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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001587-MR

JEREMY L. ROEDER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 11-CR-001421

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

DIXON, JUDGE: Jeremy L. Roeder appeals from the Jefferson Circuit Court's final judgment of conviction and sentence entered following his jury trial for robbery and assault. Finding no error, we affirm.

On May 5, 2011, a Jefferson County grand jury indicted Roeder and his co-defendant, Joseph Riggs, on charges of complicity to first-degree robbery and first-degree assault. The charges against Roeder and Riggs stemmed from an

incident that occurred on January 5, 2011, in which Larry Rice was found beaten and robbed in a vacant lot near Dreamland Lake in western Louisville.

On the evening of January 4, 2011, Roeder and Riggs were at DT's Bar drinking alcohol and playing pool. Rice was also at the bar, and he chatted with the two men during the course of the night. Rice accepted a ride from Roeder and Riggs, and they drove to a house near Dreamland Lake. The two men demanded Rice's money and began punching him. They dragged Rice to a vacant lot, continued punching and kicking him, and then left with Rice's wallet, shoes, and leather coat. Rice was semi-conscious when emergency personnel responded to the scene after a neighbor called 911. He was admitted to the hospital with a brain hemorrhage and traumatic injuries to his face. Rice subsequently had surgery to repair several broken bones in his face.

After an investigation, Detective Matthew Crouch obtained arrest warrants for Roeder and Riggs. Riggs subsequently pled guilty to the charges in the indictment, and he testified for the Commonwealth at Roeder's trial. The jury convicted Roeder of first-degree robbery and first-degree assault. The court sentenced Roeder to a total of eleven years' imprisonment pursuant to the jury's recommendation. Roeder now raises three issues on appeal.

Roeder contends the trial court erred by: 1) admitting evidence of Rice's in-court identification of Roeder; 2) excluding testimony from the defense's investigator; and 3) failing to instruct the jury on criminal facilitation to robbery.

I.

Three weeks after Rice was attacked, Detective Crouch created two photo-pack lineups for Rice to view. The first pack included a picture of Riggs, while the second pack included a photo of Roeder. Rice correctly identified Riggs; however, Rice selected a suspect other than Roeder from the second pack. Thereafter, Detective Crouch learned the bartender at DT's had taken a photograph of Rice on the night of January 4. Detective Crouch obtained the photo, which depicted Rice with his arms around the shoulders of Riggs and Roeder. After viewing the photo, Rice identified Roeder as the second perpetrator. Prior to trial, Roeder moved to suppress the evidence of Rice's out-of-court identification of him because the process employed by Detective Crouch was unduly suggestive. Due to the suggestiveness, Roeder argued that Rice should be precluded from subsequently identifying him in-court at trial. The court granted the motion in part, concluding the pre-trial identification was improperly suggestive and should be suppressed. The court denied the motion as to any subsequent in-court identification, ruling that an in-court identification would be admissible. On appeal, Roeder asserts the evidence of Rice's in-court identification of him should have been suppressed because it was tainted by the unduly suggestive out-of-court identification.

In *Grady v. Commonwealth*, 325 S.W.3d 333, 353 (Ky. 2010), the Kentucky Supreme Court stated,

when a defendant alleges that an in-court identification has been tainted by a pre-trial identification, a court must answer two questions: (1) was the first, pre-trial

identification unduly suggestive; (2) if the pre-trial identification was unduly suggestive, does there exist an independent basis to support the reliability of the in-court identification so that the unduly suggestiveness of the pre-trial identification becomes moot.

To determine whether an independent basis of reliability exists, the court must consider, under the totality of the circumstances, five factors outlined by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972). *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004). “The five factors are: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and confrontation.” *Id.*

Here, the trial court determined that the pre-trial identification process was unduly suggestive, as Rice was shown a group photograph of the two suspects standing with Rice; accordingly, we must determine whether “an independent basis to support the reliability of the in-court identification” existed. *Grady*, 325 S.W.3d at 353.

While at DT's Bar, Rice chatted with Roeder and Riggs, bought them a beer, and watched them play pool. Although Rice was drinking alcohol that night, he had ample time to observe Roeder. Rice testified that he left the bar with both men, purchased beer at a nearby gas station, and then went with them to a house that he assumed belonged to one of them. Once they arrived at the house, the men confronted Rice and demanded money.

Roeder emphasizes that Rice did not identify Roeder in the photo pack three weeks after the attack, yet he identified Roeder two months later upon viewing the photo taken on the night of the crime. We are not persuaded that Rice's inability to initially identify Roeder was determinative on the admissibility of the subsequent in-court identification. "[A] witness's prior inability to identify a defendant goes to the credibility of the in-court identification and not to its admissibility, and thus raises a proper question of fact for the jury to determine." *United States v. Briggs*, 700 F.2d 408, 413 (7th Cir. 1983). Although the trial took place approximately sixteen months after the attack, Rice was adamant in identifying Roeder as his assailant.

Further, consideration should be given to whether other evidence was presented that tended to corroborate the in-court identification. *Grady*, 325 S.W.3d at 355. At trial, the Commonwealth introduced the photograph from the bar, along with testimony from Riggs that implicated Roeder. Additionally, Riggs's former girlfriend, Kimberly Mitchell, testified that Roeder and Riggs came to her house on the night of the crime carrying items that belonged to Rice. According to Mitchell, she asked Riggs what was going on, and he told her that they had robbed and beat up a guy from the bar.

Based on the totality of the circumstances, we conclude the in-court identification was reliable. The trial court did not abuse its discretion by ruling the identification was admissible.

II.

Roeder contends he was denied the right to present a defense when the trial court excluded testimony from the defense's investigator regarding the whereabouts of an alibi witness.

This issue arose following Roeder's testimony at trial. Although Roeder's statement to Detective Crouch indicated that he had left the bar with Riggs, Roeder testified at trial that he actually called an "old friend" named Danielle, who picked him up at DT's and dropped him off at a crack house in the Valley Station area of Louisville. At the conclusion of his testimony, jurors submitted written questions for Roeder. During a bench conference, the court determined that several of the questions were improper. One question in particular, in which a juror wanted to know why Danielle had not testified on Roeder's behalf, prompted defense counsel to request that the court allow the question. When the court refused, counsel requested that her investigator be allowed to testify that he attempted to serve a subpoena on Danielle, but that she was apparently a transient. The court denied counsel's request, but allowed the investigator to testify by avowal regarding his efforts to locate Danielle.

Roeder now argues the court impermissibly denied him the right to present a defense by ruling that the investigator's testimony was inadmissible. Roeder theorizes that the investigator's testimony explained the absence of his alibi witness; consequently, the exclusion of that testimony undermined his alibi defense.

A defendant's fundamental right to due process entitles him "to develop and present any exculpatory evidence in his own defense[.]" *McGregor v. Hines*, 995 S.W.2d 384, 388 (Ky. 1999). Although the defendant is afforded the right to present witnesses in his defense, he "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973). In the case at bar, Roeder offered no theory of admissibility for the proffered testimony during the bench conference with the trial court; likewise, Roeder does not explain to this Court why the proffered testimony was admissible pursuant to our evidentiary rules. A trial court has discretion to exclude "evidence which might be otherwise relevant on grounds that confusion of the issues or misleading the jury may result." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997); Kentucky Rules of Evidence (KRE) 403. The investigator's avowal testimony indicated that he had tried several addresses and phone numbers, but was unable to locate Danielle.

We decline to speculate regarding Roeder's theory of relevancy and probativeness regarding the proffered testimony, as he failed to present an analysis as to the admissibility of the evidence in his appellate brief. *See* Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v); *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006). Despite Roeder's assertion to the contrary, we are not persuaded that the exclusion of the investigator's testimony deprived him of the fundamental right to present a defense. Roeder testified on his own behalf, and his attorney

skillfully cross-examined the prosecution's witnesses. After a thorough review of the record, we are not persuaded the court abused its discretion by excluding the proffered evidence.

III.

Roeder next argues the court erred by refusing to instruct the jury on criminal facilitation to first-degree robbery. The jury was ultimately instructed on complicity to first-degree robbery. Complicity liability is codified in Kentucky Revised Statutes (KRS) 502.020(1):

A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

However, KRS 506.080(1) codifies facilitation:

A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Roeder argues that, if the jury rejected his alibi defense, the jury could have reasonably believed he was merely present when Riggs robbed Rice, thereby supporting a theory of criminal facilitation. We disagree.

The Kentucky Supreme Court summarized the difference between complicity liability and facilitation as follows:

Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. Facilitation reflects the mental state of one who is wholly indifferent to the actual completion of the crime.

Thompkins v. Commonwealth, 54 S.W.3d 147, 150-51 (Ky. 2001).

Roeder presented an alibi defense, denying he had any involvement in the crimes and contending that Riggs acted alone. The Commonwealth's evidence indicated that Roeder actively participated in committing the robbery with Riggs. No evidence was presented to support a finding that Roeder intentionally provided Riggs with the opportunity to commit the robbery while remaining "wholly indifferent" to whether the crime was completed.

"An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense."

Webb v. Commonwealth, 904 S.W.2d 226, 229 (Ky. 1995). Here, there was no evidence to support a theory that Roeder was guilty of facilitation to robbery; accordingly, the trial court did not err in denying Roeder's request for a facilitation instruction.

For the reasons stated herein, we affirm the judgment of the Jefferson
Circuit Court.

ALL CONCUR.

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