

RENDERED: OCTOBER 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001174-MR

JOHN T. JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 11-CR-000053 AND 12-CR-000786

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: John T. Jones appeals the Jefferson Circuit Court's judgment convicting him of tampering with a witness and of being a first-degree persistent felony offender (PFO-1st). After a careful review of the record, we affirm because even if we were to assume the court erred in limiting defense counsel's questioning of Mallory, the error was harmless.

Jones was initially indicted in circuit court case number 11-CR-000053 on the charges of: criminal attempt murder; first-degree assault; and possession of a firearm by a convicted felon. Subsequently, in circuit court case number 12-CR-000786, he was indicted on the charges of: first-degree fleeing or evading police; resisting arrest; tampering with a witness; and PFO-1st. The cases were heard together for purposes of the jury trial.

During trial, part of a conversation between Jones and James Mallory, which occurred at and was recorded by the Jefferson County Jail, was played for the jury. This conversation was purportedly the basis for Jones's charge of tampering with a witness. Because much of the recording was difficult to understand, a transcript of the part of the recording that was played during trial was provided to the jury, so they could read along as they listened to the recording.¹ After the recording was played for the jury, the transcripts were collected from the jurors.

The Commonwealth did not call Mallory as a witness, but because Mallory's statements were part of the recorded conversation, Jones called Mallory, in an effort to question him about what was said on the recording. Attorneys for both Jones and the Commonwealth engaged in a lengthy debate, outside the presence of the jury, about what questions could and could not be asked of Mallory. The court ultimately decided to limit the questions that could be asked.

¹ We have listened to the entire recording of the conversation between Jones and Mallory, and we have found that much of the recording that is in the record before us is incoherent. However, we have also read the transcript of the recording that was provided to the jury as an aid during trial.

Consequently, Mallory was asked about: (a) his prior attempts at obtaining shock probation from his incarceration (*i.e.*, the timeline of when he attempted to obtain shock probation, when it was revoked, etc., was discussed); (b) the fact that Mallory had charges pending against him for murder and burglary at the time he was testifying in Jones's trial; (c) whether Mallory had written the letter that was purportedly signed by him and sent to the Commonwealth's Attorney stating that Mallory had "bombshell" evidence about Jones's case and others (Mallory denied having written the letter); and (d) whether Mallory had given a statement to the police without having a prior agreement with the Commonwealth concerning shock probation (Mallory testified that he had no agreement with the Commonwealth).

Jones's counsel had several questions he wanted to ask Mallory, but the court did not permit counsel to ask. These questions included the following: Whether the prosecutor told Mallory to lie; whether Mallory told the prosecutor that he had nothing to say against Jones; whether Jones said he did not commit the crime; whether Jones was innocent; and whether Mallory had any knowledge that Jones did anything wrong. Additionally, counsel argued in the circuit court that he would have gone into more detail about the "bombshell" letter sent to the Commonwealth's Attorney that Mallory allegedly wrote. Counsel contended that he would have questioned Mallory about his motive to make up the story about Jones, considering Mallory had been denied shock probation. Counsel also alleged that there would have been a more thorough discussion of Mallory's disciplinary

problems, which Mallory had even after he was initially granted shock probation. Counsel wanted to show how desperate Mallory was to obtain a second shock probation. Counsel would have asked Mallory whether there had really been a threatening telephone call made by Jones to the victim from the jail as Mallory had told the detective in his interview. Defense counsel asserted that he would have questioned Mallory about his statements to the press, wherein he announced he had never written a letter against anybody and that he had never sought to be a witness against anyone. Counsel argued that the testimony he would have elicited by asking about Mallory's statements to the press and the letter would have undermined Mallory's credibility. Although the court did not permit counsel to ask Mallory these questions, the court permitted counsel to put the information he would have elicited from Mallory by asking these questions into the record by avowal. Mallory's "bombshell" letter was also admitted into the record by avowal.

The jury ultimately convicted Jones of tampering with a witness, resisting arrest, and PFO-1st. Subsequently, out of the jury's presence, and upon the Commonwealth's motion, the charge of resisting arrest was dismissed. Jones was then sentenced to one year of imprisonment for the tampering with a witness conviction, enhanced to ten years of imprisonment due to the PFO-1st conviction.

Jones now appeals, contending that the circuit court committed reversible error by limiting defense counsel's examination of Mallory. Jones alleges that Mallory was the Commonwealth's only substantive witness regarding

the witness tampering charge and, therefore, the circuit court erred when it prevented defense counsel from eliciting relevant testimony from Mallory.

We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). In the present case, the testimony that Jones's counsel wanted to elicit from Mallory, but was denied by the circuit court, was for the purpose of impeaching Mallory. However, the partial jail recording played for the jury was of a conversation between Jones and Mallory, and the parties agree that the recording was the basis for Jones's tampering with a witness charge. The jury was able to hear Jones speaking to Mallory on the recording, and they were able to determine for themselves whether Jones had tampered with a witness based upon what they heard from the recording. Therefore, it was inconsequential whether counsel was permitted to impeach Mallory or not, because the jurors were able to determine, based upon their interpretation of Jones's own words, whether they believed he had tampered with a witness.² Consequently, the circuit court did not abuse its discretion in limiting the questions defense counsel could ask Mallory. Moreover, even if we were to assume for the sake of argument that the court did err in limiting the questions, the error was harmless because it made no difference as to the outcome due to the fact that the jury heard Jones speaking to Mallory on the

² We further note, regarding Jones's claim that his counsel should have been permitted to further impeach Mallory, that the jury likely knew that Mallory was a jailhouse snitch because he was wearing an orange prison jumpsuit while testifying in Jones's case and he admitted that charges for murder and burglary were pending against him at the time he testified.

recording, and this formed the basis for the tampering with a witness conviction.

See RCr³ 9.24.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Theodore S. Shouse
Louisville, Kentucky

BRIEF FOR APPELLEE:

Rob Eggert
Louisville, Kentucky

³ Kentucky Rule(s) of Criminal Procedure.