

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001449-MR

OLAJOWAN KENNEDY

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
INDICTMENT NO. 04-CR-00270

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART

** ** * * * * *

BEFORE: TAYLOR, JUDGE; ROSENBLUM,¹ SENIOR JUDGE; MILLER,² SPECIAL JUDGE.

ROSENBLUM, SENIOR JUDGE: Olajowan Kennedy appeals from his conviction and sentence for first degree robbery and fourth degree assault by a Logan Circuit Court jury in April 2005.

Kennedy also avers it was error for the trial court to admit his

¹ 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 KRS 21.580.

² 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.

videotaped statements made during his interrogation. Finding merit in Kennedy's first assignment of error, we vacate in part and affirm in part.

On November 6, 2004, Kennedy allegedly robbed Roy's Barbeque, a restaurant in Logan County, Kentucky. That evening, Kennedy, wearing dark clothing and a ski mask, entered the restaurant and struck an employee in the back of the head with a baseball bat. Kennedy forced the employee into a bathroom and then took the restaurant's bank bags containing approximately \$220.00. Shortly thereafter, witnesses saw a person dressed in dark clothing running from the restaurant toward a wooded area behind the business and escaped.

On November 17, 2004, Kennedy asked a female acquaintance for a ride in her car to a local area known as "Big Jesse's Building." Kennedy left the vehicle for a few minutes and returned. After he entered the vehicle, several males approached the car and attempted to seize Kennedy. Kennedy fled the vehicle and the police were called. A search of the interior of the car yielded the stolen bank bags from the restaurant. Two days later, on November 19, 2004, Officers Mills, Eggleston, and Higgins went to the Kennedy residence with an arrest warrant. At approximately 8:00 p.m. that evening, Kennedy was placed under arrest, handcuffed, and his Miranda rights were read to him by Officer Higgins. When asked if he

understood his rights, Kennedy responded, "Yeah." Kennedy was not questioned at that time and was transported to the local police station.

Approximately one hour after being arrested, Kennedy was interrogated by Detective Edmunds. The interview was videotaped. Kennedy was given a Miranda rights waiver form, written in English, prior to questioning and provided time to read the form. Kennedy is a high school graduate and apparently is able to read sufficiently as the video shows him reading aloud from the form. During the interview, Kennedy made several incriminating statements regarding his involvement in the robbery.

On March 29, 2005, Kennedy moved to suppress the incriminating statements given to Detective Edmunds. The record before us does not include a video recording of the hearing on the motion. Nevertheless, the record does include the written motion as well as a calendar order by the trial judge showing that evidence was taken at the suppression hearing from several witnesses. Ultimately, the judge denied Kennedy's motion, as indicated on the judge's calendar order entered April 20, 2005. A jury trial was held on April 28, 29 and May 2, 2005, in the Logan Circuit Court. Following deliberations, the jury found Kennedy guilty of first-degree robbery and fourth-degree

assault.³ Kennedy was sentenced to twelve years. This appeal followed.

Kennedy argues that the court erred when it allowed the conviction for both first-degree robbery and fourth-degree assault to stand, exposing him to Double Jeopardy in violation of the Sixth Amendment. The Commonwealth concedes this issue and we also agree.

Double jeopardy may apply to a situation involving a conviction for both first-degree robbery and fourth-degree assault. See Mack v. Commonwealth, 136 S.W.3d 434 (Ky. 2004). Here, the physical injury involved for both the robbery charge and the assault charge are the same. Thus, the assault offense merges into the robbery offense because it was Kennedy's infliction of physical injury with the baseball bat that formed the basis for both charges. Id.

Based on the foregoing, the trial court erred when it allowed the conviction for fourth-degree assault to stand. Consequently, we vacate Kennedy's conviction for fourth-degree assault and that portion of the sentence related to it and remand to the Logan Circuit Court for proceedings consistent with this decision.

Kennedy also avers that the trial court erred when it admitted into evidence at trial the videotaped incriminating

³ Kentucky Revised Statutes 515.020 and 508.030, respectively.

statements he made to Detective Edmunds. Kennedy erroneously asserts that this issue was not preserved for appeal. Kennedy brought a motion to suppress that was resolved prior to trial by the judge's calendar order thereby preserving the issue.⁴ Upon review, we find no error in the admission of the videotape at trial.

Our standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002). If they are, then they are conclusive. See RCr. 9.78. Based on those findings, we must then conduct a *de novo* review of the trial court's application of law to those facts to determine whether its decision is correct as a matter of law. Id.; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999).

Here, the trial court's findings of fact are supported by substantial evidence gathered from the testimony of Detective Edmunds and Officer Higgins as indicated in the judge's calendar order entered March 29, 2005. Consequently, we consider the trial court's findings of fact conclusive. Further, we find

⁴ See KRE 103(d). "A motion in limine resolved by order of record is sufficient to preserve error for appellate review." Additionally, the videotaped statements of Kennedy were admitted, without objection, at trial.

that the application of the law to those facts was not erroneous as a matter of law. We therefore affirm.

Kennedy argues that any statements made by him during his interrogation at the police station following his arrest should be suppressed on the basis that Detective Edmunds failed to reinform him of his Miranda rights prior to questioning him. We disagree.

The warnings required under Miranda are concerned with "the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation." Fields v. Commonwealth, 12 S.W.3d 275, 283 (Ky. 2000)(citing Miranda v. Arizona, 384 U.S. 436, 477, 86 S.Ct. 1602, 1629, 16 L.Ed.2d 694 (1966)). However, Miranda does not require that the warnings be repeated each time the interrogation process is resumed after an interruption. Id. (citing United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974); Evans v. Swenson, 455 F.2d 291, 296-97 (8th Cir. 1972), cert. denied, 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972); Miller v. United States, 396 F.2d 492, 496 (8th Cir. 1968), cert. denied, 393 U.S. 1031, 89 S.Ct. 643, 21 L.Ed.2d 574 (1969)). "In each case, the ultimate question is: Did the defendant, with a full knowledge of his legal rights, knowingly and intentionally relinquish them?" Id. (citing Miller v. United States, supra, at 496).

The testimony at the suppression hearing was that when Officer Higgins first took Kennedy into custody he informed him of his Miranda rights, which Kennedy acknowledged he understood. After police transported Kennedy to the police station, Detective Edmunds undertook to question Kennedy regarding the robbery. On this occasion, Detective Edmunds began the questioning by showing Kennedy a Miranda rights waiver form and asked him to read it and sign it. At no time did Kennedy indicate that he did not want to waive his rights nor did he indicate that he did not understand what he was signing.

Considering that Kennedy had been given his Miranda warnings only a short time earlier, at which time he acknowledged he understood them, and explicitly indicated prior to the police station questioning he again acknowledged that he understood them, we are persuaded that there was no constitutional violation of Miranda. Accordingly, the trial court did not err in denying Kennedy's motion to suppress the statements made during his interrogation.

We agree that a video recording of the suppression hearing would have been helpful, however, it was the onus of Kennedy to properly designate the record for appeal. It is the responsibility of the appellant to see that the record is prepared and certified by the clerk within the time prescribed

by CR⁵ 73.08; CR 75.07(4). See Ventors v. Watts, 686 S.W.2d 833, 834 (Ky.Ct.App. 1985). Because the record on appeal contains no transcript or video record of the suppression hearing conducted on Kennedy's motion, and review of the record on appeal confirms that no designation of record was filed as provided for in CR 75.01, we conclude that no basis for disturbing the decision of the trial court has been demonstrated. In the absence of a record of the evidence adduced at the suppression hearing, this court must indulge in the presumption that the omitted evidence supports the decision of the trial court. See Burberry v. Bridges, 427 S.W.2d 583 (Ky. 1968); Moody v. Commonwealth, 170 S.W.3d 393 (Ky. 2005).

Finally, Kennedy asks this court to review the admission of the videotaped statements for palpable error pursuant to RCr⁶ 10.26. Reversing a conviction based upon palpable error requires us to determine that a manifest injustice occurred such that, when considering the entire case, there is a substantial possibility that the result would have been different but for the error. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). Based on our thorough review of the record, we are of the opinion that there was no palpable error

⁵ Kentucky Rules of Civil Procedure.

⁶ Kentucky Rules of Criminal Procedure.

and conclude that Kennedy's substantial rights have not been unduly affected.

For the foregoing reasons, the conviction and sentence for fourth-degree assault is vacated and remanded to the Logan Circuit Court for further proceedings consistent with this opinion. We otherwise affirm the conviction and sentence for first-degree robbery.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Morehead
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky