

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002274-MR

RODNEY SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 05-CR-000424

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Rodney Smith has appealed from the judgment of the Jefferson Circuit Court convicting him of First-Degree Assault and sentencing him to 11 years' imprisonment. We affirm.

In February 2005, the Jefferson County grand jury indicted Smith on one count each of first-degree assault and first-degree wanton endangerment. The assault charge stemmed from a May 23, 2004, incident when Smith shot Tremane Williams. The wanton endangerment charge stemmed from a June 19, 2004, incident when Smith fired

several shots at Victor Northington. The second charge was severed, and the assault charge was tried first.

The matter proceeded to trial on June 21, 2005. The gist of what happened is as follows: Darlene “Bebe” Sowell, a resident of the Iroquois Homes project in Louisville, Kentucky, threw a party at her home during the afternoon of May 23, 2004. She and several other people, including Tremane “Cookie” Williams, Victor Northington, Christopher Dedmon, and Angela Adams, were either on her porch or playing dominoes at a table directly in front of her porch. Dollar, whose real name is unknown, was on a single porch down from Bebe's porch. While the party continued, Smith and another person walked around to the front of the building. Smith and Dollar spotted each other; Smith saw Dollar reach toward his pocket, which led Smith to believe Dollar was pulling out a gun. Smith then pulled out his own gun and fired at least two shots toward Dollar as Dollar ran past Bebe's porch. Smith then fled from the scene on foot. There is some dispute as to how many shots were fired, and whether Dollar had a gun and fired any shots in Smith's direction. In any event, Cookie was accidentally shot in the neck. Although he recovered from the gunshot wound, Cookie suffered a stroke while in the hospital. Smith was arrested, and he later recorded a statement with Detective Kenneth Higdon, in which he admitted to firing two shots.

The trial court instructed the jury on first-, second-, and fourth-degree assault, and the jury returned a verdict of first-degree assault. The penalty phase took place the next day. However, Smith had been released in error by Louisville Metro

Corrections the previous evening and failed to appear for the penalty phase of his trial. Smith's counsel objected to continuing with the trial. However, the trial court opted to proceed with the penalty phase and ruled that no one could mention Smith's absence to the jury. Smith's counsel presented several character witnesses, following which the jury recommended a sentence of eleven years. Smith's counsel also filed a motion for a judgment notwithstanding the verdict or for a new trial, citing a jury selection issue, several trial errors, and that there was insufficient evidence to support the verdict. More than two months later, Smith was arrested on a bench warrant. A sentencing hearing was held the following month, after which the trial court denied Smith's pending motion and entered a judgment of conviction sentencing him in accordance with the jury's verdict. This appeal followed.

Smith raises four issues in his appeal, two from the guilt phase and two from the penalty phase of the trial. Regarding the guilt phase, Smith argues that the trial court committed reversible error when it allowed the Commonwealth to present the testimony of two undisclosed eyewitnesses and when it submitted only a partial transcript of his statement. During the penalty phase, Smith argues that his rights were violated when the trial court refused to individually question the jurors or give a no adverse inference instruction regarding his absence. He also argues that the trial court erred when it allowed the Commonwealth to introduce evidence of his juvenile record when he had not been adjudicated of any offense. The Commonwealth responds to each of these arguments in its brief.

A. TESTIMONY FROM UNDISCLOSED EYEWITNESSES

Smith's first argument addresses his objection to the calling of Christopher Dedmon and Darlene Sowell as witnesses because they had not been included in a list of eyewitnesses the Commonwealth provided pursuant to the circuit court's discovery order. The Commonwealth, in turn, argues that the result would not have been different had those witnesses been excluded, as their testimony was essentially the same as other testifying witnesses and as Smith had the opportunity to interview them prior to their testimony.

In criminal cases, the function of a bill of particulars “is to provide information fairly necessary to enable the accused to understand and prepare his defense against the charges without prejudicial surprise upon trial.” *James v. Commonwealth*, 482 S.W.2d 92, 93 (Ky. 1972), citing *Brown v. Commonwealth*, 378 S.W.2d 608 (Ky. 1964). In the area of discovery, a trial court holds “broad remedial powers” pursuant to RCr 7.24 (9) to correct any violations of its discovery orders, including granting a continuance, prohibiting a party from introducing the undisclosed evidence, or entering any other just order based on the circumstances. *Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005). However, “[a] discovery violation justifies setting aside a conviction 'only where there exists a “reasonable probability” that had the evidence been disclosed the result at trial would have been different.’” *Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky. 1997). We review these matters for abuse of discretion. *Penman v. Commonwealth*, 194 S.W.3d 237, 249 (Ky. 2006). “The test for abuse of discretion is

whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In the present case, it is undisputed that the Commonwealth did not disclose the names of the two eyewitnesses at issue. However, the circuit court permitted defense counsel to interview those witnesses prior to their taking the stand and, while defense counsel entered a continuing objection the next day, a further continuance of the trial was not requested. While Smith argues that the unanticipated testimony was prejudicial to his defense, we agree with the Commonwealth's assertion that their testimony was substantially the same as testimony from the other eyewitnesses who were disclosed and testified. Furthermore, we cannot perceive any reasonable probability that the result would have been any different had the identities of those witnesses been disclosed prior to trial or if their testimony had been excluded. Therefore, we hold that the circuit court did not abuse its discretion in allowing the two undisclosed witnesses to testify.

B. SMITH'S STATEMENT

Next, Smith argues that the trial court committed reversible error by refusing to admit his partially redacted statement concerning the shooting, as that version of the transcript was necessary under the rule of completeness to explain the events that took place. At trial, the Commonwealth elicited testimony from Detective Higdon that Smith admitted to shooting his gun in his recorded statement. Smith moved for his partially redacted version of the statement to be admitted, as in it he fully explained the circumstances of the shooting, including that he shot at Dollar because he thought he saw

him pull a gun from his pocket and that the shooting of Cookie was accidental. When the trial court opted to admit a more heavily redacted version of the statement, Smith submitted the entire transcript and his partially redacted version by avowal.¹ The Commonwealth asserts that the inclusion of just over three pages of the thirteen-page transcript was sufficient.

Kentucky's Rules of Evidence provide that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” KRE 106. This rule is also known as the “rule of completeness.” The rule is designed to “prevent a misleading impression as a result of an incomplete reproduction of a statement or document.” *Commonwealth v. Collins*, 933 S.W.2d 811, 814 (Ky. 1996), quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 1.20 at 48 (3d ed. 1993). The *Collins* court went on to state that the rule “is based upon the notion of fairness—namely, whether the meaning of the included portion is altered by the excluded portion.” 933 S.W.2d at 814. We review a trial court's ruling under KRE 106 for abuse of discretion. *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330 (Ky. 2006).

Through Detective Higdon's testimony, the Commonwealth introduced Smith's admission from his recorded, out-of-court statement that he fired two shots. In light of the rest of Smith's statement, that testimony is misleading. Smith detailed in his

¹ In the redacted version he submitted by avowal, Smith had removed any references to the second charge in the indictment that had been severed from this proceeding.

statement his belief that Dollar had a gun and was going to shoot at him, which led him to pull his own gun and shoot in Dollar's direction. He also stated that Dollar shot back at him. In other words, the statement revealed that Cookie was not the intended target and that his shooting was an accidental result. Over the Commonwealth's and Smith's respective objections, the trial court admitted just over three pages of the transcript, in which Smith discusses his prior problems with Dollar and his belief that Dollar was going to shoot him and actually shot at him. However, the trial court did not include the twelve-page transcript that Smith submitted, reasoning that the remainder of the statement only included an embellishment of the shooting incident and what Smith did after the shooting. Our own review of the versions admitted by avowal support the trial court's reasoning. Therefore, we perceive no abuse of discretion in the trial court's decision to admit the partial transcript, as it provided a fair and more complete version of the shooting incident, rather than leaving the jury with the impression that Smith admitted to firing two shots without further explanation.

C. SMITH'S ABSENCE FROM PENALTY PHASE

The final two issues Smith raises relate to the penalty phase proceedings. The first issue arose from the trial court's handling of Smith's absence from the penalty phase. Smith argues that the trial court should have conducted an individual voir dire of the jury members and given a no adverse inference instruction prior to proceeding with that portion of the trial. The Commonwealth points out that the trial court granted

Smith's requested relief, in that it would not comment on or allow the Commonwealth to mention his absence, and that this relief ran counter to Smith's other requests.

By way of background, the record reflects that the jury returned the guilty verdict during the evening of June 22, 2003. Presumably due to the late hour, the trial court opted to begin the penalty phase the next morning and informed the parties and the jury of this decision. However, Louisville Metro Corrections mistakenly released Smith from custody that night, and he did not appear in court on June 23. Smith's defense counsel requested a recess until the next morning to allow them to contact Smith, or, if denied, that the trial court put evidence on the record regarding its decision to proceed without Smith present in contravention of the rule that the defendant must be present. Smith's counsel also made a motion in limine to preclude anyone from commenting on the reason for his absence or to give the jury a no adverse inference instruction. The trial court denied Smith's counsel's motion for a recess, indicating that Smith's absence was presumed to be at his own cause and that there was no good reason not to proceed. Ultimately, the trial court granted Smith's counsel's motion in limine, deciding that it would make no comment either way about Smith's absence and would not allow the Commonwealth to mention his absence. For this reason, the trial court refused Smith's counsel's request for an individual voir dire of the jurors or to provide a no adverse inference instruction, as either request would go against its earlier ruling that his absence would not be mentioned.

While Kentucky's Criminal Rules mandate, with few exceptions, that a defendant be present at every critical stage of a trial, “[t]he defendant's voluntary absence after the trial has been commenced in his or her presence shall not prevent proceeding with the trial up to and including the verdict.” RCr 8.28(1). In *Finney v. Commonwealth*, 638 S.W.2d 709, 710-11 (Ky.App. 1982), this Court addressed the voluntariness element, recognizing “the overwhelming inference” based on the facts of that case “that his absence was voluntary: he clearly knew that the hearing was being conducted; he had prior knowledge of our system of justice; and he offered nothing on his own behalf either at the time or now to suggest that his absence was anything but a personal choice.” Again, we review such matters for abuse of discretion.

In the present case, there is no evidence that Smith's absence was anything but voluntary. Although he was not technically at fault for his mistaken release, he certainly knew that he had been convicted of assault and that the penalty phase was commencing the next morning. Furthermore, Smith received the relief that he actually requested; namely, a ruling that no one could comment on his absence. In light of this ruling, we perceive no abuse of discretion in the trial court's decision to continue with the penalty phase in Smith's absence without submitting the jury members to individual voir dire or providing a no adverse inference instruction.

D. INTRODUCTION OF EVIDENCE FROM JUVENILE RECORD

Finally, Smith argues that the trial court erred by permitting the Commonwealth to introduce evidence during its cross-examination of case worker

Sharon Thompson. This evidence was related to an earlier juvenile charge of robbery filed against him that was later dismissed. The Commonwealth argues that because Thompson was a character witness, it was allowed to cross-examine her regarding specific instances of conduct pursuant to KRE 405(b) once she testified to Smith's good character.

Kentucky's Rules of Evidence provide that “[o]n cross-examination of a character witness, it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct.” KRE 405(b). However, there must be a factual basis before inquiry is permitted about a specific instance of conduct. *Id.* We note that “[w]itness credibility is always at issue and relevant evidence which affects credibility should not be excluded.” *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). We are further instructed that “the target of this kind of impeachment evidence is the credibility of the character witness, not the prior conduct of the defendant.” *Commonwealth v. Higgs*, 59 S.W.3d 886, 895 (Ky. 2001). In *Higgs*, the Court upheld the cross-examination of a defense character witness: “Having offered an opinion of Appellee's good character for honesty, Mr. Higgs opened the door for cross-examination impeaching the credibility of that opinion, even if the impeachment took the form of a specific instance of Appellee's bad conduct relevant to that character trait.” *Id.* at 894. We review this matter under an abuse of discretion standard, noting that “trial courts retain broad discretion to regulate cross-examination.” *Maddox*, 955 S.W.2d at 721. *See also Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

In this case, Smith elicited testimony from Thompson that he was a good person and that he had a good heart. On cross-examination, the Commonwealth asked Thompson whether she was aware of Smith's 1997 robbery charge. Smith objected, arguing that the Commonwealth was not permitted to ask about juvenile charges that had not been adjudicated. In response, the Commonwealth stated that Thompson was a character witness, subject to impeachment regarding her knowledge of Smith. The trial court overruled Smith's objection, noting that the Commonwealth had a good faith basis for asking the question.

We perceive no abuse of discretion in the trial court's ruling. As in *Higgs*, Smith opened the door when Thompson testified about his good character, which permitted the Commonwealth to attack Thompson's credibility by asking about her knowledge of his prior criminal charge. We also note that Thompson was not aware of any juvenile actions, but thought the robbery charge might be the reason Smith was sent to Waller Environmental School, an alternative school she had testified about on direct examination.

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

ALL CONCUR.

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