RENDERED: MARCH 18, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001734-MR
AND
NO. 2003-CA-001341-MR

RANDALL REYNOLDS — APPELLANT

v.

APPEALS FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
INDICTMENT NO. 02-CR-00097

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Following a jury trial, the Graves Circuit Court entered a judgment convicting Randall Reynolds of second degree burglary[1] and sentencing him to ten years imprisonment. Thereafter, the trial court denied Reynolds's CR 60.02 motion for a new trial based on newly discovered evidence. Reynolds

[1] KRS 511.030.

separately appealed from the judgment and order and these appeals have been consolidated before this Court. Finding no error in either appeal, we affirm.

In his first appeal, Reynolds primarily argues that the trial court erred by denying his motions for a directed verdict and for a judgment notwithstanding the verdict. At trial, the Commonwealth's evidence connecting Reynolds with the burglary hinged on one eyewitness identification of him and several witnesses' identification of his truck. He argues that these identifications were so unreliable that no reasonable juror could have found him to be guilty beyond a reasonable doubt.[2] But while the eyewitness testimony in this case was not overwhelmingly certain, we conclude that it was sufficient evidence to submit the question of Reynolds's guilt to the jury.

During the morning of January 24, 2002, two men burglarized the home of Terry and Connie Jackson in Mayfield, Kentucky. On the morning of the burglary, Patsy Nall, Terry Jackson's mother, was driving her two grandchildren to school. As she passed by the home she saw an unfamiliar pickup truck parked in front of the house. As she slowed her car to get a better look, they saw two men come out of the house carrying items. Nall told twelve-year old Lynnsey to try to get a look at

[2] *See* Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991); *citing* Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983).

the truck's license plate, and she told eight-year old Nathan to try to remember the men's appearances. When the two men realized that they were being watched, they dropped the items, got into the pickup truck and sped away.

Kentucky State Trooper James Mills responded to Nall's report of the burglary. Nall told Trooper Mills that she did not get a good look at the two men. Both Nathan and Lynnsey recalled that one of the men was tall and skinny and the other man was short and stocky. Lynnsey noted that the taller man appeared to be older and Nathan remembered that the taller man had a mustache. All three stated that the men were wearing dark sock caps. In addition, Nall, Nathan, and Lynnsey each reported that the pickup truck was a white, older-model Chevrolet and had a black bumper. Nathan also observed that the truck had three black tires and one tire which was silver or white. Lynnsey remembered that the truck had a Kentucky license plate beginning with the number 9 and the second number being either 2 or 5.

After taking the report, Trooper Mills checked records of all pick up trucks with licenses beginning with 95. Mills identified Reynolds's truck as a possible match and then drove to Reynolds's house. After confirming that the pickup truck matched the descriptions, he asked Nall to come look at the vehicle. She positively identified the pickup truck as being the truck at the burglary scene. Trooper Mills then obtained a warrant to search

Reynolds's house, but no evidence was found in that search. A search of Reynolds's truck also produced no evidence. Subsequently, Nathan identified Reynolds from a photo lineup, but Nall and Lynnsey were unable to positively identify Reynolds. The second man involved in the burglary was never identified.

Prior to trial, Reynolds moved to exclude the eyewitness identifications, arguing that the photo lineup had been unduly suggestive. The trial court denied the motion. On appeal, Reynolds first argues that the trial court erred by denying his motions for a directed verdict or for a judgment notwithstanding the verdict. Reynolds correctly notes that there was no physical evidence connecting him with the burglary, and he further asserts that the eyewitness identification lacked reliability and was tainted by the suggestive photo lineup and show-up identification of his truck.

In determining the admissibility of eyewitness identifications, Kentucky courts have consistently followed the United States Supreme Court's decision in Neil v. Biggers.[3] The Court in Neil set out a two-prong test under which the court must

[3] 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). *See* St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004); Roark v. Commonwealth, 90 S.W.3d 24, (Ky. 2002); Savage v. Commonwealth, 920 S.W.2d 512, 513 (Ky. 1996); Edmonds v. Commonwealth, 906 S.W.2d 343, 345 (Ky. 1995); Sanders v. Commonwealth, 844 S.W.2d 391, 393 (Ky. 1993); Riley v. Commonwealth, 620 S.W.2d 316, 318 (Ky. 1981); and Moore v. Commonwealth, 569 S.W.2d 150, 153 (Ky. 1978).

first determine whether the confrontation procedures employed by the police were suggestive. Following the suppression hearing, the trial court found that the photo lineup did not unduly suggest Reynolds. Because the photo lineup was not included in the record on appeal, we cannot say that this finding was clearly erroneous.

Reynolds further argues that Trooper Mills's action in calling Nall to view the truck while Reynolds was sitting in the back of the police cruiser was also unduly suggestive. Thus, Reynolds asserts that Nall's identification of his truck was tainted and should have been excluded. However, the standards set out in Neil apply to eyewitness identification of persons, not physical evidence.

Moreover, even if the photo lineup and the show-up identification of the truck were suggestive, Neil holds that unnecessary suggestiveness alone does not require exclusion of the identification.[4] Instead, the inquiry is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."[5] The Court listed five factors to be considered in evaluating the likelihood of misidentification: (1) the opportunity of the

[4] Id. at 198-99, 93 S. Ct. at 381-82.

[5] Id. at 199, 93 S. Ct. at 382.

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 demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.[6] Kentucky courts have also considered whether other evidence tends to corroborate the witness's identification.[7]

As Reynolds correctly points out, Nathan's identification of him was less than perfect and the viewing conditions were not optimal. However, Nathan testified that his attention was focused on the burglars and he got a good look at them. Nathan's pre-lineup description closely matches Reynolds's appearance. Trooper Mills showed Nathan the photo lineup on the same day as the burglary and Mills testified that Nathan quickly picked Reynolds's picture. Furthermore, all of the witnesses' descriptions of the truck closely matched Reynolds's vehicle. While there were some inconsistencies among the descriptions, we agree with the trial court that these went only to the weight of the witnesses's testimony and not to its admissibility.

Reynolds next argues that the trial court erred by denying his motion for a mistrial. During the suppression

[6] Id. at 199-200, 93 S. Ct. at 382.

[7] *See* Merriweather v. Commonwealth, 99 S.W.3d 448, 452 (Ky. 2003); Roark v. Commonwealth, 90 S.W.3d 24, 29 (Ky. 2002).

hearing, Trooper Mills testified about his investigation leading to Reynolds. Mills stated that he remembered that Reynolds's truck had been identified as being involved in a prior burglary in Tennessee, although Reynolds had not been identified. In a report, Mills also stated that he had been informed by other law enforcement agencies that Reynolds had been involved in burglaries in Illinois.

Prior to trial, Reynolds filed a motion *in limine* to exclude any reference to prior uncharged crimes or bad acts. The trial court granted the motion. At trial, Trooper Mills again testified about his investigation. After discussing his review of vehicles with license plates beginning in 95, Trooper Mills continued, "As I am driving around, I was trying to think of people in my mind . . . ." The trial court cut off Trooper Mills and reminded counsel of the pre-trial order. Reynolds's counsel moved for a mistrial, which the trial court denied. Reynolds argues that Trooper Mills's reference was an impermissible reference to prior bad acts and uncharged crimes, in violation of KRE 404(b) and the pre-trial order, and that the trial court abused its discretion in denying his motion for a mistrial.

We disagree. A mistrial is justified only when "a manifest necessity for such an action or an urgent or real

necessity" appears in the record.[8] It is within the trial judge's discretion to grant a mistrial, and that decision should not be disturbed absent an abuse of discretion.[9] In this case, the trial judge properly stepped in before Trooper Mills could disclose any facts suggesting prior bad acts or uncharged crimes. Mills's brief reference to "people" he "had in mind" did not violate KRE 404(b) or the pre-trial order. Consequently, a mistrial was not mandated. Furthermore, Reynolds's trial counsel turned down the trial court's offer of an admonition to the jury.

In his final argument in the direct appeal, Reynolds argues that the trial court improperly denied his request to remove a juror for cause. During *voir dire*, a member of the venire informed the trial court that she had several family members who work in law enforcement. Reynolds moved to remove the juror for cause. However, the trial court denied the request and Reynolds subsequently used a peremptory challenge to remove the juror from the panel. Reynolds argues that the juror had an obvious bias in favor of law enforcement and should have been stricken from the panel for cause.

RCr 9.36 provides that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair

[8] Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985).

[9] Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky.App. 1993).

and impartial verdict on the evidence, that juror shall be excused as not qualified." The standard of review for a trial court's decision on a challenge for cause is whether there was an abuse of discretion.[10] In order to find reversible error, the party alleging bias bears the burden of proving that bias and the resulting prejudice.[11] Reynolds must demonstrate a probability of bias or prejudice based on the particular facts of the case. Moreover, we will not presume bias from a relationship except when it is strictly necessary.[12]

Unfortunately, the exchange between defense counsel and the juror is largely inaudible on the videotape, and Reynolds has not attempted to provide any written transcription of the juror's responses. From our review of the tape, the juror informed defense counsel that she had several family members who were employed in law enforcement. Upon further questioning, the juror seems to answer that she had never known police officers to make a significant mistake during an investigation. However, the

---

[10] Bolen v. Commonwealth, 31 S.W.3d 907, 910 (Ky. 2000).

[11] Caldwell v. Commonwealth, 634 S.W.2d 405, 407 (Ky. 1982) (*citing* Watson v. Commonwealth, 433 S.W.2d 884 (Ky. 1968)).

[12] *See* Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997) *U.S. cert. denied*, 522 U.S. 986, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997), holding that a person will not be automatically disqualified even if he or she is a law enforcement officer, has been a victim of a similar crime, or has some knowledge of the participants acquaintance with the participants and their possible testimony.

juror cannot be heard to express any inclination to uncritically accept the testimony of police officers over other witnesses. Under the circumstances, Reynolds has failed to prove that the juror was biased or that the trial court abused its discretion in failing to strike the juror for cause.

In his second appeal, Reynolds argues that the trial court abused its discretion by denying his motion for a new trial based on newly discovered evidence. Approximately eight months after entry of the final judgment, in June 2003, Reynolds filed a motion for a new trial pursuant to CR 60.02(b). In support of the motion, Reynolds presented an affidavit from George Lewis. In his affidavit, Lewis stated that he had observed the white pickup truck parked in Reynolds's driveway at the time the burglary was taking place. The trial court denied the motion without a hearing.

CR 60.02(b) allows a court to grant a party relief from a final judgment upon a showing of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.05." Granting a new trial is within the discretion of the trial court, and such is disfavored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature.[13] Newly discovered evidence

[13] Epperson v. Commonwealth, 809 S.W.2d 835 (Ky. 1990).

"must be of such decisive value or force that it would with reasonable certainty, change the verdict or . . . would probably change the result if a new trial should be granted."[14] Further, a motion for new trial based upon newly discovered evidence must be accompanied by an affidavit showing that appellant exercised sufficient diligence to obtain the evidence prior to his trial.[15]

The Commonwealth correctly points out that Lewis's affidavit gives the wrong date for the incident – he states that he observed the pickup truck on January 24, 2001, while the burglary took place on January 24, 2002. Assuming that the discrepancy was an inadvertent error and Lewis meant to refer to the latter date, his affidavit would place the pickup truck away from the burglary scene. Reynolds asserts that Lewis's affidavit calls into question the witnesses' identification of his truck. However, several other witnesses testified at trial that Reynolds was home at the time. Thus, Lewis's testimony would have been cumulative. Moreover, the new evidence was not so decisive that it would probably change the verdict if a new trial were granted.

Furthermore, Reynolds has failed to show that he could not have obtained Lewis's testimony prior to trial through the exercise of due diligence. Although Lewis did not reveal this

[14] Coots v. Commonwealth, 418 S.W.2d 752, 754 (Ky. 1967).

[15] Wheeler v. Commonwealth, 395 S.W.2d 569 (Ky. 1965).

information until after trial, Lewis stated in the affidavit that he had spoken to Reynolds about three days after the incident. Under the circumstances, the trial court could reasonably infer that Reynolds could have discovered Lewis's testimony prior to trial. Consequently, the trial court did not abuse its discretion in denying Reynolds's motion for a new trial.

Accordingly, the judgment of conviction by the Graves Circuit Court is affirmed. Furthermore, the order of the Graves Circuit Court denying Reynolds's motion for a new trial pursuant to CR 60.02 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Clare
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky