

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000537-MR

JONATHAN L. MCCLAIN

APPELLANT

v.

APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 08-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Jonathan L. McClain appeals from the judgment of the Nicholas Circuit Court finding him guilty of first-degree burglary, theft by unlawful taking over \$300 and first-degree criminal mischief. For the reasons stated herein, we affirm.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On August 5, 2008, McClain was indicted by a Nicholas County grand jury for first-degree burglary, theft by unlawful taking over \$300 and first-degree criminal mischief. Subsequently, McClain moved to suppress the statements that he made during an interrogation conducted by police. McClain's statements consisted of an initial, unrecorded statement; and a second, recorded statement. McClain contended that both of his statements were involuntarily given because they were not made knowingly and intelligently.

At the suppression hearing, Brad Weaver, a former Carlisle Police Officer, testified that he contacted McClain about a burglary committed by two men who forcibly entered AK's Liquor through a side wall, stealing cigarettes, alcohol, and a handgun. Weaver testified that Police Chief Bill Denton advised McClain of his *Miranda* rights after he arrived at the station. He testified that he informed McClain of the evidence from the burglary, including the surveillance video obtained from the liquor store. Weaver testified that he asked McClain about a Justin Linville and asked him to tell the details of the burglary.

Weaver testified that McClain then told police about the burglary after initially becoming upset and hesitant. According to Weaver's testimony, McClain informed him that Tiffany Rothwell, Linville's girlfriend, dropped Linville and McClain off at the liquor store. The two men then burglarized the liquor store and were then picked up by Rothwell. They stole a handgun, which was thrown from the vehicle along Moorefield Road.

Deputy Sheriff Benny Buckley testified that he conducted a recorded interrogation of McClain and advised him of his rights before he was questioned. On the audio recording, McClain acknowledged that police informed him of his *Miranda* rights prior to subjecting him to questioning.

McClain then testified about his background but did not testify regarding the interrogations, his emotional state at the time of the interrogations, or whether he understood the waiver of rights form that he signed. McClain testified that he was nineteen when the crime occurred; that he was a high school dropout; that he had received treatment for depression and anger management; and that he was an African-American and his mother was white. After the conclusion of the hearing, the trial court ruled that McClain's statements were voluntarily given to police and, thus, denied the motion to suppress his statements.²

On January 13, 2009, McClain's trial began and Sandra Penrod, co-owner of AK's Liquor, testified that she observed dust and debris on the counter and register and an open drawer underneath the register on the morning of May 12, 2008. She testified that she observed a "large hole" beneath the drive-through window. Wayson Penrod, another co-owner of AK's Liquor, testified that several thousand dollars worth of liquor and cigarettes were missing from the store. He further testified that a gun was stolen and an expensive safe had been destroyed.

² Prior to this ruling, Justin Linville, who had also been indicted, and McClain were scheduled to be jointly tried before a jury. However, following this ruling, the trial court severed their trials and McClain's trial was conducted first.

Brad Weaver testified that he observed the store surveillance video and recognized a sweatshirt worn by one of the men. Weaver testified that the sweatshirt displayed on the video was worn inside out with its stitching exposed. He testified that he had previously observed McClain wearing a similar shirt. He testified that McClain was brought to the police station where he was interrogated. Weaver testified that McClain informed him that he (McClain) and Linville broke into AK's Liquor by removing blocks from the exterior wall of the building; that Linville's girlfriend provided them transportation; and that they threw the handgun between the railroad track and David Abner's house.

Chief Denton testified that he believed that he observed Justin Linville from his viewing of the store surveillance video because Justin's side profile and body posture resembled one of the men on the video. He testified that the man he identified as Linville was wearing a gray hooded sweatshirt. He further testified that police recovered a gray hooded sweatshirt after searching Rothwell's car.

Chief Denton then testified that the original store surveillance tape was submitted to the Kentucky State Police Lab, which was able to slow down the original recording and apparently enhance its picture quality. When questioned regarding what appeared to be a white hand on the person alleged to be McClain who is African-American, he testified that the process of enhancing the video washes out portions of the video, which can make portions of the lab's video lighter than the original or the actual images in real life. Finally, he testified that

he observed Linville and another man a week after the burglary searching in the same area where McClain told police that the handgun was discarded.

Daryl Shepherd testified that he accompanied Rothwell, Linville, and McClain to Lexington to donate plasma on May 12, 2008. He testified that he had a video game system that he wanted to place in the trunk of the car but that the trunk was full and was being held shut by the use of a bungee cord. Shepherd then testified that Rothwell left the men after returning from Lexington and returned around thirty minutes later. He testified that the car had been cleaned and the bungee cord was no longer present.

In his case-in-chief, McClain called Rothwell's mother, Angela Rothwell, who testified that her daughter remained inside her residence between 6 p.m., on May 11, 2008, and 8:00 a.m., on May 12, 2008. She testified that she awoke several times during the night and observed her daughter asleep on the couch. Susan McClain, McClain's mother, testified that her son dropped out of school in his sophomore year of high school. She testified that he easily gives up and breaks down when confronted which could explain his confessions. At the close of his proof, McClain, as he did at the close of the Commonwealth's proof, moved the trial court to grant him a directed verdict of acquittal. However, the trial court ruled that the evidence as a whole was sufficient to submit the case to a jury.

At the conclusion of trial, the jury found McClain guilty on all counts and recommended concurrent sentences of ten years for first-degree burglary, one

year for theft by unlawful taking of property, and one year for first-degree criminal mischief. In accordance with the jury's recommendation, the trial court sentenced McClain to a term of ten years' imprisonment. This appeal followed.

McClain contends that the trial court erred by denying his motion for a directed verdict of acquittal. He argues that he could not be found guilty of the charged offenses because the evidence was insufficient to support his convictions. He argues that the jury was only presented with inferences of his guilt, excluding his "confessions" to police. Rather, he contends that he was found guilty due to faulty confessions and Linville's actions.

Our review of a trial court's denial of a motion for directed verdict of acquittal is governed by the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187.

While McClain points out that he was not found in possession of any fruits of the crime, that he was not clearly identifiable from the video surveillance except for his clothing, that he was too large at 320 pounds to fit through the wall's opening, that police did not have his fingerprints at the crime scene, and that he gave inconsistent confessions, his argument is insufficient to establish that he was entitled to a directed verdict. His confessions, along with corroborating evidence, permitted the jury to find him guilty of the charged offenses.

RCr 9.60 precludes a defendant's conviction on the sole basis of his uncorroborated out-of-court confession. However, "[t]he corroborative evidence required addresses itself as to whether the *crime* charged was committed and *not as to whether* the particular defendant committed it." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 410 (Ky. 1987). Additionally, "[s]uch proof, very simply, must be independent of any out-of-court confession, and must show that the charged crime was, in fact, committed. Once such evidence is present, guilt of the defendant may be proven by the evidence of the confession(s)." *Id.*

In this case, McClain confessed to police that he and Justin Linville burglarized AK's Liquor Store with the help of Tiffany Rothwell. He explained how he and Linville were dropped off, how they entered the store, and how they discarded the stolen handgun. Pursuant to RCr 9.60, the corroboration of this crime was established by the video recording of the burglary. Further, McClain's confessions were supported by circumstantial evidence that Rothwell's trunk was

loaded and closed with a bungee cord and Linville was searching for something in the vicinity of where McClain stated that the gun was discarded after the burglary.

Accordingly, after McClain's confessions to the charged crimes were entered into evidence and the fact of the crime was sufficiently corroborated, the trial court did not err by denying McClain's motions for directed verdict. Stated another way, "[o]nce it has been sufficiently shown that a crime was committed the question of who committed it may be established solely upon the basis of an out-of-court confession." *Dolan v. Commonwealth*, 468 S.W.2d 277, 282 (Ky. 1971). Thus, based on these facts of this case, the trial court's rulings were not erroneous.

McClain next contends that the trial court erred by admitting his two statements to police in violation of his constitutional rights. He argues that he had a limited education, including enrollment in special education courses; that he had a history of depression and anger issues; and that he was an African-American who was subjected to questioning by white officers. He further questions whether he was properly advised of his *Miranda* rights, because there was no testimony regarding the circumstances in which he was read his rights and he asked for an attorney after he was shown his written waiver during the second interview.

Our standard of review of a trial court's ruling on a motion to suppress requires that we first decide if the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If supported by substantial evidence, the trial court's factual findings are conclusive and will not be disturbed by an appellate court. *Roberson v.*

Commonwealth, 185 S.W.3d 634, 637 (Ky. 2006). A *de novo* review of the trial court's application of the law is then conducted to determine whether it correctly applied the law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

The voluntariness of a confession is assessed based on the totality of circumstances surrounding the making of the confession. *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999). Under the federal and Kentucky constitutions, voluntariness of a confession turns on the presence or absence of coercive police or otherwise state activity. *Id.* While low intelligence and limited education are elements to be considered, these factors are only relevant if their presence causes a defendant to be predisposed to yield to coercive police tactics. *Id.* Our Supreme Court held that the relevant inquiry to determine voluntariness is as follows: (1) whether the police's conduct was "objectively coercive;" (2) whether the coercion overbore the defendant's will; and (3) whether the defendant showed that the coercive police conduct was the "crucial motivating factor" behind his confession. *Bailey v. Commonwealth*, 194 S.W.3d 296, 301 (Ky. 2006).

After reviewing the record, we conclude that the trial court did not err by denying McClain's motion to suppress his statements to police. While his education was limited and he apparently had a history of mental and behavioral issues, a review of the circumstances of his questioning by police demonstrates that he was not coerced by police. McClain focuses on issues that affected his mental state but has not demonstrated that police were the "crucial motivating factor" leading to his statements to police. The circumstances of his questioning by police

show no evidence of physical violence or other deliberate conduct to break McClain's will. *Mills*, 996 S.W.2d at 481.

We further observe that the record does not contain any evidence that McClain was not read his *Miranda* rights. In his recorded statement, McClain acknowledged that he was read his *Miranda* rights and, thus, there is no basis to reverse the trial court's findings of fact. Furthermore, because these findings are supported by substantial evidence, we will not disturb them on appeal.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky