

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001418-MR

DESHAWN RUDOLPH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 01-CR-000873

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

MOORE, JUDGE: DeShawn Rudolph, proceeding *pro se*, appeals from an order of the Jefferson Circuit Court in which the trial court denied DeShawn's motion to vacate his conviction and sentence due to ineffective assistance of counsel.

Finding no merit to DeShawn's many claims, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

DeShawn Rudolph was convicted of murder for killing 15-year old Joseph Epps and reckless homicide for causing the death of his 16-year old brother, Sedrick Rudolph. DeShawn was sentenced to a total of 30 years in prison for these crimes.

DeShawn's cousin, Nathaniel Rudolph, testified that Sedrick and Nathaniel were sitting in a car when Joseph Epps ran to the vehicle, pulled a pistol and demanded that Sedrick give him marijuana. Nathaniel testified that Sedrick told Epps that the marijuana was at Sedrick's home; that Epps demanded that Sedrick take Epps to the drugs; and that Epps ordered Nathaniel out of the car. Nathaniel attested that, after he exited the vehicle, he called DeShawn and told him that Epps was robbing Sedrick.

DeShawn gave a statement to the investigating officer¹ that he was at home on the night of the incident, where he lived with several relatives including Sedrick. DeShawn told police that he was in the basement when he received the telephone call from Nathaniel informing him that Epps was robbing Sedrick. DeShawn grabbed his .357 magnum pistol, proceeded upstairs, and told his other relatives to leave the home. Instead of leaving, DeShawn's relatives went into the basement.

Apparently, by the time DeShawn received the telephone call, Sedrick and Epps arrived and entered Sedrick's upstairs bedroom. After DeShawn ushered

¹ At trial, DeShawn did not testify, but the audiotape recording of this statement was played for the jury.

his family downstairs, he heard the door to Sedrick's room open, so he hid behind the refrigerator in the kitchen. According to DeShawn, when he heard Epps and Sedrick descending the stairs, he cocked his pistol. When Epps and Sedrick passed by DeShawn's hiding place, DeShawn stepped out behind Epps and demanded that Epps return Sedrick's property. According to DeShawn, Epps turned around, pulled a pistol² and tried to cock it. After Epps turned around, DeShawn shot him. According to DeShawn, Sedrick was standing directly behind Epps.

The Commonwealth's forensic expert testified, however, that when DeShawn shot Epps, Epps was standing with his back against something solid like a wall or another person. The bullet that hit Epps exited his body and struck Sedrick near the throat. Both teenagers died quickly. DeShawn was later convicted for their deaths.

After DeShawn's conviction, he filed an appeal with the Supreme Court of Kentucky, which upheld his conviction.³ After that, DeShawn filed a *pro se* motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 to vacate his conviction and sentence, accusing his trial counsel of ineffective assistance of counsel. The Jefferson Circuit Court denied DeShawn's motion without benefit of an evidentiary hearing.

II. STANDARD OF REVIEW

² According to DeShawn, Epps's alleged firearm was a nine millimeter semi-automatic of unknown make. In his statement, DeShawn explained that, after he shot Epps, Epps dropped the pistol. However, the police never found the alleged gun.

³ *Rudolph v. Commonwealth*, 2003-SC-0050-MR (Ky. March 18, 2004).

To succeed with an RCr 11.42 motion, the movant must demonstrate:

1) that his trial counsel's performance fell below the objective standard of reasonableness; and 2) that the counsel's performance was so prejudicial that the movant was deprived of a fair trial and a reasonable result. *Simmons v.*

Commonwealth, 191 S.W.3d 557, 561 (Ky. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Furthermore, the movant must set forth in his motion all the facts necessary to demonstrate his claim. *Simmons*, 191 S.W.3d at 561. If the movant fails to do so, the trial court is prohibited from presuming that the facts omitted from the motion establish the violation. *Id.*

III. ANALYSIS

A. CLAIM REGARDING THE FORM OF THE JURY VERDICT

Regarding the death of Epps, the trial court instructed the jury on both the theory of intentional murder and the theory of wanton murder. Both of these theories were presented to the jury in one instruction, Instruction No. 2. However, Verdict Form No. 1, which corresponded to Instruction No. 2, did not allow the jury to distinguish between intentional murder and wanton murder.

DeShawn avers that because the form did not allow the jury to choose between intentional and wanton murder, this violated his right to a unanimous verdict. Because this right was violated, DeShawn argues his trial counsel rendered ineffective assistance of counsel by failing to object.

It is well established in the Commonwealth to convict a criminal defendant; the jury's verdict must be unanimous. *Miller v. Commonwealth*, 77 S.W.3d 566, 573-574 (Ky. 2002) (citing Ky. Const. § 7, *Cannon v. Commonwealth*, 291 Ky. 50, 163 S.W.2d 15, 16 (1942) and RCr 9.82). Furthermore, the Supreme Court of Kentucky has held that a trial court can submit a "combination" instruction, which would permit a conviction for the same offense under two alternative theories of the crime, if the evidence adduced at trial supports a conviction under either theory. *Miller*, 77 S.W.3d at 574. If the evidence supports both theories, the criminal defendant has not been deprived of his right to a unanimous verdict. *Id.*

In the present case, the trial court used a "combination" instruction regarding the murder of Epps. In DeShawn's RCr 11.42 motion, he does not take issue with this instruction but with the form of the verdict, which did not allow the jury to designate under which theory it found him guilty. These facts are very similar to the facts in *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998). In *Hudson*, the murder instruction contained two theories, intentional and wanton, but the jury's verdict form did not allow the jury to distinguish between the two theories. *Id.* at 109. Like DeShawn, the appellant in *Hudson* argued that his right to a unanimous verdict had been violated. *Id.* The *Hudson* Court noted that a "combination" instruction is proper if the evidence supports both theories. Furthermore, the *Hudson* Court stated that

[i]ntent to kill can be inferred from the extent and character of a victim's injuries. Further, because a person is presumed to intend the logical and probable consequences of his conduct, "a person's state of mind may be inferred from actions preceding and following the charged offense." However, whether a defendant actually has an intent to kill remains a subjective matter. Moreover, neither the inference nor the presumption of intent [is] mandatory. Indeed, if they were, most trials would be mere formalities.

Id. at 110.

In this case, DeShawn does not dispute the facts surrounding the death of Epps, nor does he argue that the evidence adduced at trial did not support both theories. Furthermore, from the evidence adduced at trial, the jury could easily conclude beyond a reasonable doubt that DeShawn acted either intentionally or wantonly when he shot Epps. Thus, there was no error in the jury verdict form. Absent such an error, there was no reason for DeShawn's trial counsel to object. Consequently, the attorney's performance did not fall below the objective standard of reasonableness regarding this issue.

B. CLAIM REGARDING INSTANCES OF PROSECUTORIAL MISCONDUCT

In addition to taking issue with the verdict form, DeShawn argues that the prosecutor engaged in several instances of misconduct. First, in his brief, Deshawn claims misconduct because the prosecutor stated at a bench conference that the defense of protection of another, as set forth in Kentucky Revised Statute (KRS) 503.070, does not "allow for an '[u]nreasonable [b]elief' in the need to protect another[.]" According to DeShawn, these remarks were misstatements of

law, but his counsel neither objected to nor corrected these misstatements.

DeShawn argues that his counsel was unprepared and failed to know the relevant law. As a result, he rendered ineffective assistance of counsel.

A quick review of the record reveals this statement was made outside of the jury's hearing and that the trial court never instructed the jury regarding the defense of protection of another. Because the jury was never instructed on this defense, DeShawn cannot demonstrate that his attorney's performance fell below the objective standard of reasonableness and that he suffered any prejudice.

Second, DeShawn alleges that during closing argument, the prosecutor told the jury that DeShawn and Sedrick were robbing Epps, not the other way around as DeShawn claimed. According to DeShawn, the evidence did not support this remark, yet his trial counsel did not object. On appeal, DeShawn claims that the prosecutor's remark amounted to misconduct that prejudiced him and coerced the jury into convicting him of murder.

It has long been recognized in the Commonwealth that counsel has great leeway in making closing arguments. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). In addition to having great leeway during closing, a prosecutor may also comment on the evidence during closing. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). From the evidence adduced at trial, it was reasonable for the prosecutor to infer that DeShawn and Sedrick were attempting to rob Epps. So, in this particular instance, the prosecutor's remark was

not misconduct. Rather, the prosecutor was commenting on the evidence. Given the lack of prosecutorial misconduct, DeShawn's attorney had no reason to object.

Third, DeShawn claims that, during the prosecutor's closing argument, he stated to the jury, "You can't I.D. guns like you do humans." DeShawn also claims the prosecutor called him a liar during closing. DeShawn avers that his attorney did not object to either remark. DeShawn argues these remarks were unfair and were extensive and deliberately placed before the jury, in order to mislead the jury and to prejudice him. He claims *U.S. v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994) supports his view. DeShawn claims that the strength of the evidence against him was not overwhelming. Because his attorney did not object to these remarks, DeShawn reasons that he rendered ineffective assistance of counsel.

Regarding the prosecutor's remark about identifying pistols, the prosecutor was merely commenting on the evidence adduced at trial, which is well within the Commonwealth's right. *See Slaughter*, 744 S.W.2d at 412.

Regarding the prosecutor's remark calling DeShawn a liar, the Sixth Circuit has stated that

a prosecutor may assert that a defendant is lying during [the government's] closing argument when emphasizing discrepancies between the evidence and that defendant's testimony. To avoid impropriety, however, such comments must "reflect reasonable inferences from the evidence adduced at trial." [M]isconduct occurs when a jury could reasonably believe that the prosecutor was . . . expressing a personal opinion as to the witness's credibility.

United States v. Francis, 170 F.3d 546, 551-552 (6th Cir. 1999) (citations omitted). In the present case, the prosecutor called the defendant, DeShawn, a liar; however, DeShawn did not testify. Accordingly, the prosecutor could not have been emphasizing the discrepancies between the evidence and DeShawn's non-existent testimony.

While the prosecutor's remark may be construed as misconduct, reversal was not and is not assured. An appellate court will reverse for prosecutorial misconduct in a closing argument only if the misconduct was flagrant or if the misconduct satisfies each of the following requirements: 1) proof of the defendant's guilt is not overwhelming; 2) the defendant's attorney objected to the prosecutor's actions; and 3) the trial court failed to cure the misconduct with a sufficient admonition to the jury. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citing *Carroll*, 26 F.3d at 1390), and *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979).

DeShawn's attorney did not object to the prosecutor's remark and, given this failure, DeShawn's attorney's performance may have fallen below the objective standard of reasonableness. This does not necessarily mean that DeShawn is entitled to the extraordinary relief of RCr 11.42. To reverse for prosecutorial misconduct the proof of DeShawn's guilt must not be overwhelming. Given DeShawn's taped police statement and the fact that Epps' alleged weapon

was not found, there is overwhelming proof of DeShawn's guilt. Thus, DeShawn cannot satisfy all prongs of Strickland, and this claim of ineffective assistance fails.

C. CLAIM REGARDING TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE

Epps's mother, Paula Epps, testified for the Commonwealth.

According to DeShawn, Paula Epps testified that the last time she heard from her son was three days prior to his murder when he asked her for money. DeShawn also avers that Paula Epps testified that Epps was supposed to pick up the money on the day DeShawn killed him. On appeal, DeShawn claims that, during Paula Epps's testimony, he asked his trial counsel to cross-examine Paula Epps regarding the money, but his attorney refused.

DeShawn argues that if Paula Epps had been cross-examined, this may have shown that Epps was in need of money and, thus, had a motive to rob Sedrick. DeShawn contends his trial counsel abdicated his responsibility to cross-examine Paula Epps; thus, DeShawn accuses his trial counsel of rendering ineffective assistance. To support this claim, DeShawn states in his brief:

It should also be noted that Joseph had several bags of marijuana which were found on his person. For a person who had begged his mother for some money three days earlier, it does not compute and add up that Joseph [Epps] would be found with several \$20.00 bags of marijuana when he was killed in defense of another [Sedrick].

To succeed with this claim, it was incumbent on DeShawn to set forth facts that support his claim. *See Simmons*, 191 S.W.3d at 561. However,

DeShawn failed to set forth any supporting facts. In his motion, he merely made conclusory statements that Epps needed money. Furthermore, while DeShawn did set forth the fact that Epps had several bags of marijuana on his person, this fact does not support DeShawn's claim. Thus, this claim fails.

IV. CONCLUSION

The order of the Jefferson Circuit Court denying DeShawn's RCr 11.42 motion is affirmed.

ALL CONCUR.

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