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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000815-MR

TIMOTHY M. MULLINS — APPELLANT

v. — APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA SUMME, JUDGE
ACTION NO. 97-CR-00476

COMMONWEALTH OF KENTUCKY — APPELLEE

AND: NO. 1998-CA-000886-MR

JASON MYKAL FOIT — APPELLANT

v. — APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA SUMME, JUDGE
ACTION NO. 97-CR-00476

COMMONWEALTH OF KENTUCKY — APPELLEE

AND: NO. 1998-CA-000891-MR

ANTHONY GOFF — APPELLANT

v. — APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA SUMME, JUDGE
ACTION NO. 97-CR-00476

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: COMBS, DYCHE, and MCANULTY, Judges.

COMBS, JUDGE: The appellants, co-defendants Timothy Mullins, Jason Mykal Foit, and Anthony Goff were convicted of first-degree robbery, principal or accomplice (KRS 515.020 and/or KRS

502.020). After reviewing the arguments, the trial record, and the applicable law, we affirm.

According to the victim, Danny Alton, the facts are as follows. On August 19, 1997, at approximately 2:45 a.m., in downtown Covington, Kentucky, Alton was walking home from a local bar. At the corner of 8th and Madison, Alton met an acquaintance, a man he knew only as "Walter." Walter was in the company of a group of at least four other men. The group included Mullins, Foit, Goff, and C.T., a juvenile. Following a brief conversation, Alton and Walter began walking north on Madison. The group followed them. Alton became uncomfortable with being followed, and so he crossed the street and quickened his pace.

At the corner of Pike and Madison, someone in the group said, "we know you got it, give it up," and Alton was struck on the head. The blows continued and Alton was ultimately knocked to the ground. While Alton was on the ground, he continued to be struck and kicked and he could feel hands going through his pockets. Alton estimates that approximately $80.00 was removed from his pockets. Alton's attackers fled the scene.

The co-defendants wholly contest Alton's version of the facts. As told primarily through the testimony of Goff, the co-defendants represent the facts to be as follows. Alton and Goff had on a previous occasion engaged in sex. On two occasions thereafter, Alton approached Goff and asked him if he wanted to make some money — apparently in exchange for sex. On the night of the robbery, Alton again approached Goff and asked him if he

wanted to go home with him. This time Goff became upset with him, telling Alton that he was not gay. Alton again offered money — although he mentioned no specific sexual act. Alton asked Goff if he had anything against gays and took a swing at Goff. Goff moved out of the way, and Alton came forward again. Goff then took a couple of swings at Alton and hit him in the face.

Following this incident, Foit and C.T. came running from across the street to assist Goff. Mullins was in the alley "relieving himself" during this time. According to Goff, no one attempted to steal anything from Alton, nor was there any discussion among the four of doing so. Foit and C.T. pulled Goff off of Alton, and all of them ran through a nearby alley.

While there are two divergent versions of the events up to this point, the stories are consistent as to the remaining facts. It is undisputed that Alton was beaten up and injured. Alton waived down a police officer, Officer Haubner, on patrol in the neighborhood, explained to him what had happened, and gave him a description of his assailants. Haubner radioed in the description. Shortly thereafter, Police Officers Nader and Allen observed four men coming onto Madison from behind a building. The officers took the group into custody and transported them back to the scene of the altercation, where Alton was waiting, for identification by Alton. Alton identified the group of four men as the ones who had assaulted and robbed him. The four men

whom Alton identified that night as his attackers were Mullins, Foit, Goff, and C.T.[1]

On October 3, 1997, the Kenton County Grand Jury issued a joint indictment, indicting Mullins, Foit, and Goff for first-degree robbery. The cases were joined for trial. Following a two-day trial, on February 4, 1998, Mullins, Foit, and Goff were each convicted of first-degree robbery, principal or accomplice. On April 1, 1998, the trial court sentenced each of the defendants to ten-years' imprisonment.

TIMOTHY MULLINS'S APPEAL

Mullins's only argument on appeal is that the trial court erred in denying his motion for a directed verdict of acquittal. Specifically, Mullins argues that "[t]here was no scintilla of evidence shown concerning [Mullins's] guilt and even if the Trial Court assumed the Commonwealth's proof was true, there was still not enough to allow a jury's determination as to guilt or innocence." Mullins contends that he "was never put at the scene; was never identified as a participant; was specifically excluded by Anthony Goff (co-defendant) as being involved; and was never identified for record purposes[.]" (emphasis original). Mullins lists eleven specific alleged inconsistencies and short-comings in the evidence, which we will not reproduce here; however, in summary, Mullins contends that it

[1]Walter fled the scene when the attack began and it is not known with certainty what role, if any, he played in the robbery. There may also have been one other person who participated in the robbery but avoided apprehension. C.T., a juvenile, was not prosecuted as a codefendant in the Mullins, Foit, and Goff trial.

"was clearly unreasonable for a jury to find guilt concerning this Appellant." Thus, he argues, he was entitled to a directed verdict as a matter of law.

> 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.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Each of the appellants was convicted under Instruction No. 7, which stated as follows:

> [i]f you believe from the evidence beyond a reasonable doubt that the Defendant . . . is guilty of either Robbery in the First Degree under Instruction No. 5 or Complicity to Robbery in the First Degree under Instruction No. 6, but if you are unable to determine from the evidence whether the Defendant . . . committed the crime as Principal under Instruction No. 5 or Accomplice under Instruction No. 6, then you will find him guilty of Robbery in the First Degree, Principal or Accomplice, under this Instruction.

A "combination instruction," which allows the jury to find each co-defendant guilty as either a principal or an accomplice, has been upheld as proper if the jury is unable to determine in which capacity each defendant had actually participated. Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921, 925 (1986). "Where alternate theories of instruction would support a conviction, both theories

should be submitted to the jury." Campbell v. Commonwealth, 732 S.W.2d 878, 880 (1987).

In this case, because the perpetrators of the robbery began their attack from behind Alton and because Alton attempted to ward off their blows by covering his face, Alton was unable to state with specificity who did what. Therefore, according to Alton's testimony, any one of the appellants could have been a principal perpetrator of the robbery, or, in the alternative, he may have been an accomplice. In summary, in order for the jury to find Mullins guilty, it need not have believed that he engaged solo in the conduct set forth in KRS 515.020; rather, it need only have believed that he aided or assisted in the robbery as described in KRS 502.020.

The first-degree robbery statute, KRS 515.020, provides, in part, that:

> (1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime;

The accomplice liability statute, KRS 502.020, provides, in part, that:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense. . . . (Emphasis added.)

Alton testified that prior to the attack, he could hear the group behind him talking in low voices as though they did not want him to hear, followed by one of them saying, "we know you got it, give it up." At this point Alton was struck, knocked to the ground, covered his face, and was unable to say exactly "who did what." However, Mullins was identified by Alton as having been one of the men following him immediately prior to the attack. There is no question that Mullins was in the vicinity that night in the company of Foit, Goff, and the juvenile. Goff's testimony places Mullins there; Alton's testimony does the same; and Mullins was apprehended in the vicinity of Pike and Madison on the night of the incident in the company of Goff, who admitted that he administered the beating to Alton. He was also at that time in the company of a juvenile, C.T., who had blood on his shoes.

Moments after the beating, Alton identified a group of four suspects, which included Mullins, as the ones who were following him just before he was attacked. Similarly, at trial, Alton identified Mullins as one of the four who were following him immediately prior to the attack.

Our standard of review has been articulated by Benham, supra: "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." Benham, 816 S.W.2d

at 187; Mills v. Commonwealth, Ky., 996 S.W.2d 473, 489 (1999). Goff testified that Alton attacked him first, that no robbery occurred, and that Mullins was not involved in the incident because he was in an alley "relieving himself." Nevertheless, in light of Alton's testimony to the contrary, substantiated by the arrest of the four in the vicinity shortly after the alleged attack, a jury question unquestionably was created. We cannot agree that it was "clearly unreasonable" for the jury to find Mullins guilty of at least being an accomplice to the robbery. See Garrett v. Commonwealth, Ky., 560 S.W.2d 805 (1977)(where a defendant was positively identified in court by a witness who saw him near the scene of a crime, the trial court did not err in submitting the case to the jury). Hence, we find no error in the trial court's refusal to grant Mullins's motion for a directed verdict.

JASON MYKAL FOIT'S APPEAL

Foit's arguments on appeal are that: (1) Alton's out-of-court identification of the defendants the night of the incident did not meet the due process show-up procedures prescribed by Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); and (2) Alton's in-court identification was insufficient under United States v. Russell, 532 F.2d 1063 (6th Cir. 1976).

Foit's brief does not include a reference to the record showing that either of these issues was preserved for review as required by CR 76.12(4)(c)(iv). The Commonwealth argues that

Foit's arguments are unpreserved for appellate review because he failed to make a motion to suppress the identifications prior to trial or to object to the identifications when the evidence was introduced at trial. We agree.

"A party must timely inform the court of an error and request the relief to which he considers himself entitled." Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 796 (1995). When a trial court has not had the opportunity to rule, the appellate court is precluded from reviewing the alleged error. Sherley v. Commonwealth, 889 S.W.2d 794, 799 (1994). "[A] party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise, the issue may not be raised on appeal." West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989) (cert. denied, 116 S.Ct. 2569, 518 U.S. 1027, 135 L.Ed.2d (1986).

This Court may review an unpreserved error and grant appropriate relief provided that it determines that manifest injustice has resulted from that error. Renfro, supra; RCr 10.26. However, in order to grant relief and to regard an unpreserved error as palpable error, "the reviewing court must conclude that a substantial possibility exists that the result would have been different" had the alleged palpable error not occurred. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). After examining the weight of the evidence, we conclude that the alleged errors concerning Alton's identifications of Foit — if errors at all — did not rise to the level of palpable error.

Foit and his three co-defendants were apprehended immediately after the robbery and were returned to the scene of the crime for identification by the victim, Alton.

> Such a 'show-up' identification may be unreliable and suspect, but such show-ups are nonetheless necessary in some instances because they occur immediately after the commission of the crime and aid the police in either establishing probable cause or clearing a possible suspect, and the police do not need to delay the process in order to allow the suspect to have counsel present. [Citation omitted]. As the show-up procedure is suggestive by its nature, the court "must then assess the possibility that the witness would make an irreparable misidentification, based upon the totality of the circumstances and in light of the five factors enumerated in [Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375,382, 34 L.Ed.2d 401 (1972)]." Wilson v. Commonwealth, Ky., 695 S.W.2d 854, 857 (1985).

Savage v. Commonwealth, Ky., 920 S.W.2d 512, 513 (1995).

We have examined the issue of palpable error associated with Alton's out-of-court identification of Foit in light of the five factors set forth in the Biggers standard: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty of the witness demonstrated at the confrontation; and (5) the length of time between the crime and the confrontation. Biggers, supra, at 199, 93 S.Ct. 375. See also Jones v. Commonwealth, Ky. App. 556 S.W.2d 918 (1977); Wilson v. Commonwealth, supra; and Savage, supra. According to Alton's testimony, Alton observed Foit — along with the rest of the group — when he first met up with Walter and again when the

group began following him. It appears that Alton had a reasonable opportunity to observe both Foit and the group. Alton was attentive or apprehensive enough to notice the group upon his initial meeting with Walter, to take note that the group began following him, and to give a description of the group that led within minutes to the arrest of four members of the group. After a period of initial hesitation,[2] Alton was able to make a positive identification of Mullins, Foit, Goff, and the juvenile as his assailants. Finally, we note that there was a very short time-lapse between the crime and the confrontation. In summary, Alton's out-of-court identification of Foit comported with the due process requirements of Biggers, supra.

Foit likewise did not preserve his United States v. Russell argument. Russell, supra, holds that in cases where a witness identifies a stranger solely upon the basis of a brief observation at a time of stress or excitement, the trial court should be especially vigilant to make certain that there is no distortion of a possibly incomplete or mistaken perception of a witness by means of suggestive prompting or other unfair investigatory techniques. Id. at 1066. United States v. Russell applied the five-factor Biggers test to determine if there was an impermissibly suggestive out-of-court identification that would taint the reliability of an in-court identification. Id. at 1067-1068. We have reviewed the facts of this case under the criteria of both Biggers and Russell, and we have discovered no

[2]At trial, Also attributed his initial hesitation in making an identification to his fear of retaliation.

palpable error as to the unpreserved issues relating to the identification process -- either out of court or in court.

ANTHONY GOFF'S APPEAL

Anthony Goff raises two issues on appeal: (1) that the trial court erred in denying his motion for a directed verdict of acquittal and (2) that the trial court erred in overruling his objection to a cross-examination question and to a comment made during closing argument — both involving Goff's silence upon his initial detention by the police.

In our discussion of the appeal of Timothy Mullins, we identified and discussed the statutes, case authorities, and appellate standards applicable to the crimes charged and as to a motion for a directed verdict. We will not repeat the full discussion of the applicable authorities here, and we incorporate that discussion into our consideration of Goff's appeal.

With regard to Goff's argument that he should have been granted a directed verdict of acquittal, he contends that in his trial testimony, he gave an account of the events that night that was in complete conflict with Alton's recollection and that his version of the events should have been accepted. According to Goff, Alton solicited him for sex, Goff refused, Alton attacked him, and Goff struck Alton in self defense; furthermore, there was no robbery. Thus, the two testimonies as to the events of the August 19, 1997, were wholly contradictory. "[T]he weight of evidence and the credibility of the witnesses are functions peculiarly within the province of the jury, and the jury's

determination will not be disturbed." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 221 (1996) (quoting Jillson v. Commonwealth, Ky., 461 S.W.2d 542, 544 (1970).

While the jury may have chosen to accept Goff's version of the events and to disbelieve Alton's, a review of the evidence as a whole indicates that the trial court correctly denied Goff's motion for a directed verdict and properly submitted to the jury the issue of which version of the events was the more credible. As it was not clearly unreasonable for the jury to have chosen to believe Alton's version of the events over Goff's, Goff was not entitled to a directed verdict, and we may not disturb the trial court's denial of his motion for a directed verdict. Benham, supra.

Goff's second argument is that the trial court erred in overruling his objection to a question raised during cross-examination and to comment made during closing argument highlighting his failure to tell police officers immediately on the night of the robbery the story which he later told in court. Specifically, Goff cites: (1) the Commonwealth's questions of Goff on cross-examination as to whether he told police on the night of his arrest that Alton had asked him about having sex for money; and (2) the prosecutor's comments in closing argument speculating as to why Goff had not told police from the inception of the investigation that this homosexual assault was involved.

In the course of the Commonwealth's cross-examination of Goff, the following exchange took place:

> Q: Of course once you're caught, you immediately told these people . . . hey,

here's what went down . . . you told the cops . . . here's what went down . . . this homosexual tried to hustle me and I knocked him out.

A: No sir.

Q: Why didn't you do that?

A: Cause they didn't ask me sir.

Q: Nobody asked you and you just stood there and said . . . well you just told us that someone said they were picking you up for a robbery . . .

Unidentified Defense Counsel: May we approach please.

At the ensuing bench conference, defense counsel voiced an objection to the prosecutor's comment on Goff's silence. The prosecutor commented that this question did not relate to Goff's post-Miranda warning silence. Defense counsel disagreed. The trial court overruled the objection on the basis that "the door had been opened" to the question.

The cross-examination then continued as follows:

Q: Well these officers told you [you] were being picked up for a robbery, right.

A: I can't actually recall. I remember them stopping us saying, you know, I was being sustained [sic] and taken down here for ID. They didn't tell us right then and there what kind of charge we were being charged with or nothing.

Q: Well I thought you said earlier on direct examination that the officer said to you we we're going to take you down here cause there's a guy saying you [sic] been robbed.

A: They told us that in the cop car on the way down.

Q: In the cop car on the way down they told you your going here to see this guy. He's claiming that, ah, you robbed him, right?

A: Yes sir.

Q: And you knew that as you sat there in the police cruiser, right?

A: Yes sir.

Q: And you didn't say anything to anybody, right?

A: No sir.

Q: You didn't tell the police officer Foit and Mullins and [C.T.] didn't have anything to do with this. I punched the guy because he approached me for sex.

A: No sir, I didn't say nothing.

In his closing argument, the prosecutor described the events leading up to the moment when the group was picked up by the police:

> Does Goff tell anybody on the way over there this is a . . . this is a homosexual assault? I don't know what this is all about man. I punched this guy. The guy tried to do this to me and I punched him. He doesn't say a thing about it. He doesn't tell anybody his story. He doesn't give anybody a chance right then and there to cut themselves loose. Is Alton making things up? No way.

Defense counsel did not object to these closing comments.

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), held that when a criminal defendant has received Miranda warnings following arrest, his subsequent silence cannot be used to impeach his testimony at trial. Since then, Doyle has been applied in numerous Kentucky cases. See Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218 (1976); Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922, 926 (1977); Darnell v.

Commonwealth, 558 S.W.2d 590 (1977); Campbell v. Commonwealth, Ky., 564 S.W.2d 528 (1978); Wallen v. Commonwealth, Ky., 657 S.W.2d 232 (1983); Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1983); Jackson v. Commonwealth, Ky. App. 717 S.W.2d 511 (1986); Green v. Commonwealth, Ky. 815 S.W.2d 398 (1991); and Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993);

However, Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), clarified Doyle, explaining that Doyle only applied in cases where the record disclosed that Miranda warnings had been given to the defendant. The Fletcher court held that:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony. (Emphasis added).

Fletcher at 455 U.S. 607, 102 S.Ct. 1312.

While Fletcher has never been specifically adopted in this jurisdiction, we can find no holding by our Supreme Court or by this Court which would indicate that the Commonwealth's restrictions on using post-arrest (or in this case post-detention) silence for impeachment purposes should be construed differently from the standard as explained in Fletcher.[3]

[3]Green v. Commonwealth, supra, does recognize that the right to remain silent exists whether or not a Miranda warning has been given; nevertheless, it acknowledges without criticism the (continued...)

In summary, Doyle does prohibit commentary on a defendant's silence once Miranda warnings have been given in keeping with the guarantees against self-incrimination embodied virtually identically at Section 11 of the Constitution of Kentucky and in the Fifth Amendment of the Constitution of the United States. However, pursuant to Fletcher, once a criminal defendant takes the stand and elects to testify, his post-arrest silence (especially as to contradictions in his own testimony) may be used for impeachment purposes. We find no error.

For the foregoing reasons, the convictions of Timothy Mullins, Jason Mykal Foit, and Anthony Goff are affirmed.

ALL CONCUR.

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[3](...continued)
decisions (including Fletcher) authorizing the use of post-arrest silence for the purpose of impeaching a defendant's trial testimony.