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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001869-MR

MICHAEL BROADWAY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 16-CR-002357

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Michael Broadway ("Appellant") appeals from a judgment of conviction and sentence of the Jefferson Circuit Court on one count of second-degree burglary.[1] He argues that the circuit court erred in excluding testimony explaining why he broke into the victim's apartment, and in failing to

[1] Kentucky Revised Statutes ("KRS") 511.030.

instruct the jury on mistake of fact and criminal trespass. For the reasons addressed below, we AFFIRM the judgment on appeal.

FACTS AND PROCEDURAL HISTORY

On August 20, 2016, officers from the Louisville Metro Police Department ("LMPD") responded to a call that a man wearing a mask and brandishing a gun had forced his way into the apartment of Phyllis Finney in Jefferson County, Kentucky. When the officers arrived, they observed a black male exiting an apartment building and holding a mask. Testimony was later adduced that the man had a pistol in his hand and that gun shots were exchanged between the man and police, after which the man ran back into the apartment complex. Members of the LMPD SWAT team were summoned and heard Appellant crawling in the ceiling of an apartment. LMPD officers pepper sprayed the ceiling area, and Appellant was taken into custody. Officers found a gun in the ceiling where Appellant had been crawling.

Appellant was subsequently charged with one count of burglary in the first degree[2] and two counts of wanton endangerment in the first degree.[3] A jury trial was conducted, resulting in a guilty verdict on one count of burglary in the

[2] KRS 511.020.

[3] KRS 508.060.

second degree. Appellant was sentenced to 7.5 years in prison, and this appeal followed.

ARGUMENTS AND ANALYSIS

Appellant, through counsel, now argues that the circuit court committed reversible error in excluding testimony at trial that Finney's son, James Spaulding, had given heroin to Appellant's 17-year-old daughter and raped her. Appellant asserts that the jury should have been informed that the reason Appellant broke into Finney's apartment was to confront Spaulding because of the alleged rape. Appellant asserts two claims of error: first, that he should have been allowed to testify that his daughter told him Spaulding had given her heroin and raped her. Second, Appellant contends that Wayne Miles, who lived near Finney and heard Appellant talking to the police after his arrest, should have been allowed to testify that he heard Appellant tell the police that Spaulding had drugged and raped Appellant's daughter. Appellant sought to have this testimony - both that of himself and of Miles - admitted into evidence in order to inform the jury as to Appellant's motivation for breaking into Finney's apartment. He argues that this testimony is not hearsay because it was not offered to prove the truth of the matter asserted. Appellant also maintains that the testimony was relevant because it was offered to demonstrate the effect the alleged rape had on Appellant and to explain his conduct.

The question for our consideration on this issue is whether the circuit court erred in excluding the testimony of Appellant and Miles as to the allegation that Spaulding provided drugs to and raped Appellant's daughter. We must answer this question in the negative. As a general rule, all relevant evidence is admissible, and evidence which is not relevant is not admissible. Kentucky Rules of Evidence ("KRE") 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." KRE 401. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). With limited exceptions, hearsay is not admissible. KRE 802.

At trial, Appellant unsuccessfully sought to introduce testimony about the alleged rape and heroin usage in three ways. First, Appellant asked to play for the jury portions of his recorded statement to the police wherein he stated that he went to Finney's apartment looking for Spaulding because Appellant's daughter said that Spaulding had raped her. Second, Appellant sought to testify at trial as to what his daughter told him. And third, Appellant sought to present testimony from a female witness who drove Appellant's daughter to the hospital in December 2015, when the alleged rape occurred. Appellant argued at trial that even if these statements were hearsay, because either Appellant or a third party would have been

repeating what Appellant's daughter told them, they were nonetheless admissible under the excited utterance or other exceptions to the hearsay rule. In considering this argument, the circuit court determined that they were inadmissible because they were exculpatory and not statements against interest and, therefore, did not fall within the relevant exception to the hearsay rule.

KRE 804(b) states:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (c) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Appellant's counsel acknowledged that Appellant was not unavailable to testify ("obviously he's here"), and the circuit court determined that the proffered testimony did not constitute statements against interest because they tended, if anything, to be exculpatory by seeking to justify his conduct. We agree. Further, and more important, Appellant's motivation in committing the offenses was not relevant to whether he committed the offenses. Only relevant evidence is admissible. KRE 402 ("Evidence which is not relevant is not admissible.").

Appellant acknowledged breaking into Finney's apartment, and there is ample testimonial and other evidence in the record to support his conviction. We do not conclude that the circuit court erred in excluding the testimony at issue.

Appellant goes on to argue that the circuit court erred in failing to give mistake of fact and criminal trespass instructions to the jury. Appellant notes that under the burglary statute, the jury was asked to determine if Appellant entered Finney's dwelling with the intent to commit a crime therein. KRS 511.030. Appellant testified that he entered Finney's apartment with the intent to confront James Spaulding, under the mistaken belief that Spaulding was present in the apartment. Appellant asserts that this mistake of fact, *i.e.*, his incorrect belief that Spaulding was present in the apartment, demonstrates that he could not have accomplished the crime he intended to commit. As such, Appellant argues that he was entitled to a mistake of fact jury instruction.

KRS 501.070 states,

> (1) A person's ignorance or mistake as to a matter of fact or law does not relieve him of criminal liability unless:
>
> (a) Such ignorance or mistake negatives the existence of the culpable mental state required for commission of an offense; or
>
> (b) The statute under which he is charged or a statute related thereto expressly provides that such ignorance or mistake constitutes a defense or exemption; or

> (c) Such ignorance or mistake is of a kind that supports a defense of justification as defined in this Penal Code.
>
> (2) When ignorance or mistake relieves a person of criminal liability under subsection (1) but he would be guilty of another offense had the situation been as he supposed it was, he may be convicted of that other offense.
>
> (3) A person's mistaken belief that his conduct, as a matter of law, does not constitute an offense does not relieve him of criminal liability, unless such mistaken belief is actually founded upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:
>
> (a) A statute or other enactment; or
>
> (b) A judicial decision, opinion or judgment; or
>
> (c) An administrative order or grant of permission; or
>
> (d) An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

A jury instruction on mistake of fact is given when the mistake would justify the offense or otherwise show that the charged offense could not have been committed. *Mullikan v. Commonwealth*, 341 S.W.3d 99, 107 (Ky. 2011). "[A] mistake of fact is not a defense to a charge unless the mistake would support a defense of justification or otherwise show that the charged offense . . . could not have been committed." *Id*. (internal quotation marks and citations omitted).

Appellant's mistake of fact regarding Spaulding's presence at the apartment at the time Appellant forcibly entered does not fall within the limited exception set out in KRS 501.070, as it does not negate his culpable mental state nor otherwise demonstrate that he could not have committed the offense. As such, he was not entitled to an instruction on this issue.

We also find no error on Appellant's claim of entitlement to an instruction on the lesser-included offense of criminal trespass.[4] "[A] trial judge must give instructions on any lesser-included offenses supported by the evidence." *Sasser v. Commonwealth*, 485 S.W.3d 290, 296 (Ky. 2016) (footnote and citation omitted). A defendant is entitled to an instruction on a lesser-included offense only if a juror could have reasonable doubt as to a defendant's guilt on the greater charge, but also believe beyond a reasonable doubt that the defendant is guilty of the lesser offense. *White v. Commonwealth*, 178 S.W.3d 470, 490 (Ky. 2005). Testimony was adduced that Appellant broke into Finney's apartment with a pry bar, that he was armed with a pistol and had a mask, and that he was there for the purpose of confronting Spaulding. Appellant admitted breaking into the apartment with a pry bar to confront Spaulding. As no reasonable juror could conclude from the evidence that Appellant was guilty of criminal trespass but not guilty of

[4] "A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling." KRS 511.060(1).

burglary in the second degree, we do not conclude that Appellant was entitled to an instruction on criminal trespass. "We review a trial court's ruling on jury instructions for abuse of discretion." *Sasser*, 485 S.W.3d at 297 (footnote and citation omitted). We find no such abuse and, thus, no error.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the Jefferson Circuit Court.

LAMBERT, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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