IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-8-04 ElIA Grown, D.C.

2002-SC-0911-MR

RICHARD JONES — APPELLANT

V.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
CRIMINAL NOS. 01-CR-0046, 01-CR-0047, AND 01-CR-0048

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the Estill Circuit Court convicted Appellant, Richard Jones, of a series of crimes which began when a masked gunman commandeered a car in Irvine, Kentucky. The gunman, identified by an accomplice as Appellant, acquired the vehicle after approaching several young women as they sat in their cars, chatting at a local car-wash. Jumping between the cars, the gunman pointed his pistol at the back of one woman's head and ordered her to "get out of the f-ing car." Driving off with the stolen vehicle along River Road, the gunman stopped to pick up his accomplice, and the pair headed to the outlying county, where the two men, at least one still wearing a mask, committed their next crimes.

On Barnes Mountain, the men forced their way into the home of a long-time resident, initially gaining entry by knocking on the door and stating, "It's me, grandma."

Once inside, however, the intruders pushed their victim onto a bed, one man pinning her down as the other searched the house. Finding only a purse containing some cash and checks, the men fled in the stolen car, narrowly evading attempts by the victim's son-in-law and grandson to create makeshift roadblocks along a mountain road. With the authorities closing in, the men abandoned the stolen vehicle near the end of a logging trail, setting the car ablaze before they disappeared, at least for the night, into the wooded hillsides.

Several days later, upon questioning by the authorities, the accomplice confessed, naming Appellant as the masked gunman and the architect of these crimes. At the following trial, the jury, having heard this and other evidence, found Appellant guilty of first-degree robbery for the initial car theft, second-degree robbery and burglary for his crimes on Barnes Mountain, and second-degree arson for eventually burning the stolen automobile. Sentences recommended by the jury range from five to twenty years, with each sentence set to run concurrently. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

I. Record on Appeal

Before reaching the merits of this appeal, we must first determine which portions of the record have been properly submitted for our review. The original record forwarded to this Court lacked four out of the five volumes of trial transcripts. Following the submission of Appellant's brief, as well as the Commonwealth's brief, the Estill Circuit Clerk's office transmitted the four missing volumes to this Court, along with a letter of apology for its omission.

The Commonwealth, relying only on the partial transcripts originally received, urges this Court to affirm Appellant's convictions, reasoning that without a complete record of trial proceedings, Appellant cannot substantiate his claims of error. In reply, Appellant argues that the omitted transcripts were the result of an obvious clerical error, an error that the Commonwealth consciously disregarded in preparing its brief.

Our cases firmly establish that an appealing party shoulders the primary responsibility of ensuring that all materials necessary for effective review are included in the record on appeal. Oldfield v. Oldfield, Ky., 663 S.W.2d 211 (1983); Fanelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968); Belk-Simpson Co. v. Hill, Ky., 288 S.W.2d 369 (1956); Dept. of Transportation v. Kemper, Ky. App., 574 S.W.2d 932 (1978). When court proceedings are stenographically recorded, as here, an appealing party must specifically designate for inclusion any pertinent untranscribed material, CR 75.01(1), make suitable arrangements for transcription, CR 75.01(2), and then file the designated transcripts in a timely manner with the circuit court clerk. CR 75.01(3).

Appellant properly complied with all designation and transcription requirements, filing the completed transcripts with the circuit clerk within the prescribed time limits. However, on the notice of certification, the circuit clerk listed only one out of the five volumes of trial transcripts filed in her office, and included this single binder, labeled "Volume 4," with the original record forwarded to this Court.

Civil Rule 75.07(2) provides that designated portions of the record "shall when filed with the clerk be certified as part of the record on appeal." Although an Appellant's responsibilities do not end with filing, see CR 75.07(5) (timeliness of certification), we believe the omitted volumes of the record here stem from a clerical error. Such errors

may be corrected by an appellate court upon "a proper suggestion or of its own initiative." CR 75.08. Because a complete set of trial transcripts are now filed with this Court, in an effort to avoid unnecessary delay we shall consider all of the heretofore omitted transcripts in considering the merits of this appeal.

II. Post-Arrest Silence

Appellant complains that the prosecution's first witness improperly referred to Appellant's post-arrest silence, necessitating a mistrial. The witness, Deputy Sheriff James Marshall, blurted out the offending testimony during the following colloquy:

Q: All right. All right, did you, at any time, take any statements from the defendant, Rick Jones?

A: Yes.

Q: When was that?

A: I requested a written statement, requested to speak to him. Mr. Jones would not – would not –

Defense Counsel: Objection, Your Honor.

Q: Well, just tell us what he said, not what he wouldn't say.

A: He said that he would rather speak to a lawyer.

Q: Well –

Defense Counsel: Objection, Your Honor.

Prosecution: Okay.

A rather lengthy bench conference ensued, during which the prosecution conceded the impropriety of the Deputy's testimony, yet argued that the statements were inadvertent and should be deemed harmless. The trial judge, after initially holding his ruling in abeyance, denied Appellant's motion for a mistrial.

In Kentucky courts, the substantive use of a defendant's post-arrest silence during the prosecution's case-in-chief is prohibited. Hall v. Commonwealth, Ky., 862 S.W.2d 321, 323 (1993); Green v. Commonwealth, Ky., 815 S.W.2d 398, 400 (1991). See also Miranda v. Arizona, 384 U.S. 436, 465 n.37, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). Here, Deputy Marshall's testimony that Appellant chose not to make a statement, coupled with Appellant's stated preference to speak to an attorney, was "reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent." Sholler v. Commonwealth, Ky., 969 S.W.2d 706, 711 (1998). "[S]ilence does not mean only muteness; it includes the statement of a desire to remain silent as well as of a desire to remain silent until an attorney has been consulted." Wainwright v. Greenfield, 474 U.S. 284, 295 n.13, 106 S.Ct. 634, 640, 88 L.Ed.2d 623, 632 (1986).

We nonetheless consider Deputy Marshall's single reference to Appellant's silence harmless error. Typically, only the intentional or repeated use of such prohibited evidence by the prosecution will result in reversal. Hall v. Commonwealth, Ky., 862 S.W.2d 321, 323 (1993); Romans v. Commonwealth, Ky., 547 S.W.2d 128, 130 (1977). In contrast, inadvertent references to a defendant's decision to remain silent often have little impact on the overall fairness of the entire trial. Bills v. Commonwealth, Ky., 851 S.W.2d 466, 472 (1993); Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 233 (1983).

In the present matter, Appellant's timely objection, combined with the fact that the prosecution made no further mention of the matter, minimized the prejudicial effect of Deputy Marshall's testimony. Greer v. Miller, 483 U.S. 756, 764-65, 107 S.Ct. 3102, 3108, 97 L.Ed.2d 618, 629-630 (1987). Certainly this incident did not create the "manifest necessity" required for a mistrial. See Bray v. Commonwealth, Ky., 68 S.W.3d

375, 383 (2002); Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985). Furthermore, when compared to the evidence of guilt, including the accomplice's incriminating testimony as well as the inculpatory statements allegedly made by Appellant, we conclude that this single reference to silence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

III. Post-Arrest Statements

Appellant claims that new evidence adduced at trial proves that sheriff's deputies failed to "scrupulously honor" his invocation of the rights to silence and to counsel, rendering a subsequent inculpatory statement made by Appellant inadmissible. There seems to be no disagreement that deputies properly "Mirandized" Appellant following his arrest, and that soon afterward Appellant declined to make a statement and then requested to speak with an attorney. The dispute arises over whether deputies thereafter continued to badger Appellant, or if Appellant instead voluntarily re-initiated conversation with the deputies, before allegedly stating: "Yes. You've got me. I can't do forty or fifty years. Let's cut a deal. I'll make you famous."

At the pre-trial suppression hearing, Deputy Marshall testified that some ten to fifteen minutes after Appellant first invoked his rights to silence and to counsel, Appellant indicated that he wanted to talk about the crimes. According to the deputy, he once again read Appellant his rights, whereupon Appellant made the inculpatory statement. Asked at the suppression hearing if he coerced Appellant into talking, the deputy replied: "No, sir. Because I've got a different kind of law enforcement values, so I don't – I don't pressure nobody into nothing."

The trial judge denied Appellant's motion to suppress, finding that the statement was voluntarily made without any further questioning. Later at trial, however, new evidence emerged which indicates that Deputy Marshall engaged in at least some overreaching to obtain Appellant's statement, in this case by exaggerating the number of witnesses who had implicated Appellant in the charged offenses. Appellant claims this new evidence "casts doubt" on the deputy's earlier testimony at the suppression hearing, demonstrating that Deputy Marshall persisted in an effort to wear down Appellant's resistance following the invocation of his Miranda rights.

Undeniably, Deputy Marshall's trial testimony raises new questions regarding whether Appellant's waiver of his Fifth Amendment rights was a "product of a free and deliberate choice rather than intimidation, coercion, or deception." Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986), quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). However, counsel for Appellant elicited just enough "new evidence" at trial to suggest wrongdoing by the deputy, but no more. Despite Appellant's presumptive knowledge of Deputy Marshall's deceptive tactics, Appellant presented no evidence at the suppression hearing.

In Watkins v. Commonwealth, Ky., 105 S.W.3d 449 (2003), we found a similar "belated attempt" to contradict suppression hearing findings at trial "inadequate to change the outcome of [the initial] ruling." Id. at 451. Furthermore, as in Watkins, substantial evidence (here in the form of Deputy Marshall's detailed testimony) supports the trial judge's findings of fact. These findings are therefore conclusive. RCr 9.78;

Henson v. Commonwealth, Ky., 20 S.W.3d 466 (1999); Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 849 (1992).

Defense counsel's skillful elicitation of Deputy Marshall's trial testimony, although potentially damaging to the prosecution's case, never created more than an innuendo that the deputy improperly compelled Appellant to waive his Fifth Amendment rights to silence and to counsel. Cf. Crane v. Kentucky, 476 U.S. 683, 688, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986) (recognizing "the defendant's traditional prerogative to challenge [a] confession's *reliability* during the course of the trial") (emphasis in original). By failing to more fully develop the record, Appellant cannot now claim the trial court's ruling was clearly erroneous.

IV. Jury Instructions

Three separate indictments charged Appellant with first-degree arson, complicity to commit robbery and complicity to commit burglary. The jury instructions, however, omitted any reference to criminal complicity, instead allowing the jury to consider only the offenses of first and second-degree arson, burglary and robbery. Appellant claims the trial court erred by refusing to instruct the jury on criminal facilitation as lesser included offenses to all charges. We disagree.

A trial court must submit instructions to the jury on the "whole law of the case, including any lesser included offenses which are supported by the evidence." Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 72 (2000), quoting Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998). However, that duty does not extend to lesser included offenses which lack an evidentiary foundation. Gabow, supra, at 72; Barbour v. Commonwealth, Ky., 824 S.W.2d 861, 863 (1992), overruled on other grounds,

McGinnis v. Commonwealth, Ky., 875 S.W.2d 518 (1994). Although criminal facilitation is often considered a lesser included offence when an indictment, such as the one here, charges an accused with criminal complicity, Houston, supra, at 930, no state of the facts in the present case indicates that Appellant facilitated these crimes.

Criminal facilitation requires that an offender *knowingly* provide another with the means or opportunity to commit a crime. KRS 506.080(1); Smith v. Commonwealth, Ky., 722 S.W.2d 892 (1987). At trial, Appellant disclaimed any direct involvement in the charged crimes, instead asserting that he unknowingly provided others with information or assistance that enabled them to commit these offenses. For instance, in relation to the Barnes Mountain robbery, Appellant testified that he told his alleged accomplice about the victim's recent receipt of money—not for the purpose of robbing her, but instead to discuss the possibility of soliciting work from her. Similarly, Appellant also testified that he unwittingly gave the "real" carjackers a lift through Irvine, but ordered them out of his car immediately upon learning of their plans to commit a totally unrelated crime. Lacking any evidence to show he knowingly assisted others in the charged offenses, the trial court properly denied Appellant's requested facilitation instructions.

The convictions and judgment of the Estill Circuit Court are affirmed.

All concur.

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