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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001213-MR

LARRY MORRIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDRIC J. COWAN, JUDGE
ACTION NO. 06-CR-002475

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This appeal arises out of the trial and conviction of Larry Morris in the Jefferson Circuit Court on the charge of first-degree robbery. He was sentenced to a total of twelve years' imprisonment. Morris appeals his conviction and contends that the trial court erred on the following grounds: (1) the lead detective's testimony was improper because it contained a narration of a

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

surveillance video, gave an expert opinion as to the presence of "threat of force" and bolstered the testimony of another witness; and (2) the out-of-court identification of Morris should have been suppressed because the identification was unduly suggestive and unreliable. We will address each claim in turn.

On June 6, 2006, Larry Morris entered Thorton's Food Mart (Thorton's) on Seventh Street Road in Louisville. He placed luncheon meat, chips, and cupcakes in a bag and left without paying for the items. Jason Taylor, a Thorton's employee, followed Morris out of the store. Morris turned toward Taylor and raised his shirt, exposing a gun tucked inside his pants. Taylor went back into the store and later reported the crime to Thorton's corporate office and the Louisville Metro Police Department (LMPD).

LMPD Detective Nauert obtained a surveillance video recorded on a compact disc (CD) from Thorton's management. After watching the video, the detective believed that he recognized the perpetrator as Larry Morris. The detective prepared a photo pack of five men with physical similarities to the man in the video. Then on June 26, 2006, the detective met with Taylor. Taylor made a taped statement concerning the events of June 6, 2006. Taylor also viewed the photo pack provided by the detective. Although he was initially unable to identify the perpetrator, Taylor thought that he might be more likely to make an identification if he watched the surveillance video. After watching the video, Taylor identified Morris as the man who entered Thornton's, stole items, and

revealed a weapon. This identification led to the arrest of Larry Morris for first-degree robbery.

I. Detective Nauert's Testimony

During his testimony at Morris' trial, Detective Nauert stated, "as Mr. Taylor said, he turned, raised his shirt, showed him what he believed was a handgun. That's where he used the threat of physical force." Morris first alleges that the detective's testimony was improper because the trial court allowed him to narrate the video although he did not have first-hand, personal knowledge of its contents.

Kentucky Rule of Evidence (KRE) 602 provides "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Police are permitted to give simultaneous commentary on crime scene surveillance footage. *Mills v. Commonwealth*, 996 S.W.2d 473, 488 (Ky. 1999). Their testimony, however, is limited to video footage within their knowledge and experience. *Id*. The record indicates that the detective had no personal knowledge of the events of June 6, 2006. Therefore, the detective's narration of the video was improper testimony.

Next, Morris contends that the detective gave improper expert testimony when he opined that Morris showed a "threat of force," which is an element of first-degree robbery. KRS 515.020. Morris contends that statement constituted a conclusion of law.

As previously mentioned, a witness may only give testimony concerning matters of which he or she has personal knowledge. KRE 602. Although the witness does not have personal knowledge of the facts, Kentucky law allows expert testimony "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise. . . ." KRE 702.

In *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997), the Kentucky Supreme Court held that courts must question: (1) if the witness is qualified as an expert on the subject matter; (2) if the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993);[2] (3) if the subject matter is relevant under 401; and (4) whether the content of the opinion will assist the trier of fact.

Although Courts have previously upheld police expert testimony concerning matters such as the drug culture, *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004), Detective Nauert's testimony was outside the realm of permissible police expert testimony. Even with police training and experience, the detective

[2] The Supreme Court, in *Daubert*, *supra*, provided a non-exhaustive list of factors to be considered by judges when deciding whether or not to admit scientific evidence. The factors are as follows: (1) can the theory or technique be tested?; (2) has the theory or technique been published or subjected to peer review?; (3) what is the known or potential rate of error when using the theory or technique?; (4) do standards exist which can serve as controls on a techniques operation, and if so, were they employed in the issue at hand?; and (5) is the theory or technique generally accepted?

was in no better position than the jury to determine whether Morris' actions constituted a "threat of force." No specialized training or knowledge is required to recognize the presence of a threat. Therefore, the detective's opinion that Morris' actions constituted a threat of force was also improper testimony.

Third, Morris alleges that the detective's testimony improperly bolstered the testimony of Taylor. When describing the actions of Morris, the detective stated, "as Mr. Taylor said . . . ," thereby corroborating Taylor's earlier testimony. Evidence of a witness's credibility may only be introduced once the witness's character or veracity has been disputed. KRE 608.

Kentucky Courts have consistently disapproved of testimony that references the testimony of another witness. The Kentucky Supreme Court held that generally one witness may not vouch for the truthfulness of another witness. *Stringer*, 956 S.W.2d at 888; *Hall v. Comonwealth*, 862 S.W.2d 321, 323 (Ky. 1993); *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992). Further, in *Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998), the Court expressed disapproval of questioning one witness about the truthfulness of another witness's testimony. The detective's statement directly referenced and supported Taylor's testimony. Therefore, we find the detective's reference to Taylor's testimony improper.

Although we find the detective's testimony improper for the above stated reasons, we do not find the testimony to be sufficient grounds for reversal. After the detective made the improper statement on direct examination, defense

counsel objected and requested a mistrial. The trial court denied the motion for a mistrial but offered to admonish the jury as to the statement. Defense counsel declined the court's offer of an admonition under the theory that an admonition was inadequate to cure the harm of Nauert's testimony.

Juries are presumed to follow an admonition. *Mills*, 996 S.W.2d at 485. In *Combs v. Commonwealth*, 198 S.W.3d 574, 581-82 (Ky. 2006), the Court provided:

> [t]here are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect would be devastating to the defendant; or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

We find neither circumstance present in this case. We cannot say that the statement had a devastating effect on Morris. The jury was able to view the actual crime on video. Taylor testified that the footage accurately portrayed the crime. The jury had the rare opportunity to view the crime and make their conclusions. The video footage is such damaging evidence that it renders the detective's statement significantly less harmful.

We must review the trial courts' decision to deny the motion for a mistrial on an abuse of discretion standard. *Martin v. Commonwealth*, 170 S.W.3d 374, 381(Ky. 2005). "A manifest necessity for a mistrial must exist before it will

be granted." *Id*. Further, in *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005), the Kentucky Supreme Court provided:

> [w]hether to grant a mistrial is within the sound discretion of the trial court, and such a ruling will not be disturbed absent an abuse of that discretion. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way . . . .

In light of the ample evidence presented against Morris, we find that such manifest necessity did not exist. Therefore, although the detective's statements were improper, the trial court's decision to deny the motion for a mistrial is affirmed.

II. Motion to Suppress the Photo Identification

On June 26, 2006, twenty days after the robbery, Jason Taylor reviewed the photo identification pack. Initially, Taylor was unable to identify Morris. Then, Taylor suggested that he would be able to make an identification if he saw the surveillance footage of the crime. After watching the footage, Taylor identified Morris as the perpetrator. Morris contends that the photo pack identification procedure was unduly suggestive because Taylor was allowed to view the surveillance footage. In addition, Morris claims that the suggestive process increased the likelihood of misidentification and was improperly admitted. We disagree.

A photo pack identification will be set aside when, under the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972).

The United States Supreme Court identified factors used to determine the likelihood of misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' 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. *Id.* at 199.

We find that the photo pack was not unduly suggestive to the point it gave rise to the likelihood of misidentification. Taylor had the uncommon opportunity to review footage of the crime. It is unlikely that reviewing footage of the actual crime would lead to a misidentification. Further, the trial court determined that the identification was not unduly suggestive because Taylor's memory was only refreshed by the surveillance footage. In addition, the trial court reasoned that the photo pack identification occurred only twenty days after the robbery, a short time frame that allowed the memory to be fresh in Taylor's mind.

A trial court's ruling on a motion to suppress must be reviewed under the "clearly erroneous" standard. *Id*. at 199. The trial court considered the appropriate factors of reliability and misidentification in analyzing the suppression issue. We find that the trial court's decision was not "clearly erroneous."

Therefore, we affirm the trial court's denial of Morris' motion to suppress the photo identification.

Although the testimony of the lead detective was clearly improper on multiple grounds, having considered the weight of evidence against Morris, we find that an admonition would have been sufficient to cure any harm caused by the improper statements and no manifest necessity for a mistrial existed. Further, we find that the photo pack identification procedure was properly upheld by the trial court because of the low risk of misidentification.

Accordingly, the judgment of conviction and sentence of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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