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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000460-MR

KAMRON GOFF — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 16-CR-001622-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Kamron Goff appeals from a judgment based upon a jury verdict convicting him of one count of complicity to first-degree robbery for which he was sentenced to a term of ten years' imprisonment. Discerning no reversible error in any of the several arguments advanced for reversal, we affirm the judgment of the Jefferson Circuit Court.

According to the testimony adduced at trial, in June 2016, Coreyale Wilson entered GameStop, a retail video game store in Louisville, briefly conversed with GameStop employee Michael Kirby about selling old video games, and left moments before two men wearing hoods entered the store. One of the men held a gun in Kirby's face while the other jumped behind the counter to take cash from two registers which Kirby had been forced to open. He was also forced to open a nearby time-delay safe. Kirby testified that both men were yelling at him and giving him commands and that neither of the men appeared to him to be the leader.

Kirby also stated that because the robbery occurred very close to the time for a shift change, a second store employee, Michael Vanoever, entered the store while the robbery was in progress. One of the robbers grabbed Vanoever, threw him to the floor, and hit him with a pistol causing serious injury. Kirby also testified that after the money had been taken from the registers and safe, and as he was lying face-down on the floor, he was hit in the back of the head causing him to briefly lose consciousness.

Because the robbers unwittingly took a GPS tracking device along with the money from the safe and registers, police arrived at appellant Goff's apartment within minutes after the robbery. After initially refusing to answer the door, appellant, Wilson, and a third suspect ultimately left the apartment at the

urging of one of the suspects' mother and were transported to police headquarters for questioning. A search warrant issued for appellant's apartment, and police officers discovered clothing matching that which the robbers had been wearing hidden in an air vent; a pistol with five rounds in the magazine; and a backpack matching the description of the one used in the robbery.

Appellant gave a statement at police headquarters in which he admitted to having participated in the GameStop robbery, but denied being the mastermind, possessing a gun, or hitting the victims with the pistol. Appellant also denied having any knowledge of where the robbery proceeds had been hidden. However, during a monitored phone call from the jail, appellant directed his mother to the money, and police thereafter recovered an amount of cash consistent with that taken during the robbery from appellant's mother.

Appellant was subsequently indicted on one count of complicity to first-degree robbery. On the morning of trial, the court conducted a hearing on appellant's motion to suppress his videotaped statement, alleging that invocation of his right to counsel had been violated. After the denial of that motion, the court commenced a three-day trial which resulted in a guilty verdict and recommendation that the minimum sentence of ten years' imprisonment be imposed. The trial court thereafter entered judgment in conformity with the jury's verdict and recommended sentence. This appeal followed.

Appellant Goff advances three arguments to support his contention that the judgment of conviction must be set aside: 1) that the trial court erred in failing to suppress his statement to police; 2) that he was entitled to an instruction on the lesser-included offense of facilitation to robbery; and 3) that he was denied a fair trial when a juror twice fell asleep during the proceedings. Our analysis commences with the contention that appellant's statement to police should have been suppressed.

Appellant filed the motion to suppress on the eve of trial and, as previously stated, the trial court conducted a hearing immediately prior to the scheduled trial. The Commonwealth offered the testimony of Detective Matthew Crouch, as well as relevant excerpts from appellant's interrogation and statement at police headquarters. The video recording indicates that prior to the interrogation, Detective Crouch informed appellant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and presented appellant with a form listing those rights which he initialed to indicate that he understood each of the rights he was waiving. Although appellant initially indicated that he wanted to contact his attorney, he nevertheless proceeded to talk to Detective Crouch and Detective Dan Mason. After the detectives again informed appellant of his right to have counsel present, appellant stated that he wished to proceed without an attorney. Detective Crouch emphasized to appellant that if at any time he wished

to end the interrogation and contact his attorney, he was free to do so. At some point, appellant stated that he was done talking. The detectives started to leave the interrogation room, but a rustling of papers prevented an understanding of precisely what was being said. However, it is clear that appellant continued talking with the detectives. Detective Crouch confirmed that it was appellant who had reinitiated communication and was waiving his right to have his lawyer present. Detective Crouch again emphasized that appellant was free to end the interrogation at any point. Of particular pertinence is the following exchange:

> Det. Crouch: What [Detective Mason] is saying is . . . Do you understand what he's saying? You can talk to us without a lawyer; you can have a lawyer present; or reading this here, you can say "I want a lawyer here. I'll talk to you now, but if I decide later on." This is what these rights here are, okay? I'm just explaining these a little more to you, okay? You can decide you want to have one, stop talking to us and you can get a lawyer, okay? So what do you want to do?
>
> Goff: I'll start talking, but if I'm going to stop talking and get a lawyer, I got a lawyer though.
>
> Det. Crouch: Okay, so what are you saying exactly? You will or you will not talk to us right now?
>
> Goff: I will talk to y'all.
>
> Det. Crouch: Without a lawyer.
>
> Goff: Without a lawyer.
>
> Det. Crouch: Okay.

After approximately 45 minutes, appellant stated, "I'm done talking to y'all," but nevertheless continued talking, denying he had planned the robbery and stating that his co-defendants were trying to blame the robbery on him. The detectives then asked if he was done talking, ended the interview, and left the room.

Approximately 20 minutes later, the detectives came back into the interview room to advise appellant of the charges against him and he again indicated he wanted to reinitiate the interview. The detectives restarted the recording device and Detective Mason recounted what had taken place regarding appellant's deciding to reinitiate the interview. Appellant confirmed Detective Mason's statement on the record.

At the conclusion of the hearing, the trial court heard brief arguments of counsel and orally entered its findings on the record. The trial court found that while appellant had initially invoked his right to have his attorney present, he later waived that right. Although a rustling of papers prevented the recording from providing clear evidence of what occurred, the trial court found that something happened which stopped the interrogation. The detectives again reiterated appellant's right to have counsel present, which had been "very clearly stated before." The trial court found that the detectives had placed particular emphasis on appellant's right to stop the questioning at any time and invoke his right to counsel. Noting that a person who has previously invoked his right to have counsel present

is free to reinitiate communication at any time, the trial court found that based upon the totality of the evidence presented, appellant had reinitiated communication with the detectives and that his statement was therefore voluntary.

Although appellant argues that his situation is distinguishable, we are convinced that the decision of our Supreme Court in *Cummings v. Commonwealth*, 226 S.W.3d 62 (Ky. 2007), guides our analysis. *Cummings* also provides the standard by which we review motions to suppress:

> The standard of review for a motion to suppress requires a two-step determination. *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004). The factual findings by the trial court are reviewed under a clearly erroneous standard, and the application of the law to those facts is conducted under *de novo* review.

Id. at 65.

Like the defendant in *Cummings*, appellant argues that the trial court misapplied the law to the facts, insisting that once he invoked his right to have counsel present, all interrogation must cease. He seeks to distinguish *Cummings* on the basis that the Commonwealth failed to establish exactly what appellant said during the rustling of the papers that caused interrogation to resume. We disagree.

Virtually identical to the situation in *Cummings*, both the testimony of Detective Crouch and the recording of the interrogation clearly establish that appellant was repeatedly and clearly advised that he could end the interrogation at any time. And as was essential to the holding in *Cummings*, "the police did not

'reapproach' or initiate questioning with Appellant; rather, Appellant spoke to the detective." *Id*. at 66. We also note that our review of the recording discloses nothing which could be construed as intimidating or coercive in the detectives' questioning, tone of voice, or demeanor. Thus, we find no basis for concluding that the trial court's findings were clearly erroneous. Further, our *de novo* review of the trial court's application of the law to those facts produces the same result as that reached in *Cummings*:

> The court concluded that Appellant was frequently advised of his rights and there was no evidence to show that his waiver was not completely voluntary. If there could have been any doubt that Appellant's initial waiver was not voluntary, knowing, and intelligent, numerous subsequent waivers erased the last shred of it. We find no error in the trial court's application of the law to these facts.

Id. There was no error in refusing to suppress appellant's statement to the detectives.

The second issue pressed for reversal centers on the trial court's refusal of appellant's tendered instruction on the lesser-included offense of facilitation. Appellant insists that the failure to instruct on facilitation deprived him of a fair trial. Again, we disagree.

Quoting *Osborne v. Commonwealth*, 43 S.W.3d 234, 244 (Ky. 2001), the Supreme Court in *Allen v. Commonwealth* reiterated the principle that "[a]n instruction on a lesser included offense is appropriate if, and only if, on the given

evidence a reasonable juror could entertain a reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser charge." *Allen*, 338 S.W.3d 252, 255 (Ky. 2011). The *Allen* Court went on to clarify that "[a]n appellate court likewise applies this 'reasonable juror' standard to a claim that the trial court erred by refusing to give a lesser included offense instruction." *Id*. Implicit in the *Allen* analysis, however, is the principle that "[n]o instruction is warranted, of course, unless supported by the evidence[.]" *Id*. We thus consider whether, considering the evidence most favorably to the proponent of the instruction, the evidence supports a facilitation instruction and, if so, whether "a reasonable juror could acquit of the greater charge but convict of the lesser." *Id*. (citations and footnote omitted).

We commence by examining the statutes on complicity and facilitation. Kentucky Revised Statute (KRS) 502.020, the complicity statute, provides in subsection (1):

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

In contrast, the facilitation statute, KRS 506.080, provides in subsection (1) that "[a] person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime." In *Thompkins v. Commonwealth*, the Supreme Court of Kentucky explained the distinction between the two statutes:

> Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. **Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance.** *Skinner v. Commonwealth*, Ky., 864 S.W.2d 290, 298 (1993). "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 160 (1995), *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

54 S.W.3d 147, 150-51 (Ky. 2001) (emphasis added).

The evidence in this case does not support a facilitation instruction. It is well-established that "a mere division of labor between robbers in the commission of the crime does not preclude conviction of each as a principal."

Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). In so concluding, the *Smith* court adopted the following rationale from 67 AM.JUR.2D, *Robbery*, section 9:

> Generally, all who are present at the commission of a robbery, rendering it countenance and encouragement, and ready to assist if needed, are liable as principal actors. *To be liable, the accused need not to have taken any money from the victim with his own hands*, or actually participated in any other act of force or violence; it is sufficient that he came and went with the robbers, was present when the robbery was committed, and acquiesced therein.

Id. (emphasis added in *Smith*). Thus, facilitation contemplates a defendant who has no intent to promote or commit the crime himself but merely provides the means or opportunity for another to do so. *See Gabow v. Commonwealth*, 34 S.W.3d 63, 72 (Ky. 2000), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The evidence in this case clearly establishes that appellant's participation in the robbery went far beyond engaging "in conduct which knowingly provide[d] [his co-defendant] with means or opportunity for the commission of the crime." Because appellant was not only present at the robbery but actively participated in the crime, we are convinced that the evidence in this case simply would not support an instruction on the lesser-included offense of facilitation.

Finally, appellant asserts that he was deprived of a fair trial when the trial court allowed a juror who fell asleep twice during the proceedings to remain on the panel. A juror's inattentiveness is a "form of juror misconduct, which may prejudice the defendant and require the granting of a new trial." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 276 (Ky. 2006) (quoting *Lester v. Commonwealth*, 132 S.W.3d 857, 862 (Ky. 2004)). We review a trial court's decision whether to remove a juror or take other appropriate measures to remedy juror misconduct for abuse of discretion. *Id*.

The first incident of juror misconduct cited by appellant occurred while the Commonwealth was introducing various pre-marked exhibits, including items of clothing alleged to have been worn by appellant during the robbery. At some point, the prosecution noticed that a juror appeared to be nodding off. There was virtually no testimony during the introduction of the exhibits, except for a brief explanation as to why the witness was wearing gloves. The Commonwealth requested a bench conference, informed the trial court that one of the jurors appeared to be nodding off, and requested the court to inform the jurors they could stand. Defense counsel suggested a recess. The trial court responded that they would finish introducing the exhibits and then take a break.

When trial resumed after the recess, appellant's counsel moved for a mistrial. In response to the trial court's question as to which juror had fallen

asleep, counsel responded that he wasn't sure, but believed that he was a juror on the back row. The trial court denied the mistrial motion stating:

> That tells me that you also didn't notice it, so I've been watching here [the witness] more than anything else. When it was noticed, it was during the presentation of exhibits, so not during, not to say not pertinent testimony, but there was actually very little testimony during that. It was simply opening up of exhibits.

Appellant alleges that a second incident occurred as the Commonwealth was playing the video recording of appellant's statement to the police. Defense counsel approached the bench and stated that he had "spotted the same juror going to sleep again, so I'm going to renew my objection." The trial judge responded that she had been watching the jury and had seen blinking and moving and that she was willing to grant a recess or whatever counsel wanted to do. At the prosecutor's suggestion, the trial court allowed the jury to stand and stretch before continuing testimony.

As a threshold matter in cases involving a juror alleged to have been sleeping, an "aggrieved party must present *some* evidence that the juror was actually asleep or that some prejudice resulted from that fact." *Ratliff*, 194 S.W.3d at 276. Here, review of the proceedings discloses that in the first instance, there was no direct evidence as to which juror was sleeping or, in fact, that the juror was actually asleep. The prosecutor described the juror as starting to "nod off." In the second instance, defense counsel asserted that assistant counsel noticed the same

juror "going to sleep again." In both instances, the trial court allowed the jury to stand, stretch, and move around to refresh themselves before resuming testimony.

We are convinced that it is possible to distinguish between "nodding off," meaning the juror's head is falling forward because he is about to fall asleep, and actually sleeping. Regardless, appellant has failed to satisfy the prejudice prong of *Ratliff*. The alleged inattentiveness occurred during presentation of the Commonwealth's case and, thus, it would appear that the Commonwealth was the party suffering the prejudice. In any event, the evidence regarding the extent of the juror's inattentiveness and any resulting prejudice is clearly insufficient to disturb the decision of the trial court on the mistrial motion or motion to alter, amend, or vacate:

> It is well-established that "[t]he trial judge is in the best position to determine the nature of the alleged jury misconduct" and the "appropriate remedies for any demonstrated misconduct." *United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995), *cert. denied*, 516 U.S. 874, 116 S.Ct. 199, 133 L.Ed.2d 133 (1995). In reviewing the district court's decision for abuse of discretion, *id*., we conclude that the court properly denied the motion. Sherrill has provided no evidence-indeed, he makes only a vague assertion-that the juror was in fact sleeping, and that such behavior had a prejudicial effect on his defense.

United States v. Sherrill, 388 F.3d 535, 537 (6th Cir. 2004) (other citations omitted). Finding the situation here virtually identical to that addressed in *Sherrill*, we are similarly convinced that the trial court fashioned an appropriate remedy for

the alleged juror misconduct. The rationale of *Sherrill* is dispositive of appellant's complaint of abuse of discretion.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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