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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002311-MR

FLOYD WHITFIELD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CR-000374

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Floyd Whitfield appeals from the judgment of the Jefferson Circuit Court imposed after a jury found him guilty of the offenses of assault in the third degree and resisting arrest. Whitfield argues on appeal that the trial court improperly instructed the jury regarding the presumption of innocence and that the court should have issued an instruction on the defense of intoxication. We affirm.

On January 9, 2002, Whitfield approached Louisville Police Officer Yolanda Baker, running towards her cruiser while waving his arms. The officer rolled down her window and Whitfield told her that two men had just robbed him. Whitfield was highly agitated, according to the officer's testimony. Baker parked her car and got out, after telling Whitfield to get back onto the sidewalk. As she used her flashlight to get a better look at him, Whitfield pushed her toward the street with both hands, then reached for the door handle of the police car. Baker grabbed his shirt, and Whitfield turned and pushed her again. Whitfield got the door open and jumped into the driver's seat, and positioned himself as if he were about to drive away. Baker ordered him out of the car, but Whitfield instead reached for the gearshift. Baker forced Whitfield over to the passenger seat, and Whitfield began punching her as she tried to get him out of the vehicle. When Baker managed to force Whitfield out of the car, she pinned him against the car long enough to hit the emergency button on her police radio. Whitfield broke away, and ran after another car that was passing by, jumping into the back seat. The driver and passenger of that car stopped the car, jumped out and ran away. Baker pulled her weapon and ordered Whitfield out of the car, but when she realized he was not responding to the threat, she holstered her weapon and hauled Whitfield out of the car. Whitfield stood up and began

hitting Baker in the chest with his fists. Baker was wearing a police protective vest at the time. She hit Whitfield back, and then tried to wrestle him down. Other officers arrived on the scene and subdued Whitfield. Baker testified at trial she used mace against Whitfield but it seemed to have no effect, and because of that, she believed he was high on something. Baker sustained injuries to her wrist and hand in the fight, and was placed on light duty for a few days.

Whitfield was charged with robbery in the first degree, assault in the third degree, resisting arrest and criminal mischief in the third degree. At trial, the court directed a verdict on the robbery charge, but the jury found Whitfield guilty on the charges of assault and resisting arrest, and the court sentenced him to five years' imprisonment. This appeal followed.

Whitfield first argues that the trial judge told the jury that the presumption of innocence no longer applied once they began their deliberations. The record reveals the judge stated the following:

"The other concept from the criminal justice system that I need to discuss with you is that the accused is presumed innocent. This presumption of innocence goes with the accused throughout the proceedings, throughout the trial, back into the jury room until you all begin your deliberations and talk about

that, but it's part of the criminal justice system that you believe in the presumption of innocence. Any of you all have problems with that concept of our American criminal justice system?"

No objection was made to this statement at the time it was made, during voir dire. Also during voir dire, the Commonwealth stated that through the production of evidence, it would strip away the presumption of innocence until it was gone, likening the presumption of innocence to the peel of a banana. No objection was made to this statement either. We must review these claimed errors under Rule of Criminal Procedure 10.26, the palpable error rule.

Not only do these statements not constitute palpable error, they are not erroneous. While perhaps the trial court might have phrased it better, the court correctly explained that the presumption of innocence follows the defendant throughout the trial, from the beginning of trial into the jury room. Likewise, the argument of the prosecutor is nothing more than an accurate description of how the presumption of innocence, like any presumption, is rebutted by the production of evidence. The prosecutor's argument does not imply that the presumption of innocence disappears when the Commonwealth produces evidence. We therefore reject this contention.

Proceeding to the issue of intoxication, we note that Whitfield did not request such an instruction, but now claims that an instruction should have been given as the facts clearly warranted it. We disagree. In Callison v. Commonwealth, Ky. App., 706 S.W.2d 434, 435 (1986), this Court stated that to be entitled to an instruction on the defense of intoxication, "a defendant must show (1) evidence of drunkenness or other intoxication; and (2) evidence that the defendant did not know what he was doing." Intoxication must be so severe as to render the defendant unable to form criminal intent, in order for the instruction to be warranted. Here, the only evidence of intoxication is the statement of the officer that the defendant appeared to be high on something. However, as the Commonwealth points out, the defense tried to disprove that Whitfield was intoxicated, through cross-examination of the officer, who did not see evidence of drugs or alcohol other than Whitfield's behavior. Since the defense did not raise the theory of intoxication as a defense, and since the evidence of intoxication is so scant, the instruction was not warranted and it was not error for the court to not issue the instruction on its own initiative.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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