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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000538-MR

MICHAEL HURT

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 04-CR-00426

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON, BARBER, AND MINTON,¹ JUDGES.

BARBER, JUDGE: Appellant, Michael Hurt (Hurt), files this direct appeal from a conviction of complicity to assault in the first degree. The conviction is affirmed.

Hurt and a co-defendant, Joshua Wright, (Wright), were set to be tried on charges of first degree assault. Hurt made a motion for separate trial, alleging that he and the co-defendant had inconsistent defenses. The trial court overruled the motion.

¹ Judge John D. Minton, Jr. concurred in this opinion prior to his resignation effective July 25, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

The charges against Hurt stem from a fight in which a third party, Clifford Heard, was shot. Hurt claimed that he accompanied Wright to the scene to engage in a fight. He asserted at trial that he did not intend for anyone to be shot. He contended that he did not know that Wright had a gun. Hurt admits that he and Wright went to the scene to fight with Clifford Heard and a fourth man, Darryl Allen. Darryl Allen was the previous boyfriend of Hurt's girlfriend at the time, and that relationship gave rise to bad blood. Hurt drove Wright to find Allen. When they found Allen and Heard, Wright fired a number of shots at them. Clifford Heard was struck in the back by a bullet. Numerous witnesses testified that Hurt and Wright had been in the vehicle containing the individual who shot Heard.

Shortly after the shooting, Hurt turned himself in to the Covington Police Department. He gave a statement indicating that he believed he and Wright were going to fight Allen, and that he did not know that Wright had a gun. Hurt's statement was that he informed Wright that there were too many people around to engage in a fight, and that he informed Wright they would have to come back later. He stated that, at that point, Wright pulled out a gun and began to shoot.

Hurt complains that his defense was prejudiced by the denial of his motion for separate trials. Hurt contends that

counsel for co-defendant Wright questioned Hurt about matters not properly before the court, and acted as a "second prosecutor" during the course of the trial. He argues that Wright's attempt to defend himself resulted in virtually a second trial for Hurt, and that little or none of the prior bad acts evidence would have been introduced had Wright not been part of the same trial. Wright's counsel cross-examined Wright at trial regarding claims of ongoing conflict between Hurt and Allen, discussing many prior confrontations between the two. Counsel questioned Wright, Hurt and Hurt's father about prior altercations between Hurt and Allen, and about Hurt threatening Allen with a gun on an earlier occasion.

The Commonwealth introduced evidence of the altercation between Hurt and Allen at White Castle during which Hurt stated that he had a gun and threatened to harm Allen. No witnesses saw a gun. A gun was not mentioned in the police report regarding the incident. Hurt objected to that as being an improper introduction of prior bad acts. The trial court overruled the objection.

Hurt argues that the Kenton Circuit Court erred in denying his motion for a separate trial. RCr 9.16 holds that "if it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants . . . the court shall . . . grant separate trials of defendants or

provide whatever other relief justice requires." The determination as to whether a motion for separate trials should be granted is within the sound discretion of the trial court. Foster v. Commonwealth, 827 S.W.2d 670, 679 (Ky. 1991). An appellant must show an abuse of that discretion to warrant reversal on appeal.

The Commonwealth asserts that Hurt failed to show that he was so prejudiced by the joinder that reversible error occurred. The Commonwealth contends that all the evidence admitted in the joint trial would have been admissible in either trial. The Commonwealth argues that the evidence introduced by Wright's counsel was damaging, but contends that the fact that evidence is damaging, and may pertain to one defendant but not to the other, is insufficient to establish the kind of prejudice required to mandate separate trials. Hoskins v. Commonwealth, 374 S.W.2d 839 (Ky. 1964).

Hurt argues that Wright's counsel acted essentially as a second prosecutor by raising the prior altercations between Hurt and Allen during his cross-examination of Alan and Heard. Counsel for Wright also cross examined Hurt, and asked about gloves and a gun, and prior threatening statements made by Hurt towards Alan. Hurt asserts that this evidence was not properly before the Court and would not have been raised had his trial been separate from that of Wright.

Hurt argues that he and Wright had antagonistic defenses. Hurt's defense was that he merely intended to fight Allen, and did not know that Wright had a gun. Wright's defense was that he had an alibi for the time of the shooting. This issue was not provided to the trial court in the pre-trial motion. Further, on appeal Hurt fails to show that the antagonism was such that it would mislead or confuse the jury, rendering the verdict improper and reversible. Foster v. Commonwealth, 827 S.W.2d 670,680 (Ky. 1991).

On review, this Court is charged with determining whether the trial court's ruling constituted an abuse of discretion such that the defendants were improperly prejudiced:

A trial court's decision to deny a motion for separate trials is reviewed for abuse of discretion. Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 887 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). Upon review of the record, we conclude that the trial court did not abuse its discretion in denying the motion for separate trials on the following grounds.

"A defendant must show that antagonism prevented a jury from being able to separate and treat distinctively evidence that is relevant to each particular defendant at trial and that the antagonism between codefendants will mislead or confuse the jury." Id.

Gill v. Commonwealth, 7 S.W.3d 365, 368 (Ky. 1999). The trial court has broad discretion in ruling upon such a motion. Berry v. Commonwealth, 84 S.W.3d 82 (Ky.App. 2002).

The Supreme Court of Kentucky stated that the issue before the Court is:

[W]hether Appellant was unduly prejudiced by the joinder, i.e., whether the prejudice was unnecessary and unreasonable. RCr 9.16; Price v. Commonwealth, Ky., 31 S.W.3d 885, 888 (2000) (citing Romans v. Commonwealth, Ky., 547 S.W.2d 128, 131 (1977)). The primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other. Price, at 889; Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993).

Roark v. Commonwealth, 90 S.W.3d 24, 27 (Ky. 2002). We believe no improper admission occurred here. The evidence regarding Wright was admissible at trial of Hurt, and vice versa. The trial court's denial of the motion for severance is affirmed.

Hurt contends that the court improperly admitted evidence regarding a police officer's questioning of co-defendant Wright. Hurt argues that this evidence was prejudicial and admission of the evidence was violative of law. At trial, co-defendant Wright testified that he was not at the scene and that he was in Cincinnati playing basketball on that day and did not return home until hours after the shooting had taken place. Hurt alleges that contradictory statement had been given to the police by Wright shortly after the shooting. This evidence was presented by a rebuttal witness, an investigating officer, who claimed to have found notes he took after

questioning Wright, while the trial was in process. In that statement Wright admitted that he was in Kentucky at the time of the fight, but that he did not shoot Heard. In that statement Wright did not mention that he had been playing basketball in Cincinnati, or give the names of the individuals who later testified on his behalf in his alibi defense.

The Commonwealth claimed that the information did not come to counsel's attention until the trial was in progress. Counsel admits to having the evidence during the course of the trial, and providing it to defense counsel after the close of evidence. The officer was called to the stand during rebuttal to discuss his notes regarding the communication with Wright. The investigating officer testified that Wright did not make a statement when arrested. The officer stated that in his notes he found a piece of paper on which he had jotted "Mirandized Wright at 03:25 hours and he said nothing about shooting. Received permission to search room but found nothing. Was in Covington but did not do a shooting." The officer testified at trial that he had just found that paper, and that he had never transferred it to his Log Sheet. The note had not been turned over to the Commonwealth in discovery. The officer testified that he found the note when Wright was testifying, and turned it over to the Commonwealth's Attorney at that time. The Commonwealth's Attorney stated that he had used that information

when examining Wright, but that he had inadvertently failed to turn it over to the defense. The defendants were permitted to question the officer on rebuttal. Hurt has failed to show that the evidence was improperly admitted, or that the potential for prejudice constitutes reversible error.

Hurt filed a motion in limine prior to trial, arguing that prior bad acts should be held inadmissible. Hurt also filed a Response to the Commonwealth's Notice to Introduce 404(b) evidence about the "White Castle incident," where Hurt had allegedly threatened Allen, and where Allen claimed that Hurt had a gun in his possession. The Court denied the motion in limine, and reserved the right to rule on the Commonwealth's motion until trial. At trial the court found the evidence admissible. Hurt argues that the evidence should have been held inadmissible.

The Commonwealth claims that the evidence was properly admitted to show pattern of conduct, or plan; his intent to harm Allen, and to rebut his claim that he never possessed a weapon. Evidence of prior bad acts may be found admissible to show the intent of the defendant. Garland v. Commonwealth, 127 S.W.3d 529, 536 (Ky. 2003). Where a defendant is claiming "mere presence" at the scene of a crime, prior bad acts can be introduced to show intent or mental state. Walker v. Commonwealth, 52 S.W.3d 533, 535 (Ky. 2001).

The decision whether or not to admit evidence of prior bad acts is left to the sound discretion of the trial court. Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999). In order to show reversible error, the defendant must prove that minus the error, the defendant would not have been found guilty. Stanford v. Commonwealth, 734 S.W.2d 781, 787 (Ky. 1987). Evidence in the record, outside the discussion of the "White Castle incident," showed continuing bad blood between Allen and Hurt. Evidence other than the "White Castle incident" indicated that Hurt may have possessed a gun. Other evidence contradicted that showing. Even without discussion of White Castle and the alleged confrontation, sufficient evidence existed upon which the jury could find Hurt guilty. At worst, introduction of the evidence was harmless error. Harmless error does not give rise to grounds for reversal. Holloman v. Commonwealth, 37 S.W.3d 764, 766 (Ky. 2001).

Lastly, Hurt argues that the court erred by orally amending the jury instructions after the jury began its deliberations. Hurt contends that the oral instructions were in violation of RCr 9.54, which requires all jury instructions to be in writing. During its deliberations, the jury asked the court if they had to convict Joshua Wright in order to convict Michael Hurt. The court responded that he noted an error in the instructions, and that whenever the instructions made a

reference to Joshua Wright they should read "Joshua Wright or another."

The Commonwealth cites Allee v. Commonwealth, 454 S.W.2d 336 (Ky. 1970) as permitting the trial court to give an "oral explanation" of its jury instructions. The Commonwealth contends that the judge's actions were not in error, and in the alternative, if there was any error, that it was harmless. A court's decision to provide the jury with oral clarification of the jury instructions has been held reversible only where the court's actions constituted plain error creating a miscarriage of justice. United States v. Combs, 33 F.3d 667, 669 (6th Cir. 1994). See also: United States v. Samuels, 308 F.3d 662, 668 (6th Cir. 2002), holding that the court's oral supplement to the jury instructions was not reversible error.

Based on the foregoing, we affirm the conviction.

MINTON, JUDGE, CONCURS.

ABRAMSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Wilbur M. Zevely
Stefanie L. Durstock
Florence, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky