

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002129-MR

NAKIA DILLARD

APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 94-CR-00224

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: Nakia Dillard appeals from the summary denial of his RCr 11.42 motion. He alleges that his trial counsel failed to move for a directed verdict at the close of the Commonwealth's proof and failed to request an instruction on the lesser-included offense of wanton endangerment. We affirm.

On July 11, 1994 Steve Marquess and Tracey Geordan were cleaning the parking lot of the Brickyard Plaza Shopping Center in Hopkinsville. Marquess had previously changed clothes

in a nearby tool shed where he had left his pants, wallet, and watch. Sometime after 10:30 p.m. Dillard and Ernest Arnaze Rogers approached Marquess and Geordan. Dillard pointed a gun at Marquess and demanded money. After Marquess told him that his money was in his wallet, Dillard led Marquess to the shed at gunpoint. When Dillard entered the shed to get the money, Marquess fled. Dillard fired three shots at Marquess, who escaped unharmed.

In his video taped confession, Dillard stated that when he emerged from the shed with Marquess' pants and wallet, he found that Rogers had led Geordan away from the scene. Dillard heard Geordan scream and then two gunshots. Geordan died of a gunshot wound to the head. She was found with her shirt and brassiere pulled up and her shorts and underwear pulled to her knees. Marquess' pants were found lying on Geordan's body and his wallet nearby. Dillard explained that he removed thirty dollars from Marquess' wallet and was leaving the scene when he stumbled over Geordan's body and dropped the pants and wallet. Dillard was convicted of the kidnapping, robbery and the attempted murder of Marquess and the kidnapping of Geordan. The jury deadlocked on the attempted rape and the attempted murder of Geordan. Dillard was sentenced to twenty years on each offense committed against Marquess to be served consecutively. The sentencing for the kidnapping of Geordan was

reserved until a retrial of the attempted rape and murder indictments.

The Kentucky Supreme Court affirmed Dillard's convictions and sentences and the United States Supreme Court denied Dillard's Petition for Writ of Certiorari. Dillard v. Kentucky, 528 U.S. 1009, 120 S.Ct. 508, 145 L.Ed. 2d 393 (1999). After Dillard's motion to vacate judgment pursuant to CR 60.03 was denied, Dillard filed an RCr 11.42 motion.

To succeed on a claim of ineffective assistance of counsel, the movant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's unprofessional error, there is a reasonable probability that the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984). The purpose of an RCr 11.42 motion is to provide a forum for grievances that could not have been raised on direct appeal. If the trial court record refutes the issues raised, an evidentiary hearing is not required. Hodge v. Commonwealth, 116 S.W. 3d 463, 468 (Ky. 2003).

Dillard claims that trial counsel should have requested a directed verdict on the basis of KRS 509.040, the kidnapping exemption statute. The defense is applicable only if three factors are present: (1) the criminal purpose must be the commission of an offense outside KRS Chapter 509; (2) it must be

determined whether the interference with the victim's liberty occurred immediately with and incidental to the commission of the offense; and, (3) the restraint of liberty must not exceed that which is ordinarily incident to the commission of the underlying intended crime. Griffin v. Commonwealth, 576 S.W.2d 514 (Ky. 1978). The statute's purpose is to prevent misuse of the kidnapping statute to impose greater punishment for rape, robbery and other offenses that have a restriction of the victim's liberty as an essential or incidental element. Gilbert v. Commonwealth, 637 S.W.2d 632, 635 (Ky. 1982). It does not, however, preclude a kidnapping conviction unless the restraint of the victim was both close in distance to the commission of the intended offense and brief in time. Timmons v. Commonwealth, 555 S.W.2d 234, 241 (Ky. 1977).

Dillard's purpose was to rob Marquess. After he demanded money and Marquess informed him of its location in the shed, the robbery could have been accomplished without taking Marquess to the location. When the victim was taken at gunpoint from a public parking lot to a shed some distance away, Dillard exceeded the scope of the restraint necessary to accomplish the robbery. At that point there was no need to restrain Marquess at all since Dillard could have gone to the shed, recovered the money, and fled. In Bishop v. Commonwealth, 549 S.W.2d 519 (Ky. 1977), during the commission of a robbery the victim was led at

gunpoint from a store to a dark field. The court held that the victim was exposed to a much greater risk of death or serious bodily injury than if left in the store and the interference with the victim's liberty was in excess of that which ordinarily accompanies a robbery in the first degree. Id. at 522.

Marquess was placed at much greater risk by being taken to the shed than he would have been if left unrestrained in the parking lot. The evidence did not warrant an instruction on the kidnapping exemption and there was no error in counsel's failure to move for a directed verdict. Id. at 523. The court rejected the argument that under the circumstances counsel was ineffective for not raising the kidnapping exemption statute as a defense.

To be successful, Dillard must show that counsel committed error and that the error was so prejudicial that there is a reasonable probability that he would not have been convicted of the offenses. Strickland, supra. Although he contends that his counsel erred by not objecting to a first-degree assault instruction, he offers no hint as to why the inclusion of the instruction resulted in prejudice.¹

¹ Casey v. Commonwealth, 313 S.W. 2d 276 (Ky. 1958) holding that where defendant is found guilty under a correct instruction, an erroneous instruction on a lesser degree will be regarded as harmless unless the circumstances justify a different conclusion. He was convicted of first-degree assault so any error was harmless.

Finally, we find no error in counsel's failure to demand a wanton endangerment instruction. An accused is entitled to an instruction on a lesser included offense when a "reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Skinner v. Commonwealth, 864 S.W. 2d 290, 298 (Ky. 1993). An instruction is not required when not supported by the evidence. Prince v. Commonwealth, 987 S.W.2d 324 (Ky. App. 1997). Dillard confessed that he fired three shots at Marquess with the intent to kill him. He did not testify at trial and offered no contrary evidence of his intent. The evidence did not warrant a wanton endangerment instruction.

We find no evidence that trial counsel was ineffective. The order denying Dillard's motion pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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