

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000288-MR

BRADLEY RANKIN

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 03-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE, McANULTY, JUDGE; MILLER, SENIOR JUDGE.¹

McANULTY, JUDGE: Appellant Bradley Rankin (Rankin) appeals his conviction in the Hopkins Circuit Court for three counts of robbery in the first degree following a jury trial. He was sentenced to ten years' imprisonment. Rankin claims reversible errors were committed in his trial, and that the court below erred in denying his motion for new trial. We affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Rankin was tried on four robbery counts, all involving robberies of convenience stores in the Madisonville area, and convicted of three. Rankin's first claim of error is that charges were improperly joined for trial. His pretrial motion for separate trials on the four counts was denied. The applicable rule on joinder is RCr 9.16, which provides that separate trials shall be granted if it appears that the defendant or the Commonwealth will be prejudiced by joinder of offenses or defendants. The granting or denial of a motion for separate trials under RCr 9.16 is a discretionary function of the trial court, which must weigh prejudice to the defendant by the joinder of offenses. Edwards v. Commonwealth, 500 S.W.2d 396, 397 (Ky. 1973). Reversal is required only if the court's denial is a clear abuse of discretion and prejudice to the defendant is positively shown. Id. at 398.

Rankin alleges he was prejudiced because, as to the four robberies, the certainty of the identifications varied, the quantum of evidence varied, and the "quality" of Rankin's alibi defenses as to each robbery varied. Rankin also notes that video surveillance evidence was available in only two of four robberies, and not all of the witnesses identified the vehicle with a particular style of headlight which was similar to a car owned by Rankin.

Joinder may be prejudicial in the manner alleged by Rankin if it encourages the jury to find guilt based on cumulating evidence rather than the evidence as to each individual count. Edwards, 500 S.W.2d at 397. However, we do not believe Rankin has shown prejudice by joinder in this case. The evidence was sufficient as to each count brought before the jury, including eyewitness identifications for each of the charges. Furthermore, we believe that the fact that Rankin was acquitted of one of the four joined charges indicates that the jury was not more disposed to find guilt as to any one offense from the evidence introduced as to the other offenses.

Instead, we believe the charges were properly joined due to their similarities. The evidence adduced on the different charges shows them to have been similar in terms of the locations robbed (gas station/convenience stores), including one store twice, the times of the robberies, the descriptions of the perpetrator's appearance (a dark sweatshirt with the hood pulled up, and a turtleneck or similar garment pulled over the nose), the weapon used, and the involvement of a vehicle with a particular style of headlight. These are reasons for permitting the joinder. Offenses which are similar in character or are based on the same acts connected together or constituting parts of a common scheme or plan may, within the discretion of the

trial court, be joined for trial. Harris v. Commonwealth, 556 S.W.2d 669, 669-70 (Ky. 1977). We conclude joinder was proper.

Rankin next argues that the court should have granted his motion for a directed verdict. Rankin argues that the only evidence against him was that the robber was described as a light-skinned black male. He notes that during each of the robberies only the eyes, eyebrows and the bridge of the nose were visible on the perpetrator. Rankin also believes the videos used by the Kentucky State Police video expert were not reliable when providing a "digitally enlarged and pixilated image" of the perpetrator's shoes and clothing. He also argues reasonable doubt was shown by his evidence that other suspects were stopped by police who had clothing similar to those used by the perpetrator, and his identification of an inmate who claimed to have committed robberies in Madisonville. He believes that under all the evidence it was unreasonable for the jury to find guilt.

We disagree. The standard for appellate review of a denial of a motion for directed verdict is if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). Under the evidence as a whole, there was a reasonable basis for the jury's verdict. There was eyewitness

testimony as to all three of the robberies of which the jury convicted Rankin. Belinda Adcock identified Rankin as the robber of the Pantry on October 29, 2002. Preston Moore and David Sean Cox identified Rankin as the person who robbed "Pore Ole Freddie's" when they were present on December 12, 2002. Brittany Sandefur Brown identified Rankin as the robber of The Pantry on December 12, 2002. In addition, since there were videotapes of The Pantry robberies, the jury could compare the general appearance of the robber with Rankin's appearance and the descriptions given by the eyewitnesses.

Although Rankin makes reasonable arguments against the reliability of the eyewitness identifications given the concealing garments worn by the perpetrator and the very brief time for the witnesses to observe, we conclude these did not render the verdict unreasonable. These were arguments to be made before the jury, but those factors did not render identification impossible. Moreover, the eyewitness identifications were accompanied by physical evidence in that items of clothing Rankin possessed were like those observed in the Pantry videotapes. Additionally, Rankin was in possession of a vehicle which was similar in age and design to the vehicle observed at two of the robberies. We find it was not clearly unreasonable for the jury to reach its verdict, and so we affirm the trial court's denial of the directed verdict of acquittal.

Next, Rankin argues that the Kentucky State Police employee Kibler's narration over the videotape of the robberies, particularly the enhanced, pixilated images, invaded the province of the jury under KRE 701. The Commonwealth responds that this issue was never brought to the attention of the trial court, and Kibler was properly qualified as an expert in "forensic video analysis" under KRE 702. There was no objection to Mr. Kibler's narration during trial, and Rankin's counsel specifically stated that he had no objection to Mr. Kibler's qualifications as an expert.

Rankin admits the lack of objection, but alleges that Kibler's narration constituted a substantial and palpable error under RCr 10.26. We will not review this claim of error since it is unpreserved by contemporaneous objection. Furthermore, since Rankin allowed Kibler to testify unchallenged as an expert under KRE 702, we regard his claim on appeal of prejudice to his substantial rights under KRE 701 (opinion testimony of lay witnesses) as unfounded.

In addition, Rankin argues that it was error for Kibler to testify to the "market prevalence" of the shoes identified at trial. Kibler had identified shoes obtained from Rankin as having the same characteristics as the perpetrator's shoes in the videotape. In response to a juror question about how many shoes from different companies Kibler had compared,

Kibler testified over objection that he went to various shoe stores in the city of Frankfort but did not observe anything similar to those shoes.

While it was true that Kibler was not qualified as an expert in the market for footwear, Kibler never claimed expertise in determining how prevalent the shoes were in the market. He stated he was "no shoe expert." Instead, he informed the jury of the limited search he made for those shoes in the city where apparently he works. This response was only for clarification purposes, and if anything it informed the jury that his assessment was limited because he had not done a comprehensive search. We conclude that this evidence was relevant and admissible under KRE 401 and 403, and the trial court properly allowed Kibler's testimony.

Next, Rankin complains because the trial court did not respond to a pretrial motion he filed to obtain the identity of an alleged unidentified informant who named Rankin and Gregory Jackson as individuals who had been "bragging about the robberies." At trial, the officers did not mention an informant on whom they relied for information, but testified that the police developed information from "individuals off the street."

Rankin claims this issue is "partially preserved" by the filing of the motion, even though it was not ruled on by the trial court. Yet the issue is not preserved for review if no

ruling was obtained. It is the duty of the person who moves the trial court for relief to insist upon a ruling on his motion, and failure to do so leads to waiver of that claim. Dillard v. Commonwealth, 995 S.W.2d 366, 371 (Ky. 1999); Wilkey v. Commonwealth, 452 S.W.2d 420, 422 (Ky. 1970). Moreover, though Rankin claims palpable error under RCr 10.26, we observe no basis for so concluding. See also KRE 508 (Commonwealth has a privilege not to disclose the identity of a person who furnished information relating to an investigation to law enforcement).

Next, Rankin argues that he was prejudiced by the use of "investigative hearsay" at trial. The prosecutor asked Officer Shaun Bean a number of questions relating to his investigation and in particular how he developed a suspect. Officer Bean testified that he and other officers had noted similarities in the robberies in terms of modus operandi, and suspect and vehicle descriptions. The prosecutor noted that the jury had learned that at some point in time Rankin's name surfaced as a potential suspect, and inquired, "Without getting into what was said, how did his name surface and/or anyone else who may have surfaced?" Officer Bean testified that when he arrived at work on January 1, 2003, he had a note on his desk from another officer stating, "Contact me in reference to the robberies." Officer Bean testified that when he did so, the officer informed Bean that the officer had developed information

that Rankin and Greg Jackson were the perpetrators of the robberies. Rankin's objection was overruled after the prosecutor argued that the testimony was not being offered for its truth but only to explain how Rankin became a suspect. Rankin objects that this the officer's testimony was "hearsay on hearsay" and the trial court allowed it improperly as investigative hearsay. The Commonwealth responds that this is simply testimony explaining the actions the officer took, which were an issue in the case.

Out of court statements made during the course of an investigation are not admissible under any "investigative hearsay" exception to the hearsay rule. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). Hearsay "is no less hearsay because a police officer supplies the evidence." Id. at 541. Accordingly, a police officer may only testify to information furnished by another when it tends to explain action taken by the officer as a result of that information *and* the taking of the action is an issue in the case. Id.

More recently, the Supreme Court discussed the investigative hearsay proscription as balanced against the need sometimes for officers to explain the "motivation of police officers for actions they have taken." Gordon v. Commonwealth, 916 S.W.2d 176, 178 (Ky. 1995). While reiterating the general rule stated in Sanborn, the Court noted:

In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect, should be sufficient.

Id. In Gordon, the Court concluded it was not improper to allow evidence that the defendant had become a suspect in a county-wide drug investigation. Id. However, the Court held that it was error in the same case for the officer to say or imply that the defendant was suspected by the police of selling drugs in a particular area. That evidence was based in part on hearsay and unassailable by the defendant since he could not have confronted and cross-examined those witnesses against him. Id.

Having reviewed the officer's testimony, we conclude that the statement at issue was investigative hearsay. The officer did more than merely testify that they developed information which led to Rankin's becoming a suspect. Instead, he added that another unidentified officer and persons in the community asserted that Rankin committed the crimes in this indictment. We find this testimony indistinguishable from the prohibited testimony in Gordon, in that the officer identified Rankin as having committed a particular crime. Another reason is this information came from persons who were not identified and would not be present to be cross-examined by Rankin at

trial. Furthermore, we do not agree with the Commonwealth that the officer's actions were an issue at trial.

Nevertheless, considering the whole of the evidence in this case, we conclude that the investigative hearsay evidence was harmless error. RCr 9.24. The convictions on the three counts of robbery were founded on eyewitness identifications. The police were also able to identify clothing belonging to Rankin as similar to that used in the robberies, and a vehicle belonging to Rankin as having similar taillights to those seen in one of the robberies. We do not perceive this as a case in which investigative hearsay was introduced in order to bolster an insubstantial case. We believe the evidence of guilt was of sufficient strength such that the error did not affect the jury's deliberations. Thus, reversal is not required based on the investigative hearsay in this case.

Next, Rankin alleges that the prosecution improperly commented on his post-arrest silence and shifted the burden of proof to him to establish that he did not commit the robberies. Some of Rankin's family members testified that Rankin had been with them on the dates of some of the robberies. In rebuttal, the Commonwealth asked the investigating officer whether any of Rankin's family had called him to report their alibi information. Rankin moved for a mistrial, but the court allowed

the officer to answer the question. Rankin argues that his right of post-arrest silence was infringed by the inquiry.

We disagree. It is true that cross-examining the defendant on whether he had previously told anyone an alibi story infringes the right to post arrest silence and violates Section 11 of the Kentucky Constitution and the Fifth Amendment of the United States Constitution. Jackson v. Commonwealth, 717 S.W.2d 511 (Ky.App. 1986). However, that right does not extend to other witnesses. In addition, since the questioning was in response to evidence introduced by Rankin, we do not find that this was an instance of shifting the burden of proof, but was instead impeachment of the reliability of Rankin's evidence. We find no error.

Rankin argues that reversible error was committed when jurors had ex parte communication with the bailiff during deliberations. In the incident, the foreman and two other jury members approached the bailiff and asked if they were supposed to proceed with sentencing the defendant if they found him guilty. The bailiff told them they were to do that later, and then informed the court of the incident. Rankin moved for a mistrial. The judge called the jury from their deliberations into open court to ask about the incident.

The foreperson stated that he had asked the bailiff about procedure, and related what he had learned from the

bailiff. He stated that two other jurors had been with him when he spoke with the bailiff, and that no other information was sought. The court informed the jurors that the proper practice was to direct questions to the court, and then explained how their deliberations should proceed. After sending the jury back, the court in chambers denied the motion for mistrial on the basis that Rankin was not prejudiced by the exchange.

Facing this same issue in Johnson v. Commonwealth, 12 S.W.3d 258, 266-67 (Ky. 1999), the Supreme Court found no prejudice when a juror asked the sheriff whether there would be a separate sentencing phase in the event of a guilty verdict. The Court concluded that since the trial court had instructed the jury prior to retiring that there would be a second sentencing phase if they returned a guilty verdict, the jury had not obtained any information they had not already been told. Id. at 266.

In the case at bar, the judge did not instruct the jurors before they left for deliberations on the bifurcated trial structure. In Johnson, the Court noted that a mistrial is not warranted if the conversation was "innocent" and matters of substance were not involved, and the true test is whether the juror's misconduct prejudiced the defendant to the extent that he did not receive a fair trial. Id., citing Talbott v. Commonwealth, 968 S.W.2d 76, 86 (Ky. 1998). Under this

standard, we agree a mistrial was not warranted. The questions were not about the substance of the case but were, as the foreman put it, procedural. Rankin has not identified any prejudice from the exchange. Thus, we affirm the trial court's ruling.

Finally, Rankin alleges that he should have been granted a new trial based on new evidence. He states that an inmate came forward who said that he spoke with another inmate, named Elkana, he was incarcerated with who stated that he had committed some robberies in Madisonville during the time period of the robberies in this case. We agree that the trial court correctly denied the motion for new trial.

The standard for granting a motion under such circumstances is that newly discovered evidence must be of such decisive value or force that it would with reasonable certainty change the verdict or it would probably change the result if a new trial should be granted. Foley v. Commonwealth, 55 S.W.3d 809, 814 (Ky. 2000). A defendant is entitled to one fair trial and not a series of trials based on newly discovered evidence unless that evidence is sufficiently compelling as to create a reasonable certainty that the verdict would have been different had this evidence been available at the former trial. Id. at 814-15. The Commonwealth refuted the newly discovered evidence on the basis that Elkana did not arrive in Kentucky until after

the robberies in this case occurred; and he was taller than Rankin and did not have a vehicle like Rankin's. Moreover, Rankin presented other evidence at trial that the robberies could have been perpetrated by others and not by him. We find no certainty of a different result, and conclude the trial court did not abuse its discretion in refusing to grant a new trial on the basis of this evidence.

For the foregoing reasons, we affirm Rankin's convictions in the Hopkins Circuit Court.

COMBS, CHIEF JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MILLER, SENIOR JUDGE, DISSENTING. I would reverse and remand for a new trial. I'm of the opinion that it was prejudicial error for the prosecutor to inquire of police officers as to whether during the investigatory process the appellant's family members had taken it upon themselves to call law enforcement to establish his alibi. This line of inquiry served only to infer that the appellant had some role in assisting the police in the investigatory process, thus improperly shifting the burden of proof to the defendant. As noted in Butcher v. Commonwealth, 96 S.W.3d 3, 10 (Ky. 2002), any burden shifting to a defendant in a criminal trial is

unjust. It is therefore my opinion that the prejudicial value of this questioning requires reversal and remand.

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