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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001214-MR

WILLIAM MCCLAIN III — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 09-CR-000961

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: William McClain III appeals from the Jefferson Circuit Court's judgment of conviction and sentence following a jury trial whereby he received a sentence of ten years' imprisonment. We affirm.

McClain was indicted in April 2009 by a Jefferson County grand jury on two counts of robbery in the first degree,[1] two counts of theft by unlawful

[1] Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

taking over $300.00,[2] theft by unlawful taking under $300.00,[3] theft by deception under $300.00,[4] criminal trespass in the second degree,[5] loitering,[6] and being a persistent felony offender in the first degree (PFO I).[7] The charges stemmed from a series of events that occurred between January 22 and February 8, 2009, on or near the University of Louisville (U of L) campus involving five different victims. At the start of McClain's trial, the Commonwealth moved to dismiss one of the misdemeanor theft by unlawful taking counts.[8] The trial proceeded on the remaining charges and the following facts were presented to the jury.

On January 22, 2009, Steven Perry was leaving the U of L student center when he was approached by a man he later identified from a photo line-up as well as an in-court identification as McClain. McClain informed Perry his car had run out of gas, his daughter was sick, and he needed to go to the hospital to see her. Perry went to a nearby ATM and withdrew $20.00 to give to McClain. McClain asked for a ride to an apartment complex and Perry agreed. McClain

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[2] KRS 514.030, a Class D felony.

[3] KRS 514.030, a Class A misdemeanor.

[4] KRS 514.040(1)(a)(7), a Class A misdemeanor.

[5] KRS 511.070, a Class B misdemeanor.

[6] KRS 525.090, a violation.

[7] KRS 532.080.

[8] Prior to the trial, McClain informed the trial court he wished to invoke the benefit of a recent change in the theft statutes which raised the threshold level for felony theft from $300.00 to $500.00. Accordingly, the trial court's instructions to the jury omitted the value of the stolen property and all of the theft charges were treated as misdemeanors.

borrowed Perry's cell phone saying that his own phone had a dead battery. Sometime during the ride, McClain appeared to drop Perry's phone. When they arrived at the apartment complex, Perry requested his phone from McClain who said he had dropped the phone in the vehicle and quickly walked away. Perry could not locate his phone and was subsequently unable to locate McClain. Perry reported the incident to police. He indicated the stolen phone was an Apple iPhone valued at around $400.00.

On February 4, 2009, Daniel Sharp parked his vehicle at Papa John's Stadium where many U of L students park. A man he would later identify from a photo pack and an in-court identification as McClain approached him and said his own car had run out of gas and he needed a ride to see his daughter who had a fever. Sharp agreed to give McClain a ride. During the ride, McClain borrowed Sharp's cell phone and asked for gas money. When they arrived at what Sharp believed was McClain's residence, McClain pulled out a gun and demanded Sharp's wallet and cell phone. McClain took $20.00 out of the wallet along with Sharp's Apple iPhone valued at about $200.00. McClain threatened Sharp not to report the theft to police or McClain would find out about it. Sharp filed a report about a week later.

Clint Peyton was approached by McClain on February 5, 2009, who again asked for money, this time reporting that his car had been towed and he needed to get it out of impound so he could pick his daughter up from elementary school. Peyton went to the ATM in the student center and withdrew $60.00 to give

McClain. Peyton allowed McClain to use his cell phone to make a call. McClain gave Peyton a piece of paper with a woman's name on it saying it was his mother who would meet him later to repay the funds. McClain then left with the $60.00 and Peyton's phone valued at $240.00. Peyton was able to identify McClain from a photo line-up as the perpetrator of the crime.

On February 8, 2009, Tanner Watson, a recent U of L graduate had just left a laundromat when he stopped at a traffic signal just off of the U of L campus. While stopped, a man he identified from a photo pack and in court as McClain spoke to him but he could not hear what was said. He rolled down his window but it appeared as though the man had left. McClain then suddenly opened Watson's car door and got into the passenger seat. McClain told him to drive. During the short trip, McClain asked for Watson's cell phone. Upon arrival at the destination, Watson asked for his phone back as McClain was exiting the vehicle. McClain, who had started walking away from the car, responded "you're lucky I didn't totally rob your ass" before returning to the driver's side and rummaging through Watson's pockets for cash. McClain got away with less than $5.00 in change and Watson's phone which he valued between $400.00 and $500.00. Watson reported the incident to police and informed them McClain had pointed a semi-automatic handgun at him during the incident. He would later clarify to the prosecutor that at the time of the incident he merely *thought* McClain was armed with the pistol and he got that impression from the fact that the man

was menacing and kept his left hand in his jacket pocket throughout the ordeal. He testified that during the crime he believed his life was in jeopardy.

Also on February 8, 2009, U of L student Darik Dixon was approached in his dorm parking lot by a man identifying himself as "Tyler" but whom Dixon would later identify as McClain. McClain told Dixon his daughter was in his car which was about to be towed and asked for a ride to a nearby market. Dixon agreed and when the two got into the car, Dixon threw his wallet and phone into the back seat. McClain acted "skittish" during the ride and kept "messing with his pockets." When they got to the market, Dixon dropped McClain off and drove away even though McClain had asked him to wait. A short time later Dixon was unable to find his wallet which contained his debit card, a credit card, a small amount of cash, and two checks totaling $2,600.00.

On February 9, 2009, Demetrius Gray was on the U of L campus when he observed McClain talking to another person. After the conversation between the pair ended, McClain approached Gray and asked for money. McClain told Gray his daughter was in his car and he was trying to get her to Kosair Hospital. Gray, who served on the Department of Public Safety Student Advisory Council, was reminded of information he had received at a recent public safety meeting regarding reports of similar activity on or around campus leading to criminal activity. Gray told McClain he had no money and McClain left. Gray continued to watch McClain while reporting the incident to campus police.

As a result of Gray's call, U of L Police Sergeant Danny Willoughby was dispatched to the area. Upon making contact with McClain and getting basic identifying information from him, Sergeant Willoughby learned that McClain had been ordered to stay off of the U of L campus. Sergeant Willoughby placed McClain under arrest for criminal trespass in the second degree and he was later charged with loitering. McClain denied any involvement in the recently reported thefts. Other peripheral facts not significant to this appeal were also introduced during the trial.

At the close of the Commonwealth's case-in-chief, McClain moved for a directed verdict on all counts. Pertinent to this appeal, McClain alleged the Commonwealth had failed to meet its burden of proof as to the robbery charge involving Watson. The Commonwealth conceded it had not met its burden to go forward on a robbery in the first degree charge, but argued it had produced sufficient evidence to withstand a directed verdict motion on robbery in the second degree as related to the Watson incident. The trial court agreed and directed a verdict only as to robbery in the first degree.

The jury returned guilty verdicts on robbery in the second degree, four counts of theft by unlawful taking, criminal trespass and loitering. The jury fixed McClain's punishment for the theft, criminal trespass and loitering charges. During penalty phase deliberations, McClain reached an agreement with the Commonwealth on punishment for the robbery. He entered a guilty plea to the PFO I in exchange for a ten-year sentence reserving his right to appeal the

underlying conviction. The trial court sentenced McClain in accordance with the agreement and ordered the misdemeanor sentences to run concurrently with the felony sentence. This appeal followed.

McClain presents two allegations of error in urging reversal of his convictions. First, he contends the evidence was insufficient to support a conviction for robbery in the second degree as the Commonwealth failed to produce evidence that he used or threatened the use of physical force against Watson and the trial court erred in not granting his motion for a directed verdict. Second, he contends the trial court abused its discretion in failing to sever each count of the indictment thus causing him to suffer substantial prejudice. We disagree and affirm.

First, McClain contends there was insufficient evidence presented that he used or threatened the use of physical force against Watson in the course of committing a theft as required under KRS 515.030,[9] and that Watson's subjective assumption McClain was armed is insufficient to constitute the threat of force. Thus, he argues the trial court should have granted his motion for a directed verdict on the robbery in the second degree charge as it related to Watson, and its failure to do so constitutes reversible error. We disagree.

> On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond

[9] KRS 515.030(1) states: "A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft."

> a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

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

In *Swain v. Commonwealth*, 887 S.W.2d 346 (Ky. 1994), our Supreme Court held that menacing gestures and a victim's assumptions that a perpetrator is armed are insufficient to warrant a conviction on robbery in the first degree. However, the Supreme Court went on to discuss a factual situation very similar to the matter at bar.

> As to the three counts in which no weapon was seen or mentioned but in which appellant demanded money while having at least one hand inside his clothing, the jury should have been instructed on robbery in the second degree and theft by unlawful taking. As to robbery in the second degree, the facts presented here are sufficient to constitute a threat of immediate physical force if the jury believes from the evidence there was such, or theft by unlawful taking if it believes there was no threat of physical force.

Id. at 348.

Here, the jury was presented with Watson's testimony that McClain entered his vehicle without permission, demanded to be driven to a certain

location, asked for a cell phone, kept his hands in his pockets during the trip, and exited without returning the cell phone. Watson testified that when he requested the phone be returned, McClain told him he was lucky to not have been "totally" robbed before returning to the vehicle, opening the driver's side door, and rummaging through his pockets. Watson informed the jury that he "freaked out" when McClain first got into his car, he "was pretty scared" throughout the incident, he thought McClain had a gun and that his life was in danger if he didn't comply with McClain's demands.

A jury is free to draw inferences from the proof presented, *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky. 1999), and is charged with assessing the weight and credibility of the evidence. *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). Under the facts elicited at trial, the jury could easily have concluded McClain threatened the use of physical force against Watson in furtherance of the theft. Contrary to McClain's contention, we do not believe it was clearly unreasonable for the jury to find him guilty of robbery in the second degree. Thus, he was not entitled to a directed verdict of acquittal. *Benham*.

Finally, McClain contends the trial court abused its discretion in failing to sever each count of the indictment. He argues that this failure caused the jury to be unduly prejudiced against him. Again, we disagree.

RCr[10] 6.18 allows the joinder of offenses in a single indictment "if the offenses are of the same or similar character or are based on the same acts or

[10] Kentucky Rules of Criminal Procedure.

transactions connected together or constituting parts of a common scheme or plan." Under RCr 9.16, if it appears to the trial court that the Commonwealth or defendant is or will be prejudiced by a joinder of offenses, it shall order separate trials on each count.

> A conviction resulting from a trial in which a motion for separation of the charged offenses has been denied will be reversed on appeal only if the refusal of the trial court to grant such a severance is found to amount to a clear abuse of discretion and prejudice to the defendant is positively shown.

Harris v. Commonwealth, 556 S.W.2d 669, 670 (Ky. 1977) (citing *Spencer v. Commonwealth*, 554 S.W.2d 355 (Ky. 1977); *Russell v. Commonwealth*, 482 S.W.2d 584 (Ky. 1972)).

McClain has failed to demonstrate how he was prejudiced by the joint trial of the charged offenses, nor has he shown that the trial court clearly abused its discretion. The crimes charged occurred in close physical and temporal proximity to one another. Each involved the theft of a cellular phone and/or cash, and all were strikingly similar in character and mode of execution. McClain was identified as the perpetrator by each of his victims. We are unable to discern any prejudice that resulted from trying these similar offenses in a joint trial. The trial court did not err in refusing to order separate trials.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Annie O'Connell
Assistant Public Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky