

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002460-MR

CHARLES D. SMITH

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE. Appellant Charles D. Smith appeals his conviction in the Boyd Circuit Court for one count of criminal possession of a forged instrument in the second degree and one count of being a persistent felony offender in the first degree. Appellant was sentenced to eighteen years' imprisonment. On appeal, appellant challenges the sufficiency of the evidence to convict him of possession of a forged instrument, and criticizes the court's jury instruction on that count. In addition,

appellant argues that the prosecutor's attempt to define reasonable doubt during voir dire constituted palpable error pursuant to RCr 10.26. We affirm.

Appellant asserts that the evidence was insufficient for the jury to convict him of possession of a forged instrument in the second degree. The appellate standard of review for a claim of insufficiency of the evidence is: if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, the defendant is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). The Commonwealth responds that the jury's verdict was far from impossible and certainly reasonable.

On appeal, appellant concedes that there was a forged instrument and that whoever possessed the check knew it was a forged instrument. Appellant argues that it was not shown that he was guilty of possessing or uttering the instrument with intent to defraud. Appellant asserts this is because the evidence demonstrated that Steven Young, and not appellant, was the one who passed the check to a store clerk. The videotape at the Speedway convenience store showed that appellant entered the store after Young gave the check to the store clerk. Thus, appellant argues that there is no evidence of culpability on his part.

We find sufficient evidence of intent to defraud. Angelia Grubbs testified that appellant told her he took a purse from a car, and even showed her the car with its window broken. Erica Davis testified that her windshield was broken and her purse taken from her car. She testified that her checkbook was in the purse. There was evidence, therefore, that appellant took possession of the checkbook as well as the purse. Appellant asserts that the evidence that he stole Ms. Davis' purse from her car has no relevance, but that is incorrect. Despite the fact that it constituted proof of an uncharged crime, the evidence was relevant to show appellant's guilty knowledge or his intent to defraud. Francis v. Commonwealth, Ky., 468 S.W.2d 287 (1971).

Further, Ms. Grubbs testified that she went with appellant and Young to Speedway. Appellant asked Young if he wanted to make money. Appellant said he had a check and "this girl" wanted to get cigarettes. Ms. Grubbs said she saw appellant give Young a paper which she guessed was the check. Appellant attacks Ms. Grubbs' credibility on appeal, but determinations of credibility are for the finder of fact to make. The exchange related by Ms. Grubbs demonstrates appellant's intent to pass the check off as being from Erica Davis, by giving it to Young to take in the store. Thus, we conclude the entirety of this evidence was sufficient for the

jury to reasonably find the element of intent to defraud another.

Next, appellant argues that the trial court improperly instructed the jury on possession of a forged instrument in the second degree. Appellant tendered an instruction which paralleled the model instruction for KRS 516.060 in 1 Cooper, *Kentucky Instructions to Juries (Criminal)*, § 6.72. The trial court instead used an instruction which purported to correspond to the two theories presented by the Commonwealth - that either appellant presented a forged check or that he worked in concert with Young who presented a forged check. Accordingly, the instruction stated the "uttered or possessed" element of the charge as follows:

- A. That in this county on or about January 25, 2002, and before the finding of the Indictment herein on March 28, 2002,
 - a) he had in his possession a written instrument purporting to be a check issued by Erica Davis;

OR

- b) he gave such a written instrument to Steve Young for the purpose of having Steve Young present the check for payment[.]

Cooper's model instruction contains "a)" above only, the trial court's instruction added "b)."

Appellant states it was error to include the Commonwealth's alternative theories because appellant's position was that the jury should not have had the option of convicting him if it believed he gave a written instrument to Young to present for payment. He further asserts that version "a)" above, from the model instruction, covers both of the Commonwealth's theories so that adding "b)" was redundant.

"Kentucky follows the 'bare-bones' principle in providing instructions." McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 936 (1994). This means that the jury instructions should omit evidentiary detail, which may instead be fleshed out by counsel in closing argument. Baze v. Commonwealth, Ky., 965 S.W.2d 817, 823 (1997). The problem with instructions which comment on the evidence is that they over-emphasize an aspect of the evidence. McGuire, 885 S.W.2d at 936. The Kentucky Supreme Court has stated that:

If instructions are to be kept concise and to the point, as they should be, their supplementation, elaboration and detailed explanation fall within the realm of advocacy. Contrary to the practice in some jurisdictions, where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to confine the judge's function to the bare essentials and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean.

Young v. J.B. Hunt Transp., Inc., Ky., 781 S.W.2d 503, 506-07 (1989)(quoting Collins v. Galbraith, Ky., 494 S.W.2d 527, 531 (1973)).

We agree that it was not necessary, perhaps even redundant, for the court to include in the instruction how it was from the evidence the jury might believe that appellant possessed or uttered a check. But because no harm has been demonstrated by the structure of this instruction, we do not find reversible error. Not only error but injury must be shown to justify a reversal for error in jury instructions.

Commonwealth v. Higgs, Ky., 59 S.W.3d 886, 890 (2001).

Other than arguing that the instruction was redundant and that he did not want the jury to be able to convict him on this theory, appellant finds no fundamental fault with the court's instruction. We do not observe that this particular instruction was misleading or prejudicial to appellant. The instruction as written required that the jury find that appellant possessed or uttered the check,¹ so it properly required the jury to find all of the elements of the charged offense. Therefore, we conclude that appellant has not identified any reversible error.

Finally, appellant argues that the prosecutor inappropriately defined "beyond a reasonable doubt" during voir

¹ "Uttering" is defined as offering of a forged instrument, knowing it to be such, whether such offer is accepted or not, with a representation by words or actions that it is genuine, and with an intent to defraud. Fain v. Commonwealth, 287 Ky. 507, 154 S.W.2d 553, 555 (1941).

dire. The rule is clear that counsel shall refrain from any expression of the meaning or definition of the phrase "reasonable doubt," although counsel can point out to the jury whether or not the evidence creates reasonable doubt.

Commonwealth v. Callahan, Ky., 675 S.W.2d 391, 393 (1984).

Trial courts shall prohibit counsel from any definition of "reasonable doubt" at any point in the trial. Id. Appellant concedes that there was no contemporaneous objection. He asks that we review this issue as a palpable error pursuant to RCr 10.26. We do not agree, however, that appellant has identified palpable error in this case. The attempt to explain reasonable doubt during voir dire occurred very early in the trial of this case, and did not give rise to a manifest injustice in the trial as a whole.

For the foregoing reasons, we affirm appellant's conviction in the Boyd Circuit Court.

ALL CONCUR.

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