

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001896-MR

CALVIN HOUSTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-01475

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a jury verdict finding the Appellant, Calvin Houston, guilty of first degree assault. Houston presents several grounds for appeal including, an argument that the trial court erred in excluding expert

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

testimony regarding the frequency of misidentification in criminal trials. For the following reasons, we affirm the conviction.

BACKGROUND INFORMATION

Zachary Bell was shot and wounded on March 30, 2007. Bell was at the apartment of Rita Smith at the time he was shot. Stephen Morton, a friend of Bell's, was also at the apartment. Bell was standing inside the doorway, having come back into the apartment after going outside to smoke. Bell testified that he had a funny feeling there was someone behind him. When he turned around, he saw a man standing outside the doorway. Bell stated that the man was wearing a black hoodie and had a scarf partially covering his face.

Bell said the man told him to leave his brother alone and then shot him with a shotgun in the face. Morton did not see the shooter. He also testified that he did not recognize the voice he heard. Morton did, however, state that earlier in the evening, he was in Houston's vehicle to go get money from his debit card. He stated that he saw a shotgun in Houston's lap and that he asked to get out of the car because he had recently been released from federal prison and did not want to be in the car with a gun.

Bell asserted that he recognized Houston's eyes and facial features from seeing him around the neighborhood. While Bell stated that he did not know why Houston shot him that night, Bell stated that he did have an altercation with a man later identified as Houston's brother, Andre Houston.

Bell first identified Houston from pictures he was shown while he was in the hospital. Later, while recovering at his grandmother's house, he again identified a picture of Houston as the shooter. At trial, Houston's sole defense was that Bell had misidentified him.

STANDARD OF REVIEW

Under Kentucky Rules of Evidence (KRE) 702, a trial court has the discretion "to admit expert witness testimony regarding the reliability of eyewitness identification[.] *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002). Thus, we review the trial court's ruling regarding the admission of expert testimony "under an abuse of discretion standard." *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001).

As to the issue of directed verdict, a trial court must determine whether sufficient evidence, has been introduced at trial. In other words, whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt based upon the evidence presented. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In reviewing the trial court's ruling on a directed verdict, we must determine "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.] *Id.* With these standards in mind, we examine the issues raised by Houston.

DISCUSSION

In Kentucky, pursuant to KRE 702, trial courts may allow expert testimony regarding eyewitness testimony to be admitted at trial. *Christie*, 98 S.W.3d at 485. Like any testimony, however, it must be relevant.

KRE 401 provides that relevant evidence is:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

A trial court may exclude even relevant evidence, however, if its probative value is outweighed by its prejudicial effect. KRE 403. As stated above, Houston's sole defense at trial was that he was misidentified by Bell. In support of his defense, Houston called Dr. Solomon Fulero, a psychologist with experience in the study of eyewitness identification. Dr. Fulero has been deemed a reliable witness on the subject of eyewitness identification in many courts. A *Daubert* hearing was held and Dr. Fulero testified that a Justice Department report examined twenty-eight (28) cases in which DNA evidence had exonerated the defendant. In nearly 90 percent of those cases, there had been eyewitness identification of the accused.

After the *Daubert* hearing, the trial court ruled that Dr. Fulero could testify regarding the various factors that affect memory and eyewitness identification and how they related to the facts in Houston's case. During the trial, Dr. Fulero brought up the Justice Department report. When he started to tell the jury that in 80 percent of cases where there is mistaken conviction, it was eyewitness

identification that convicted the defendant, the Commonwealth objected to Dr. Fulero's testimony. The trial court ruled that he could not testify regarding other cases. In other words, his testimony was to relate only to the specifics of Houston's case.

KRE 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

A trial court is to act as a "gatekeeper" and make a preliminary determination that the underlying science was, in fact, valid. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469, 61 USLW 4805 (1993). The trial court had the role of determining what evidence proffered by Dr. Fulero was relevant and the court determined that general evidence regarding those exonerated at a later date was not relevant. We find no abuse of discretion in the trial court's ruling on this issue. Additionally, in this case, Bell stated that he had seen Houston around the neighborhood enough to recognize him. There was also testimony that Bell had treated Houston's brother

harshly and that the shooter had indicated that Bell should leave his brother alone. Given this testimony, we conclude that Dr. Fulero's testimony regarding the exoneration of previously convicted individuals was not relevant to Houston's case.

Houston also argues that the trial court should have granted his motion for a directed verdict, or at least suppressed the out of court and in court identification of Houston as unreliable. At trial, Houston's counsel argued that he should be granted a directed verdict because all the evidence against him was the identification by Bell that he was the shooter. He contended that Bell was so confused regarding the identification that a jury could not find him guilty beyond a reasonable doubt.

In *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 758 (Ky. 2005), the Kentucky Supreme Court held that one person's eyewitness "testimony alone was sufficient to support . . . conviction." As set forth above, Bell identified Houston through photos, seeing him around the neighborhood and the fact that the gunman stated his reason for shooting Bell was that he had an altercation with his brother. Morton also testified that he had been in the car with Houston earlier and that there was a shotgun in the car. This was all evidence in support of Bell's identification of Houston as the shooter.

Houston next contends that the trial court should have suppressed Bell's identification of him due to its unreliability. This issue was not preserved. The Appellant seeks review of this alleged error pursuant to Kentucky Rules of

Criminal Procedure (RCr) 10.26. This rule allows the appellate court to consider whether this failure to suppress Bell's identification was palpable error.

An error is palpable only if it is "shocking or jurisprudentially intolerable." In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a "probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law."

Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009).

Further,

the requirement of "manifest injustice" as used in RCr 10.26 (formerly RCr 9.26) [] mean[s] that the error must have prejudiced the substantial rights of the defendant, *Schaefer v. Commonwealth, Ky.*, 622 S.W.2d 218 (1981), *i.e.*, a substantial possibility exists that the result of the trial would have been different. *Partin v. Commonwealth, Ky.*, 918 S.W.2d 219, 224 (1996).

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000).

In this case, Houston points to the fact that Bell only saw the shooter through a closed screen door and at an angle during the nighttime. Bell stated that the man's head was covered with a hoodie and his face from his nose down was covered with a bandana. Also, he points to the fact that Bell was recovering when he was shown Houston's photos and that he was on pain medication when he made the identification.

Houston also asserts that Bell's memory could have been affected by subsequent "filling in" of what his subconscious told him he "should" have remembered. Regardless of these possible factors, however, Bell did testify that

Houston was the man who shot him. Thus, we find that the trial court was correct in denying Houston's motion for a directed verdict as there was sufficient evidence that a reasonable juror could have found Houston guilty of assaulting Bell beyond a reasonable doubt.

Additionally, the Appellant has not established that the identification was unreliable under *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Houston did not set forth any specific reason for Bell's testimony regarding his identification of Houston to be suppressed other than the fact that his memory may have been bad and that he should not have been able to identify the shooter given that his face was mostly covered. As we previously set forth, there was additional evidence given by Morton regarding the shotgun and what the shooter had said prior to discharging his weapon. We find no reason the trial court should have suppressed the evidence of Bell's identification of Houston as the shooter.

The determination of whether identification testimony violates a defendant's due process rights involves a two-step process. *Dillingham v. Commonwealth, Ky.*, 995 S.W.2d 377, 383 (1999) quoting *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986), cert. denied sub nom. *Foltz v. Thigpen*, 482 U.S. 918, 107 S.Ct. 3196, 96 L.Ed.2d 683 (1987); and *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 10 L.Ed.2d 1247 (1968). "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive." *Id.* If not, the analysis ends and the identification testimony is allowed. "If so, 'the identification may still be admissible if under the totality of the circumstances the identification was reliable even though the [identification] procedure was

suggestive.’’ *Id. quoting Stewart v. Duckworth*, 93 F.3d 262, 265 (7th Cir. 1996) and *Neil*, [409 U.S. at 199, 93 S.Ct. at 382].

King v. Commonwealth, 142 S.W.3d 645, 649 (Ky. 2004). The Appellant does not argue that the confrontation procedure was suggestive. We do not believe that the confrontation procedure was suggestive. The admission of the in-court and out-of-court identification was proper.

Houston contends that the trial court prevented him from presenting a defense by not allowing Dr. Fulero to testify regarding the percentage of eyewitness identifications in the exoneration cases. Houston is correct that he has a right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636, 54 USLW 4598 (1986). Houston asserts that the information about the psychological factors that cause misidentification in general about which Dr. Fulero testified was insufficient to make up for the excluded testimony regarding witness identification and exoneration cases. We disagree.

A trial court has discretion in determining what evidence is admissible. In this case, as set forth above, we believe the information Dr. Fulero was excluded from giving was not relevant to Houston’s case. He testified regarding the difficulty of eyewitness identification and, we find, this was sufficient for Houston’s defense. The jury simply chose to believe Bell had correctly identified Houston as the shooter.

Finally, Houston argues that the trial court undermined his presumption of innocence during defense counsel’s closing argument.

Defense counsel told the jury that when weighing if it was convinced beyond a reasonable doubt, it can weigh a lot more than him [Houston] saying he did not shoot him [Bell]. The prosecutor objected that Houston's statement that he did not shoot Bell was not in evidence. The trial court sustained the objection and request for an admonition.

Appellant's brief at 25.

Although defense counsel has wide latitude to present closing argument, defense counsel may not argue facts that are not in evidence or reasonably inferable from the evidence. *Garrett v. Commonwealth*, 48 S.W.3d 6, 16 (Ky. 2001). There was no evidence on which to support the argument of defense counsel. This did not undermine the defendant's presumption of innocence. A jury must be told that a defendant is presumed innocent. Here the trial court admonished the jury.

Ladies and gentlemen. It is proper closing argument for the attorneys to reference any evidence presented to you or in any reasonable inference from the evidence. The court does not recall any statement by the defendant about denying shooting in this particular case. So I will ask you to disregard that last statement of Mr. Freedman and confine your consideration to matters of evidence presented to you. Thank you.

Appellee's brief at 17.

The admonition "did not misstate the law or mislead the jury." *U.S. v. Curry*, 187 F3d 762, 768 (7th Cir. 1999). It only explained to the jury to confine their consideration to the evidence presented.

Thus, for all of the foregoing reasons, we affirm Houston's conviction.

ALL CONCUR.

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