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RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000214-MR

COREY D. TOOGOOD, JR. — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
NOS. 10-CR-003585 AND 11-CR-003548

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

On September 19, 2010, Dante Beausejour took his new moped for a ride with his friend, Jamone Williams. The two noticed the moped's muffler was producing a rattling sound. They pulled into a Marathon gas station at the corner of Broadway and 18th Street in Louisville, Kentucky. According to Beausejour, Appellant, Corey D. Toogood, Jr., approached the two men and stated that he could fix the moped. Appellant and Beausejour then exchanged phone numbers. Later that same day, Appellant called Beausejour to offer to fix the moped and instructed Beausejour and Williams to meet him in a nearby alley. Once the men were in the alley, Appellant pointed a gun at Beausejour and demanded the moped. Beausejour threw the keys at Appellant and both he and Williams ran away. Beausejour immediately called 911 for assistance.

Police responded and spotted Appellant on the moped near the Marathon gas station. A chase ensued. Police apprehended Appellant and found a small bag of marijuana in his pocket and a loaded revolver nearby. Both arresting officers heard Appellant threaten to kill the witnesses.

Appellant's account of what transpired differs dramatically from that of Beausejour. He stated that he and Beausejour met while shooting dice. Appellant offered to purchase the moped in exchange for $1,000 and a gun. Appellant stated that he was merely taking the moped for a test drive when the responding officers spotted him. Appellant stated that Beausejour's 911 call was attributable to him being upset that the test drive took longer than expected.

A Jefferson Circuit Court jury found Appellant guilty of robbery in the first degree, terroristic threatening in the third degree, possession of marijuana, possession of a firearm by a convicted felon, and being a persistent felony offender in the first degree. Appellant's sentence was enhanced to twenty years imprisonment by virtue of the PFO conviction. Appellant now appeals his conviction and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b).

Lesser-Included Offenses

Appellant argues that the trial court erred in failing to instruct the jury on lesser-included offenses. Specifically, Appellant requested that the trial court instruct the jury on unauthorized use of a motor vehicle and theft by unlawful taking of property valued over $500, both charges being lesser-

included offenses of first-degree robbery. The trial court denied both instructions.

A lesser-included offense instruction is required "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth,* 975 S.W.2d 925, 929 (Ky. 1998). Explained a different way, a lesser-included offense instruction is not warranted if "there is no room for any possible theory except that he is guilty [of the greater offense] or he is innocent." *Oakes v. Commonwealth,* 320 S.W.3d 50, 58 (Ky. 2010) (citing *Commonwealth v. Wolford,* 4 S.W.3d 534, 538–39 (Ky. 1999)). In addition, we note that a trial court's rulings with respect to jury instructions are reviewed for abuse of discretion. *Williams v. Commonwealth,* 178 S.W.3d 491, 498 (Ky. 2005).

Theft by Unlawful Taking

KRS 514.030(1)(a) provides that "a person is guilty of theft by unlawful taking or disposition when he unlawfully [t]akes or exercises control over movable property of another with intent to deprive him thereof." Robbery, on the other hand, requires additional proof that the assailant used or threatened the immediate use of physical force. *Morgan v. Commonwealth,* 730 S.W.2d 935, 937 (Ky. 1987). In order to warrant a theft by unlawful taking instruction, as applied to Appellant, there must be evidence that Appellant stole Beausejour's moped without the use or immediate threatened use of physical force. However, no evidence was presented at trial to support the theory of

theft by unlawful taking. On the contrary, Appellant testified that he had permission to take the moped for a test drive.

"The jury is required to decide a criminal case on the evidence as presented or reasonably deducible therefrom, not on imaginary scenarios." *White v. Commonwealth,* 178 S.W.3d 470, 491 (Ky. 2005) (quoting *Thompkins v. Commonwealth,* 54 S.W.3d 147, 151 (Ky. 2001)). Consequently, the evidence only supports two findings: that Beausejour gave Appellant permission to test drive his moped or that Appellant stole the moped with the threatened use of force. Either scenario obviates a conviction of theft by unlawful taking. The trial court did not err in refusing to instruct the jury on the lesser-included offense of theft by unlawful taking.

Unauthorized Use of a Motor Vehicle

KRS 514.100(1)(a) provides that a "person is guilty of the unauthorized use of an automobile or other propelled vehicle when he knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof." This crime stops short of theft because no intention to deprive the owner of his property is necessary. KRS 514.100, Official Commentary. In order for an unauthorized use of a motor vehicle instruction to be proper, the jury must have been able to deduce that Appellant knowingly used the moped without Beausejour's consent, but that he did so with the intent to return the moped to Beausejour. There is simply no evidence to support such a finding. The evidence showed that Appellant either had consent to test drive the moped or, in the alternative, he

stole the moped from the victim with no intention of returning it. Accordingly, we cannot find that the trial court abused its discretion in denying the instruction for unauthorized use of a motor vehicle.

Recording of Victim's 911 Call

Appellant brings forth three alleged errors concerning a taped recording of Beausejour's 911 call. We will address each argument in turn.

Hearsay Testimony

First, Appellant contends that the 911 recording was inadmissible hearsay and that its admission was reversible error. Over Appellant's objection, the trial court found that the call was admissible as an excited utterance pursuant to KRE 803(2). Evidentiary rulings are within the sound discretion of the trial court. *See Partin v. Commonwealth,* 918 S.W.2d 219, 222 (Ky. 1996) (overruled on other grounds by *Chestnut v. Commonwealth,* 250 S.W.3d 288 (Ky. 2008)).

KRE 803(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In assessing Beausejour's statements to the 911 operator, we must consider the totality of circumstances. *See Hartsfield v. Commonwealth,* 277 S.W.3d 239, 245 (Ky. 2009). The circumstances "must give the impression that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation." *Id.* Additionally, we must note that "[i]t is not controlling that the declarations were in response to questioning . . . [where] the questions were brief and not

suggestive, and the declarant remained agitated throughout the entire discussion." *Ernst v. Commonwealth,* 160 S.W.3d 744, 755 (Ky. 2005).

We agree with the trial court that Beausejour's statements to the 911 operator were excited utterances. Beausejour called 911 just moments after being held at gunpoint, with little time for reflection or deliberation. Beausejour's statements were made while under the stress of having been held at gunpoint, a clearly startling event. During the 911 call, the operator's questions were short and not suggestive. Beausejour sounded distraught and out of breath, which demonstrated the level of excitement necessary for the application of KRE 803(2). Thusly, the trial court did not err in finding that the 911 recording qualified as an excited utterance.

Prejudicial Testimony

Appellant next argues that, even if the 911 recording qualifies as an excited utterance, its admission was prejudicial as cumulative evidence and improperly bolstered Beausejour's testimony. In *Pollini v. Commonwealth,* 172 S.W.3d 418, 423-24 (Ky. 2005), we analyzed a similar situation where the 911 caller also testified at trial. We found that the 911 recording was neither cumulative nor bolstering of the witness's testimony. *Id.* (holding that the recording was properly admitted because it "functioned to put the sequence of events into context for the jury."). Similarly, the 911 recording provided the jury with a more detailed description of the circumstances leading up to the crime and its immediate aftermath. While the 911 recording was consistent

with Beausejour's testimony at trial, we do not believe that fact alone infringes on the jury's role of assessing his credibility.

Undue Emphasis

Lastly, Appellant maintains that it was error for the trial court to allow the 911 recording into the deliberation room as it placed an undue emphasis on that particular piece of evidence. RCr 9.72 states that "[u]pon retiring for deliberation the jury may take all papers and other things received as evidence in the case." The trial court ultimately has the discretion to allow or disallow certain exhibits into the jury deliberation room. *Johnson v. Commonwealth,* 134 S.W.3d 563, 567 (Ky. 2004). Concerns that a jury will place an undue emphasis on evidence present in the jury deliberation room generally arise in the context of exhibits that are testimonial in nature. *E.g., Buckhart v. Commonwealth,* 125 S.W.3d 848, 850 (Ky. 2003). On the other hand, "[n]ontestimonial exhibits . . . which are verbal in nature, are generally allowed to go into the deliberations." *Id.* (quoting *Chambers v. State,* 726 P.2d 1269, 1275 (Wyo. 1986)).

We believe Beausejour's statements made during the 911 call were non-testimonial in nature. Beausejour made these statements "under circumstances objectively indicating that the primary purpose of the [operator's questions was] to enable police assistance to meet an ongoing emergency." *See Davis v. Washington,* 547 U.S. 813, 822 (2006). Consequently, the trial court did not abuse its discretion in allowing the 911 recording to accompany the rest of the permissible evidence into the jury deliberation room.

Police Officer Testimony

Appellant contends that his constitutional rights to due process and a fair trial were violated when Officer Johnson and Officer Furman provided improper opinion testimony. Both officers heard Appellant threaten to kill Beausejour and Williams. These statements in turn led to a charge of terroristic threatening. On direct examination, the Commonwealth asked both officers if they believed Appellant's threats were credible. Officer Johnson testified in the affirmative with no objection from Appellant. However, as Officer Furman was answering the Commonwealth's question, Appellant made an objection, which the trial court sustained. Officer Furman continued to state that he believed Appellant's threats were credible. Appellant then moved for a mistrial, which the trial judge overruled.

"A mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Woodard v. Commonwealth,* 147 S.W.3d 63, 68 (Ky. 2004) (quoting *Bray v. Commonwealth,* 68 S.W.3d 375, 383 (Ky. 2002)). On appeal, we review the trial court's decision to grant or deny a mistrial for an abuse of discretion. *Shabazz v. Commonwealth,* 153 S.W.3d 806, 810 (Ky. 2005).

The testimony of Officer Johnson and Officer Furman regarding the credibility of Appellant's threats was irrelevant. Appellant was convicted of terroristic threatening in the third degree which, as applied to the Appellant, occurs when one "threatens to commit any crime likely to result in death or

serious physical injury to another person[.]" KRS 508.080(1)(a). Therefore, the jury had to plainly find that Appellant issued a threat to kill the victims, not that such a threat would actually be carried out. We agree that the officers' testimony was inadmissible as irrelevant opinion testimony.

Unfortunately, the jury heard both officers' testimony. However, we believe the testimony was only marginally prejudicial. Furthermore, the error could have been easily remedied through an admonition, which Appellant failed to request. *See Hayes v. Commonwealth,* 698 S.W.2d 827, 829 (Ky. 1985). Ultimately, whether the officers believed Appellant's threats to be credible bears no relevance to any element of the crime. Accordingly, there was no manifest necessity which mandated that the trial court grant Appellant's motion for a mistrial.

Court Costs

Lastly, Appellant urges the Court to vacate the trial court's imposition of court costs in the amount of $130. Appellant concedes that this issue is not preserved for our review. Regardless, we have "inherent jurisdiction to cure such sentencing errors[.]" *Travis v. Commonwealth,* 327 S.W.3d 456, 459 (Ky. 2010). Indeed, "sentencing issues may be raised for the first time on appeal[.]" *Cummings v. Commonwealth,* 226 S.W.3d 62, 66 (Ky. 2007).

Pursuant to KRS 23A.205(2), the trial court shall impose court costs "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." Time and time again, we have

unequivocally held that court costs may not be imposed on defendants who are found to be poor. *E.g., Travis,* 327 S.W.3d at 459. As evidenced by Appellant's qualification for and use of a public defender, in addition to his twenty-year sentence, it is apparent that Appellant is unable to pay court costs presently or in the foreseeable future. Therefore, we vacate that portion of the trial court's judgment with respect to the imposition of court costs.

Conclusion

For the forgoing reasons, the Jefferson Circuit Court's judgment is hereby affirmed, except as to the portion thereof imposing court costs, which is hereby vacated. Accordingly, this matter is remanded to the court for entry of a judgment consistent with this opinion.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. Minton, C.J.; Abramson, Cunningham, Noble and Scott, JJ., concur. Venters, J., concurs in result only.

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