

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2003-SC-0050-MR

DeSHAWN R. RUDOLPH

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
2001-CR-873

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Rudolph of one count of murder and one count of reckless homicide. He was sentenced to a total of thirty years in prison.

The questions presented are whether the trial judge correctly refused to dismiss the indictment; whether the defense was entitled to discovery of the handwritten notes of police; whether three jurors were properly removed for cause; whether certain photographs were admissible; whether the jury instructions were correct, and whether the closing argument was improper.

On December 30, 2000, eighteen-year-old Rudolph shot and killed two victims, ages 15 and 16. The 16-year-old victim and Rudolph were brothers who lived in the same home where the shooting occurred along with their mother, two younger brothers, a grandmother and a cousin. There was testimony that the two victims were friends.

For purposes of this opinion, we will refer to the 15-year-old victim as the first victim and the 16-year-old victim as the second victim.

The evidence at trial indicated that the first victim was standing in front of the second victim when Rudolph fired a single shot from a .357 magnum. The bullet struck the first victim, passed through him, and struck and remained lodged in the second victim. The medical examiner believed that the gun had been between two to 24 inches away from the first victim when it was fired. Because of the appearance of the exit wound in the first victim, she concluded that his body had been backed up firmly against an object, such as a wall or another person.

Rudolph was arrested approximately three months after the incident and at that time gave a taped statement to police. In that statement, he claimed that his cousin called him at home and warned him that the first victim was attempting to rob the second victim. With that, Rudolph retrieved his .357 and told the family members in the home to go to the basement. When he heard the second victim's upstairs door open, he hid by the refrigerator with his gun cocked and waited for them to come downstairs. When they did, he told the first victim "to give my little brother's stuff back." According to Rudolph's statement, the first victim reached in his pocket for a 9-millimeter gun and when he tried to cock it, Rudolph shot him. He claimed that at the time he did not know that the second victim had been shot.

Rudolph did not testify at trial, but his cousin that made the alleged telephone call did. According to the cousin, the second victim received a call about some weed and asked the cousin to go with him. While they were sitting in a car, the first victim ran to the car, pulled out a gun and demanded the weed. The second victim told the first victim that the weed was at home, and the first victim asked to be taken to it. Shortly

after driving off, the first victim ordered the cousin out of the car. The cousin then went to another cousin's home and called Rudolph to warn him that the second victim was being robbed and that they were coming to the family home. The cousin admitted at trial that when he talked to the police that evening, he told them that he did not know what had happened that evening and that he gave them a false name. He also admitted on cross-examination that he did not want Rudolph to be convicted and that he would be willing to lie to keep Rudolph out of trouble.

The jury convicted Rudolph of one count of murder and one count of reckless homicide. He was sentenced to twenty-five years and five years, respectively, the sentences to run consecutively for a total of thirty years in prison. This appeal followed.

I. Grand Jury/Notice

Rudolph argues that the trial judge erred by refusing to dismiss the indictment where the Commonwealth failed to provide notice to him or his counsel that his case was being presented to the grand jury. He contends that this precluded him from exercising his right to request to present evidence pursuant to RCr 5.08.

Rudolph was arrested on April 5, 2001 and he maintains that he was arraigned in district court two days later. The grand jury returned an indictment on April 10, 2001, charging him with two counts of murder. Three days later, Rudolph moved to dismiss the indictment because the Commonwealth did not notify him of the grand jury proceedings. Following a hearing on the motion, the trial judge ruled that the Commonwealth was under no obligation to provide notice.

The Commonwealth is not required to notify an accused before submitting his case to a grand jury. Grand jury proceedings are conducted in secret, with only the jurors, prosecutor, witnesses, stenographer, recording device operator or interpreter

present. Malone v. Commonwealth, Ky., 30 S.W.3d 180 (2000). The accused does not have a constitutional right to appear before a grand jury. Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 794 (2001). RCr 5.08 is simply an indulgence of the Court. Id. The trial judge did not err in denying the motion to dismiss the indictment.

II. Discovery

Rudolph claims that the trial judge erred by failing to require the Commonwealth to produce law enforcement officers' handwritten notes in order to determine their relevancy and materiality. He believes that his case should be remanded to the circuit court for the Commonwealth to produce these notes and for the trial judge to conduct an in camera hearing to determine the relevancy and materiality of the information contained therein.

Defense counsel filed a written motion requesting that the Commonwealth produce any and all notes or memoranda, including handwritten notes, made by law enforcement officers or agents of the Commonwealth made in connection with the case. Following a hearing on the motion, the trial judge, citing Cavender v. Miller, Ky., 984 S.W.2d 848 (1988) and RCr 7.24, entered a written order denying the request.

The trial judge correctly denied Rudolph's motion to compel production of handwritten notes by police because those notes are exempt from production pursuant to the rules of discovery. Cavender, supra. RCr 7.24(2) "authorizes pretrial discovery and inspection of official police reports, but not of memorandum, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case . . ." Remanding this case for an in camera review is unwarranted because Rudolph has not established a reasonable belief that any alleged notes of the police contain exculpatory evidence. See Commonwealth v.

Barroso, Ky., 122 S.W.3d 554 (2003), *abrogating* Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1995).

III. Jurors Removed for Cause

Rudolph asserts that the trial judge erred by improperly striking three jurors for cause based upon their religious beliefs, depriving the jurors of their rights to equal protection of the law and religious freedom and denying him his rights to equal protection of the law and a fair trial. We disagree.

During voir dire, the prosecutor asked the venire panel whether anybody was unable to sit in judgment of someone because of their religious or philosophical views. Although their actual oral responses cannot be discerned from the videotape record, three jurors, Juror #26092, Juror #48898 and Juror #1354, raised their hands and indicated that they had some type of religious conviction concerning judging others. The Commonwealth later made a motion to strike these jurors for cause based on their response. Defense counsel objected on grounds that religious and spiritual beliefs were not sufficient grounds to strike jurors for cause. The trial judge granted the motion, finding that the jurors “answered sufficiently . . . that their convictions would prevent them from being able to hear the case.”

There was no error in the inquiry by the prosecutor of prospective jurors if they held any religious or philosophical beliefs that would interfere with their service on the jury. See Wheeler v. Commonwealth, Ky., 121 S.W.3d 173 (2003); Parrish v. Commonwealth, Ky., 121 S.W.3d 198 (2003). Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), has no application here.

The question of whether a juror should be excused for cause is a matter within the sound discretion of the trial judge. Thompson v. Commonwealth, Ky., 862 S.W.2d

871 (1993); Alexander v. Commonwealth, Ky., 862 S.W.2d 856 (1993), *overruled on other grounds*, Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997). Pursuant to RCr 9.36(1), a prospective juror shall be excused as not qualified if there is reasonable ground to believe that the juror cannot render a fair and impartial verdict on the evidence. Here, the indication by the three jurors that they could not sit in judgment of another person was sufficient to support the decision by the trial judge. There is no violation of any provision of either the federal or state constitutions.

IV. Photographs

Rudolph argues that the trial judge erred by allowing the Commonwealth to introduce irrelevant and prejudicial photographs of him and the second victim. We disagree.

We must observe that none of the original photographs are included in the record. Instead, the record contains photocopies of fourteen photographs of various combinations of Rudolph, the second victim, the cousin and another person. In most of the photographs, the subject or subjects are making gang signs, holding a bottle of alcohol, and either holding a gun or showing one tucked into their waistband. Except for one photograph that depicts two guns, all of the “gun photographs” depict only one gun. Only nine of the fourteen photographs were admitted into evidence. There are no trial exhibit numbers on any of the photographs and, therefore, it is not clear which photographs the jurors actually saw.

During direct examination, the Commonwealth asked the mother of the second victim and the defendant whether she was aware if either of those sons owned guns. She denied any such knowledge. When the Commonwealth confronted her with a prior statement she gave police that the second victim probably owned a gun, the mother

said she could not recall making that statement. The prosecutor then showed her a series of photographs that depicted her sons with a gun tucked into their waistband. The mother indicated that the photographs were of her sons but claimed that the originals did not show a gun. She later explained that the gun was a pellet gun she had given the second victim when he was younger and that in all of the photographs there was only one gun. She also stated that she gave the detective other photographs that showed her sons holding a gun.

The prosecutor then presented the mother with another series of photographs of a similar nature except that one of them depicts a second gun. She originally agreed that the photographs were accurate, and she recalled giving them to a detective. The mother stated that she took them off the mirror of the second victim. However, she later stated she was not sure if the photographs were the ones she gave the detective and that they did not look like the ones she had at home. She acknowledged during her testimony that there was a gun in the home because her mother owned a gun, but she was unable to account for the second gun in the photograph because it did not look like the ones she had at home.

After reviewing the inconsistent and confusing testimony of the mother, it is clear that the photographs were properly admissible for impeachment purposes. The information was relevant and the probative value outweighed any prejudice. The trial judge did not abuse his discretion in admitting the photographs.

V. Jury Instructions

Rudolph contends that the trial judge erred by failing to give proper jury instructions in the guilt-innocence phase. He asserts that the evidence supported an instruction on the defense of protection of another. Rudolph also complains that the

trial judge improperly consolidated the instructions regarding self-protection and protection against burglary.

There was no evidence that Rudolph was justified in using force to protect a third person against imminent death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat as required by KRS 503.070(2). According to Rudolph's statement, he lay in wait for the two victims to come down the stairs and then confronted the first victim with a cocked .357 magnum and told him to "give my little brother's stuff back." The first victim, if he had a gun, only pulled it out after Rudolph pointed his gun at him. Neither the murder weapon nor the alleged gun used by the first victim was ever recovered. When the victim's body was found, he was still wearing gloves that would have made it difficult for him to have been an immediate threat to either Rudolph or the second victim. After a careful review of the record, it is clear that the evidence did not support an instruction on the defense of protection of another. The trial judge properly denied the requested instruction.

Nor did the trial judge err in consolidating into one instruction the defenses of self-protection and protection against burglary. The first paragraph of the instruction contains both defenses but they are plainly separated by the word "or." There is no merit to the claim that the consolidation of the two defenses diluted the importance of each defense or in any way misled the jury. Subpart A of the instruction, entitled "Initial Aggressor Qualification," also makes it clear that the qualification only applies to the self-protection defense. Contrary to the claim by Rudolph, the evidence warranted adding an initial aggressor qualification. According to Rudolph's own statement, he was the first to brandish a cocked gun. The jury instructions were correct.

VI. Closing Argument

Rudolph asserts that the trial judge erred by condoning improper and prejudicial statements made by the Commonwealth during its closing argument. He claims that the Commonwealth impermissibly shifted the burden of proof to him to prove his innocence and misstated the evidence that had been introduced at trial.

During closing argument, the prosecutor addressed the alleged call made by the cousin and posed the following question to the jury, "Why didn't [defense counsel] bring in the phone records and show us that call?" Defense counsel objected, arguing that the Commonwealth was improperly shifting the burden to the defense and arguing facts not in evidence. The trial judge determined that the Commonwealth did not go that far and that it was fair comment.

When reviewing claims of error in closing argument, "the required analysis, by an appellate court, must focus on the overall fairness of the trial and not the culpability of the prosecutor. . . . A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1987). Reversal is only justified when the alleged prosecutorial misconduct is so serious as to render the trial fundamentally unfair. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979); Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). Here, the prosecutor did not go beyond the permissible boundaries of closing argument. Cf. Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002) wherein we held that it was a reasonable comment on the evidence for the prosecutor to state during closing argument that "We didn't hear from the defendant's mother. He could've called her but he didn't."

Rudolph also contends that the Commonwealth misstated important evidence during its closing argument when it used enlarged pages of the transcript of the statement by Rudolph to point out various discrepancies. According to the transcript, Rudolph told the detective that the second victim was “standin’ behind me.” On the audiotape, Rudolph actually stated that the second victim was “standin’ behind him.” When defense counsel objected to the Commonwealth’s reference to the transcript, the trial judge instructed the Commonwealth to inform the jury that the “tape was the evidence.” The Commonwealth complied and defense counsel sought no further relief, indicating his satisfaction. See Derosset v. Commonwealth, Ky., 867 S.W.2d 195 (1993). There was no error in regards to the closing argument.

Rudolph was not denied any of his state or federal constitutional rights. He received a fundamentally fair trial.

The judgment of conviction is affirmed.

Lambert, C.J., Cooper, Graves, Johnstone and Wintersheimer, JJ., concur.
Stumbo, J., concurs in result only. Keller, J., dissents and would reverse and remand for a new trial because the trial court erred to Appellant’s substantial prejudice when it failed to instruct the jury regarding the KRS 503.070(2) protection of another defense.

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