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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001535-MR

JAMES BRANDENBURG

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 04-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

GUIDUGLI, JUDGE: James Brandenburg appeals his conviction and
sentence following a jury trial on the charge of first-degree
robbery. He was sentenced to ten year in prison. We affirm.

On October 7, 2005, the Farmers National Bank in
Berry, Kentucky was robbed. A man wearing a Halloween mask
entered the bank, pointed what appeared to be a gun towards the
bank teller, handed the teller a bag, and ordered the teller to

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution
and KRS 21.580.

fill it with money. The robber threatened to kill the teller if she set off an alarm. Upon exiting the bank, the robber entered a vehicle that was waiting outside and drove away. Fortunately, a bystander observed what was happening and recorded the license plate number of the car, and that information was relayed to the local police. The police determined that the vehicle was registered to Rhoda Gould, Brandenburg's mother, and went to Gould's home to investigate. While the police were talking with Gould, the getaway vehicle approached Gould's residence, and upon seeing the police, the three occupants sped away in the car. The vehicle was followed and later found stopped at a factory near Gould's home. Two females were still in the car, but the third occupant had abandoned the vehicle. One employee of the factory observed a man walking quickly past her work station, but she could not identify the individual. During a search of the area, the police recovered the stolen money on top of a stack of pallets located near the stopped vehicle. Several minutes after the vehicle sped past the Gould home, Brandenburg entered the back door of the home and asked his mother, "What are the cops doing here, Mom? Do they have a warrant for my arrest?" Thereafter, the police arrested Brandenburg.

Brandenburg and the two females in the vehicle, Deborah Agee and Machelles² Brandenburg (Brandenburg's wife), were transported to the police station and questioned by the police. Eventually, Brandenburg, in response to a question about who robbed the bank, stated that he did it, and then made a written statement to that effect. In addition, Deborah Agee decided to cooperate with the police. Agee told the police that the three had robbed the bank and where to find the Halloween mask and clothes that Brandenburg had been wearing during the robbery.

Separate trials were granted with Brandenburg going to trial first. At trial, the Commonwealth put on numerous witnesses who detailed what had occurred during the robbery and the subsequent investigation and arrest of Brandenburg. Agee testified against Brandenburg and implicated his involvement in the robbery. The jury found Brandenburg guilty of robbery in the first-degree and recommended a sentence of ten years. The trial court entered a judgment and sentence in accordance with the jury's recommendation. This appeal followed.

On appeal, Brandenburg raises three issues. His first contention is that a Brady³ violation occurred when the deal Agee had with the Commonwealth was not revealed. Agee had decided to

² Machelles's name is spelled "Machelles" in Brandenburg's brief and "Michelle" in the Commonwealth's brief. We shall refer to her as Machelles in this opinion.

³ Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963).

cooperate with the Commonwealth from the beginning and she had agreed to testify against Brandenburg at trial. However, the extent of any plea agreement, if any, was not revealed during the trial. Prior to trial, the Commonwealth had informed the Court and other parties that a tentative offer had been made to Agee, but that it was not willing to resolve her case until all the cases had been resolved. Later, the Commonwealth informed the court that after Brandenburg's trial, the other cases "should fall into place." At trial, Agee was cross-examined about her deal with the Commonwealth. During the exchange with Brandenburg's attorney, Agee stated that she knew she was looking at significant time in prison, but that no written offer had been made if she pled guilty. She stated that she was told it would not hurt her if she cooperated and that she was not expecting to stay out of jail, but hoping she would so that she could go back to vocational school and pursue a degree.

Brandenburg argues that based upon the fact that Agee had obviously entered into a plea agreement with the Commonwealth, he was entitled to know the exact details of that agreement in order to show why Agee testified as she did. However, Brandenburg has failed to show anything other than his assumption that a specific deal had been entered. There is nothing in the record or brought out in the appeal that Agee had in fact entered into a plea agreement or what it was. He argues

that the jury was biased by Agee's testimony, but he thoroughly cross-examined her as to her motives and any potential leniency she was to receive. Citing to Brady, supra, Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, L.Ed.2d 481 (1985), Brandenburg sets forth the standard necessary to prove a constitutional violation of due process resulting from withholding evidence from the defense. In order to prevail, a defendant must show 1) the evidence has not been disclosed to the defendant; 2) the evidence is material; and 3) a reasonable probability exists that, had the material evidence been disclosed, a different outcome would have resulted. Brandenburg cannot meet the standard he has set out.

As to disclosure, Brandenburg was aware that Agee had agreed to cooperate with the police and the Commonwealth from the day of the robbery. The Commonwealth informed the court and defense counsel that the cases against Agee and Mabelle Brandenburg would "fall into place" after Brandenburg's trial, and that a tentative plea agreement had been reached, but the exact details had not been resolved. Brandenburg knew as much about the deal that Agee had made as Agee herself knew and he has not presented anything to the contrary. While the evidence was material, Brandenburg was given every opportunity to cross-examine Agee and expose any bias, prejudice or motive for her

testifying against him. And finally, there exists little probability that a different outcome would have resulted had a specific plea agreement, if one did exist, been revealed. Evidence of Brandenburg's involvement in the robbery was overwhelming, from his own admission to the police, to his mother's identification of him in the car rushing past her home, to Agee's description of his involvement and his magical entry into his mother's home, coupled with the statement, "do [the police] have a warrant for my arrest?" While no one at the bank could positively identify Brandenburg as the armed robber because of the mask he wore, the evidence presented at trial dispels any argument that the outcome would have been different had a specific plea bargain been entered by Agee prior to trial and then revealed to the jury.

Brandenburg next argues that he was entitled to a directed verdict due to the insufficiency of the evidence. The standard of review of a directed verdict has been set forth in Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991), to be:

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, 660 S.W.2d 3 (Ky. 1983).]

As stated in Sawhill, there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

In this case, as in Benham, a review of the evidence clearly indicates that the trial judge correctly determined that a reasonable jury could fairly find guilt beyond a reasonable doubt. The prosecution produced evidence that was considerably more than a mere scintilla and the case was properly presented to the jury for determination.

Lastly, Brandenburg argues that his statements to the police that he committed the robbery were not voluntary and should have been suppressed. This issue was not preserved, but he asks this Court to review it under the palpable error standard. RCr 10.26. Following his arrest, Brandenburg was taken to the police station and questioned concerning the

robbery. His wife, Machelles, and Agee were also taken to the police station and questioned separately. Machelles is considered legally blind, and Brandenburg contends that he was so concerned about his wife that he eventually confessed so that the police would permit him to see her. He claims he was under substantial and overwhelming emotional duress and finally told the police officer that "I'll tell you anything you want to know if you'll just let me see my wife." Thereafter, the investigating officer agreed to let him see his wife if he wrote a statement concerning the robbery. Brandenburg then gave a written statement admitting his involvement in the bank robbery. He now argues that his confession was involuntary and should have been suppressed because it was coerced from him due to his concern for his disabled wife. While one might concede that he was rightfully concerned about his wife, a co-defendant who was also being questioned by the police regarding a felony bank robbery, there is nothing in the record to support a conclusion that his statement was not voluntary or that it was the result of any unlawful action by the police, or illegal coercion on their part. As such, we find no error in the admission into evidence of Brandenburg's statement that he "did the bank."

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

ALL CONCUR.

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