

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000339-MR

TIMOTHY HARRISON

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 05-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant Timothy Harrison appeals the Pulaski Circuit Court's judgment following a jury trial in which Appellant was convicted of first-degree assault and sentenced to serve a term of fifteen years of imprisonment. Harrison alleges that the circuit court improperly denied his motion for a lengthier continuance and that the circuit court erred when it refused Appellant's request to introduce evidence showing that the victim was drunk and "on drugs" the night that she was shot. After a careful review of the record, we affirm the Pulaski Circuit Court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant shared a home with the victim, his girlfriend, Lori Epperson. On April 5, 2005, they had an argument. They spent most of the next day apart from each other. Their accounts of what happened later that day differed at trial. The victim testified that, after telling Appellant that she was going to move out, he held a gun close to her face and shot her cheek. She attested that while she was running away down the hall, Appellant shot her in the side and, after she fell to the ground, he shot her twice in the back.

Appellant provided a different explanation of the incident. He testified that on the day of the shooting, the victim accused him of cheating on her. He further testified that the victim was drunk and that after he realized she was drunk, he poured all of the liquor that was in the house down the drain. Appellant testified that, at some point, the victim came after him armed with a small gun, he pushed the gun away from his face and the gun discharged, lodging a bullet in the floor. As they struggled, the gun fired repeatedly, resulting in shots to the victim's face, side, and back. Appellant attested that, at the time, he did not realize that the victim had been shot.

As a result of the shootings, the victim became paralyzed from the waist down. Appellant was charged with first-degree assault. Trial was originally scheduled to begin on October 3, 2005, but Appellant's counsel moved to continue the trial. In August 2005, the court granted the motion for a continuance, and trial was rescheduled for January 3, 2006.

Appellant's lead counsel again moved to continue the case by motion dated December 30, 2005. The motion was stamped filed on January 3, 2006, the day that trial was scheduled to begin. In that motion, counsel asserted that he had been ill for a week; that he was taking antibiotics, but he was not feeling better; that, because of his illness, he had been unable to meet with Appellant and with witnesses prior to the scheduled trial date, in order to properly prepare them for trial; that due to his illness, he had not been able to meet with his co-counsel, who was planning to assist him at trial; and that, if a continuance was not granted, Appellant would be denied his rights to a fair trial and to the effective assistance of counsel. In this motion, Appellant's counsel did not request a continuance for a specific period of time; rather, he requested only "a short continuance of the trial." Counsel subsequently faxed a letter from his doctor dated December 30, 2005, opining that counsel should not work for a week due to bronchitis. At a hearing on the motion, Appellant requested a two-week continuance. Rather than two weeks, the circuit court granted a two-day continuance and rescheduled Appellant's trial for January 5, 2006.

On January 5th, the parties convened in chambers prior to trial, and Appellant's counsel informed the court that he was still sick. When asked by the court whether he was ready for trial, counsel reminded the court that he had been ordered at the hearing two days prior that he and his co-counsel had to be ready for trial on January 5th. Additionally, counsel stated that he was "not going to try to hold up this trial," but he expressed to the court that he was not feeling "a hundred percent."

The circuit court stated for the record that at the hearing two days prior, it had no indication that counsel was unprepared for trial. The court then determined that trial would begin as scheduled on January 5, 2006.

During trial, Appellant's counsel attempted to introduce medical records indicating that the victim was drunk and had high levels of Xanax in her system when she was shot. Upon cross-examination of the victim, Appellant's counsel asked her if she had been drinking alcohol prior to the shooting, and the victim responded that she did not know if she had been drinking. However, the victim denied having taken drugs prior to the shooting. Appellant's counsel then tried to introduce medical records showing that she had been drinking and taking Xanax. Appellant's counsel argued that such evidence needed to be admitted at trial because it was important to Appellant's defense, as he claimed that the victim was drunk and angry and that she had shot herself during the struggle with Appellant. The circuit court did not permit the medical records to be admitted into evidence and refused to permit the defense to question the victim about the information in her medical records.

The jury found Appellant guilty as charged. The circuit court sentenced Appellant to fifteen years of imprisonment. Appellant now appeals the circuit court's denial of a longer continuance, as well as the court's refusal to allow Appellant to introduce evidence from the victim's medical records indicating that she was drunk and had Xanax in her system at the time of the shooting.

II. ANALYSIS

A. MOTION FOR A CONTINUANCE CLAIM

Appellant first alleges that the circuit court erred when it denied his motion for a longer continuance. We review the circuit court's denial of Appellant's motion for an abuse of discretion. *See Anderson v. Commonwealth*, 63 S.W.3d 135, 139 (Ky. 2001). “[T]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004). The following seven factors

should be considered by a trial court when deciding whether to grant a continuance: (1) The length of delay; (2) Whether there have been any previous continuances; (3) The inconvenience to the litigants, witnesses, counsel, and the court; (4) Whether the delay is purposeful or caused by the accused; (5) The availability of competent counsel, if at issue; (6) The complexity of the case; and (7) Whether denying the continuance would lead to any identifiable prejudice.

Anderson, 63 S.W.3d at 138.

In the present case, the circuit court noted that the reasons why it had not granted a longer continuance was because co-counsel, who was planning to assist Appellant's lead counsel at trial, would be out of town the following week, so if the court had chosen to grant a longer continuance, the trial would have to be postponed for a much longer period of time. The court noted that Appellant had been under indictment since April 2005, and he had been represented by "extraordinarily competent counsel for approximately eight months." Additionally, the circuit court had previously granted a

three-month continuance, plus the two-day continuance that the court granted on January 3, 2006.

Regarding the inconvenience of granting a continuance, the circuit court noted that the victim was in pain and ongoing treatment. The Commonwealth expressed at the January 3, 2006, hearing on the motion for a continuance that its expert witness, a doctor, already had to clear her calendar once so that she could testify on January 3rd. Moreover, the court noted at the hearing that if it granted the continuance, many other cases would have to be rescheduled.

There was no suggestion that the delay was purposeful or caused by the Appellant. Further, regarding co-counsel, the circuit court mentioned that there had been no indication made to the court that co-counsel was retained only in an advisory capacity, and the court noted that both Appellant's lead counsel and co-counsel were among the best attorneys in the Commonwealth. Moreover, Appellant admits in his appellate brief that this was not a complex case.

Regarding whether denying the continuance would lead to any identifiable prejudice, although Appellant's counsel contended that Appellant would be denied his rights to a fair trial and to the effective assistance of counsel if a continuance was not granted, a continuance of two days was in fact granted. Additionally, because the circuit court considered co-counsel to be one of the best attorneys in the area, Appellant could not establish that denying a longer continuance would lead to any identifiable prejudice. Furthermore, the circuit court noted that, aside from claims that there were witnesses who

needed to be interviewed, the court was not provided any other indication that counsel was unprepared for trial. Finally, the circuit court opined that sufficient time had passed for Appellant's lead counsel to be prepared for trial.

Thus, upon review of the record, it is apparent that the circuit court considered and thoroughly analyzed the seven factors mentioned in *Anderson* and applied them to the present case before the court denied Appellant's motion. Consequently, we find that the circuit court did not abuse its discretion when it denied Appellant's motion for a longer continuance.¹ *See Anderson*, 63 S.W.3d at 139.

B. MEDICAL RECORD EVIDENCE CLAIM

Appellant next argues that the trial court erred when it did not permit him to introduce evidence from the victim's medical records showing that she was drunk and that she had Xanax in her system at the time of the shooting. We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

Appellant admits that the details of the circuit court's ruling on this issue are not in the record. However, Appellant ambiguously contends that the court's reasons for not allowing the admission of the evidence are apparent because Appellant sought to impeach the victim through the admission of the medical records, the Commonwealth

¹We note that in the conclusion section of the part of Appellant's brief concerning the motion for continuance issue, he alleges that his rights to due process and the effective assistance of counsel were violated when the circuit court failed to grant his motion. However, Appellant makes no attempt at developing his argument in support of this constitutional claim. Thus, his allegation is conclusory and it fails because he did not show how counsel's performance was deficient or prejudicial, as required under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

objected, and the circuit court sustained the objection. Appellant asserts that the admission of the victim's medical records would have served to impeach her as a witness because she testified that she had not taken any drugs prior to the shooting, even though her medical records showed that there was Xanax in her system. Appellant alleges that the circuit court's ruling denied him the ability to present a "complete defense."

Because the circuit court failed to give an explanation on the record for excluding Appellant's proffered evidence, it is difficult to ascertain whether the circuit court abused its discretion. However, according to the Kentucky Rules of Criminal Procedure (RCr) 9.24,

No error in either the admission or the exclusion of evidence . . . is ground for . . . setting aside a verdict . . . unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

In other words, we will consider the error to be harmless, "if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different[.]" *Scott v. Commonwealth*, 495 S.W.2d 800, 802 (Ky. 1972) (citations omitted). At trial, Appellant alleged that the victim shot herself; however, this allegation was contradicted by the fact that the victim had been shot *twice in her back*. It is difficult to imagine how the victim could have shot herself twice in her back. Thus, even if Appellant had been permitted to introduce evidence showing that the victim had Xanax in her system at the time of the shooting, thereby impeaching her as a

witness, there was no substantial possibility that the result of the trial would have been different because the presence of alcohol and/or drugs in the victim's system does not prove that the victim shot herself. Consequently, the circuit court's exclusion of the evidence was harmless error, even if we were to assume, *arguendo*, that the circuit abused its discretion.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.
ALL CONCUR.

BRIEF FOR APPELLANT:

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