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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001987-MR

BRIAN HALEY, JR. APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 10-CR-00077

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brian Haley, Jr., brings this appeal from a September 16, 2011, Final Judgment of the Simpson Circuit Court sentencing him to a total of twelve-years' imprisonment. We affirm.

On August 14, 2009, appellant was indicted by a Logan County Grand Jury (Action No. 09-CR-00169) upon the offense of receiving stolen property over

$10,000 in violation of Kentucky Revised Statutes (KRS) 514.110. The indicted offense stemmed from the theft of personal property, including jewelry, from the residence of Sara Bichon in July 2009. It was alleged that appellant pawned two rings at a Logan County pawn shop. Bichon identified the rings as being stolen from her Simpson County residence. Eventually, appellant entered a guilty plea to the offense, and by judgment entered January 20, 2010, the Logan Circuit Court sentenced appellant to one year in prison.

Thereafter, on July 19, 2010, a Simpson County Grand Jury indicted appellant upon first-degree burglary (KRS 511.020), second-degree criminal mischief, and with being a first-degree persistent felony offender in Action No. 10-CR-00077. These indicted offenses also stemmed from the theft of personal property from Bichon's residence in July 2009. Eventually, a jury trial ensued, and appellant was found guilty of second-degree burglary, third-degree mischief, and with being a first-degree felony offender. By final judgment entered September 16, 2011, appellant was sentenced to a total of twelve-years' imprisonment. This appeal follows.

Appellant contends that his conviction upon burglary in Simpson County and upon receiving stolen property in Logan County violated the constitutional prohibition against double jeopardy. In particular, appellant argues:

> [Appellant] pled guilty to the Logan County [receiving stolen property] charge on January 12, 2010. He was sentenced to one year. [Appellant] was arrested for the Simpson County charges on June 29, 2010, some six and a half months after he pled guilty to the Logan County

> charges. On July 19, 2010, he was indicted by a Simpson County grand jury for Burglary First-degree, Criminal Mischief and Persistent Felony Offender First-degree.
>
> At a hearing before the first trial on January 14, 2011, trial counsel argued that KRS 505.020(1)(b) applied in this case. [Appellant] was charged with [receiving stolen property] in Logan County and Burglary Second-degree in Simpson County, but both arose out of the same incident: the Bichon burglary. [Appellant] had no co-defendant and was charged with neither facilitation nor complicity to burglary. Therefore, in order to find him guilty, the jury necessarily would have to find that [appellant] was present in and took items from the Bichon house. That finding was logically inconsistent with the [receiving stolen property] conviction, which required that [appellant] received property from someone who had actually been in the Bichon house at the time the burglary was committed.

Appellant's Brief at 6 (citations omitted). For the reasons hereinafter stated, we disagree.

In *Phillips v. Commonwealth*, 679 S.W.2d 235 (Ky. 1984), our Supreme Court held that a defendant's conviction upon both burglary and receiving stolen property did not violate the constitutional prohibition against double jeopardy. The Court concluded that burglary and receiving stolen property were "two distinct offenses." *Id.* at 236. The Court reasoned:

> It is clear that two distinct offenses occurred here. The burglary was completed when Phillips entered the apartment with the intent to commit a crime inside. Even if he had then and there abandoned his activity, he would be guilty of burglary. KRS 511.020-. 040. The fact that he stole the television set after he entered the apartment constituted a completely separate offense - theft or receiving stolen property.

Phillips, 679 S.W.2d at 236.

Likewise, in this appeal, appellant committed two separate offenses (burglary and receiving stolen property) for which he was separately charged and sentenced. Additionally, we do not believe inconsistent or contradictory facts formed the bases for appellant's convictions upon robbery and receiving stolen property. In sum, we are of the opinion that double jeopardy was not violated.

Appellant next contends that the circuit court erred by admitting into evidence certain testimony of Kentucky State Trooper Greg Dukes. Appellant claims it was prejudicial error for Trooper Dukes to testify concerning the contents of a surveillance videotape taken at the Logan County pawn shop where the stolen rings were recovered. Appellant argues that the videotape was not produced at trial and that Trooper Dukes' testimony was inadmissible per Kentucky Rules of Evidence (KRE) 1002. Under KRE 1002, appellant asserts that the contents of a recording may only be proved by the original recording or a copy of the recording. In particular, appellant maintains:

> Trooper Dukes testified that while he was in [the pawn shop], he examined the videotape of the premises. He said he knew [appellant] by sight and on the video, saw him coming into the store and standing at the counter. . . . By the time the police attempted to make a copy of the tape, they were unable to because the tape had rewound.
>
> Unfortunately, introduction of this testimony violated the Best Evidence rule because [Trooper] Dukes had not personally observed [appellant] coming into the pawn shop and the video was not presented at the trial. His comments about the events he saw on a videotape,

> events of which he had no personal knowledge, were not the best evidence of what occurred. It is of no moment that the videotape had been reused; a [pawn shop] employee who waited on [appellant] testified. The pawn receipt [appellant] signed was also introduced.

Appellant's Brief at 14-15 (citations omitted).

To begin, this issue was not preserved for our review; therefore, appellant requests this Court to review the alleged evidentiary error under Kentucky Rules of Criminal Procedure (RCr) 10.26. Under the substantial error rule of RCr 10.26, an appellate court may review an unpreserved error and reverse only upon a showing that the error affects the substantial rights of defendant and will result in manifest injustice. *Martin v. Com.*, 207 S.W.3d 1 (Ky. 2006). In this appeal, we do not believe that the admission of Trooper Dukes' testimony concerning the contents of the videotape constituted a substantial error under RCr 10.26.

Under KRE 1004(1), the original videotape recording is not required if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" Here, the evidence revealed that the original surveillance videotape was destroyed before a copy could be made. It appears that the original surveillance videotape was inadvertently rewound and copied over by the pawn store. Thus, the destruction of the original surveillance videotape was not due to bad faith but rather was a mistake.

Moreover, Trooper Dukes testified that he recognized appellant on the original surveillance videotape. However, evidence was also admitted that

appellant pleaded guilty to receiving stolen property in Logan County, and, in fact, appellant admitted to this crime during his opening statement.

Upon the whole, we are unable to conclude that the admission of Trooper Dukes' testimony as to the surveillance videotape violated a substantial right resulting in manifest injustice per RCr 10.26. We, thus, reject this contention of error.

Appellant finally asserts that the circuit court erred by admitting certain DNA evidence. Appellant argues that the DNA evidence was inadmissible because of a break in the chain of custody of two buccal swabs collected from him and his brother. In particular, appellant maintains:

> Shortly after the Bichon home was burglarized, police began to suspect [appellant] and his brother, Bobby, of being the culprits. On July 23, police took a buccal swab from [appellant] at the Logan County Detention Center. [Mike] Rigg said he had never performed a buccal swab collection, so he asked for EMT Rodney Harp to accompany him and actually collect the sample. Bobby Haley had been lodged at the Simpson County Detention Center; Rigg said Bobby gave permission for the swab to be collected. According to Rigg, later on the day he and Harp collected the sample from Bobby, he wrote and executed a search warrant in order to collect a buccal sample from [appellant] because [appellant] was in the Logan County Detention Center and therefore, out of his jurisdiction. Rigg said that was on July 21, the warrant was executed on July 23, 2009, and that samples from both Bobby and [appellant] were collected on July 23.
>
> Unfortunately, Rigg was a tad confused. On cross, he admitted that Bobby's buccal swab was taken the day before he took [appellant's] and that he wrote the search warrant because he had seen what looked to be cuts on

> Bobby's arms. Therefore, Rigg said, because he included the fact that he had seen cuts on Bobby's arms in the search warrant, he had to have taken Bobby's buccal swab before applying for the warrant to take a buccal swab from [appellant]. In the end, he said, he obtained the search warrant on July 21 and took [appellant's] buccal swab on July 23.
>
> That incident was not the first time Rigg had confused Bobby and [appellant]. On cross, Rigg did not recall saying that the affidavit he wrote in order to obtain the search warrant may have had a type and should have read that [appellant], not Bobby, had cuts on his arms. After reviewing his testimony during the first trial on January 11, 2011, Rigg admitted that he had Bobby and [appellant] confused at that time and had said [appellant] had cuts, when it was actually Bobby Haley. He also admitted that he was confused that he had taken buccal swabs from both Haley brothers on the same day.

Appellant's Brief at 16 -18 (citations omitted).

In criminal proceedings, the Commonwealth has a constitutional duty to preserve evidence so as to enable a criminal defendant to present a complete defense. To do so, the Commonwealth must preserve the chain of custody of evidence to ensure that it has not been "altered in any material respect." *Rabovsky v. Com.*, 973 S.W.2d 6, 8 (Ky. 1998) (citations omitted). Thus, it is incumbent upon the Commonwealth to demonstrate that "the proffered evidence was the same evidence actually involved in the event in question and that it remains materially unchanged from the time of the event until its admission." *Thomas v. Com.*, 153 S.W.3d 772, 779 (Ky. 2005).

Upon review of the record, the evidence indicates that Ronnie Harp, an EMT, actually accompanied Captain Mike Rigg to perform the buccal swabs on

appellant and his brother. Harp testified that he actually swabbed both appellant and his brother. Harp stated that he went to Simpson County Jail to swab the brother and went to Logan County Jail to swab appellant. According to Harp, he sealed both swab kits separately with evidence tape and labeled each accurately. Captain Rigg also testified that Harp actually swabbed both appellant and his brother. Moreover, despite his confusion as to some details, Captain Rigg plainly stated that the swabs of appellant and his brother "were taken at two different places and were never co-mingled." Commonwealth's Brief at 7-8.

Upon the whole, we believe the chain of custody was properly established and that the circuit court properly admitted the DNA results into evidence.

For the foregoing reasons, the Final Judgment of the Simpson Circuit Court is affirmed.

ALL CONCUR.

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