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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001050-MR

ROBERT LOUDEN — APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 01-CR-00740-002

COMMONWEALTH OF KENTUCKY — APPELLEE

and

NO. 2002-CA-001120-MR

JEREMIE J. SULLIVAN — APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 01-CR-00740-003

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

KNOPF, JUDGE: Shortly after midnight on August 20, 2001, Jeremie Sullivan, Robert Louden, and Richard Arlinghaus assaulted Jeff McManama in the parking lot of Jillian’s, a restaurant and bar in Covington. The three men were soon arrested, and because a satchel of compact discs had been taken

from McManama, they were charged with second-degree robbery.[1] Arlinghaus eventually pled guilty to fourth-degree assault. Louden and Sullivan, however, jointly stood trial and were convicted, respectively, of second-degree robbery and complicity to second-degree robbery, both class C felonies. By judgment entered May 8, 2002, the Kenton Circuit Court sentenced Louden to eight years' imprisonment. By judgment entered May 15, 2002, the court sentenced Sullivan to five years' imprisonment and probated that sentence for five years. Louden and Sullivan have both appealed. This Court consolidated their appeals for review. The appellants maintain that their attack upon McManama was a misdemeanor assault, not a robbery, and that the trial court erred by failing to direct a verdict to that effect. In addition, Louden maintains that the trial court arbitrarily rejected his guilty plea, and Sullivan complains that one of the Commonwealth's exhibits and certain remarks by the prosecutor undermined the fairness of the trial. We affirm.

McManama and three companions went to Jillian's on a Sunday night to bowl and to drink a few beers. One of the companions brought in a small satchel of compact discs, and the bartender played the discs on Jillian's stereo system. Late in the evening another group of young men, including Louden and Sullivan, came into the bowling alley. Apparently there was

[1] KRS 515.030.

some cordial interaction between the groups. McManama's group bought all a round or two of beers and gave the other group some food. When Jillian's closed, at midnight, one of McManama's companions had already gone to the car and the two others stopped in the restroom on the way outside. McManama, with the satchel of compact discs in his hand, left the building and was confronted in the parking lot by Louden, Sullivan, and Arlinghaus.

What passed between them is not clear. No one called Arlinghaus as a witness, Louden and Sullivan declined to testify, and McManama, who was beaten unconscious, testified that he could not recall what preceded the attack. McManama's companion who had left early was asleep in the car. The two companions who had stopped in the restroom testified that as soon as they left the building and came into the parking lot they heard McManama trying to pacify the other three. "What is the problem?" he said. "We bought you drinks, we gave you food." They then saw Louden and Sullivan punch McManama in the face, knock him down, and kick him several times in the head and ribs. One of companions went inside for help, the other intervened. Apparently there was a brief standoff. McManama may have attempted to get up, but Arlinghaus felled him again with another kick to the head. Louden, according to one of the

companions, picked up the satchel of compact discs and fled together with Sullivan.

Within a few minutes several policemen had arrived. One attended McManama and saw him into an ambulance. One arrested Arlinghaus not far from the parking lot. Another followed a tip to a residence on Lewis Street where he found the satchel of compact discs and, in the residence's parking area, arrested Louden and Sullivan.

KRS 515.030 provides that

> [a] person is guilty of robbery in the second 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.

KRS 502.020(1) provides in part that

> [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]ids, counsels, or attempts to aid such person in planning or committing the offense.

Louden and Sullivan contend that the Commonwealth failed to prove that they attacked McManama intending to take the cds. Louden argues that the jury could have inferred that the attack was sparked by something else and that the theft of the cds was an afterthought. Sullivan argues that even if Louden intended to take the cds there was no evidence that he, Sullivan, knew of or shared that intent.

This court, of course, may not order a directed verdict unless the jury's finding of guilt was clearly unreasonable.[2] The jury is permitted to make reasonable inferences, including inferences about the defendant's state of mind from proof about his acts and the circumstances surrounding those acts.[3] The jury's inferences need only be reasonable in light of that proof, they need not be the only possible inferences. The robbery statute, moreover, requires only that theft be a purpose of the assault, not the only purpose.[4]

The evidence that Sullivan and Louden attacked in unison and apparently in concert, that Louden made a point of picking up the satchel of cds, that he and Sullivan fled together immediately after he picked it up, and that together they attempted to secret the cds in the Lewis Street residence are all facts permitting a reasonable inference that the theft of the cds was a motive for the attack upon McManama and that Sullivan shared that motive. Although this is not the only possible interpretation of the evidence, it is a likely interpretation and one that a reasonable juror could believe beyond a reasonable doubt. The trial court did not err,

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

[3] Commonwealth v. Suttles, Ky., 80 S.W.3d 424 (2002); Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999).

[4] Morgan v. Commonwealth, Ky., 730 S.W.2d 935 (1987).

therefore, when it denied the defendants' motions for directed verdicts.

Louden also contends that the trial court abused its discretion when it rejected his offer to plead guilty. The day before trial Louden's attorney represented to the court that Louden desired to plead guilty to an amended charge of second-degree assault under extreme emotional disturbance, a class D felony.[5] A discussion ensued during which the parties conceded that the amended charge bore little relation to the alleged facts, but struck a compromise between second-degree robbery, a class C felony, and fourth-degree assault, a class A misdemeanor. The court expressed distaste for such fictional guilty pleas and indicated that it probably would not accept Louden's plea. Several times during the discussion Louden indicated by shaking his head that the proposed plea was his attorney's idea, not his, and at the conclusion of the hearing, when counsel asked him if he still wished to tender the plea, Louden emphatically said that he did not.

Although it would seem to be well within the trial court's broad discretion under RCr 8.08 to reject a plea for which there is no factual predicate, we need not reach that question because Louden's plea was never tendered and so could not be rejected. Louden's claim that the trial court somehow

[5] KRS 508.020, KRS 508.040.

improperly influenced his decision not to tender the plea is meritless. His decision was clearly based not on anything the trial court said, but on his desire to avoid a felony conviction, even at the risk of a trial for robbery.

Turning to Sullivan's contentions, the officer who arrested Louden and Sullivan seized the shoes they were wearing because he suspected the presence on them of fresh human blood. The Commonwealth introduced the shoes into evidence along with lab results confirming the officer's suspicions. Sullivan contends that the Commonwealth failed to establish an adequate foundation for the introduction of his shoes and further contends that the lab result, which confirmed that human blood was on the shoes but did not identify the individual source of the blood, was unduly prejudicial.

KRE 901(a) provides that

> the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

To authenticate the allegedly bloody shoes, the Commonwealth offered testimony by the officer who seized the shoes and by two forensic lab technicians who inspected the shoes. The officer testified that the shoes offered at trial were the same shoes he had seized from Sullivan the night of the attack. The shoes are black, and at trial the officer conceded that he could not then

see the alleged spatter marks. He testified, however, that at the time he seized the shoes the spatter marks were visible to the unaided eye. One of the technicians testified that the shoes offered at trial were the ones he had tested. He described his removal of samples from both shoes and the tests he performed to determine that the samples were human blood.

Someone had drawn on the shoes, apparently to indicate areas that may have been spattered or areas to be tested. The drawer did not testify, and Sullivan contends that absent that testimony KRE 901 was not satisfied and the shoes should not have been admitted. Not only does the drawer represent a missing link in the chain of custody, but the markings, may, Sullivan insists, have created a false impression about the amount of blood on the shoes. We disagree.

As our Supreme Court has explained,

> a party seeking to introduce an item of tangible evidence need not satisfy an "absolute" identification requirement, and evidence is admissible if the offering party's evidence reasonably identifies the item. . . . [I]f the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the "chain of custody" of the item with sufficient completeness to render it improbable that the original item

> has either been exchanged with another or been contaminated or tampered with.[6]

We agree with the trial court that the Commonwealth's proof in this case satisfied this standard. Enough of the chain of custody was presented to establish the probability that Sullivan's shoes were tested and that they had not been contaminated or tampered with. The drawings, of course, did not alter the presence of blood, and they corresponded closely enough with the areas where blood samples were found as not to require a separate explanation. There is no indication that they were intended to be misleading, nor is it at all likely that they were given the jury's opportunity to examine the shoes and the testimony by several witnesses that McManama had bled noticeably but not profusely.

Because the Commonwealth did not determine whose blood was on the shoes, Sullivan contends that they amounted to sensational and prejudicial evidence that was not sufficiently probative to be admitted. We disagree. Evidence is probative, of course, if it has any tendency to make a material fact more or less probable than it would be without the evidence. The fact that Sullivan's shoes bore spatters of human blood increases the probability that he participated in the attack upon McManama. Evidence is unduly prejudicial if the jury is

[6] Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 80 (2000).

apt to give it substantially more weight than it deserves. As evidence of Sullivan's participation in the assault, the jury is not apt to have exaggerated the import of the shoes. There was ample evidence in addition to the shoes that Sullivan participated in the assault.

Sullivan's concern, as we understand it, is that the jury may have been sufficiently outraged by evidence that the attack was brutal to have found the attack a robbery instead of an assault. As noted above, however, there was sufficient evidence of Sullivan's intent to further Louden's theft of the cds to justify his robbery conviction. Proof that the assault was brutal enough to draw blood was not unduly prejudicial.

Finally, Sullivan contends that during his closing argument the prosecutor told the jury that Sullivan could be found complicit in the robbery regardless of his intent. The prosecutor did no such thing. He did argue, legitimately, that the intent of the robbers could be inferred from the fact that the theft occurred in close temporal proximity to the assault. He then suggested that such an inference was required. Both defendants immediately objected, and the trial court admonished the jury to follow the law as expressed in the instructions. In their closings, of course, the defendants had emphasized robbery's intent element and the weakness of the Commonwealth's proof on that point. We are confident that the jury appreciated

the issue. Notwithstanding the unsuccessful attempt by the prosecutor to overstate his case, Sullivan's trial was fundamentally fair.[7]

In sum, the General Assembly has declared its intolerance of robbery, no matter how petty the theft involved. In this case, the jury was convinced that to further a very petty theft Louden and Sullivan perpetrated a violent assault. The evidence does not compel, but it supports this conclusion. Louden was not deprived of a right to plead guilty, and the trial for both defendants was fundamentally fair. Accordingly, we affirm the May 8, 2002, and May 15, 2002, judgments of the Kenton Circuit Court.

ALL CONCUR.

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[7] Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1987).