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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002067-MR

RALPH WAYNE GRIMES

APPELLANT

APPEAL FROM ADAIR CIRCUIT COURT
v. HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 03-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES

CLAYTON, JUDGE: Appellant, Ralph Wayne Grimes, was originally convicted of first-degree manslaughter but in 2006, the Kentucky Supreme Court reversed his conviction due to the trial court's error in denying his motion for a continuance. Grimes was retried and convicted again of first-degree manslaughter in 2008. He

now appeals his second conviction arguing various trial errors. After a perusal of the record before us, we affirm the conviction.

BACKGROUND INFORMATION

The following factual synopsis is from the Kentucky Supreme Court's Slip Opinion, *Grimes v. Commonwealth*, 2004-SC-1096-MR:

Grimes, a female friend and two other males, went to visit another female acquaintance at her trailer late in the evening. The victim was present when the group arrived at the trailer. There was conflicting testimony about the actual events but it is clear from all versions that a party ensued and everyone present consumed a significant quantity of alcohol.

The victim was involved in scuffles and arguments with several of the visitors during the hours of the party. There are conflicting versions of the exact sequence of events. Some claim the visiting foursome all left the trailer but returned to retrieve some personal belongs inadvertently left behind. Another version has the group remaining in the trailer until a melee broke out.

Regardless of the exact factual sequence of events, at some point in time, the victim, wielding a knife, became aggressive toward one of the visitors although there was testimony from the female resident of the trailer that it was Grimes who introduced the knife into the fight. It was, however, Grimes alone who suffered a knife wound.

During this final fight, Grimes, who was significantly smaller than the victim, managed to hold the victim in what he claims was a headlock and maintained this hold until the victim went still. The so-called headlock was in fact a strangle hold which was the ultimate cause of death.

At trial, Grimes was the only witness for the defense. He testified that he applied a "sleeper hold" until the victim was unconscious and that he saw blood from his nose. He admitted that he stomped the victim three times on his back.

Grimes was convicted of manslaughter and was sentenced to twenty (20) years of imprisonment. After a direct appeal, the Kentucky Supreme Court held that the trial court's failure to grant a continuance was a basis for a new trial.

At his new trial, Grimes was once again convicted of manslaughter in the first degree and this time he was sentenced to eighteen (18) years of imprisonment. Grimes now appeals his conviction and alleges several trial errors. We will discuss each error in turn.

STANDARD OF REVIEW

Under Kentucky Rules of Criminal Procedure (RCr) 10.02(1), a new trial is warranted if a defendant was somehow prevented from having a fair trial, or if justice otherwise requires it. The denial of a motion for a new trial by the trial judge is reviewed under the abuse of discretion standard. *Foley v. Com.*, 55 S.W.3d 809, 814 (Ky. 2000).

DISCUSSION

Grimes first contends that the trial court erred in failing to grant a mistrial due to the Commonwealth's failure to provide exculpatory evidence. Grimes asserts that the failure of the Commonwealth to turn over a tape of "The Jerry Springer Show" entitled him to a mistrial.

Tonya Robertson was a witness for the Commonwealth and was called the first day of trial. During Robertson's testimony, counsel for Grimes discovered that there was an episode of the "Jerry Springer Show" which was taped in 2005 which, Grimes contends, contradicted her testimony at trial. Grimes'

counsel stated that while she knew of Robertson's appearance on the show, she was not able to obtain a copy of the tape until the trial had started.

The Commonwealth argued that the show was not exculpatory. After Grimes' counsel moved for a mistrial, the trial court held that the tape was now in possession of Grimes' counsel, so there was no harm. The trial court did not view the episode and held that since Grimes did not want a continuance, there was no prejudice to him. The trial court also found that the Commonwealth could not produce a copy of the tape if it did not have it. The Commonwealth's attorney stated that he had obtained the tape from a friend and returned it.

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 2d 215 (1963). The Commonwealth contends that the evidence was not material to Grimes' guilt or innocence. Grimes, however, contends that Robertson's demeanor in court was in contradiction to her demeanor on the show.

While Robertson appeared on a show that is known for fights and confrontation, she seemed for the most part rather meek on the show. Regardless, Grimes has not shown that anything Robertson did on the show would have been material to his case. While Robertson's demeanor during trial and on the show may have been different, we do not believe it was in any way material evidence. Thus, we find that the “Jerry Springer Show” tape was not exculpatory evidence and uphold the trial court's decision not to grant a mistrial based upon this issue.

Next, Grimes contends that the trial court erred in excluding the evidence of the “Jerry Springer Show.” Again, we agree with the Commonwealth. Grimes contends that the show proves that Robertson had a relationship with another man rather than the victim and that she was not trustworthy as a witness.

After viewing the tape of the episode, we can find no evidence which directly contradicts Robertson’s testimony. She states that she had an “on again, off again” relationship with Waylon. While she states that he is the father of “her kids,” the parentage of the children was not material to Grimes’ defense. Also, the unrefuted testimony of Robertson was that “The Jerry Springer Show” is scripted. Therefore, this is not viable evidence. We agree with the Commonwealth that evidence such as this would make a mockery of the judicial system should it be considered viable evidence.

Grimes next contends that the trial court improperly admitted his prior testimony. In this action, Grimes testified in the first trial at which he was charged with the murder of the victim. That testimony became part of the record. Grimes moved the court to exclude his prior testimony stating that it was unduly prejudicial and that he may not have testified at the first trial had he known it would be reversed and a second trial initiated. For purposes of appeal, a trial court’s ruling on the admissibility of evidence is within the sound discretion of the trial judge and is reviewed under the abuse of discretion standard. *Simpson v. Com.*, 889 S.W.2d 781 (Ky. 1994).

In *Sherley v. Com.*, 889 S.W.2d 794, 798 (Ky. 1994), the Kentucky Supreme Court held that:

Testimony given by the defendant during his previous trial was properly admitted in the second trial. He was not prejudiced or denied a fair trial.

At the first trial, Sherley testified in his own defense, however, during the second trial, he did not testify. During the second trial, the prosecutor advised the court that he wanted to read to the jury parts of Sherley's testimony in the previous trial. Sherley objected on the grounds that he was not required to testify pursuant to the Fifth Amendment, that he would not testify at the trial and that to read his previous testimony would violate his rights. The trial judge permitted the testimony to be read.

Once the defendant decides to speak to police officers or testify in open court, he waives his Fifth Amendment privilege. There was nothing improper about introducing the prior testimony at the second trial. Sherley waived his rights to silence when he testified at the first trial in his own defense. There is nothing which requires the extension of immunity to any trial other than the one where the right is preserved by a refusal to testify. (Citations omitted).

Grimes contends that *Sherley* is distinguishable in that only portions of the defendant's prior testimony were read into the record. In the case at bar, Grimes entire testimony was admitted. Grimes has not, however, shown which parts of the testimony he considers to have been irrelevant or inadmissible. Grimes also did not request that the trial court redact any of the testimony. Thus, we will deny his appeal on this issue as well.

Next, Grimes contends that it was error for the trial court to allow the Commonwealth to inform the jury that co-defendant Chester Voils pled guilty to the charges in this action.

[T]here is case law that warns that it is improper to show that a co-indictee has already been convicted [or acquitted] under the indictment. *Martin v. Commonwealth*, Ky., 477 S.W.2d 506, 508 (1972); *see also Tipton v. Commonwealth*, Ky., 640 S.W.2d 818, 820 (1982). The reason for this common law rule is that whether the defendant committed a [specific crime] is not aided in the slightest by the admission of evidence of the fact that another jury concluded that another defendant had [or had not] committed the [same crime]. (Citations omitted).

Norris v. Com., 89 S.W.3d 411, 414 (Ky. 2002).

The Commonwealth contends that it was not using the evidence as substantive evidence of guilt, but simply using it to impeach Voils' testimony. At trial, Grimes' counsel argued that the Commonwealth could only ask Voils whether or not he was a convicted felon. The Commonwealth argued that defense counsel's question to the witness regarding his conversation with the Commonwealth's attorney would not be clear to the jury without asking whether he had pled guilty to a charge related to the death of the victim. We agree.

Grimes' attorney clearly opened the door for a question regarding his conversation with the Commonwealth's attorney where he stated he would testify truthfully regarding the events of the evening in question. Thus, we affirm the trial court's ruling allowing the testimony to be heard by the jury.

Grimes' final allegation of trial error is that the trial court erred when it excluded testimony of Herbie Pike that supported the defense theory that the victim was the aggressor and suggested an alternative cause of some of the victim's injuries. Pike is the father of Robertson's youngest child. Grimes contends that Pike's testimony regarding the interaction between Robertson and other men created a pattern of fighting between men, ostensibly for her affections.

Pike testified through avowal that he had an "on again, off again" relationship with Robertson. He also testified that he had been in an altercation with the victim a few weeks before his death. Grimes contends that this testimony should have been admitted since the Commonwealth used the number of injuries present on the victim's body as evidence of the crime. He argues that some of the injuries could have been caused by Pike and that the jury should have been informed of this as well as his observations regarding Robertson and her interaction with men.

Evidence which is relevant is generally admissible (Kentucky Rules of Evidence (KRE 401, 402)); however, "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence" (KRE 403), it may be excluded. The Commonwealth argues that such is the case with Pike's testimony.

Pike's testimony regarding a fight he had with the victim several weeks prior to his death is clearly prejudicial. Further, testimony of other injuries

is not relevant as the victim died from “asphyxiation by manual strangulation.” The only probative value would be to show the victim was in another fight and that some of his injuries could have been from that prior altercation. There was testimony, however, that some of the marks on the victim’s body were older than the ones from the night he died. Pike’s testimony would not have added anything other than prejudice to this evidence.

As to Pike’s regard of Robertson’s interaction with other men, we believe this, too, to be prejudicial. Regardless of Robertson’s interaction with the men in question the night of the murder, the defendant’s actions resulted in the death of the victim. Clearly, the evidence would have been more prejudicial than probative. Thus, we affirm Grimes’ conviction.

ALL CONCUR.

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