

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000664-MR

GARY WAYNE MUNDY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
INDICTMENT NO. 03-CR-01288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: Gary Wayne Mundy was charged with two counts of first degree robbery committed at two separate Sav-a-Lot stores in Lexington on August 28 and 29, 2003. He was found guilty of the lesser included offenses of second degree robbery and theft by unlawful taking under \$300. The jury recommended sentences of eight years and six months, respectively. The trial court reduced the felony sentence to six years and ordered the two sentences to run concurrently for a total of six years' imprisonment.

Mundy's sole issue on appeal is that the trial court erred in denying his proffered instruction on missing evidence. He argues that the Commonwealth had impermissibly failed to preserve the surveillance tapes recorded by the Sav-a-Lot store cameras. Thus, Mundy continues, he was entitled to an instruction that allowed the jury "to infer that this evidence if now available would be favorable to the Defendant's case." The denial of this instruction, says Mundy, constitutes reversal error.

We disagree. "[T]he purpose of a 'missing evidence' instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence." Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002) (emphasis original). "[T]he Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect or preserve any evidence. It just means that absent some degree of 'bad faith,' the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure." Id. (emphasis original).

Here, Mundy fails to convince us (as he did the trial court) that the Commonwealth or its witnesses acted in bad faith, or that the missing evidence was exculpatory in nature. "More importantly, [Mundy] does not suggest how this evidence could have substantially affected the outcome of this case."

Roark v. Commonwealth, 90 S.W.3d 24, 38 (Ky. 2002). We find no error in the denial of the instruction.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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