RENDERED: AUGUST 5, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000456-MR

REGINALD VAN PHIFER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-01643

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

KELLER, JUDGE: Reginald Van Phifer (Phifer) appeals from the circuit court's conviction of first-degree assault. On appeal, Phifer argues that his statements to detectives should have been suppressed because he was not advised of his *Miranda*[1] rights prior to being questioned by the detectives, and because his statements were involuntary and coerced. Phifer also argues that the trial court

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

erred by: (1) denying his motion to sever his trial from his co-defendant's; (2) providing improper jury instructions; and (3) failing to order a mistrial. For the following reasons, we affirm.

FACTS

On October 19, 2007, Phifer's girlfriend, Nena Taylor (Taylor), took her two-month-old female child, J.T., to the University of Kentucky (UK) Emergency Room. Because the nursing staff recognized signs of abuse, they called hospital security and the Lexington Police Department (LPD). A police investigation ensued and charges were later filed against Phifer and Taylor. Prior to trial, Phifer made a motion to sever his trial from Taylor's. The trial court held a hearing and denied the motion.

Phifer then made two motions to suppress statements he made to police regarding how J.T. received her injuries. Specifically, Phifer argued that the statements were obtained in violation of his constitutional rights and were not voluntary. The trial court held another hearing and denied Phifer's motions.

Ultimately, Phifer and Taylor were tried together in the Fayette Circuit Court. During trial, the Commonwealth presented medical evidence that J.T.'s injuries were consistent with severe physical abuse. The medical evidence also suggested it is likely J.T. will never be able to walk, talk, or fully function on her own. At the end of trial, a jury found Phifer guilty of first-degree assault, and found Taylor guilty of second-degree criminal abuse and two counts of

endangering the welfare of a minor. The trial court sentenced Phifer to fourteen years' imprisonment.

We set forth additional facts below as necessary to address the issues raised by Phifer on appeal.

STANDARDS OF REVIEW

The issues raised by Phifer have differing standards of review. Therefore, we set forth the appropriate standard of review as we address each issue.

ANALYSIS

1. Motion to Suppress

Phifer raises a number of issues with regard to the trial court's denial of his motion to suppress. He argues that he: (1) was improperly seized by the LPD; (2) was not given proper *Miranda* warnings; and (3) was coerced.

The standard of review on a suppression motion is two-fold. First, the findings of fact are conclusive if supported by substantial evidence and should only be reviewed for clear error. RCr 9.78; *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). Second, when the findings of fact are supported by substantial evidence, the question is "whether the rule of law as applied to the established facts is or is not violated." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (*quoting Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996)).

a. Seizure and Questioning

There are several points in time when police actions can violate a person's constitutional rights. The first is when a person is improperly seized. *Commonwealth v. Marshall*, 319 S.W.3d 352, 356 (Ky. 2010). In this case, Phifer was not seized; he voluntarily agreed to speak with the officers at the LPD before every interview. Therefore, any arguments he has regarding improper seizure are without merit.

b. *Miranda* Warnings

The second point in time when police actions can violate a person's constitutional rights is after a person is taken into custody. Once in custody, a person must be advised of his constitutional rights. *Miranda,* 384 U.S. at 444, 86 S. Ct. at 1612. *Miranda* provides that, prior to any police questioning, a suspect must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney. *Id*. Phifer argues that the officers failed to properly advise him of his rights. However, based on the record before us, we believe this argument also lacks merit.

On October 19, 2007, Taylor gave the LPD consent to search her apartment. LPD Officer Michael Geis (Officer Geis), while searching the property, found Phifer outside the apartment. Phifer agreed to go with Officer Geis to the LPD and to talk to the police. Officer Geis testified that he issued Phifer his *Miranda* warnings outside of Taylor's apartment while he handcuffed and placed

Phifer in the back of the police cruiser.[2] Officer Geis then transported Phifer to the LPD for questioning. Approximately forty-five minutes after Officer Geis issued Phifer his *Miranda* warnings, LPD Detective Al Johnson (Detective Johnson) attempted to again issue *Miranda* warnings to Phifer at the LPD. However, Phifer acknowledged that he understood his rights by stating, "I know what they are. He read me my rights, the right to remain silent. [Officer Geis] *Mirandized* me, the officer at the scene." Phifer did not request counsel or ask for the interrogation to halt at any point during questioning.

In addition to the October 19 interview, Phifer agreed to be interviewed at the LPD on October 24 and again on October 25. Detective Tim Ball (Detective Ball), who participated in all three interviews with Detective Johnson, issued Phifer his *Miranda* warnings prior to the latter two interviews.

Phifer argues that he was not *Mirandized* prior to his first interview because Detective Johnson did not finish the full reading of the *Miranda* warnings. Additionally, Phifer contends that, because he was not properly *Mirandized* before the first interview, his statements made during subsequent interviews were tainted and should have been suppressed. We disagree.

First, Phifer waived his *Miranda* warnings. While we must "presume that a defendant did not waive his rights[,]" the Commonwealth can overcome that presumption with evidence that the defendant, by his actions and words, knowingly

[2] We note that Officer Geis testified that handcuffing is a standard police procedure when transporting a witness or suspect, whether voluntarily or involuntarily, to the LPD for questioning.

and voluntarily waived those rights. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); *Mills v. Commonwealth*, 996 S.W.2d 473, 482 (Ky. 1999), *overruled on other grounds, Padgett v. Commonwealth*, 312 S.W.3d 366 (Ky. 2010).

In this case, Phifer interrupted Detective Johnson before Detective Johnson finished reading Phifer his rights. Phifer then told Detective Johnson that he understood his rights and that Officer Geis had already read them to him. There is no evidence to the contrary. Thus, by a preponderance of the evidence, the Commonwealth established that Phifer knowingly and voluntarily waived his rights.

Even if Phifer did not waive his *Miranda* rights, Detective Johnson was not required to re-read Phifer his rights simply because forty-five minutes had passed since Officer Geis *Mirandized* Phifer. As stated in *Hughes v. Commonwealth*, 87 S.W.3d 850, 854 (Ky. 2002):

> [T]here is no per se rule that a suspect must be readvised of his *Miranda* rights after the passage of time or a change in questioners . . . . The purpose of the *Miranda* warnings is to ensure that a suspect is aware of his constitutional rights before being interrogated.

(Internal citations omitted).

It is undisputed that Officer Geis advised Phifer of his rights, and Phifer does not allege that he forgot them or was unaware of them when he was interviewed forty-five minutes later. Instead, Phifer admitted at the outset of his interview with Detective Johnson that he understood his rights and that Officer

Geis had already read them to him. Therefore, we conclude that even if Detective Johnson's attempt to *Mirandize* Phifer was constitutionally defective, Officer Geis's warnings remained effective. Accordingly, Phifer's argument that he did not receive an appropriate *Miranda* warning is without merit.

c. Coercion

A third point in time when police actions can violate a person's constitutional rights is when a confession is the result of coercion. Phifer argues his statements to police were involuntary and coerced. We disagree.

As set forth in *Tabor v. Commonwealth*, 613 S.W.2d 133, 134 (Ky. 1981) (*citing Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)), the Commonwealth bears the burden of proving by a preponderance of the evidence that a confession was voluntary. When determining if a confession is the result of coercion, one must look to the totality of the circumstances to determine the voluntariness of a statement. *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999) *(citing Arizona v. Fulminante,* 499 U.S. 279, 286–88, 111 S.Ct. 1246, 1252–53, 113 L. Ed. 2d 302 (1991)). The Kentucky courts have set forth three factors to consider:

> (1) whether the police activity was objectively coercive; (2) whether the coercion overbore the will of the defendant; and (3) whether the defendant showed that the coercive police activity was the crucial motivating factor behind the defendant's confession.

Id. (*citing Morgan v. Commonwealth,* 809 S.W.2d 704, 707 (Ky. 1991)). With these standards in mind, we now address the issues raised by Phifer regarding coercion.

First, Phifer alleges that on the night of the first interview Detective Ball stated, "[n]o one is going to jail." Phifer contends that this statement by Detective Ball was misleading and he made damaging statements as a result. Prior to Detective Ball's statement, the detectives had brought Taylor into the room with Phifer. Taylor and Phifer began arguing. Taylor told Phifer she could not tell the detectives what happened to J.T. because Phifer was the only one in the room with J.T. the night she was injured. Phifer and Taylor then expressed concerns about receiving jail time. At this point, Detective Ball told Phifer and Taylor, "[n]o one is going to jail."

Detective Ball testified at the suppression hearing that the comment was made to de-escalate the situation between Taylor and Phifer. Detective Ball further explained that he made that statement because no one was going to jail at that time. In fact, Phifer was not arrested until five days after Detective Ball made the statement.

Phifer did not call any witnesses to refute Detective Ball's testimony. Furthermore, Phifer offered no proof to show that Detective Ball's statement played any role in his confession, much less any proof that the statement was the "crucial motivating factor" in his confession. *Henson*, 20 S.W.3d at 469. Based on the preceding evidence, the trial court found that because Phifer and Taylor

continued to argue, it did not appear the statement was heard. Therefore, the court found that Detective Ball's statement was not coercive. We agree, based on the totality of the circumstances, that Detective Ball's statement did not alter the statements made by Phifer, and was not coercive.

Phifer also contends that the detectives coerced him regarding the language he was using to describe the events of the night in question. Specifically, Phifer contends that the detectives coerced him into substituting words like "throw" or "toss" for the word "drop" when describing what happened to J.T.

It is important to note Phifer's story to the LPD was anything but consistent. Originally, Phifer told the detectives he was not at Taylor's apartment on the night of the incident. Then, Phifer changed his story and stated he was in the back room with J.T., changed her diaper, left the room, and returned to find her face-down on the floor. As police gathered more evidence, Phifer again changed his story. In the final version of his story, Phifer stated that he tossed J.T. into the air and may have hit her against the bed as he tried to catch her. Additionally, he admitted he may have covered her mouth to keep her from crying.

At the suppression hearing, Detective Ball testified that he told Phifer not to use the word "drop" to describe what happened to J.T. Detective Ball testified that this was because the detectives had been told by medical experts that J.T.'s injuries were more likely to have come from force consistent with a throw or a toss, not a drop. After Phifer told Detective Ball he had hit J.T. up against the bed post, Detective Ball asked Phifer, "Have I forced you to say anything you

didn't want to say?" Phifer responded by stating that Detective Ball had done his job, and Phifer admitted he had been lying to the detectives because he was scared.

The trial court concluded that Detective Ball did tell Phifer to refrain from using the word "drop." However, the trial court also concluded that there was no coercive effect in this, and Detective Ball was trying to get Phifer to tell the truth. In addition, the trial court found the aforementioned actions to be proper interrogation techniques. Accordingly, the court denied the motion to suppress these statements.

Phifer has offered no proof as to how Detective Ball's request that Phifer stop using the word "drop" was "objectively coercive[,]" "overbore the will" of Phifer, or "was the crucial motivating factor" behind his confession. *Henson*, 20 S.W.3d at 469. Because he told police they did not make him say anything he did not want to say, Phifer cannot now contend his statements to detectives were involuntary. Furthermore, detectives are often given the task of procuring accurate facts from unwilling suspects. While Detective Ball may have suggested Phifer use different words to describe how J.T. sustained her injuries, Detective Ball was searching for the truth as to what happened to J.T. Consequently, we conclude Phifer was not coerced and his statements were voluntary. Accordingly, for all of the preceding reasons, we affirm the trial court's ruling denying Phifer's motion to suppress.

2. Motion to Sever

Phifer also appeals from the trial court's order denying his motion to sever. As noted in *Cohron v. Commonwealth*, 306 S.W.3d 489, 493 (Ky. 2010), "[t]he trial court has broad discretion with respect to joinder and will not be overturned in the absence of a showing of prejudice and a clear abuse of discretion."

RCr 6.20 states that:

> [t]wo (2) or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

Further, RCr 9.16 states that:

> [i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

As provided in *Humphrey v. Commonwealth*, 836 S.W.2d 865, 868 (Ky. 1992), a defendant must prove that joinder would be so prejudicial as to be unfair, unnecessary, or unreasonably hurtful. However, joinder of offenses is proper where the crimes are closely related in character, circumstances, and time. *Cannon v. Commonwealth*, 777 S.W.2d 591, 597 (Ky. 1989).

In this case, Phifer argues that his charges were not related to Taylor's charges, and he was prejudiced by the evidence admitted against Taylor. Taylor

was charged and convicted with criminal abuse in the second degree and two counts of endangering the welfare of a minor, one count as to J.T. and the other count as to J.T.'s brother. Phifer was charged and convicted of assault in the first degree.

Although Phifer and Taylor had separate charges, those charges stemmed from the same events over the course of three days. Additionally, it is likely the same doctors, LPD officers, and LPD detectives would testify against Phifer and Taylor had they been tried separately. Accordingly, the trial court did not abuse its discretion in denying Phifer's motion to sever.

3. Jury Instructions

Phifer also appeals from the trial court's jury instructions. "Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (*citing Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006)). As set forth in RCr 9.54(2),

> [n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Furthermore, if a defendant objects to a part of an instruction, but not to other parts, the error is preserved only as to that part to which the objection was addressed. *Davis v. Commonwealth*, 967 S.W.2d 574, 580 (Ky. 1998).

The following is a typed copy of the jury instructions from which Phifer complains:

INSTRUCTION NO. 2

COUNT 1- FIRST DEGREE ASSAULT

You will find the Defendant guilty of First-Degree Assault under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about October 18, 2007, and before the finding of the Indictment herein, he caused a serious physical injury to [J.T.] by striking her head with or against an object and/or shaking her and/or suffocating her;

AND

B. That in so doing:

1(a). The Defendant intentionally caused a serious physical injury to [J.T.];

AND

1(b). His hands were a dangerous instrument as defined under Instruction 1.

OR

2. The Defendant was wantonly engaging in conduct which created a grave risk of death to another and thereby caused serious physical injury to [J.T.] under circumstances manifesting extreme indifference to the value of human life.

If you find the Defendant "Not Guilty" under this instruction, then please proceed to Instruction number 3. However, if you find the Defendant to be "Guilty" under this instruction, then please proceed to Instruction No. 4.

Phifer argues a reasonable juror would be confused by the wording of the instructions used by the trial court. Specifically, he contends that the use of the word "OR" in subsection B between 1(b) and 2 in Instruction No. 2 was confusing.

Additionally, Phifer states that, when instructions are offered in the alternative, the evidence must support conviction under either or both theories. According to Phifer, the evidence did not support a finding that he intentionally harmed J.T. Thus, rendering the intentional harm instruction fatally flawed.

We note that while Phifer objected to other parts of the instructions, he did not object to the use of the word "OR." Additionally, Phifer did not offer any alternative instructions to the trial court. Therefore, Phifer did not preserve this issue for appeal. Accordingly, we do not address it.

However, had Phifer preserved the issue, we would discern no error. As noted by the Commonwealth, the instructions are not confusing and there was more than enough evidence to support a conclusion that Phifer intentionally harmed J.T.

4. Prosecution's Closing Argument

Finally, Phifer contends that the trial court erred in failing to order a mistrial or admonish the jury after the Commonwealth made a false statement in closing argument.

At trial, Phifer's counsel told the jury that Dr. Given had testified that J.T.'s bruises were of different ages. During her closing, the prosecutor stated to the jury that Phifer's counsel had made a false statement because Dr. Given never testified that J.T.'s bruises were of different ages. After the prosecution finished its closing argument, Phifer's counsel objected to the statement made by the prosecutor. The trial judge overruled the objection on the grounds that all the evidence had been produced and the jury would remember the evidence as presented.

We discern no error for two reasons. First, prosecutors enjoy considerable latitude as to the content of closing arguments. *Berry v. Commonwealth*, 84 S.W.3d 82, 90 (Ky. App. 2001). A prosecutor's statement in closing argument must be "so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Phifer has offered no proof as to the grave unfairness of the prosecution's statement.

Secondly, Phifer did not move for a mistrial or for an admonishment of the jury. As stated in *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989), if a criminal defendant claims that he is entitled to a mistrial, then it is incumbent upon him to make a timely motion with the trial court for such relief. If a party has

failed to move for mistrial after objecting and receiving an admonition from the trial court, then such failure indicates that the party was satisfied with the admonition. *Id*.

Thus, we conclude Phifer failed to show the prejudice required for a mistrial, and even if he had, Phifer's failure to move for a mistrial precludes him from arguing it on appeal. Therefore, we affirm the trial court.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rawl Douglas Kazee
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky