversations. Subsequently, Payton approached the prosecutor and informed him that he had, in fact, told Robinson to record all conversations. The prosecutor then advised the court of the conversation and expressed his concern that his closing argument may have contained inaccurate statements of fact. Defense counsel, the prosecution, and the trial court engaged in a bench conference and it was decided that the parties could review Payton's testimony to discover any inconsistencies in the facts and the prosecutor's closing argument. After the tape was reviewed, the parties returned to the courtroom and the bench conference resumed. Defense counsel made no objection and rejected the opportunity to move for a mistrial indicating there might later be an objection after reviewing the entirety of Robinson's testimony.⁵ There was no motion for a new trial. We cannot construe the discussion that occurred at the bench, after which all defense counsel agreed to allow the jury to continue deliberations.

The Howards also failed to properly preserve the alleged error that the jury instruction failed to include all elements of conspiracy. The only objection made to the instruction was that it was confusing and unnecessary to list each accused under the bribery instructions. That issue is not

⁵ This procedure is questionable since, if defense counsel were to raise any objection post-trial, it would have had to have been raised during the trial.

raised on appeal. Having reviewed the instructions in search of palpable error, we find nothing so unfair or prejudicial that warrants this court disturbing the jury's verdict.⁶

We have reviewed the prosecution's closing argument including the discussion distinguishing between the defense of extortion, coercion, and entrapment. The trial court denied the Howards' objection to the prosecutor's attempt to further explain the court's instructions, stating that the Commonwealth was well within the proper scope of closing argument. We agree. The prosecutor is given wide latitude in presenting closing argument to the jury. A prosecutor may comment on defense strategy by providing his interpretation of the evidence and its application to the court's instructions.⁷ We can find nothing in the closing argument that requires reversal.

The surveillance tape recorded on March 5, 2001, contained racially offensive remarks made by Joshua. Pretrial, the prosecutor agreed to redact the remarks complained of by defense counsel, and during the trial, the court admonished the jury that the sound would be turned off during a portion of the tape. After the jury began to deliberate, however, defense counsel advised the court that in addition to the redacted portion, when the tape was played to the jury there was another

⁶ Kentucky Rules of Criminal Procedure (RCr) 10.26.

⁷ Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 125 (2001).

racially offensive remark. Defense counsel explained that no objection was made when the tape was played for fear of drawing attention to the offensive remark. All parties agreed that if the jury asked to listen to that particular tape again, the additional comment would be redacted; the jury, however, never again requested the tape. There is no evidence that the Commonwealth intentionally withheld the existence of the additional racial comment or that defense counsel, who had access to the tapes through discovery, could not have discovered it and made the necessary objection. The alleged error is not properly preserved and we find no reason to review the error under RCr⁸ 10.26.

Finally, the Howards' contention that their motions for directed verdict of acquittal should have been granted because they were entrapped is without merit. "In ruling on a directed verdict motion, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth's evidence is true, leaving questions of weight and credibility to the jury."⁹ We find no error.

The judgment is affirmed.

ALL CONCUR.

⁸ Kentucky Rules of Criminal Procedure.

⁹ Slaughter v. Commonwealth, Ky. App., 45 S.W.3d 873, 875 (2000).

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