RENDERED: February 26, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003074-MR

JOHN MCGUFFIN — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 96-CR-0043

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: DYCHE, EMBERTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: John McGuffin (McGuffin) appeals from a judgment entered by the Grayson Circuit Court on November 8, 1996, that convicted him of assault in the first degree in violation of Kentucky Revised Statutes 508.010 and sentenced him to prison for a term of twelve years. We affirm.

On May 31, 1996, McGuffin was in his car in Caneyville, Kentucky, when Jeremy Adam Parks (Parks), a passenger in a truck

moving in the opposite direction, gave McGuffin an offensive hand gesture. McGuffin turned his vehicle around and followed the truck to its destination, the home of Brad Smith (Smith). McGuffin asked who had made the gesture and Parks responded that he had. McGuffin invited Parks to go to another location where the two of them could fight, but Parks declined and asked McGuffin to leave. When McGuffin refused to leave, Parks took several swings at him through McGuffin's car window and landed at least one of them on McGuffin's left eye.

McGuffin drove to the home of Dewayne McGuffin (Dewayne), his father. He was upset and told his father about his altercation with Parks. Dewayne and various family members and friends were in the midst of planning a cookout. According to McGuffin and Dewayne, the two of them, a friend, Clifford Morris (Morris), and Morris' girlfriend, Arlene Hayes, drove into Caneyville to get some bread and soft drinks for the party.

After driving around Caneyville for a while, ostensibly looking for McGuffin's girlfriend, Nancy Lampton, and an open grocery store, the four ended up at a gasoline station/food mart where they ran into Parks and Smith. Another altercation occurred. There was conflicting evidence as to which of the participants started this round of bickering. Morris hit Parks in the shoulder with a bumper jack. The encounter ended when Dewayne shot Parks four times with a handgun. Parks was

critically injured and eventually had to undergo open heart surgery. He also lost a significant portion of his colon.

McGuffin, Dewayne, and Morris were each indicted on one count of assault in the first degree and one count of assault in the second degree. The three were tried together before a jury in October 1996. McGuffin and Dewayne were represented by Attorney James Maples, who has continued in that capacity throughout their appeals. McGuffin testified that it was Parks who started the argument at the gasoline station and that Dewayne shot Parks only after Parks obtained a rifle from the seat of Smith's pick-up truck. McGuffin acknowledged that he was aware of the presence of a gun in his vehicle prior to the shooting, but stated that the gun was still in the vehicle when he got out. The Commonwealth's witnesses presented a somewhat different version of events. Specifically, several witnesses testified that the McGuffins were the aggressors and that Parks was not armed at any time during the confrontation.

Both McGuffin and Dewayne were found guilty of assault in the first degree. McGuffin received a sentence of twelve years and Dewayne received a twenty-year sentence. Morris was acquitted. McGuffin has raised the following five issues in this appeal: (1) whether the trial court erred when during jury selection it refused to strike for cause Lillian Bratcher, mother-in-law of the Grayson County Attorney; (2) whether the trial court erred during jury deliberations when it sua sponte

suggested that the jury look at the medical evidence; (3) whether the trial court erred in allowing the statement McGuffin gave to police on the day of the shooting to be admitted into evidence since the statement was taken while McGuffin was in custody and after he expressed a desire to speak to his attorney in violation of his Miranda[1] protections; (4) whether the trial court erred in denying McGuffin's motion for a directed verdict of acquittal; and (5) whether the cumulative effect of these alleged errors deprived McGuffin of a fair trial.

The first three issues raised in McGuffin's appeal were also raised by Dewayne in his direct appeal to the Supreme Court of Kentucky. That Court found no error in the trial court's failure to strike venireman Bratcher for cause for the reason that Bratcher's son-in-law was neither a "witness, party, counsel, or victim such that bias must be implied to the potential juror", and despite her close relationship to the county attorney, Bratcher "expressed no bias" in favor of law enforcement.[2] Further, the Court determined that the alleged error concerning the comment made by the trial court during the jury's deliberation was not preserved for review. In any event, the Court stated that it could not see how the comment could

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

[2]McGuffin v. Commonwealth, 96-SC-1042-MR, memorandum opinion of the Court rendered November 20, 1997, designated "not to be published."

cause prejudice, and held that if error occurred, it was harmless.[3] In regard to these two issues, McGuffin has not made any argument that has not already been addressed by the Supreme Court or which would lead us to reach a different result.

Dewayne also raised in his appeal to the Supreme Court the issue concerning the admission of a statement given by McGuffin to the police in violation of McGuffin's Fifth Amendment right to counsel. The Supreme Court did not address the merits of that issue but instead held that Dewayne lacked standing to assert this error as such rights are "personal and cannot be asserted by third parties." We will discuss the merits of that issue and our determination that no reversible error occurred.

On the day Parks was shot, McGuffin and Dewayne were taken into custody and made aware of their Miranda rights. McGuffin testified that Officer Payton, the chief investigating officer, asked him three times if he wanted to give a statement, and that all three times he told Officer Payton that he did not want to give a statement until he had an opportunity to talk with an attorney. McGuffin testified that on the fourth request for a

[3]The facts underpinning this issue are as follows: After the jury had been deliberating for some time, they returned to the court room and requested to be shown the victim's scars. The judge told them he could not have Parks remove his shirt at that point in the proceeding, but that he could replay that portion of the video where Parks undressed during his direct examination. The trial judge started to suggest that the jury could find the same information in the medical records. However, before he could finish his sentence, the video of Parks began.

statement he agreed to give one because Officer Payton promised that if he did so, he would be able to go home.

Although the statement was provided to defense counsel some time before trial, there was no pre-trial motion to suppress the statement. In the Commonwealth's case-in-chief, Officer Payton was asked whether McGuffin gave a statement on May 31, 1996, and whether he admitted being at the scene at the time of the shooting. No objection was made to these questions, and Officer Payton answered affirmatively. During cross-examination of McGuffin while he testified in his own defense, the Commonwealth's Attorney attempted to impeach him with portions of the statement that conflicted with his trial testimony. It was at this juncture that a motion to suppress was made.

In a hearing held in chambers, Officer Payton's testimony essentially paralleled that of McGuffin. Officer Payton acknowledged that more than once McGuffin expressed a desire to confer with an attorney. Officer Payton stated that he believed that McGuffin had talked to an attorney on the phone in the room in which McGuffin was being detained. The only difference between Officer Payton's version of events and McGuffin's is that Officer Payton remembered asking McGuffin only three times if he was ready to give a statement, not four. McGuffin moved for a dismissal of the charges, or in the alternative, for a mistrial based upon the introduction of the statement taken in violation of his right to counsel. However,

the trial court found that McGuffin did not sufficiently assert his right to counsel so as to create an Edwards[4] problem and ruled that the statement was admissible.

In light of the undisputed factual scenario of McGuffin's custodial interrogation presented to the trial court, we disagree with the trial court's ruling that the issue does not squarely fall within the parameters of Edwards v. Arizona, supra. In Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990), the Court discussed the Miranda-Edwards Fifth Amendment Right to Counsel as follows:

> Miranda, of course, required police interrogators to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments and set forth a now-familiar set of suggested instructions for that purpose. Although recognizing that the Miranda rules would result in the exclusion of some voluntary and reliable statements, the Court imposed these "prophylactic standards" on the States, . . . to safeguard the Fifth Amendment privilege against self-incrimination. Edwards v. Arizona added a second layer of protection to the Miranda rules, holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." . . . Edwards thus established another prophylactic rule designed to prevent police from

[4]Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

> badgering a defendant into waiving his previously asserted Miranda rights.

Id., 494 U.S. at 350, 108 L.Ed.2d at 302 (citations omitted). See also Linehan v. Commonwealth, Ky., 878 S.W.2d 8 (1994).

The protections provided by Miranda and Edwards are designed exactly to apply in situations like the one in which McGuffin found himself. Clearly, McGuffin's statement should not have been used by the Commonwealth in presenting its case-in-chief. However, we cannot fault the trial court for the fact that McGuffin's statement was introduced during the Commonwealth's case-in-chief as there was no motion to suppress the statement or any objection made to the testimony elicited from Officer Payton at that time. In any event, since the information concerning the statement introduced during the Commonwealth's case-in-chief was so limited and not disputed (that is, that McGuffin gave a statement and admitted being at the scene of the crime—facts he has never denied), any error would be harmless.

It was during the cross-examination of McGuffin that the statement's prejudicial effect became apparent. McGuffin, when asked to explain certain inconsistencies, admitted lying to the police about the identity of the person he was going to meet in Caneyville that day. Also, he admitted that the statement was not accurate in regard to his original encounter with Parks.[5]

[5]In his statement, McGuffin omitted any reference to the hand (continued...)

Further, McGuffin claimed that, contrary to his statement, Parks did not drop the rifle he was holding, but merely fell back into the truck with it.

While pursuant to a proper motion to suppress the statement would not have been admissible during the Commonwealth's case-in-chief, the Commonwealth is correct that it was proper to admit the statement to impeach McGuffin's direct testimony. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), forecloses any argument that statements taken in violation of Miranda are inadmissible for impeachment purposes as follows:

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

Id., 401 U.S. at 225-226, 28 L.Ed.2d at 4-5 (footnote omitted). See also Campbell v. Commonwealth, Ky., 788 S.W.2d 260, 264 (1990); Murphy v. Commonwealth, Ky., 652 S.W.2d 69, 73-74 (1983). Thus, although the trial court erred in its analysis of the

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[5](...continued)
gesture made by Parks and his response thereto. Instead, he stated that he was stopped at a parking lot waiting for a friend when Parks approached his car and hit him in the face three times with brass knuckles.

issue, it was not error to allow the Commonwealth to use the statement during its cross-examination of McGuffin.

Finally, we find no error in the trial court's refusal to direct a verdict of acquittal on the charge of assault in the first degree. There was evidence from which a reasonable jury could believe that McGuffin was upset and angry about the fight with Parks earlier that day, that he went to Dewayne's house to get a weapon to use against Parks, that he directed the search in Caneyville for Parks, and that he, knowing that Dewayne had a gun in his pocket, distracted Parks with verbal taunts and otherwise aided or attempted to aid Dewayne in assaulting Parks.[6] The testimony of Parks and others shows that McGuffin and Dewayne approached Parks, stood on opposite sides of him, threatened and goaded him, and that Dewayne eventually shot him. Under the standard of our review articulated in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), it is apparent that there was no error in this regard.

Accordingly, finding no error, and thus no cumulative error, the judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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[6]The indictment under which McGuffin was tried alleged that he acted in complicity with others in assaulting Parks. See KRS 502.020. The Commonwealth's theory was that McGuffin sought Dewayne's help and acted in concert with Dewayne to seek revenge for Parks' conduct earlier in the afternoon of the shooting.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Hon. James A. Maples
Elizabethtown, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
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ORAL ARGUMENT FOR APPELLEE:

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