

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001638-MR

SHANE DOUGLAS WILLIAMS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 98-CR-0461-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Shane Douglas Williams (Williams) appeals from a final judgement of the Fayette Circuit Court entered June 25, 1998, which found him guilty of receiving stolen property and being a second degree persistent felony offender and sentenced him to five years' imprisonment. We affirm.

On March 8, 1998, Susan Wornall (Wornall) robbed a Shell gas station in Lexington, Kentucky. After obtaining approximately \$734 in cash, Wornall drove away in a small red car. According to the station attendant and a customer, Pat Wells, there was a passenger in the car. Wornall and Williams were arrested later the same day. Following a jury trial, Williams was convicted of

receiving stolen property over \$300 and being a second degree persistent felony offender. This appeal followed.

- I. Should the prosecution have been allowed to present evidence of Williams' alleged involvement in an unrelated robbery?

On May 26, 1998, the prosecution gave Williams written notice that it intended to introduce "evidence of the Defendants [sic] presence and involvement in a similar robbery in Paris, Kentucky...as proof of preparation, plan and knowledge with respect to the Defendant's activities on the day in question." Williams' initial objection to this evidence was over-ruled.

During opening statements, the prosecution informed the jury that the evidence would show that on March 3, 1998, Wornall robbed a service station in Paris, Kentucky at Williams' direction. According to the prosecution, Wornall obtained approximately \$200-\$300, which she gave to Williams. The pair then proceeded to Lexington, where they paid for a hotel room and went on a drug buying spree. The prosecution then stated that the pair ran out of money "from the robbery of the service station in Paris and they needed more money." When Wornall refused to shoplift items from K-mart and Wal-Mart and then return them for cash, they decided to rob the Shell station. It appears that the prosecution anticipated that Wornall, who was scheduled to testify against Williams, would testify about the Paris robbery. Williams made no objection to the prosecution's opening statement.

At a bench conference following the lunch break, the trial court was informed that Wornall had met with her attorney

over lunch and had been advised not to testify about the Paris robbery. When questioned by the trial court, Wornall stated that she would plead the Fifth Amendment if questioned about the Paris robbery. It appears that Wornall had been charged with the Paris robbery, but had not yet been tried. Counsel for Williams then requested a mistrial due to the prosecution's inability to bring forward any evidence to support its allegations pertaining to the Paris robbery. The trial court denied Williams' motion on the ground that the prosecution's statements were made in good faith. The Commonwealth had no prior knowledge of Wornall's last-minute decision not to testify in regard to the Paris robbery. The trial court offered to give an admonition to the jury concerning this situation. Wornall's testimony proceeded, but she was not questioned by either party regarding the Paris robbery.

Prior to instructing the jury, the trial court admonished the jurors to disregard the prosecution's statements pertaining to the earlier robbery due to lack of evidence. The trial court further told the jury that remarks made during opening statements are not to be considered as evidence. At the close of all evidence, Williams objected on the ground that the admonition was insufficient to cure the damage caused by the prosecution's unsupported allegations concerning the Paris robbery and once again requested a mistrial. The objection was over-ruled.

Williams contends that the trial court erred in failing to sustain his objection to introduction of evidence pertaining to his alleged involvement in the Paris robbery. While we agree

with Williams that the trial court should have taken further action aside from admonishing the jury once it became evident that the prosecution would be unable to bring forth evidence in support of its allegations, we do not believe that a new trial is warranted in this case. In order for Williams to be entitled to reversal, he must not only show that an error occurred, but also that the error was prejudicial. Decker v. Commonwealth, Ky., 198 S.W.2d 212, 214(1946); RCr 9.24. Where there is strong direct evidence of a defendant's guilt of the crime for which he is charged and it is apparent from the examination of the entire record coupled with no substantial possibility that the outcome would have been different had the evidence of prior crimes been excluded, the error is non-prejudicial and no relief is warranted. Yarnell v. Commonwealth, Ky., 833 S.W.2d 834, 837(1992).

We have reviewed the videotape of Williams' trial and the evidence presented therein. Having done so, we do not believe that Williams would have been acquitted had the prosecution not discussed the Paris robbery. Therefore, based upon the entire record, we do not believe that Williams is entitled to relief on this ground.

- II. Should Williams have been permitted to conduct an in-depth examination of Wornall pertaining to her prior felony convictions?

At the outset of her testimony on behalf of the prosecution, Wornall admitted that she had prior felony convictions. When asked by the prosecution why she refused to

shoplift from stores as suggested by Williams, she responded that she was not a thief.

Williams' attorney requested permission to cross-examine Wornall on her prior convictions, but the request was denied. The trial court limited any questioning as to Wornall's prior convictions to (a) stating the charge; and (b) asking Wornall if she has been convicted. When Williams' attorney asked if she had been convicted of obtaining drugs by fraud, she responded affirmatively.

Williams argues that because Wornall denied being a thief and because she admitted to the convictions only "after repeated questioning by defense counsel," he should have been permitted to question her regarding specific facts of her prior convictions. We disagree.

As established in Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984):

a witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions[.] After impeachment, the proper admonition shall be given by the court.

Richardson, 674 S.W.2d at 517-518. This case specifically overruled Cotton v. Commonwealth Ky., 454 S.W.2d 698(1970), upon which Williams relies because Wornall admitted to

having prior felony convictions, there was no error in the trial court's ruling.

III. Should the testimony of Pat Wells been suppressed?

At trial, Pat Wells, a customer at the Shell station at the time of the robbery, testified that she saw Williams waving at Wornall while she was robbing the store. Although Williams had previously asked that Wells' testimony concerning his actions during the robbery be suppressed, his motion was denied.

Williams contends that the trial court erred in denying his motion to suppress Wells' testimony on the ground that pre-trial discovery did not disclose the fact that Wells saw Williams make any sort of motion during the robbery. Williams maintains that the prosecution's failure to advise him of the substance of Wells' testimony was violative of the open file discovery policy of the Commonwealth. We disagree.

We fail to see how Williams' could argue he was surprised by Wells' testimony. However, there is no allegation made that counsel for Williams was unaware that Wells was to be called as a witness or that he was unaware of her identity. In fact, the prosecutor noted during his response to Williams' motion to suppress that Wells was listed as a witness on the police report and her address was given as well. If counsel for Williams failed to question Wells prior to trial to ascertain the nature of her testimony, he cannot now be heard to say that he was somehow surprised at trial.

Secondly, there is nothing in the criminal procedural rules which requires the prosecution to divulge the nature of Wells' testimony. RCr 7.26 only requires the prosecution to produce written or recorded witness statements, and there has been no allegation that Wells gave a written or recorded statement which was not produced. Likewise, there is nothing in RCr 7.24, which deals with pre-trial discovery and inspection, which requires disclosure of the substance of a witness' testimony.

Even if Wells' testimony should not have been admitted, Williams' argument is once again precluded by the fact that the error was not prejudicial. Our review of the record shows that there was substantial evidence presented at trial to support Williams' conviction even if Wells' testimony had been excluded. Therefore, reversal is not proper on this ground. Yarnell, 833 S.W.2d at 837.

Having considered the parties' arguments on appeal, the final judgement of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Mead
Lexington, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Dana M. Todd
Assistant Attorney General
Frankfort, KY