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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-001109-MR

RYAN M. DAVIS — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 05-CR-00001-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,[1] SPECIAL JUDGE.

GUIDUGLI, JUDGE: Ryan Davis appeals the judgment of conviction rendered in Casey Circuit Court reflecting a jury verdict of guilty on one count of first-degree robbery and one count of first-degree burglary. Davis argues that the circuit court committed reversible error in failing to instruct the jury on robbery second, burglary second, receiving stolen property, and facilitation to burglary and robbery. He also maintains that circuit court erred permitting the Commonwealth's use of parole

[1] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

eligibility guidelines. For the reasons stated below, we affirm the judgment on appeal.

On December 27, 2003, Maleen Lawless was asleep at her home in Casey County, Kentucky, when she was awakened by the sound of an intruder. When Lawless confronted the intruder, he fired one shot from a pistol at her and demanded money. When she told the intruder that she didn't have any money, he fired a second shot. Neither shot struck Lawless.

The intruder went from room to room using a flashlight, and after a few minutes exited the house. Lawless's jewelry box, a cedar chest, and a bedroom drawer containing jewelry were discovered to be missing. Lawless would later state that she recognized the intruder's voice as that of Ryan Davis, a person to whom she had rented a house.

The intruder disabled the telephone before leaving, so Lawless located a neighbor who contacted the sheriff's office. Casey County Sheriff Jerry Coffman responded, and after speaking with Lawless drove to the home of Davis's uncle, Ronnie McMullin, to look for Davis.

On arriving at McMullin's house, Sheriff Coffman saw a black Ford Thunderbird with its trunk and passenger door open. Visible from outside the vehicle were jewelry boxes in the trunk and passenger seat. Coffman asked McMullin if he had seen Davis, and if Davis had a gun. Earlier in the morning, McMullin

saw Davis brandishing a gun in McMullin's home, but McMullin denied this to Sheriff Coffman when asked.

After speaking with McMullin, Coffman located Sherman Townsend in the home. Townsend was intoxicated, smelled of alcohol, and was either passed out or asleep on the couch. Coffman arrested Townsend, who was in possession of the Thunderbird's keys, and recovered the jewelry boxes from the vehicle. Lawson later identified the jewelry as hers. Sometime thereafter, a third party found a drawer containing some of Lawson's jewelry in a field. Davis was arrested several months later in Pulaski County, Kentucky.

The Casey County grand jury indicted Davis on one count each of robbery in the first degree, or complicity, and burglary in the first degree, or complicity. Townsend was charged by way of a separate indictment. In April 2005, Townsend and Davis were jointly tried in Casey Circuit Court. Each denied any involvement in the robbery. Townsend acknowledged that he was with Davis on the morning of the robbery, but claimed that he merely agreed to accompany Davis to retrieve some stereo equipment from Davis's former wife. Townsend admitted to have been using methamphetamine for several days, and stated that he remembered nothing more than having fallen asleep in the Ford Thunderbird and then waking up in someone's house.

Davis also denied any involvement in the robbery, stating that Townsend took him to a field to show him some jewelry that Townsend wanted to trade for methamphetamine. He told of having been in the Thunderbird when it ran into a ditch, requiring him and Townsend to ask McMullin for help removing it. Davis denied having a gun, and denied breaking into Lawless's residence.

Davis's parents and cousin testified that Townsend had picked up Davis in a black car on the morning of the robbery. McMullin admitted lying to Sheriff Coffman on the day of the robbery, and stated that when Davis came to McMullin's home on that morning, Davis was brandishing a 22 caliber black and brown pistol and that McMullin told him to put it away. McMullin also testified that Davis showed some jewelry to McMullin's wife.

Finally, Lawless recounted the events of that morning. When pressed as to how she knew that Davis rather than Townsend was the intruder, she said she recognized Davis's voice. She also described Davis as "the skinny one" and Townsend as "the chubby one."[2] Lawless stated that Townsend was waiting in the car during the robbery, but on cross-examination said she had not actually seen either Townsend or the car because it was dark.

[2] Contrary to Davis's claim in his written argument, Lawless did not testify at trial that she saw Townsend, a.k.a. "the chubby one," in her house.

The matter went to the jury, which returned guilty verdicts on each count of the indictment. Davis was sentenced to 13 ½ years in prison, and this appeal followed.

Davis first argues that the trial court erred in failing to instruct the jury on burglary in the second degree and robbery in the second degree. He notes that both he and Townsend testified that neither had a gun, and maintains that the jury could have believed that Lawless was lying when she testified that the intruder twice fired a gun in her residence. He argues that the trial court erred in failing to instruct the jury on these lesser included offenses, and claims that this failure denied him fundamental constitutional rights and entitles him to a new trial.

We find no error on this issue. A defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury to rationally find him guilty of the lesser-offense and acquit him of the greater.[3] When the jury has no basis for concluding that the defendant committed the lesser-included offense, the trial court does not err in refusing to instruct on the lesser-included offense.[4]

In the matter at bar, the evidence showed either that Davis and/or Townsend committed robbery first and burglary first

[3] Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982).

[4] Smith v. Commonwealth, 737 S.W.2d 683 (Ky. 1987), citing Gray v. Commonwealth, 695 S.W.2d 860 (Ky. 1985).

while using a firearm, or that they committed no robbery and burglary at all. That is to say, Lawless testified that Davis twice fired a gun during the commission of the robbery and burglary, whereas Townsend and Davis testified that they had nothing to do with the break-in. No evidence was tendered that Townsend and Davis committed the robbery and burglary without using a gun. As such, there was no basis upon which the jury could reasonably find Davis guilty of robbery second and burglary second, and the circuit court properly so ruled.

Davis next argues that the trial court erred when it failed to instruct the jury on receiving stolen property. Davis claimed at trial that Townsend wanted some methamphetamine and offered to give Davis some of Lawless's stolen property in exchange. He argues that this was his theory of the case, that it was supported by the evidence, and that accordingly he was entitled to have it submitted to the jury for consideration.

This claim of error does not form a basis for reversing the judgment on appeal. A defense may be submitted to the jury only if it is supported by the evidence.[5] No evidence was tendered at trial that Davis received stolen property. At best, Davis testified that Townsend sought to give him stolen property in exchange for drugs, but no evidence was offered that such a transaction occurred. As such, the circuit court

[5] Taylor v. Commonwealth, 995 S.W.2d 355 (Ky. 1999).

properly refused to instruct the jury on receiving stolen property.

Davis's third argument is that he was entitled to an instruction on complicity and facilitation to burglary first and second, and to robbery first and second.[6] Davis claims that the jury could have believed that he was with Townsend when Townsend committed the burglary and robbery, that Davis intended for it to happen and was to drive the get-away vehicle. In support of this claim, Davis points to evidence in the record that he helped Townsend with his vehicle's mechanical problem and helped Townsend remove the vehicle from the ditch.

The instant facts are distinguishable from Webb v. Commonwealth,[7] to which Davis cites in support of his claim of error. In Webb, error was found when the court did not instruct on facilitation when the defendant drove his girlfriend to a parking lot knowing that she was going to purchase drugs. The Kentucky Supreme Court opined that the jury could have believed that Webb facilitated his girlfriend's purchase of drugs without specifically intending that the crime be accomplished.

[6] As a point of clarification, Davis did receive an instruction on complicity to robbery in the first degree and burglary in the first degree. He argues that he was entitled to instructions on complicity to robbery in the second degree and burglary in the second degree, and to facilitation to robbery first and second degree, and burglary first and second degree.

[7] 904 S.W.2d 226 (Ky. 1995).

In the matter at bar, no evidence supports Davis's claim that he was entitled to an instruction on complicity (to robbery second and burglary second) and facilitation. That is to say, no evidence was adduced at trial that Davis – while acting with the knowledge that Townsend intended to commit an offense - provided the means or opportunity for Townsend to commit that offense.[8] As such, the circuit judge properly refused to instruct on complicity (to robbery second and burglary second) and facilitation to burglary first and second, and to robbery first and second.

Davis's last argument is that the Commonwealth's use of parole eligibility guidelines prepared by the Kentucky Department of Corrections violated KRS 803 and Crawford v. Washington.[9] The substance of his argument on this issue is that the guidelines were evidentiary in nature, and should not have been admitted during the "truth in sentencing" phase of the proceeding because no one from Corrections testified about the chart or was available for cross-examination.

Crawford held as inadmissible the out of court statements of witnesses who were not subject to cross examination. We have closely examined the case law and the Kentucky Rules of Evidence, and find nothing supportive of the

[8] KRS 506.080.

[9] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

claim that the parole eligibility guidelines fall under the auspices of Crawford. KRS 532.055(2)(a) expressly provides that the Commonwealth may introduce evidence addressing parole eligibility, and we are persuaded that the guidelines do not constitute inadmissible hearsay. KRE 803(8) defines as admissible any

> . . . records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

The parole eligibility guidelines constitute a record, report, statement or data compilation of a public office or agency, and their use in the sentencing phase of the proceeding against Davis did not rule afoul of Crawford or the Kentucky Rules of Evidence. As such, we find no error.

For the foregoing reasons, we affirm the judgment of the Casey Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky