

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000682-MR

CARL D. HARRIS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 04-CR-00504

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY¹ AND SCHRODER, JUDGES; ROSENBLUM,² SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Carl D. Harris (Harris) brings this matter of right appeal from a judgment of the Campbell Circuit Court, entered March 14, 2005, adjudging him guilty of second-degree robbery³ upon a jury verdict, and adjudging him guilty of

¹ Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

³ Kentucky Revised Statutes 515.030, a class C felony.

second-degree persistent felony offender⁴ (PFO II) upon a guilty plea, and sentencing him to twelve years' imprisonment. We affirm.

On August 31, 2004, seventeen-year old Aaron Angel (Angel) was living in Alexandria with his dad. He was a full-time freshman computer science major attending Northern Kentucky University (NKU). He worked part-time at a restaurant in the evenings, and also helped his grandfather and uncle in their siding business. That day, he helped his grandfather and uncle put siding on a house in Bellevue. He left them at 4:00 p.m. to give himself time to shower before a 6:15 p.m. night class.

While stopped at a stop sign in Bellevue, Angel's vehicle was approached by three strangers - twenty-five year-old Harris, Bryan M. Turner (Turner), and Gillis Gilliam III (Gilliam). (Throughout the next hour, he came to know two of their names because they mentioned "Carl" and "Gilliam.") The men told Angel that they needed a ride to a gas station several minutes down the road. Angel unlocked the front passenger side door, but before he could tell them that he was only giving one of them a ride, Harris got in and unlocked the backseat passenger side door allowing Turner and Gilliam to also enter the vehicle. Turner sat behind Angel, and Gilliam sat behind Harris.

⁴ Kentucky Revised Statutes 532.080.

On the way to the gas station, Harris told Angel that he needed to also go and get some money for his baby's mother so he could see the baby. Hoping not to make any extra stops, but figuring that with all three in the car he did not want to create any "static," a nervous Angel offered Harris some money and produced \$15.00 from his wallet, leaving about \$10.00 for gas. Angel testified that he considered this a loan on Harris' assurance that he would give the money right back.

Harris then indicated that getting all the money he needed would involve a trip to Cincinnati. Again, in order to avoid further problems, and although unfamiliar with Cincinnati, Angel agreed. Harris directed Angel to stop at a specific Cincinnati building. Once there, Harris exited the vehicle for several minutes. While Harris was gone, Turner moved to the front passenger seat. When Harris returned, he took Turner's original seat behind Angel.

Following an apparent insincere offer by the three men to return to the gas station, Turner next began directing Angel down several streets, finally telling him to stop on the side of a street. While stopped, Harris and Turner talked to a man who approached the passenger window, Turner indicating that he needed a "twenty or something." The man left and returned a few minutes later. After the man shook hands with Turner, Turner commented that what was handed to him was not enough.

Angel told the men that he wanted to go back and did not want to drive them anymore, and although Turner agreed, Angel was instead directed to a third location on a street corner. The place did not look friendly and Angel did not want to go there. Once stopped, a man came to the rear driver-side window and spoke to Harris, then left and returned a short time later with something that Harris indicated he wanted to "taste . . . before he bought it." Harris and the man then began yelling at each other.

At that point, Turner instructed Angel to drive away, but at the corner where they were stopped, the traffic light was red. Angel expressed concern that he was not supposed to run the red light. Turner instructed Angel that, if he wanted to keep his car intact, he needed to run the red light to get away from the man who was arguing with Harris because the man would likely do something to the car if they stayed. After running the red light at Turner's insistence, Angel became upset, his eyes tearing up, he was shaking, and he had difficulty breathing. He was told that they were not making any more stops and were returning to Kentucky.

Instead of returning to Kentucky, however, Angel was directed to another stop. First, they instructed him to drive the wrong way on a one-way street. Although Angel hesitated, the men assured him that it was common practice to drive up the

street the wrong way. After driving up the wrong way, Turner then instructed Angel to drive back down the street the correct way, and to pull over when the men spotted a man they knew who was wearing black and red. Harris went into a house with the man. While Harris was gone, Angel became concerned that Harris might have a gun. He mentioned this possibility to Turner and Gilliam, and Turner confirmed that Harris did, indeed, have a gun in his possession. Turner told Angel to be ready to drive away quickly if he heard shots being fired. Harris came out of the house and got back into the car behind Angel. Turner told Angel where to drive. Angel was having so much difficulty driving due to crying that Turner offered to drive, but Angel continued driving.

At the stop-light intersection of the one-way street, Harris told Angel to turn "right," because he saw someone he recognized. Turner instead told him to turn "left." When the light turned green, Angel started turning left toward Kentucky, figuring he had a better chance of getting back home going that way. Harris began yelling at Angel for starting to turn left, but Turner argued with Harris that Angel had been cooperative and had not done anything "that big," pleading with Harris not to hurt Angel.

Sometime while in Cincinnati, Turner used one of Angel's school notebooks/binders as a base to make three lines

of a white powder substance. Turner rolled up a dollar bill and snorted one of the lines and passed the binder to the backseat to Harris and Gilliam.

As they were within sight of the bridge to Kentucky, Harris told Angel that they needed to see his wallet to make sure that he was not a "cop." Angel protested that he was too young. Turner told Angel to give him his wallet, and Turner passed the wallet to Harris or Gilliam in the back seat. When his wallet was returned from the backseat, Angel checked it and discovered that his ATM card, driver's license, and remaining cash were missing. Although the men indicated that they would return the money and driver's license, nothing was ever returned.

Angel drove back to the gas station in Bellevue. He pleaded with the men to let him go, indicating that he had been cooperative and done everything they said. He asked the men to get out of the car. All three men yelled at him and refused to get out of the car until Angel drove them to Provident Bank, the bank on Angel's ATM card. Angel had a joint savings account at the bank with his dad.

Angel felt threatened and afraid, and drove the men to the bank, parking across the street. Everyone got out of the car. Harris and Turner followed closest to Angel to the ATM, with Gilliam hanging behind. They asked how much he had in the

account, to which Angel responded \$30.00. They told him to take out more but he said the machine would not let him. They gave him his card, and forced him to withdraw the money from his account. They took the money from the machine as Angel took the card and receipt. According to the receipt, the transaction occurred at 4:53 p.m. and left him with \$1.78 in his account. Angel was very upset, his biggest concern at that point getting away from the men. He just wanted them to leave. He was upset that he had to drive them. He was crying, shaking and had trouble breathing. Because of the withdrawal from the ATM, he was worried about paying for school tuition, which was his responsibility. He gave them the \$30.00 to get them to leave.

The group walked back to the sidewalk from the ATM. They told Angel to call them to get his money back. Back at the car, Harris took a golf scorecard from Angel's car and wrote the name "Carl" and a seven-digit number on it. He told Angel to call him sometime, they would hang out, and the money would be returned. Harris hugged Angel and kissed him on the cheek. The three men then walked down the street. Angel, feeling threatened during the ordeal, indicated that he was going to do whatever needed to be done to get out of the situation.

Angel returned to his car and cried for a little bit. Upset and unsure of what he should do, he called a friend at NKU and asked if he could come over. At the friend's dormitory room

at NKU, he explained what had happened. He checked his wallet again and noticed that his social security card was missing,⁵ and a decision was made to call the campus police. The campus police arrived at the dorm and referred him to the Bellevue police.

Because he did not feel in any shape to drive, Angel's friend drove him to Bellevue. On the way to the Bellevue police department, Angel saw one of the men in a group of men by a restaurant. He told his friend to turn around. Angel then saw two of the men, and he also saw Bellevue Police Sgt. Jimmy Poynter exiting a nearby restaurant. An upset Angel quickly relayed the events of the day to Sgt. Poynter. While in the restaurant, Sgt. Poynter had seen Harris, Turner and Gilliam pass by the window with a group of men, and later saw Turner and Gilliam pass by. The officer approached the group and questioned the men. The officer directed Angel to go to the Bellevue police department, where Angel wrote out a statement and a criminal complaint was filed. Because of the filing of the police report, Angel missed his evening class and was not allowed to make it up.

Harris, Turner and Gilliam were indicted for first-degree robbery.⁶ Harris was also indicted for PFO I. Before

⁵ The card was never recovered.

⁶ Kentucky Revised Statutes 515.020, a class B felony.

trial, the Commonwealth amended the indictment against Harris to second-degree robbery. Harris and Turner were tried together; Gilliam had apparently fled before trial.

Before us, Harris argues that the trial court 1) deprived him of his federal and state constitutional rights⁷ by refusing to grant a directed verdict of acquittal due to insufficient evidence that a) Harris, Turner and Gilliam ever used physical force or threatened to immediately use physical force against Angel and that b) Harris, Turner and Gilliam intended to permanently deprive Angel of his property; 2) deprived him of his federal and state constitutional rights⁸ by failing to grant a mistrial when at least one and possibly several jurors viewed him being transported in handcuffs to court on the day of trial; and 3) deprived him of his federal and state constitutional rights⁹ when it denied his motion in limine to exclude hearsay statements from Turner, a non-testifying co-defendant, about Harris' possession of a gun. We disagree, and affirm.

Our standard for review of the trial court's denial of a directed verdict motion is stated in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

⁷ U.S. CONST. amend XIV; Ky. CONST. § § 2, 3.

⁸ U.S. CONST. amends. V, XIV; Ky. CONST. § § 2, 3, 11.

⁹ U.S. CONST. amend. VI; Ky. CONST. § § 2, 3, 7, 11.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. [Commonwealth v.] Sawhill[, Ky., 660 S.W.2d 3 (1983)].

Harris was convicted of second-degree robbery, defined in Kentucky Revised Statutes (KRS) 515.030 as:

[W]hen, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

In finding Harris guilty of second-degree robbery, the jury was instructed to find him guilty if they found evidence that he "stole or attempted to steal property from Aaron Angel" and "(t)hat in the course of so doing, and with intent to accomplish the theft, he used or threatened the immediate use of physical force upon Aaron Angel," or alternatively that Harris, Turner and Gilliam "stole or attempted to steal property from Aaron Angel" and that Harris aided and assisted Turner and Gilliam in

the planning and commission with the intent to steal property from Aaron Angel.

Harris first argues insufficient proof that Harris, Turner and Gilliam used or threatened the immediate use of physical force upon Angel, "physical force" defined for the jury as "force used upon or directed toward the body of another person." In Swain v. Commonwealth, 887 S.W.2d 346, 347 (Ky. 1994), the Kentucky Supreme Court held that evidence was sufficient to establish a threat of immediate physical force for a second-degree robbery instruction when, although the victim never saw a weapon, the defendant told the victim that he had a gun. In Williams v. Commonwealth, 721 S.W.2d 710, 712 (Ky. 1986), the court indicated that, in a case where evidence of a weapon to support a first-degree robbery conviction was lacking, but evidence was sufficient to support a second-degree robbery instruction, "the threat of physical force is the gravamen. A response of perceiving danger is quite real under threat."

Herein, Harris concedes that testimony established that Angel overheard Gilliam mention a gun to Turner, and further that Turner acknowledged that Harris was armed and for Angel to be ready to drive if shots were heard. Harris also concedes that there was testimony that he was harassing Angel during the drive in Cincinnati, and that Harris began yelling at Angel when Angel did not start to make the turn that Harris had

requested, with Turner asking Harris not to hurt Angel. Additionally, the three men yelled at Angel when they returned to Bellevue and told him to drive to the bank. All while this was occurring, Angel felt threatened and was crying, shaking, and had difficulty breathing.

Overall, the evidence as a whole established that seventeen-year old Angel, in offering a ride to a stranger, wound up with the three strangers in his car, who indicated that they needed money and directed him, under intimidation and harassing conditions, to drive to several stops in Cincinnati during which drug transactions occurred and drugs were consumed, and to give up his personal belongings including his wallet, money, driver's license, social security card, and ATM card. Although he never saw a weapon, he was given to believe there was one, as well as being in the presence of a conversation wherein Turner asked Harris not to hurt Angel. Based on the above, it was not clearly unreasonable to the jury to find that Harris used or threatened the immediate use of physical force upon Angel.

Harris next argues insufficient proof that Harris, Turner and Gilliam intended to permanently deprive Angel of his property. KRS 514.030 defines theft as unlawfully taking or exercising control over the movable property of another with the intent to deprive, with the applicable definition of deprive

found in KRS 514.010(1)(a) as "(t)o withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation" and in (b) as "(t)o dispose of the property so as to make it unlikely that the owner will recover it."

In support of this argument, Harris concedes that with regard to the \$15.00 that Angel characterized as a "loan," Angel further explained that at that time he would rather loan the money than drive the men around, clearly implying that he was not voluntarily with the men. Harris also concedes that the men took Angel's ATM card, driver's license and money from his wallet, although characterizing the promise of the return of the money, the return of the ATM card in order for Angel to withdraw money from the ATM, and Angel's lack of calling the phone number Harris gave him to get the money, as evidence of no intent to permanently deprive Angel of the items.

Again, taking the evidence as a whole, Harris took \$15.00, \$10.00 and \$30.00 from Angel on three different occasions and did not return it. Based on the above, it was not clearly unreasonable to the jury to find that Angel was being permanently deprived of his property. Benham, *supra*.

Harris next argues a denial of due process rights and right to a fair trial when the trial court failed to grant a

mistrial upon an allegation that one or more jurors saw him in handcuffs in the parking lot of the courthouse on the first day of the trial. The record reveals that the trial court denied Harris' motion for a mistrial before trial, after information as to this allegation was brought before the court. Further, during discussion of jury instructions Harris' counsel provided more specific information that a sheriff's deputy/jailer indicated that as he was attending to his own children in the parking lot of the courthouse on the morning of the first day of trial, he specifically noticed one juror, and maybe others, who were getting out of their cars, see Harris being transported in handcuffs. The Commonwealth stipulated that one juror had seen Harris in handcuffs when being brought into the courtroom, and that other jurors were in the vicinity when the defendants were being brought into the courtroom. The court again denied the motion for a mistrial. From the discussion, it was strongly implied that the "one juror" was a woman who did sit on Harris' jury, but less clear was whether this juror was the female alternate juror who did not deliberate.

Because a mistrial is an extraordinary remedy, a manifest necessity must exist before it will be granted. Lynch v. Commonwealth, 74 S.W.3d 711, 714 (Ky. 2002); Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002). The harmful event must be of such magnitude as to deny the defendant a fair and

impartial trial, the prejudicial effect of which could be removed in no other way. We review the trial court's denial of a motion for mistrial under an abuse of discretion standard. Bray v. Commonwealth, 68 S.W.3d 375, 383 (Ky. 2002).

With respect to a juror, who may or may not have actually sat in deliberation, seeing Harris being brought into the courthouse in handcuffs, the Kentucky Supreme Court has "repeatedly held that the inadvertent viewing of the defendant in either handcuffs or another restraint for the sole purpose of being taken to or from the courtroom is not automatically reversible error." Moss v. Commonwealth, 949 S.W.2d 579, 582-83 (Ky. 1997); see also Shegog v. Commonwealth, 142 S.W.3d 101, 109 (Ky. 2004); Williams v. Commonwealth, 474 S.W.2d 381, 383 (Ky. 1971). Additionally, the weight of authority is that a brief sighting by jurors of a defendant in restraints, shackles, or handcuffs, especially outside the courtroom, does not rise to the level of a constitutional violation. United States v. Waldon, 206 F.3d 597, 607-08 (6th Cir. 2000); Castillo v. Stainer, 983 F.2d 145, 148 (9th Cir. 1992) (no constitutional harm from jurors' "brief and accidental viewing" of the defendant in a corridor in chains); State v. Jalowiec, 91 Ohio St.3d 220, 225, 744 N.E.2d 163, 171 (Ohio 2001) ("[e]ven if some potential jurors saw [defendant] handcuffed on the first day of voir dire, the danger of prejudice was slight, since the juror's

view of [defendant] in custody was brief, inadvertent, and outside the courtroom"); Eustice v. State, 11 P.3d 897, 901 (Wyo. 2000) (“[a] brief or incidental viewing by the jury of the defendant in restraints is not necessarily prejudicial; a defendant must make some showing of actual prejudice.”)

Under Kentucky Rules of Criminal Procedure (RCr) 8.28(5), a judge shall not permit a defendant to be seen by the jury in shackles except upon the showing of good cause. In Hill v. Commonwealth, 125 S.W.3d 221, 234-36 (Ky. 2004), the shackling of a defendant in court who had demonstrated a previous propensity for escape was held not to be an abuse of discretion. In the instant case, Harris was not handcuffed in court, only in being transported to the courthouse. Additionally, it is not clear whether this was seen by more than one juror, or if that juror even deliberated. We conclude that there was no abuse of discretion by the trial court in denying the motion for a mistrial.

Harris lastly contends that the trial court erred when it denied his motion in limine to exclude a statement made to Angel by a non-testifying co-defendant that Harris had a gun and that Angel should be ready to leave if shots were heard. In denying the motion, the trial court concluded that the statement was not hearsay as it was not being introduced to prove the truth of the matter asserted.

Kentucky Rules of Evidence (KRE) 801 defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In Crowe v. Commonwealth, 38 S.W.3d 379, 382 (Ky. 2001), the court indicated that "(a) legitimate nonhearsay use of an out-of-court statement always involves relevancy in the *mere utterance of the words* comprising the statement (i.e., a logical connection between the utterance of the words and some material element of the case)." Emphasis in original. Herein, the statement was properly admitted for a nonhearsay purpose to show that the "mere utterance of the words" (putting a gun in Harris' possession) logically connected to establish the threat element of second-degree robbery (Angel's fear of Harris, Turner and Gilliam), in direct opposition to the defendant's theory of the case that Angel was a willing and voluntary participant in provision of transportation and money to assist three total strangers in obtaining drugs and money. Our standard of review for admission of evidence is whether there has been an abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Having reviewed the record, we find no abuse of discretion, and decline to disturb the trial court's ruling.

For the foregoing reasons, the judgment of the
Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Lisa Bridges Clare
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Kentucky Attorney General

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky