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Supreme Court of Kentucky

2010-SC-000810-MR

CHRISTOPHER BOYD JOHNSON

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 08-CR-002950

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Christopher Boyd Johnson appeals, as a matter of right,¹ his convictions for murder, tampering with physical evidence, and being a second-degree persistent felony offender (PFO 2). Johnson argues that the trial court erroneously (1) excluded evidence supporting his alternative-perpetrator theory, (2) denied his motion for a directed verdict, and (3) allowed the Commonwealth to introduce his mug shot into evidence. After reviewing the record, we affirm Johnson's convictions.

¹ Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL BACKGROUND.

Johnson checked his brother, Tony Johnson, into a Louisville motel, paying around \$200 in cash for Tony to stay there for a week. On the day Tony was supposed to check out of the motel, motel employees heard a gunshot and discovered Tony's body lying on the bed in his room. Tony died from a single gunshot wound. There were no signs of a forced entry and no defensive wounds on Tony. Recovered at the scene were a "Federal 40 S&W" cartridge case; three Doral cigarette butts bearing DNA traces that matched Tony's DNA profile; and floating in the toilet in Tony's room one Kool cigarette butt, bearing DNA residue that did not match Tony's DNA profile. Motel surveillance footage showed Johnson entering Tony's motel room at around 2:00 p.m. and leaving the room about 15 minutes later, a fact Johnson admitted. He admitted visiting Tony in his motel room on the day of his murder in order to give Tony \$20, but Johnson denied murdering his brother.

A grand jury indicted Johnson for Tony's murder, for tampering with physical evidence, and with being a PFO 2. A circuit court jury found him guilty of all three charges and recommended a 34-year prison sentence. The trial court sentenced Johnson in accordance with the jury's recommendation.

At trial, Aric Dickerson, who was Johnson's friend, testified that on the evening of Tony's murder, he, Johnson, and Johnson's girlfriend at the time, Channell Kennedy, drove to Cox's Park. Johnson and Kennedy went for a walk while Dickerson stayed in the car. Dickerson testified that he saw Johnson walk down to the river at one point.

Kennedy testified that she did not go to the motel with Johnson on the day of the murder.² But the evening of the murder, Kennedy, Johnson, and Dickerson visited Cox's Park. She and Johnson walked around the park first, then Johnson and Dickerson walked around while she sat in the car. Kennedy saw one of the men walk toward the river, but it was too dark for her to tell whether it was Dickerson or Johnson.

Kennedy further testified that she owned a .40-caliber Smith & Wesson gun and that the gun was at Johnson's house on the day of the murder. A police dive team recovered Kennedy's .40-caliber gun from the Ohio River at the location in Cox's Park identified by Dickerson and Kennedy. At trial, a firearm and tool-mark examiner with the Kentucky State Police confirmed that the cartridge case found at the murder scene was fired from the gun found in the Ohio River.³

II. THE TRIAL COURT DID NOT VIOLATE JOHNSON'S RIGHT TO PRESENT A DEFENSE.

Johnson contends that the trial court's exclusion of certain evidence denied him his right to present a defense. Before trial, Johnson moved to

² Kennedy's testimony in this regard differed from her statement to the police, in which she initially said she went to the motel but stayed in the parked car and talked with a friend while Johnson went into the motel. On re-direct, Kennedy admitted that she told the police this story after Johnson informed her that was what he told the police. Johnson gave Kennedy the idea to tell the police this story.

³ As explained at trial, the bullet portion of a cartridge is forced out the muzzle of the gun; and the cartridge case is forced rearward inside the chamber and ejected out of the gun onto the floor. Johnson correctly notes that the firearm and tool mark examiner could not confirm that the bullet portion of the cartridge was fired from the gun found in the Ohio River. What Johnson fails to note is that the examiner did confirm that the cartridge case found at the murder scene was fired from the gun found in the Ohio River.

introduce (1) Tony's criminal record regarding drug-related crimes, (2) the presence of cocaine in Tony's urine at the time of death, and (3) the presence of drug paraphernalia in the motel room where Tony was murdered. He attempted to introduce these items as evidence that Tony was involved in a drug culture and that his murder was a result of a failed drug deal. Johnson argued to the trial court that he should be allowed to introduce this evidence because individuals involved in the drug culture often find themselves involved in risky, life-threatening situations.

The trial court excluded Tony's criminal record and evidence of his drug use because it was highly prejudicial and had questionable probative value. The trial court ruled that the speculative nature of Johnson's alternative-perpetrator theory lessened the probative value of Johnson's proposed evidence, and the prejudicial effect of this proposed evidence greatly outweighed its probative value because of the risk that the jury would misinterpret and misuse the evidence.

On appeal, Johnson asserts that the trial court's ruling prevented him from presenting his theory that (1) Tony was attempting to buy more drugs from someone, but the transaction soured and (2) the drug dealer was the one who deposited the Kool cigarette butt into the toilet, had access to the gun that Tony possessed, and stole the \$20 Johnson gave Tony on the day of the murder.⁴ Johnson claims that the excluded evidence of Tony's criminal record

⁴ Johnson asserts that the following circumstantial evidence supports his alternative-perpetrator defense: (1) Kennedy implied that Tony stole her gun from Johnson; (2) an unknown person was in Tony's motel room, as evidenced by the Kool

of drug-related offenses, the cocaine present in the victim's urine, and the drug paraphernalia located in the room would have supported this alternative-perpetrator theory.

Under the United States Constitution and the Kentucky Constitution, an accused has a right to present a complete and meaningful defense.⁵ This right includes the right to present evidence that an alternative perpetrator committed the crime with which the accused is charged.⁶ "An exclusion of evidence will almost invariably be declared unconstitutional when it significantly undermines fundamental elements of the defendant's defense."⁷

But the right to present a defense does not

abrogate the rules of evidence. . . . [T]he defendant's interest in the challenged evidence must be weighed against the interest the evidentiary rule is meant to serve, and only if application of the rule would be arbitrary in the particular case or disproportionate to the state's legitimate interest must the rule bow to the defendant's right.⁸

Evidence must be relevant under Kentucky Rules of Evidence (KRE) 401 and pass the balancing test under KRE 403 to be admissible at trial. "In making a KRE 403 ruling, a trial court must consider three factors: the probative worth of the evidence, the probability that the evidence will cause

cigarette butt that did not bear DNA matching Tony's DNA profile; and (3) the \$20 that Johnson allegedly gave Tony was not found.

⁵ *Brown v. Commonwealth*, 313 S.W.3d 577, 624-25 (Ky. 2010) (citations omitted).

⁶ *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003) (citations omitted).

⁷ *Id.* (citation and internal quotations and brackets omitted).

⁸ *McPherson v. Commonwealth*, 360 S.W.3d 207, 214 (Ky. 2012) (citations omitted).

undue prejudice, and whether the harmful effects substantially outweigh the probative worth.”⁹ We apply the abuse-of-discretion standard of review to a trial court’s decision to exclude evidence under KRE 403.¹⁰ Weighing the relevancy of evidence against its prejudice is “peculiarly within the province of the trial court.”¹¹

Alternative-perpetrator evidence should be admitted when a defendant can show both motive and opportunity of a specific person who may have committed the crime.¹² “We have upheld . . . the exclusion under the evidence rules of a defendant’s evidence that was cumulative, only marginally relevant, or supportive of merely speculative defenses.”¹³ Exclusion is warranted when the defense theory is “unsupported, speculative, and far-fetched and could thereby confuse or mislead the jury.”¹⁴

The trial court did not abuse its discretion by excluding, under KRE 403, the evidence that Johnson sought to admit because Johnson’s alternative-perpetrator theory is speculative. Johnson was allowed to argue to the jury that someone else killed Tony based upon the circumstantial evidence that someone else was in the room with Tony. But the theory that this alternative perpetrator was Tony’s drug dealer and that the murder occurred in a drug

⁹ *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998) (citations omitted).

¹⁰ *Id.* (citations omitted).

¹¹ *Foley v. Commonwealth*, 942 S.W.2d 876, 888 (Ky. 1996) (citations omitted).

¹² *Beaty*, 125 S.W.3d at 208; *Harris v. Commonwealth*, 134 S.W.3d 603, 608 (Ky. 2004) (citations omitted).

¹³ *McPherson*, 360 S.W.3d at 214 (citations omitted).

¹⁴ *Beaty*, 125 S.W.3d at 207 (citation and internal quotations and brackets omitted).

deal gone awry is nothing more than speculation. “The mere fact that a murder victim may have used drugs, does not, without more, permit a reasonable inference that [his] murder was drug-related.”¹⁵

Johnson’s alternative-perpetrator theory is also speculative because he fails to identify any specific individual as Tony’s alleged murderer. “[I]n cases where this Court or its predecessor have addressed the [alternative-perpetrator] issue, the defendant has always been able to identify a specific person who may have committed the crime.”¹⁶ Instead of identifying a specific person with a motive to kill the victim, the appellant in *Harris v. Commonwealth*¹⁷ asserted only that the victim was involved in the drug trade, which frequently involves violence. The *Harris* Court affirmed the trial court’s ruling to exclude evidence of the victim’s involvement with drugs because the appellant was unable to establish a direct connection between the crime and any specific person with a motive to kill the victim.

Johnson claims his case differs from *Harris* because a specific, tangible connection existed between the victim’s drug habit and Johnson’s alternative-perpetrator theory. We disagree. Although evidence exists that some person other than Tony was in his hotel room, it is too speculative to infer that this person was some unknown drug dealer who committed the murder simply

¹⁵ *Brown v. Commonwealth*, 313 S.W.3d 577, 625 (Ky. 2010).

¹⁶ *Harris*, 134 S.W.3d at 608-09 (citations omitted).

¹⁷ *Id.*

because Tony used drugs and drug paraphernalia was found at the crime scene.¹⁸

The trial court did not abuse its discretion by excluding the evidence under KRE 403 as highly prejudicial in light of its minimal probative value. Given the speculative nature of Johnson's alternative-perpetrator theory and its potential to distract and confuse the jury, its exclusion "did not amount to either an arbitrary or a disproportionate application of the relevance rules."¹⁹ And exclusion of the evidence did not violate Johnson's right to present a defense.

III. JOHNSON WAS NOT ENTITLED TO A DIRECTED VERDICT.

Johnson moved for a directed verdict on the murder and tampering with physical evidence charges at the close of the Commonwealth's case and renewed the motion at the conclusion of all the evidence. On appeal, Johnson argues that the trial court erroneously denied his motion because it was clearly unreasonable for the jury to find him guilty of the charges. Johnson claims that (1) the evidence produced at trial failed to exclude the possibility that someone else killed the victim, (2) the police did not conduct a thorough investigation, and (3) Dickerson's and Kennedy's testimony was unreliable. We hold that the trial court properly denied Johnson's motion for a directed verdict.

¹⁸ The Kool cigarette butt found in the bathroom did not match Tony's DNA. Although there was testimony Johnson smoked Kools, no further evidence regarding the cigarette butt was introduced.

¹⁹ *McPherson*, 360 S.W.3d at 215.

When ruling on a directed verdict, the trial court must view the evidence in favor of the Commonwealth.²⁰ And questions of the credibility and weight of evidence are left to the jury.²¹ A directed verdict must be denied if a reasonable juror could find the elements of the crime proven beyond a reasonable doubt.²² On appellate review, “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.”²³ The Commonwealth must introduce more than a mere scintilla of evidence.²⁴ And “neither motive alone nor motive plus opportunity (or presence at the scene) is enough to justify a conviction.”²⁵ But “[c]ircumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt.”²⁶

Considering the circumstantial evidence in this case, it is not clearly unreasonable for a jury to find Johnson guilty of murder²⁷ and tampering with

²⁰ *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

²¹ *Id.*

²² *Id.*

²³ *Id.* (citations omitted).

²⁴ *Id.* at 187-88.

²⁵ *Marcum v. Commonwealth*, 496 S.W.2d 346, 349 (Ky. 1973) (citations omitted).

²⁶ *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994) (citations omitted).

²⁷ A person is guilty of murder when “[w]ith intent to cause the death of another person, he causes the death of such person or of a third person” Kentucky Revised Statutes (KRS) 507.020(1)(a).

physical evidence.²⁸ We reject Johnson's arguments regarding the police investigation and the unreliable nature of the witnesses' testimony. These factors affect the credibility and weight of the evidence, which are questions left to the jury.

We also reject Johnson's argument that he is entitled to a directed verdict because the Commonwealth failed to eliminate the possibility that someone else killed Tony. "It is not required, in order to sustain a conviction based on circumstantial evidence, that the evidence be such as to exclude every possibility of the defendant[s] innocence; it is sufficient if all of the circumstances, when considered together, point unerringly to the defendant[s] guilt."²⁹ The circumstantial evidence presented at trial unerringly points to Johnson's guilt.

The motel surveillance video shows Johnson enter Tony's room at approximately 2:00 p.m. on the day of the murder. Around 15 minutes later, the video shows Johnson leaving Tony's room at the same time that a motel employee emerges from a room on the floor above Tony's room. This motel employee testified that he heard a loud noise while he was working in a room on the second floor of the motel. When the employee heard the noise, he stepped out onto a landing and saw a heavy-set, black person exit the room

²⁸ A person is guilty of tampering with physical evidence when, "believing that an official proceeding is pending or may be instituted, he: [d]estroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding" KRS 524.100(1)(a).

²⁹ *Holland v. Commonwealth*, 323 S.W.2d 411, 413 (Ky. 1959) (citation omitted).

where Tony's body was found.³⁰ The video does not show any other individual enter or leave Tony's room around this time. Nor did motel employees see anyone else in the area after they heard the loud noise.

An anonymous caller informed a detective working the investigation that the murder weapon was thrown into the Ohio River at Cox's Park and advised the detective to talk to Dickerson for more information. Dickerson testified that on the night of the murder, Johnson picked him up; and the two of them, along with Kennedy, went to Cox's Park. At one point, Dickerson saw Johnson walk to the river.

Kennedy also testified that she went with Johnson and Dickerson to Cox's Park on the evening of Tony's death. She testified that she stayed in the car while Johnson and Dickerson walked around outside and she saw one of the men approach the water. On separate occasions, Dickerson and Kennedy both took the police to the location in Cox's Park that they visited with Johnson. At this location, a police dive team discovered a gun in the Ohio River. This gun belonged to Kennedy, who testified that she brought the gun to Johnson's house on the day of Tony's murder.³¹ A firearm and tool-mark

³⁰ A second employee also testified that he heard a loud noise, stepped outside the room he was working in to investigate, and saw a black man walk across the parking lot.

³¹ On cross-examination, Kennedy changed her testimony. She said that she kept the gun at Johnson's house and shortly before Tony moved into the motel, Johnson became upset with Tony because some of Johnson's belongings disappeared when Tony lived with him. And while Johnson never told Kennedy that Tony took the gun, Kennedy testified that the last time she saw the gun was about a week before Tony's murder. But this discrepancy in Kennedy's testimony was a question for the jury to determine concerning Kennedy's credibility and the weight to afford her testimony.

examiner with the Kentucky State Police confirmed that the cartridge case found at the murder scene was fired by Kennedy's gun.

In light of the evidence presented at trial, it would not be clearly unreasonable for a jury to find Johnson guilty of murder and tampering with physical evidence. We hold that Johnson was not entitled to a directed verdict.

IV. JOHNSON'S MUG SHOT WAS PROPERLY INTRODUCED.

Johnson argues he was denied his right to a fair trial when the trial court allowed the Commonwealth to introduce into evidence his mug shot. Although the Commonwealth raises a preservation issue, we will treat this claim as preserved. We find no error in the admission of Johnson's mug shot under these circumstances. And even if error occurred, it was harmless.

During the Commonwealth's case-in-chief, a detective testified that he obtained a photograph of Johnson from police headquarters to compare it to the person seen entering and exiting Tony's room on the motel surveillance footage. Johnson objected and moved for a mistrial because the detective's comment implied that Johnson had a criminal record.³² The trial court denied Johnson's motion, ruling that the comment was nondescript.³³ Approximately thirty minutes later, the Commonwealth asked the same testifying detective if

³² Johnson does not argue on appeal that the trial court should have granted his motion for a mistrial.

³³ The Commonwealth then alerted the trial court to the fact that they later planned to introduce into evidence Johnson's mug shot from around the time of the crime. Johnson argued that the jury would assume that the picture was Johnson's mug shot. Although difficult to discern from the video, it appears the trial court withheld ruling on the matter until the Commonwealth actually sought to introduce the photograph.

Johnson looked the same at the time of trial as the day the detective interviewed Johnson in 2008. The detective replied that Johnson had gained weight since the initial interview. The Commonwealth then showed the detective a mug shot of Johnson taken around 2008, and the detective said it fairly and accurately represented how Johnson looked around the time of Tony's murder. Johnson objected based on improper foundation because the photograph was not dated. And the trial court admitted the evidence over the objection.

Use of a mug shot can have a damaging effect on the accused's case because the jury can infer that the accused has been involved "in the toils of the law in some manner."³⁴ When mug shots are introduced into evidence, "the probative value of the mug shot must outweigh the prejudicial effect."³⁵ The following three-prong test weighs a mug shot's probative value against the prejudicial effect to determine the propriety of introducing a mug shot at trial:

(1) the prosecution must have a demonstrable need to introduce the photograph[]; (2) the photo[] . . . , if shown to the jury, must not imply that the defendant had a criminal record; and (3) the manner of [its] introduction at trial must be such that it does not draw particular attention to the source or implications of the photograph[].³⁶

Under the three-prong test, the probative value of Johnson's mug shot outweighed the prejudicial effect. First, the Commonwealth demonstrated a

³⁴ *Roberts v. Commonwealth*, 350 S.W.2d 626, 628 (Ky. 1961) (citation and internal quotations omitted).

³⁵ *Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky. 1991) (citation omitted).

³⁶ *Id.* (citations omitted).

need to introduce the photograph. The detective testified that Johnson looked different when he interviewed him in 2008 than he did at the time of trial. Johnson's appearance at the time of Tony's murder was pertinent because the detective identified Johnson as the individual seen on the motel surveillance video. Admittedly, the Commonwealth's need to introduce the photograph was limited. Johnson admitted that he is the person shown on the surveillance footage, and it does not appear that Johnson's appearance drastically changed from the time of the crime to the trial. But the Commonwealth was attempting to establish why the detective, in conducting the investigation, believed Johnson was the person in the surveillance video.

Second, the photograph did not imply that Johnson had a criminal record. It is not apparent from the face of the photograph that it is Johnson's mug shot. Third, the Commonwealth did not draw attention to the source of the photograph or imply that it is Johnson's mug shot. The detective's reference to obtaining a picture of Johnson from police headquarters occurred thirty minutes before the introduction of this picture. And it is not clear that the photograph introduced into evidence is the same one the detective retrieved from police headquarters.

Even if error occurred, it was harmless. The detective's comment that the photograph came from police headquarters was innocuous and did not necessarily mean that it was a mug shot. This comment occurred approximately thirty minutes before the photograph was introduced. And it is not clear whether the photograph the detective retrieved from police

headquarters is the same photograph introduced at trial. We can “say with fair assurance that the judgment was not substantially swayed by the error[,]” making the error harmless.³⁷

V. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur. Schroder, J., not sitting.

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³⁷ *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (citation omitted).