

Commonwealth Of Kentucky

Court Of Appeals

No. 96-CA-2075-MR

RUSSELL WAYNE JEFFIRES

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 95-CR-00099

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE: Russell Wayne Jeffires appeals from his conviction for assault in the second degree and the resulting five-year sentence. Jeffires's claims that the trial court erred when it (1) permitted a witness to testify to a matter solely within the province of the jury; (2) permitted a defense witness to be improperly questioned about a prior felony conviction; (3) permitted Jeffires to be questioned about other crimes; and (4)

denied his motion for a directed verdict of acquittal, based on the strength of his self-defense claim. Having reviewed the evidence presented at the trial and the applicable law, we affirm.

On July 19, 1995, the Nelson County grand jury indicted Jeffires for assault in the first degree and for wanton endangerment in the first degree. Following Jeffires's trial on May 20 and 22, 1996, the jury returned a verdict of guilty on assault in the second degree and recommended a sentence of five years. The trial court entered a Judgment of Conviction on July 8, 1996, and sentenced Jeffires to imprisonment for five years. On July 5, 1996, the trial court denied Jeffires's motions for a new trial and judgment notwithstanding the verdict.

One year earlier, during the Fourth of July weekend in 1995, Jeffires went to Melody Lake on July 3 to spend time with his four children, celebrate the birthday of one of his sons, and to stay with friends there. By the time Jeffires arrived, the man Jeffires was staying with and the men in a neighboring cabin had been drinking and arguing. After supper, Mike Redmon, who lived in the cabin where Jeffires was staying, told the group inhabiting the cabin next door to move a truck parked in front of Redmon's cabin. As the man who owned the truck went to move it, Jeffires and several other men followed.

During the prosecution's case-in-chief, witnesses testified that at the rear of the truck that was being moved Jeffires struck Donnie Bronger in the face with a handgun. A

Nelson County police officer also testified about what the parties and other witnesses had told him on the night of the incident and thereafter. His testimony was contradicted by several prosecution witnesses. Defense witnesses testified that Jeffires hit Bronger with his fist only after Bronger had swung at Jeffires. They also testified that Bronger hurt himself when he fell on the damaged bumper of his own car while running toward it after Jeffires hit him.

Jeffires's first claim on appeal is that the trial court committed reversible error when it overruled his objection to the testimony of Bronger's surgeon about the seriousness of Bronger's injury, because the issue of the injury's seriousness was solely within the province of the jury. Bronger testified that he was in the hospital for fourteen days and that his surgery cost between \$30,000 and \$45,000. He also testified that he missed six or seven weeks of work, that he still had no feeling in his upper lip and right cheek, and that his eyes became repeatedly infected. Dr. Christopher Gordon, a plastic surgeon at the University of Louisville Hospital, testified that the right side of Bronger's face was fractured, and that he placed at least five plates in Bronger's face during a six-hour surgery. The prosecutor asked Dr. Gordon whether Bronger had sustained a serious physical injury, to which Dr. Gordon responded "unquestionably."

At the time of Jeffires's trial, the general rule was that opinion evidence about the ultimate issue of guilt or

innocence was improper but that a witness could state an expert opinion from observed facts to assist the jury in drawing the correct inference from the facts. See, e.g., Renfro v. Commonwealth, Ky., 893 S.W.2d 795 (1995); Brown v. Commonwealth, Ky., 812 S.W.2d 502 (1991). In this case, the ultimate issues about guilt or innocence related to (1) whether Jeffires struck Bronger; and (2) if Jeffires struck Bronger, Jeffires's culpable mental state at the time he struck Bronger, the nature and extent of injuries sustained by Bronger, and whether Jeffires acted in self-defense. Dr. Gordon invaded the province of the jury by testifying in conclusory terms about the nature and extent of Bronger's injuries.

Recently, in Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 889-890 (1997), the Kentucky Supreme Court revisited the "ultimate issue" rule and disavowed earlier Kentucky precedent applying the rule, including Brown and Renfro, supra. The Court concluded a long discussion about expert testimony addressing ultimate facts by stating:

Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, and when the subject matter is outside the common knowledge of jurors. Presumably, jurors do not need assistance in the form of an expert's opinion that the defendant is guilty or not guilty. However, they usually do need the assistance of a[n] . . . expert in determining the cause of a . . . condition in order to understand the evidence and determine the ultimate issue of fact in issue. KRE 401; KRE 702.

* * *

We now again depart from the "ultimate issue" rule and rejoin the majority view on this issue. Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

956 S.W.2d at 889-890. There is no indication that Stringer has any retroactive application and we need not address its applicability here. Even if the expert opinion expressed by Dr. Gordon was improper under pre-Stringer precedent, it nevertheless was harmless in view of the overwhelming and prolonged evidence about the nature and extent of Bronger's injuries and treatment. As noted, his injuries required a six-hour surgical procedure costing \$30,000-\$45,000 and resulted in a fourteen-day hospital stay. Five plates were placed in Bronger's face, he missed six or seven weeks of work, and he has lingering facial problems. Where the record as a whole contains such overwhelming evidence of the alleged ultimate fact, a single statement such as Dr. Gordon's, while error, is nonetheless harmless. See, e.g., Renfro, supra, 893 S.W.2d at 797.

Jeffires's second contention is that the trial court erred when it permitted a defense witness to be questioned about a stale, 10 ½ year-old felony conviction. The Commonwealth initially sought to impeach Redmon with that Florida conviction.

After a conference in chambers where Redmon's extensive record was discussed, the trial court permitted the Commonwealth to impeach Redmon with a single question about a prior felony conviction - a 1990 conviction for theft of a motor vehicle. The trial court admonished the jury about the limited purpose for which it could consider this prior conviction. In response to Jeffires's post-verdict motion to review Redmon's criminal record, the trial court denied Jeffires's motion, concluding in its July 31, 1996 Order that Redmon was properly impeached with a conviction that was not ten years old. We agree. By allowing the Commonwealth to impeach Redmon with a six year-old conviction, the trial court did not violate KRE 609(b).

The third claim advanced by Jeffires is that the trial court committed reversible error when it permitted Jeffires to be questioned about other crimes. During cross-examination of Jeffires, the Commonwealth questioned him about whether he owned any pistols or rifles and whether he had ever pointed a rifle at the house of a "Mr. Crow." Jeffires denied owning guns and denied pointing a gun at Mr. Crow or his house. After a side bar conference, the trial court declined to admonish the jury but did caution the Commonwealth to refrain from any further questioning on this matter.

While evidence about other crimes is inadmissible under KRE 404(b) to show criminal predisposition, it may be offered for some other purpose such as motive, plan, identity, or where it is so interwoven with other essential evidence that the two cannot

be separated. As to the "Mr. Crow" incident, the Commonwealth at trial questioned Jeffires who denied the incident. Because of the trial judge's ruling, the Commonwealth produced no proof to substantiate its purpose in asking about the alleged incident. Admission of limited questioning as to the alleged prior bad act of pointing a gun at the home of "Mr. Crow" was harmless because it was not sufficiently prejudicial to affect the outcome of the trial. See Smith v. Commonwealth, Ky., 904 S.W.2d 220 (1995). As to the questions about whether Jeffires had owned pistols or rifles, such questioning was proper cross-examination intended to challenge his credibility. That credibility was indeed challenged further on rebuttal when the Commonwealth introduced testimony that Jeffires's children had verified that there was a gun in his home.

Jeffires's last assertion is that there was insufficient evidence to support his conviction for assault in the second degree. The record of the trial reveals that Jeffires's counsel moved for a directed verdict at the close of the Commonwealth's proof, and the trial court denied the motion. Jeffires renewed the motion after verdict when he moved for a new trial and judgment notwithstanding the verdict. A motion for a directed verdict of acquittal is the established procedural device for challenging the sufficiency of the evidence to support a conviction. Failure to make the motion properly precludes consideration of the sufficiency of the evidence by reviewing courts. The law in Kentucky is clear on this issue. The

Kentucky Supreme Court detailed in Scruggs v. Commonwealth, Ky., 566 S.W.2d 405, 412 (1978), cert. denied 439 U.S. 928, 99 S. Ct. 314, 58 L. Ed. 2d 321 (1978), the specific procedures for preserving for appellate review questions relating to the sufficiency of the evidence.

[A]t the conclusion of the Commonwealth's evidence in chief, the defendant may make a motion for the court to direct a verdict of acquittal. In the event the motion is granted, then the charges will be dismissed. On the other hand, if the motion is denied, then, and in that event, the defendant must either stand on his motion and refuse to put on any proof or he may present his evidence to support his defense. At the conclusion of the defendant's case, he must renew his motion for a directed verdict of acquittal.

(Emphasis supplied.) The consequence of Jeffires's trial counsel's failure to follow this two-part procedure is that the issue of evidentiary sufficiency is not properly preserved for review by this Court.

The failure to make a timely motion for a directed verdict may be deemed a palpable error affecting the substantial rights of the defendant, when the insufficiency of the evidence constitutes a substantial constitutional error violative of due process. See RCr 10.26. Under these circumstances, this Court can review the error even though it was not properly preserved for appellate review. Perkins v. Commonwealth, Ky. App., 694 S.W.2d 721 (1985).

A jury verdict must be upheld if there is substantial evidence to support it, viewing the evidence in the light most

favorable to the Commonwealth. The United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979) stated that the pertinent

inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

See also, Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

The trial testimony in this case revealed that it was not conclusive that Jeffires was acting in self-defense. Most trial witnesses testified that Jeffires struck Bronger, some saying he hit Bronger with a gun and others saying he hit him with his fist. Some witnesses asserted that Bronger was running at Jeffires when the latter hit him, and others declared that they saw nothing on Bronger's part that provoked Jeffires. Here, the prosecution was successful in creating a jury issue in its

attempt to disprove Jeffires's self-defense claim. See, Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky. 1997) (insufficient evidence for directed verdict on self-protection).

There was some conflict in the proof about how Bronger suffered serious physical injuries - from Jeffires's blow or from his own awkwardness. The Commonwealth's witnesses claimed that the injury suffered by Bronger that evening was from Jeffires's assault, while defense witnesses testified that Bronger's serious wounds were the result of Bronger falling on the bumper of his car as he ran toward the car after being hit. Viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence for the jury to believe that Jeffires committed a second-degree assault. See, Key v. Commonwealth, Ky. App., 840 S.W.2d 827 (1992).

Finding no error in the trial court's rulings, we affirm the July 5, 1996 Judgment of Nelson Circuit Court.

ALL CONCUR.

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