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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001371-MR

GEORGE KENNETH RANKIN — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 98-CR-00073

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART
** ** ** ** **

BEFORE: CHIEF JUDGE GUDGEL, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, George Kenneth Rankin, appeals from a conviction of one count of kidnapping and one count of first-degree robbery. As appellant was entitled to the application of the kidnapping exemption statute, KRS 509.050, we reverse the kidnapping conviction. Although the prosecutor's use of an out-of-court statement made by appellant's non-testifying co-defendant violated appellant's right to confrontation, it was harmless error. Hence, we affirm appellant's conviction for first-degree robbery.

The facts of the case are as follows. On December 31, 1996, at approximately 9:30 p.m., Roger Adkins exited the

building of his employer, Ohio Valley Wholesale (Ohio Valley), located in Ashland, Kentucky. As Adkins walked to his car in the parking lot, he was approached by an individual, later identified as Zeke Davidson. As Adkins began to unlock the car, Davidson told him to turn around and go back inside. Adkins testified that he saw something "silver plated" that he believed to be a gun. Adkins turned around, walked to the door, unlocked it, and went back inside Ohio Valley followed by Davidson. Once inside, Davidson forced Adkins to walk down a narrow hallway, and as they passed by offices, Davidson would ask "is there anything in here?", to which Adkins would reply no. As they got near the end of the hallway, Davidson heard voices and asked Adkins how many people were there, and Adkins replied that there were three or four. Davidson then noticed a motion detector at the end of the hall, and asked Adkins if it was a camera. Adkins said that it was, and at that point Davidson turned and ran from the building.

Later that night, Officer James Crisp, a policeman with the City of Russell, stopped a car driven by Hugh Lee Myers, in which appellant and Davidson were passengers. Appellant was wearing a stainless steel Rossi .38 special in a holster on his belt. The three were charged with intoxication offenses and taken to the Russell Police Department where they were interviewed by Lieutenant Charles Carter and two other officers of the Ashland Police Department. The three's involvement in the Ohio Valley robbery came to light when Davidson, while "bragging" to Lieutenant Carter about other burglaries he'd committed,

mentioned that he hadn't "been nowhere except that one thing tonight", and then asked if they had his face on video camera.

On August 13, 1998, appellant and Myers were indicted by the Boyd County grand jury each for one count of kidnapping, KRS 509.040, and one count of first-degree robbery, KRS 515.020. Davidson entered a guilty plea encompassing the Ohio Valley robbery and other burglaries, agreeing to testify against appellant and Myers. Appellant and Myers were tried jointly in a jury trial which commenced on May 25, 1999. Appellant and Davidson presented conflicting versions of the events at trial. Davidson testified that he, appellant, and Myers originally planned to burglarize Ohio Valley that evening. He stated that they parked in the lot of a nearby gas station, and while Myers and appellant waited in the car, he walked over to Ohio Valley planning to smash the window out with a brick, but when he got there, he saw a man (Adkins) enter the building. Davidson said he walked back to the car, told appellant and Myers he saw a man go into Ohio Valley, borrowed appellant's gun, walked back over to Ohio Valley and waited for the man to come back out. When Adkins emerged from the building, the robbery commenced.

Appellant's defense at trial was that he was not part of any plan to rob Ohio Valley. He testified that the three men had been riding around in the car, and stopped at the gas station to get something to drink. Appellant stated that Davidson had asked to "see" appellant's gun, and when appellant went into the gas station, Davidson walked over to Ohio Valley with appellant's gun and committed the robbery, unbeknownst to appellant. Myers

did not testify at trial. His counsel presented a defense that Myers was a person of low intellectual functioning and unable to form the requisite intent. Appellant was convicted of kidnapping and first-degree robbery, and sentenced to a ten-year term for each offense, with the sentences to run concurrently for a total of ten years' imprisonment. Myers was found not guilty on both charges.

On appeal, appellant first argues that the trial court erred in overruling his motion for a directed verdict, as there was insufficient evidence to convict him of kidnapping. Appellant further argues that he was entitled to a dismissal of the kidnapping charge under the kidnapping exemption statute, KRS 509.050. KRS 509.050, "Exemption", states, in pertinent part:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

The application of the kidnapping exemption statute is tested on a case-by-case basis. Harris v. Commonwealth, Ky., 793 S.W.2d 802, 807 (1990), cert. denied, 499 U.S. 924, 111 S. Ct. 1319, 113 L. Ed. 2d 252 (1991); Gilbert v. Commonwealth, 637 S.W.2d 632, 635 (1982), cert. denied, 459 U.S. 1149, 103 S. Ct. 794, 74 L. Ed. 2d 998 (1983). In order for the exemption statute to apply, a three-prong test must be satisfied. Harris, 793 S.W.2d at 807. First, the criminal purpose must have been the commission of an offense defined outside KRS Chapter 509; second, the interference with the victim's liberty must have occurred immediately with and incidental to the commission of that offense; and third, the interference must not have exceeded that which is ordinarily incident to commission of the offense in the first prong. Id., Griffin v. Commonwealth, Ky., 576 S.W.2d 514 (1978); KRS 509.050.

We believe appellant satisfies the three prongs of the test, and was therefore entitled to the application of the kidnapping exemption statute. First, his criminal purpose was the commission of first-degree robbery, KRS 515.020. Second, the interference with Adkin's liberty occurred immediately with and incidental to the robbery, lasting only for the time Davidson forced Adkins to walk from the car to the door, unlock it, and go down the hall with Davidson. Third, the interference was not in excess of that which is ordinarily incident to first-degree robbery. Adkins was accosted in his employer's parking lot, and compelled at gunpoint to let Davidson in the building and assist

him in looking for valuables. The crime of first-degree robbery encompasses the situation in which a person is threatened with a gun for the purpose of committing a theft, which is precisely what occurred in the instant case. KRS 515.020. Adkins was released immediately when the robbery ended, and was not used as a hostage or shield. As such, the restraint was not in excess of that which generally accompanies first-degree robbery.

The Kentucky Supreme Court has stated that, with regard to the second and third prongs, in order for the exemption statute to apply, the restraint must be "close in distance and brief in time." Timmons v. Commonwealth, Ky., 555 S.W.2d 234, 241 (1977). Adkins testified that the entire incident lasted for only five or six minutes. Further, we feel it is significant that Adkins was never removed from his employer's premises, thus distinguishing the instant case from others in which a victim restrained for a brief time and moved a short distance was nevertheless found to have been kidnapped. For example, in Bishop v. Commonwealth, Ky. App., 549 S.W.2d 519 (1977), a kidnapping was found where a supermarket clerk was forced at gunpoint to carry the proceeds of the robbery out of the store, through the parking lot, and about fifty feet into the woods. This Court held that taking the victim from the "safety of the well lighted supermarket" into a dark wooded area exposed him "to a much greater risk of death or serious bodily injury, and the interference with his liberty was far in excess of that which ordinarily accompanies a robbery in the first degree". Id. at 522. Thus KRS 509.050 did not apply. See also Commonwealth v.

Seay, Ky., 609 S.W.2d 128 (1980) (Kidnapping found where victims were tied up and forced from their own apartment into nearby apartment, and one victim taken from her apartment and compelled to help robbers get into neighbors' apartments. Court held restraint on liberty went far beyond that necessary to carry out robberies, which precluded application of KRS 509.050). In the instant case, Adkins was not forced from his employer's premises or into a more dangerous area, but back inside the building, where other employees were working. In fact, Adkins testified at trial that he felt more secure after he was taken inside the building than he did in the parking lot. For the aforementioned reasons, we believe appellant satisfies all three prongs of the test and was entitled to the application of KRS 509.050, thus, his kidnapping conviction must be reversed.

Appellant next argues that the trial court erred in refusing to sever his case from that of his co-defendant Myers. Appellant contends that this resulted in the Commonwealth's introduction of an out-of-court statement by Myers which incriminated appellant, thus violating appellant's right to confrontation. The Commonwealth wished to introduce a statement Myers made to police, "[T]hey wanted to try to hit Ohio Valley", to prove Myers knew a robbery was planned. As Myers was not testifying, the court found that, per Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the statement could not be introduced in its raw form without violating appellant's confrontation rights, as the pronoun "they" clearly referred to appellant and Davidson. Hence, the court

instructed the Commonwealth to paraphrase Myers's statement, which was introduced at trial through the testimony of Lieutenant Carter as follows:

> Commonwealth: Did Mr. Myers indicate to you that he, Mr. Myers, was aware that there was a plan to rob Ohio Valley that night?
>
> Lieutenant Carter: Yes sir, he did.

Appellant contends that the paraphrased version nonetheless incriminated him, because other evidence at trial linked him with Myers and Davidson that evening. Appellant further contends that the trial court's admonishment of the jury was insufficient to cure the violation, as it did not specifically instruct the jury not to consider Myers's statement against appellant. At the close of the trial, the court admonished the jury as follows:

> I admonish the jury that any of the evidence that you have heard over the course of the trial that you may or may not find as incriminating toward Mr. Rankin, you shall not consider that evidence as having any weight or any affect against Mr. Myers. And likewise, any evidence or testimony that you've heard during the course of this trial that you may or may not find having been incriminating as to Mr. Myers, you shall not

> treat that evidence or give it any weight as being incriminating towards or prejudicial to Mr. Rankin. Which is probably a fancy way of saying you consider them separately as you evaluate the evidence as it may apply to each.

Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) held that "in a joint trial the admission of a non-testifying co-defendant's confession which 'expressly implicated' his fellow co-defendant, was a violation of the Confrontation Clause of the Sixth Amendment". Rogers v. Commonwealth, Ky., 992 S.W.2d 183, 185 (1999). However, in Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the Court considered the issue that appellant advances in the instant case - "whether Bruton requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." Richardson, 481 U.S. at 202, 107 S. Ct. at 1704. The Court held that, in such a situation, "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Richardson, 481 U.S. at 211, 107 S. Ct. at 1709; Rogers, 992 S.W.2d at 185. "[A] joint trial utilizing a properly redacted

statement is appropriate where given the totality of the circumstances no substantial prejudice will result. It is appropriate where the statement does not provide details that point unerringly to the nonconfessing defendant". Cosby v. Commonwealth, Ky., 776 S.W.2d 367, 370 (1989), cert. denied, 493 U.S. 1063, 110 S. Ct. 880, 107 L. Ed. 2d 963 (1990), overruled in part on other grounds by, St. Clair v. Roark, Ky., 10 S.W.3d 482 (1999). Myers's statement as admitted contained no reference to appellant's existence, did not point unerringly to appellant, and was accompanied by a proper limiting instruction by the trial court. Id.; Rogers, 992 S.W.2d at 186. Accordingly, the admission of Myers's out-of-court statement as paraphrased was not in error.

Appellant further contends that the most damaging use of the statement, and a violation of his confrontation rights, occurred in the following exchange later during Lieutenant Carter's testimony:

> Commonwealth: . . . Is it a reasonable inference that Mr. Rankin, being in the car with Mr. Davidson and Mr. Myers, and knowing that Mr. Myers indicated he was aware of a plot to commit this robbery of plan, is it a reasonable implication that that's what Mr. Rankin understood as well?
>
> Lieutenant Carter: Yes sir. I felt that it was.

We agree with appellant that this exchange was improper, as the prosecutor was clearly attempting to use Myers's out-of-court statement to prove appellant was in on the plan to rob Ohio Valley. A prosecutor is not permitted "to undo the effect of the limiting instruction by urging the jury to use [the nontestifying co-defendant's] confession in evaluating [the other co-defendant's] case." Richardson, 481 U.S. at 211, 107 S. Ct. at 1709. However, a Bruton violation "need not constitute reversible error if the evidence introduced through the confession or statement of the non-testifying co-defendant is cumulative and other evidence of the guilt of the accused is overwhelming. In such a case only harmless error occurs and the conviction may be upheld." Butler v. Commonwealth, Ky., 516 S.W.2d 326, 328 (1974).

In the instant case, we adjudge the violation of appellant's confrontation rights to be harmless error. In light of Davidson's testimony as to appellant's role in the robbery, the prosecutor's use of Myers's statement against appellant was cumulative. Testimony of police officers, and appellant himself, placed appellant with Davidson and Myers throughout the evening of the robbery. Appellant's gun was used to commit the crime, and an illegal police scanner was found in the car in which the three men were arrested. Additionally, appellant had made

statements to police that he knew what Davidson "was going to do" and that he "walked to try to stop [Davidson] from doing it", from which the jury could have inferred he meant the robbery.

Finally, the trial court did not err in refusing to sever the trials of appellant and Myers. "The trial judge has broad discretion to determine whether the risk of prejudice requires severance and such a decision will be overturned only upon a clear showing of an abuse of discretion." Epperson v. Commonwealth, Ky., 809 S.W.2d 835, 838 (1990). Having found only harmless error, we cannot say the lower court abused its discretion or that appellant was prejudiced by the joint trial.

For the aforementioned reasons, the judgment of the Boyd Circuit Court is reversed with regard to the kidnapping conviction and affirmed as to the first-degree robbery.

ALL CONCUR.

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