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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001605-MR

JEFFREY ALAN SCHERRETZ — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 06-CR-00195

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

MOORE, JUDGE: Jeffrey Alan Scherretz appeals from a judgment of the Henderson Circuit Court in which he was convicted of manslaughter in the second degree and burglary in the first degree and was sentenced to 15 years in prison. On appeal, Scherretz claims the jury instructions were in error; the Commonwealth failed to comply with a discovery order; the trial court erred by holding a "dry-run"

of a defense witness's testimony; prosecutorial misconduct during the Commonwealth's closing argument; he was prejudiced by being forced to establish the chain of custody regarding DNA evidence; the trial court violated his constitutional rights when one of his witnesses, who was incarcerated, was not transported for trial; and cumulative error. After carefully reviewing the record and the appropriate law, we affirm Scherretz's conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Anna Green was strangled to death in her home in Henderson, Kentucky, during what appeared to be the commission of a burglary and robbery. Although Scherretz was only one suspect among many investigated by the Henderson Police Department in connection with Green's death, he was the only person indicted. He was initially charged with murder, robbery in the first degree and burglary in the first degree. At the Commonwealth's request, the trial court amended the indictment, adding one count each of conspiracy to commit murder, conspiracy to commit robbery in the first degree, and conspiracy to commit burglary in the first degree.

At trial, the lead detective testified that someone had broken into Green's house and ransacked two bedrooms. The police found Green lying face-down in a bedroom. Green's head was bound by duct tape, covering only her eyes. Her arms were bound behind her back with duct tape, and her legs were also bound with duct tape. Another officer testified that a roll of duct tape was found on a piece of property adjacent to Green's property.

The medical examiner also testified. She found three parallel, red bruises on Green's neck, consistent with the marks being made by a hand. The medical examiner attested that Green was killed by asphyxia caused by manual strangulation.

An analyst from the Kentucky State Police (KSP) Crime Lab testified that the duct tape used to bind Green's legs and her head came from the roll of duct tape found near her home. Additionally, a KSP fingerprint analyst testified he found one fingerprint on the duct tape used to bind Green's legs and that print was made by Scherretz's right thumb.

Beyond the forensic evidence, the Commonwealth put on evidence that Scherretz knew Green; her habits; had been inside her home before; and was aware that Green may have had several thousand dollars in cash in her home.

After the close of the evidence, the trial court instructed the jury on intentional murder, wanton murder, manslaughter in the second degree, robbery in the first degree, complicity to robbery in the first degree, burglary in the first degree, and complicity to burglary in the first degree. Despite the multitude of instructions, the jury only found Scherretz guilty of second-degree manslaughter and first-degree burglary. The trial court sentenced Scherretz to serve a total of 15 years in the state penitentiary.

II. ANALYSIS

A. INSTRUCTION REGARDING SECOND-DEGREE MANSLAUGHTER

On appeal, Scherretz insists the evidence did not support a jury instruction regarding manslaughter in the second degree. Scherretz avers Green died from asphyxia by strangulation and that strangulation can only be an intentional act. Relying on *Commonwealth v. DeHaven,* 929 S.W.2d 187, 188 (Ky. 1996), Scherretz argues it is improper to instruct on second-degree manslaughter when the evidence adduced at trial established that the victim was intentionally killed.[1] Furthermore, relying on *Mills v. Commonwealth,* 44 S.W.3d 366, 372 (Ky. 2001), Scherretz claims the Supreme Court of Kentucky recognized that "death by strangulation is the type of conduct that would warrant a murder instruction, not some other instruction." According to Scherretz, there was no evidence adduced at trial that he engaged in wanton, reckless or unintentional behavior, resulting in Green's death; thus, he reasons the second-degree manslaughter instruction was not supported by the evidence.

It is well settled in the Commonwealth that the trial court has the responsibility to instruct the jury on the whole law of the case, giving instructions that are applicable to every state of the case deducible from or supported to any extent by the evidence adduced at trial. *Lawson v. Commonwealth,* 85 S.W.3d 571, 574 (Ky. 2002).

In the present case, the trial court instructed the jury regarding manslaughter in the second degree. For the Commonwealth to convict Scherretz of second-degree manslaughter, it had to prove that he wantonly caused the death of

[1] While we do not necessarily disagree with Scherretz's proposition, we note that the holding in *DeHaven* simply does not support this proposition.

Anna Green. *See* KRS[2] 507.040. According to Scherretz, in *Mills*, the Supreme Court held that death by strangulation cannot be anything other than intentional. However, the holding in *Mills* does not support Scherretz's proposition at all.[3] In fact, the Supreme Court has held the opposite. In *Hudson v. Commonwealth,* 979 S.W.2d 106, 109 (Ky. 1998), the victim died from asphyxia by manual strangulation. The appellant was charged with murder. *Id*. at 108. At trial, the court instructed the jury on intentional murder and wanton murder. *Id*. at 109. On appeal, the appellant argued the fact that the victim had been strangled to death could not be evidence of wanton conduct. *Id*. at 110. According to the Supreme Court,

> [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.
>
> Once the facts of a killing are established, whether the act itself is murder depends upon the mind of the killer. The state of that mind at the time of the killing is almost never clear, not even to the defendant himself . . . .

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[2] Kentucky Revised Statute.

[3] Contrary to Scherretz's assertion, the *Mills* Court neither discussed death by strangulation nor hold that strangulation could only be an intentional act. The victim in *Mills* was not strangled but was both shot and stabbed. *Mills,* 44 S.W.3d at 368-369. Thus, *Mills* is factually distinguishable from the case at hand.

> To say that the method and means of [the victim's] death [strangulation] only support an instruction on intentional murder is to make the inference of intent mandatory.

Id. Consequently, Scherretz's proposition that death by strangulation can only support a jury instruction of intentional murder is not supported by prior case law.

When the rationale of *Hudson* is combined with the evidence in this matter, we find no error in the manslaughter instruction. Green was bound by duct tape and strangled to death. Scherretz's right thumb print was found on the duct tape used to bind Green's leg. Scherretz testified that he must have left his print on the duct tape when he helped Green tape up a cardboard box three days prior to the murder. In his brief, Scherretz makes much of this testimony, insisting it was uncontradicted and unassailed.

Despite Scherretz's testimony, the jury was under no obligation to accept it as true. *See Dunn v. Commonwealth,* 286 Ky. 695, 151 S.W.2d 763, 764-765 (1941); *Gillispie v. Commonwealth,* 212 Ky. 472, 279 S.W. 671, 672 (1926). It was within the jury's discretion to believe all, part or none of Scherretz's testimony. Given the evidence, we cannot say it was reasonable for the jury to infer Scherretz strangled Green to death, satisfying the element that he caused Green's death.

Pursuant to *Hudson*, the jury was not required to conclude Scherretz intended to kill Green; thus, the jury could reasonably conclude Scherretz had acted wantonly. While the evidence adduced against Scherretz was primarily circumstantial, it was sufficient to support an instruction on second-degree

manslaughter. *See Baker v. Commonwealth,* 307 S.W.2d 773, 775 (Ky. 1957) ("Indirect and circumstantial evidence may be the basis of establishing the necessary elements of an offense. The jury may consider circumstances from which it may reasonably infer guilt, and in such instances, the question of guilt or innocence is for the jury.") Thus, the trial court did not err when it instructed the jury on manslaughter in the second degree.

B. INSTRUCTION REGARDING FIRST-DEGREE BURGLARY

In addition to challenging the instruction regarding second-degree manslaughter, Scherretz claims the evidence at trial did not support an instruction on first-degree burglary. According to Scherretz, there is no evidence he was in Green's home the day she was killed. Scherretz argues that his fingerprint does not establish when he was in Green's home, and Scherretz points out the Commonwealth's fingerprint expert conceded that point. Furthermore, Scherretz testified he was in Green's home three days before her murder, helping her place duct tape on a box at Green's request. In addition, he claims the Commonwealth did not prove the elements of burglary in the first degree because it did not prove he caused physical injury to Green.

Turning to the elements of first-degree burglary as they pertain to this case, according to KRS 511.020, to sustain a conviction for first-degree burglary the evidence must demonstrate that Scherretz: 1) with intent to commit a crime, 2) knowingly entered or remained unlawfully in a building, and 3) while in the building, caused physical injury to a person who was not a participant in the crime.

The evidence established Scherretz's thumbprint was found on the duct tape used to bind Green's legs. Based on this evidence, the jury could reasonably conclude Scherretz was present in Green's house when her house was ransacked and she was killed. Consequently, we cannot say it was unreasonable for the jury to convict Scherretz of first-degree burglary.

Scherretz also argues he could not be convicted of first-degree burglary because the jury acquitted him of first-degree robbery. However, this proposition is not supported by the law in the Commonwealth. In fact, the former Kentucky Court of Appeals, now the Supreme Court, held many years ago that robbery and burglary are distinct offenses which have different elements; therefore, "the conviction or acquittal of either is not a bar to the other." *Easley v. Commonwealth,* 320 S.W.2d 778, 779 (Ky. 1958).

In conclusion, as with Scherretz's conviction for second-degree manslaughter, the evidence against him was mostly circumstantial; however, the evidence was sufficient to sustain his conviction. Consequently, the trial court properly instructed the jury regarding burglary in the first degree.

C. FAILURE TO IDENTIFY CO-CONSPIRATORS

Scherretz argues that prior to trial, the trial court ordered the Commonwealth to disclose the identity or identities of Scherretz's alleged co-conspirator or co-conspirators, but the Commonwealth failed to comply with this order. Scherretz claims this allowed the Commonwealth to make vague arguments to the jury about conspiracy without presenting any evidence regarding conspiracy.

Scherretz maintains this was inherently unfair and unduly prejudicial. Citing *Harper v. Commonwealth,* 43 S.W.3d 261 (Ky. 2001) and *Hollin v. Commonwealth,* 158 Ky. 427, 165 S.W. 407 (1914), Scherretz argues the Commonwealth must prove the existence and identity of co-conspirators to prove conspiracy. Furthermore, Scherretz claims the Commonwealth did not provide the identity of the principal who killed Green and claims the DNA and hair evidence presented at trial excluded him from any involvement in her death.[4] Yet, by arguing that Scherretz acted in concert with unidentified third parties, the Commonwealth was able to refute the DNA and hair evidence.

Scherretz's prior counsel moved the trial court for a bill of particulars and asked for the identity of Scherretz's alleged co-conspirators. The trial court granted the motion and ordered the Commonwealth to disclose the name of the individuals who allegedly conspired with Scherretz. In response, the Commonwealth stated in its bill of particulars that "[t]he exact name of the individuals Jeffrey Scherretz conspired with and/or aided and/or was complicit with in the commission of the charged offenses is, at this time, unknown to the Commonwealth." After the Commonwealth filed its bill of particulars, Scherretz did not object to the Commonwealth's response and did not move for clarification of the bill of particulars. Knowing the Commonwealth's response, he neither moved to quash the amended indictment nor to dismiss the conspiracy charges.

[4] At trial, evidence was adduced that a hair was found, and DNA and hair structure analyses established it did not belong to the victim, Green, nor Scherretz. While Scherretz believes this proves that he could not have been involved in Green's death, it merely proves the hair did not come from him or Green.

Scherretz did not challenge this again until his motion for judgment of acquittal and/or a new trial that the Commonwealth never disclosed the identities of the co-conspirators as required by the trial court's order.

While the Commonwealth did not disclose the identities of the alleged co-conspirators, it nevertheless sufficiently complied with the court's order by giving Scherretz all the information it had in its possession at the time. *See Deskins v. Commonwealth,* 512 S.W.2d 520, 524 (Ky. 1974). Nonetheless, the trial court did not instruct the jury on conspiracy. Consequently, we simply find no error regarding this issue.

D. "DRY-RUN" PURSUANT TO *COMBS V. COMMONWEALTH*

Scherretz called Archie Turner, a hostile witness, to testify on Scherretz's behalf. The trial court, for unclear reasons, was concerned about Turner's Fifth Amendment right against self-incrimination. Consequently, the trial court held a "dry-run" pursuant to *Combs v. Commonwealth,* 74 S.W.3d 738 (Ky. 2002) in chambers. However, Scherretz insists *Combs* was inapplicable. According to Scherretz, the holding in *Combs* is limited to those situations where a criminal defendant wants to call a co-defendant or co-conspirator as a witness. Scherretz avers that he merely wished to call a hostile, non-implicated witness. By holding the "dry-run," Scherretz maintains the trial court deprived him of his constitutional right to call witnesses on his behalf.

It is well settled in the Commonwealth that to preserve an issue for appeal, an appellant has the duty to timely object and must be specific enough in

his objection to indicate to the trial court and the appellate court to what he is objecting. *Bell v. Commonwealth,* 473 S.W.2d 820, 821 (Ky. 1971). Furthermore, if an appellant does object, he must insist the trial court rule on the objection; otherwise, the issue is waived. *Id.*; *see also Collett v. Commonwealth,* 686 S.W.2d 822, 823 (Ky. App. 1984) ("Kentucky Rule of Criminal Procedure 9.22 requires a party to render a timely and appropriate objection in order to preserve an issue for review. By his failure to object, [the appellant] has waived this allegation of error."). A review of the record reveals Scherretz neither objected to nor made any motion regarding the "dry-run." Consequently, he waived this issue for our review.

E. ERROR DURING THE COMMONWEALTH'S CLOSING ARGUMENT

Scherretz argues that after the close of the evidence, the Commonwealth moved *in limine* to prohibit Scherretz from making any reference or suggestion to the jury "about taking a roll of duct tape and experimenting with it during deliberations." Scherretz claims the trial court "sustained" the Commonwealth's motion. During the Commonwealth's closing argument, the prosecutor "challenged the jury to go back and test, by way of experiment, the veracity of [Scherretz's] uncontradicted testimony as to how he rolled and re-rolled the tape, for the victim." According to Scherretz, the Commonwealth violated the trial court's order regarding its own motion *in limine*, prejudicing him.

The Commonwealth moved *in limine* to prevent Scherretz, during closing argument, from conducting an experiment by removing duct tape from a

previously taped box and from arguing duct tape could be easily removed from a previously taped box. Scherretz claimed he could argue that duct tape could be removed because he testified that he removed duct tape from a box and re-rolled the duct tape onto the original roll. Scherretz cites to the record, insisting the trial court granted the Commonwealth's motion *in limine*; however, we have thoroughly reviewed the record and have found the trial court never ruled on the motion.

During the Commonwealth's closing, the prosecutor stated to the jury it should not be misled by the fact that there were several pieces of duct tape. The prosecutor told the jury the tape was in evidence and the jurors may unroll it. Scherretz immediately objected, argued that the Commonwealth had previously moved *in limine* about unrolling the duct tape, and asked for an admonition. In response, the trial court sustained Scherretz's objection but gave no admonition. Instead, the trial court ordered the prosecutor to correct his statements, which the prosecutor did. Scherretz did not object to the prosecutor correcting himself and did not ask for a ruling on the admonition.

As discussed *supra*, an appellant must object and insist on a ruling in order to preserve an issue for appeal. *See Bell,* 473 S.W.2d at 821. Scherretz objected to the prosecutor's comments, and the trial court sustained the objection. Furthermore, while Scherretz asked for an admonition, he did not insist on one when the trial court failed to give it. Scherretz appeared satisfied with the trial court's resolution; consequently, Scherretz waived this issue.

F. BURDEN OF PROOF

Scherretz argues that the "Commonwealth, during its closing arguments, stated that [Scherretz] produced *no* witnesses to corroborate his story or that he failed to produce alternative suspects." (Emphasis in original). According to Scherretz, the Commonwealth impermissibly shifted the burden of proof to him, which was highly prejudicial.

During the Commonwealth's closing, the prosecutor stated to the jurors that they did not hear any witness come into the court and testify that the Commonwealth's experts were wrong. Additionally, the prosecutor stated Scherretz had the right to subpoena witnesses, and he could have brought in experts to testify that the Commonwealth's experts were not right. Scherretz immediately objected to the prosecutor's comments; argued the prosecution had shifted the burden of proof to him; and asked the trial court for an admonition. The trial court sustained Scherretz's objection and admonished the jury that Scherretz had no burden to present witnesses. It is presumed that when a trial court admonishes a jury, it will heed the admonition. *Boone v. Commonwealth,* 155 S.W.3d 727, 729-730 (Ky. App. 2004). Thus, we find no error.

G. CHAIN OF CUSTODY

Scherretz challenges the Commonwealth's failure to call its own DNA expert to testify regarding the results of the tests performed on the hairs found in Green's home. Scherretz speculates the Commonwealth failed to call this expert due to the exculpatory nature of the evidence in her possession, *i.e.*, the hairs belonged to Green and to an unknown third person. Believing this information

would exonerate him, Scherretz called his own DNA expert to the stand to testify. However, the Commonwealth objected to her testimony, arguing that Scherretz was required to prove the chain of custody of the evidence in the expert's possession before she could testify. The trial court agreed and required Scherretz to establish the chain of custody.

Scherretz argues that by being forced to prove the chain of custody, he was unduly prejudiced. Nonetheless, he proved the chain of custody and presented the results of the DNA tests to the jury.

Although a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) is no longer required to introduce certain types of DNA evidence, the party opposing the introduction of such evidence can still challenge the chain of custody. *See Fugate v. Commonwealth,* 993 S.W.2d 931, 938 (Ky. 1999). Furthermore, while Scherretz cries prejudice on appeal, he fails to demonstrate any prejudice because he sufficiently proved the chain of custody and successfully introduced the results of the DNA tests. Because Scherretz achieved the results he was seeking, there was simply no error regarding this issue.

H. FAILURE TO TRANSPORT DEFENSE WITNESS

At trial, Scherretz attempted to call Terry Wayne Tyler, an inmate, to testify on Scherretz's behalf. Scherretz "applied for and received an executed transport Order" for Tyler; however, Tyler was not transported. After the trial court informed Scherretz that Tyler was not present, the trial court commented that

a subpoena had not been issued for Tyler. On appeal, Scherretz argues, the trial court's rationale regarding the lack of a subpoena is misplaced and only a transport order could have secured Tyler's presence for trial. The order, however, was not forwarded to the penitentiary where Tyler was housed. Because the order was not forwarded, Scherretz reasons the trial court erred and denied him his Sixth Amendment and Section Eleven of the Kentucky Constitution right to call witnesses on his behalf.

It has long been established that a criminal defendant has the right to compel witnesses to attend trial in order to testify on his behalf. *Ross v. Commonwealth,* 577 S.W.2d 6, 10 (Ky. App. 1977). Furthermore, a criminal defendant has the right to compel the attendance of a prisoner as a defense witness, and it is appropriate for the defendant to secure the attendance of such a witness by court order. *Id*. So, Scherretz is correct that a subpoena was not necessary to secure Tyler's attendance. However, a criminal defendant is required to exercise due diligence to ensure the attendance of his witnesses. *See id*. at 11.

The trial court signed an order to transport Tyler for trial. Scherretz drafted that order but failed to include either the Department of Corrections or the institution in which Tyler was incarcerated in the certificate of service. Because the certificate of service failed to name the Department of Corrections or the appropriate penitentiary, neither was served with the transport order.

On appeal, Scherretz claims the Henderson Circuit Clerk's Office assured him Tyler would be at trial. However, it was Scherretz's responsibility to

exercise the necessary due diligence to ensure his witness was at trial. By failing to include the proper institutions in the certificate of service, Scherretz failed to exercise the necessary due diligence, resulting in Tyler's absence. Thus, we find no error.

I. CUMULATIVE ERROR

Additionally, Scherretz claims cumulative error. However, because none of Scherretz's individual allegations of error merit reversal, we disagree with him and conclude his allegations do not constitute cumulative error.

III. CONCLUSION

The judgment of conviction entered by the Henderson Circuit Court is affirmed.

ALL CONCUR.

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