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RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4-8-04 Ella Gray-Hardin, D.C.

2002-SC-0491-MR

RAMON PATTERSON — APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
2000-CR-0431

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ramon Patterson, was convicted of one count of first-degree robbery, three counts of second-degree robbery, and being a first-degree persistent felony offender. He was sentenced to a total of forty years' imprisonment. He appeals to this Court as a matter of right. For the reasons set forth below, we affirm his conviction and sentence.

I. Introduction

This is a very troubling case. Defense counsel had to pursue an open records request to obtain exculpatory material in the Commonwealth's possession. The Commonwealth destroyed or lost a key piece of evidence before trial and before defense counsel could examine it. One of the Commonwealth's witnesses related a statement made by Patterson that was clearly inadmissible under KRE 404(b). Defense counsel presented each of these claims of error to the trial court. Twice the

trial court was willing to grant a mistrial but refused to find deliberate prosecutorial misconduct, which would have barred a retrial. See Johnson v. Commonwealth, Ky. App., 709 S.W.2d 838, 840 (1986). Both times, defense counsel elected to continue the case. The record does not adequately explain his reasons for taking this course.

We have carefully reviewed the trial court's rulings and find no error. The trial court rightfully allowed Patterson to elect to allow the trial to continue at his own peril. See Johnson v. Commonwealth, Ky., 12 S.W.3d 258, 265 (1999). (Jeopardy attaches in a jury trial when the jury is impaneled and sworn, and, indicating that ordering a mistrial over a defendant's objection after jeopardy attaches would bar retrial.) Therefore, we affirm the judgment of the Jefferson Circuit Court.

II. Issues

A. Eyewitness Identifications

Patterson first argues that the photo-pack procedure used by the police in this case was unduly suggestive and, further, that under the totality of the circumstances, the procedure used was inherently unreliable. We disagree.

The identifications at issue here come from four of the robbery (purse-snatching) victims: R.W., P.K., M.B., and M.C.

R.W.

On December 14, 1999, R.W. pulled into her employer's parking lot. While gathering her belongings from the car, a man stepped up to her car and said, "Excuse me, ma'am." As R.W. was turning around, the man grabbed her purse from her shoulder. He displayed a knife and said, "This is a robbery." The man then fled the scene.

R.W. described the man to police as being a six-foot black male weighing between 185 and 190 pounds. She described the clothes he was wearing as black jeans, a black sweatshirt with a front zipper, and a baseball cap.

Once Patterson became a suspect in the case, a Detective Keeling compiled an array of six photographs, including a photograph of Patterson, which was labeled with a number "5." In compiling the array, Detective Keeling chose photographs of other people who resembled Patterson, rather than photographs of persons who resembled R.W.'s description of the person who had robbed her. Before showing R.W. the photographs, he advised her that the array contained a photograph of the man the police believed robbed R.W. After she picked Patterson from the array, Detective Keeling told her that she was "a good girl," and that Patterson had been arrested for another robbery.

P.K.

On December 12, 1999, P.K. pulled her car into a private garage. She started to exit the car when a man pushed her back inside and said, "Shut up. This is a robbery." The man reached over her and grabbed her purse from the passenger seat. He then fled.

P.K. described the man as being a black male who was five-foot seven-inches tall and possibly had some Hispanic blood in him.

Detective Keeling showed P.K. the same array of photographs that he showed to R.W. Before showing her the photographs, he also told her that a suspect was in the array. R.W. indentified the photograph of Patterson as being the person who robbed her.

M.B.

On December 18, 1999, M.B. pulled into a private garage. As she was leaving the car, a man approached her with his hand in his pocket and said, "Your money or your life." M.B. handed over her purse. The man walked away, got into a car, and drove away.

M.B. described the man as a six-foot black male with a medium build. She said he was wearing a large jean jacket and a knit toboggan.

A Detective Bryant showed M.B. the array of photographs prepared by Detective Keeling. M.B. identified the photograph of Patterson as being the person who robbed her.

M.C.

On December 23, 1999, M.C. pulled into a commercial parking lot. As she was leaving the car, a man approached her and said, "This is a robbery. Don't make it any worse than it has to be." He grabbed her purse and quickly walked away. M.C. hid behind a tree and watched the man get into a red American-made car. She memorized the license plate. (The car was registered to Patterson's girlfriend.)

M.C. described the man as being a black male with short hair, who was five-feet nine-inches tall and weighed 180 pounds.

A Detective Alvey prepared a different array of photographs to show to M.C than the one used by Detective Keeling. After M.C. identified Patterson, Detective Alvey assured her that she had picked out the right person.

Argument

Patterson first argues that the photographs used in the two arrays were unduly suggestive for a number of reasons relating to the photographs themselves, e.g., his

photograph was more recent than some of the other photographs. We have reviewed the photographs carefully and reject this argument. Next, Patterson argues that Detective Keeling's statements to R.W. and P.K. that the array contained a photograph of the police suspect made the procedure used in their cases unduly suggestive. In support of this argument, Patterson cites Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), which indicates that alerting a witness that the police have other evidence that one of the persons pictured in the array committed the crime in question is a factor that may make a pretrial identification procedure suggestive.

In the case at bar, the trial court concluded that the detectives' comments did not make the identifications unduly suggestive because the victims most likely would logically infer that the suspect was in the array. We agree with the trial court that these comments did not make the pretrial identification procedure unduly suggestive. Accord Monk v. State, 895 S.W.2d 904, 908 (Ark. 1995); Bundy v. State, 455 So. 2d 330 (Fla. 1984), stay granted, 475 U.S. 1041, 106 S. Ct. 89 L.Ed.2d 362, and cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986).

Patterson next argues that Detective Keeling's statements to P.K. and M.B. and Detective Alvey's statement to M.C. confirming that they had picked the right person, i.e., the police suspect, made the pretrial identification procedures unduly suggestive. Of course, the identifications had already been made at the time the detectives made the affirming remarks. These remarks undoubtedly bolstered the witnesses' confidence in their identifications of Patterson from the array of photographs, and the police should have refrained from making such statements. But in all likelihood, the information that the victim correctly identified the defendant in the case will become known to the victim

at some point prior to trial during the preparation of the Commonwealth's case or from contact by defense counsel. In any event, based on this record, we fail to see how these remarks should have resulted in suppression of the identifications.

Therefore, we hold that the trial court did not err in denying Patterson's motion to suppress the victims' identifications of him.

B. Exculpatory Evidence

While in jail awaiting trial, one Dietrich Stewart allegedly told Patterson that he, Stewart, and another person, had committed the purse snatchings for which Patterson had been arrested. This information was eventually relayed to an investigator for the Jefferson Public Defender's office. The investigator contacted Detective Keeling and asked him to follow up on this information. Subsequently, Patterson filed a written motion for the Commonwealth to produce exculpatory evidence relating to its investigation of other purse snatchings that occurred in the Highlands area and for which Patterson had not been charged.

The Commonwealth filed a response in which it urged the trial court to deny the motion on grounds that the evidence was not relevant to the case. After hearing argument on the motion, the trial court ultimately agreed with the Commonwealth and denied Patterson's motion. Undeterred, defense counsel obtained this information through an open records request from the Louisville Police Department.

The open records request revealed that R.W. had identified Dietrich Stewart as closely resembling the man who had robbed her. Further, the victim of another uncharged purse snatching also identified Dietrich Stewart as the man who had robbed her. Armed with this information, Patterson moved the trial court to dismiss the indictment against him or, in the alternative, to suppress the eyewitness identifications.

While the trial court denied the motion, it did grant Patterson bond relief and released him from jail into the home incarceration program.

On appeal, Patterson argues that the trial court did not grant adequate relief. Rather, Patterson argues that the trial court should have dismissed the indictment. We disagree.

The evidence was exculpatory. That R.W. identified another person as closely resembling the person who had robbed her undermined the strength of the identification. The Commonwealth should have disclosed this evidence in discovery. But the evidence was available to the defense, and we commend defense counsel's ingenuity and perseverance in obtaining it. The evidence, however, was far from conclusive proof of Patterson's innocence. Thus, we cannot say that the trial court abused its discretion in granting the relief it did. See Berry v. Commonwealth, Ky., 782 S.W.2d 625, 627-28 (1990). (Trial courts have broad discretion in matters dealing with discovery.)

C. Destroyed Evidence

R.W. told the police that the man who stole her purse brandished a knife as a threat. A knife was recovered at the scene. Prior to trial, defense counsel met Detective Keeling to review the physical evidence in the case. During this meeting, defense counsel was shown a knife, which he took to be the knife discovered at the scene of the R.W. robbery. The knife shown to defense counsel, however, was actually a knife taken from a set belonging to Patterson's girlfriend.

During trial, the Commonwealth announced to the trial court that the knife found at the R.W. crime scene had been inadvertently destroyed and the Commonwealth planned to introduce pictures of the knife instead. It was only at this point in time that

defense counsel learned that the knife Detective Keeling had shown him was not the knife found at the crime scene. Defense counsel made an immediate and earnest objection and moved the trial court to dismiss the indictment because neither the knife nor the photographs of it were provided during discovery. The trial court denied the motion, but sua sponte declared a mistrial.

Defense counsel objected to the mistrial and, instead, asked the trial court to exclude all evidence pertaining to the knife, including the photographs and any testimony regarding its recovery. The trial court granted this request.

The scope of the trial court's ruling came into question when, on direct examination, the Commonwealth asked Patterson's girlfriend about the set of knives she owned and whether any of the knives were missing. Pictures of this set of knives were also ultimately introduced into evidence. Defense counsel argued that this evidence was excluded by the trial court's earlier ruling. The trial court, however, concluded that the earlier ruling only encompassed the knife recovered at the R.W. crime scene and not the set of knives owned by Patterson's girlfriend.

On appeal, Patterson argues that the introduction of evidence concerning the knife set and the missing knife allowed the Commonwealth to unfairly take advantage of its own mistake in destroying the knife found at the R.W. crime scene. But there is nothing to indicate that the destruction was done deliberately. Further, the trial court did declare a mistrial, which would have provided complete relief to what was a blatant discovery violation. The trial court cannot be faulted for continuing the trial after defense counsel objected to the mistrial. All sorts of potential mischief lies in allowing the trial court to declare and enforce a mistrial over the defendant's objections. The most obvious being that this power would allow a trial court to "save" the

Commonwealth's case whenever it felt things were going badly for the prosecution. Finally, the trial court's ruling allowing evidence of the knife set was entirely consistent with its earlier ruling excluding evidence of the knife recovered at the R.W. crime scene. Therefore, we hold that the trial court did not err in allowing introduction of evidence of the knife set and the missing knife.

D. Prior Bad Acts

On direct examination, Detective Alvey testified that Patterson defended the charges against him by declaring that robberies were not his m.o. and that he got his money by selling drugs. Again, defense counsel vigorously objected on grounds that this statement was not disclosed during discovery, that it was inadmissible under KRE 404(b), and that the Commonwealth failed to comply with the notice requirements of KRE 404(c).

Initially, defense counsel asked for a mistrial, but reconsidered. Instead, defense counsel moved to dismiss the indictment on grounds that this was just another in a long string of discovery violations. Incredibly, the Commonwealth's Attorney argued that Patterson's admission to selling drugs was admissible as evidence of a guilty state of mind. Upon repeated questioning by the court, the Commonwealth's Attorney was unable to explain how "a guilty mind" differed from the general prohibition of KRE 404(b), which states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The trial court then ruled that the statement was excluded by KRE 404(b).

The trial court denied the motion to dismiss the indictment, but indicated very strongly that it would grant a mistrial. Thereafter, the trial court attempted to clarify whether the defense wanted to continue with the trial. Defense counsel requested that

the trial court reserve a ruling on the issue until a hearing could be held regarding Detective Alvey's statement. The hearing apparently was never held.

We agree with the trial court that the statement was not admissible. But what was the trial court to do besides ruling on the admissibility of the evidence and admonishing the jury to disregard it? Defense counsel wanted to continue with the trial and did request that the trial court admonish the jury to disregard Detective Alvey's testimony, which the trial court did. Thus, there is simply no trial error for us to review or rule upon.

E. Right to Present a Defense

At trial, defense counsel attempted to cross-examine Keeling with questions designed to show that he was biased against Patterson. Upon objection, the trial court disallowed this line of questioning. The issue is preserved by avowal. The questions concerned why Detective Keeling did not disclose to the defense the fact that a witness had identified Dietrich Stewart as closely resembling the person who had robbed her and the circumstances under which the defense obtained this information. On appeal, Patterson argues that exclusion of this line of questioning deprived him of his constitutional right to present a defense. We disagree.

In Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974), the U.S. Supreme Court reaffirmed in no uncertain terms that the right to cross-examine witnesses was essential to a defendant's right of confrontation under the Sixth Amendment, which includes the right to impeach the witness. Further, the Confrontation Clause embraces the right to cross-examine to show that the witness is biased or prejudiced against the defendant. Caudill v. Commonwealth, Ky., 120 S.W.3d 635, 661 (2003). But still, the trial court retains broad discretion to regulate

cross-examination. Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721 (1997). We conclude that there was no abuse of discretion here.

The defense was able to impeach the reliability of R.W.'s identification of Patterson with her statement that she had previously determined that Dietrich Stewart closely resembled the person who had robbed her. Why Detective Keeling failed to disclose this statement had little or no relevance to show that he was personally biased against Patterson. It might reveal professional bias that he was certain that Patterson was the guilty party, but did not show that he had a motive to lie or fabricate evidence. Further, the fact that the defense obtained the statement through an open records request had no relevance to the credibility of Detective Keeling's testimony. Therefore, we hold that the trial court did not err in excluding this evidence.

F. Failure to Severe the Indictment

Finally, Patterson argues that the trial court erred in allowing the four robberies to be tried together. We disagree.

"A trial court has broad discretion with respect to joinder and a decision in that regard will not be reversed absent a showing of prejudice and clear abuse of discretion." Jackson v. Commonwealth, Ky., 20 S.W.3d 906, 908 (2000). In denying Patterson's motion to sever the robbery charges, the trial court concluded that the modus operandi in the four cases, while not identical, was sufficiently similar to allow joinder of the offenses under RCr 6.18, which permits joinder of two or more offenses in the same indictment if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan. We agree and hold that the trial court did not abuse its discretion in denying Patterson's motion to sever the counts in the indictment.

III. Conclusion

As noted above, this is a difficult case and we are greatly troubled by the actions of the Commonwealth. On appeal, Patterson alleges numerous instances of trial error, most of which relate in some way to the Commonwealth's questionable conduct in this case. We have reviewed the record carefully for trial court error and have found none. Therefore, we affirm the judgment of the Jefferson Circuit Court.

All concur.

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