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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000060-MR

ROBERT ANTHONY CARTER — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA JEAN ECKERLE, JUDGE
NOS. 10-CR-000384-001 and 10-CR-003253

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Robert Anthony Carter of charges arising from his alleged participation in two home-invasion armed robberies involving multiple victims. Carter appeals as a matter of right[1] the judgment convicting him of five counts of complicity to first-degree robbery and of being a second-degree Persistent Felony Offender (PFO 2), for which he was sentenced to twenty years' imprisonment.

Carter contends the trial court erred (1) by failing to suppress evidence of the photo-pack identifications performed by the police and (2) by refusing to sever for separate trials the robbery charges arising from each of the two home invasions. We affirm the convictions and sentences imposed by the trial court.

[1] Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

Carter and Donte Jones were tried jointly based upon on a single indictment containing charges stemming from two armed robberies occurring eleven hours apart in Louisville in January 2010. For the sake of clarity, it is worthwhile to note the race of these codefendants: Carter is white and Jones is black.

A. Robbery at 1913 Beech Street.

Late at night on January 6, 2010, Alvin McDowell opened the door to his home to get some items from his car. As he opened the door, two men—one black and one white—burst in with guns. The intruders ordered Adrianna Griffith, McDowell's girlfriend, to get on the floor. Griffith grabbed the small child who was with her and complied. She did not see the intruders. McDowell was forced to the floor; and the intruders searched through his pockets and Griffith's purse, stealing her cell phone. The black man then grabbed McDowell and dragged him by the collar around the house, stopping in a bedroom where McDowell's sister, Janay Kelly, was hiding under the bed with her boyfriend, Stacey Young. Young, Kelly, and her four children were living with McDowell and Griffith at the time.

The intruders lifted up the mattress and demanded money, threatening to shoot McDowell and Kelly if they kept talking. The intruders stole money, credit cards, and cell phones before leaving. Kelly did not see the intruders and was unable to identify anyone for the purposes of investigation.

McDowell and Young chased after the two men as they left the residence. According to McDowell's testimony, the intruders entered on the passenger side, one after the other, of a red Chevrolet truck. McDowell noticed that the truck had an open bed, a bent bumper, and something black on the door.

McDowell provided descriptions to the police. He stated that the black man had a mask or scarf over his face, revealing only his eyes. But McDowell was able to see the black man's nose and mouth when the black man was dragging him around the house and wrestling with him. The white man also wore a mask; but it kept slipping off, allowing McDowell to see his face.

B. Robbery at 4506 Dumesnil Street.

Fifteen-year-old Jailah Keltee was home from school with a sprained ankle on January 7, 2010. Her father, Jermaine Keltee, was also there recuperating from a broken hip and ankle and was unable to walk. Early that morning, Jailah answered a knock at the door. Two men—one black and one white—armed with guns rushed into the residence. The black man had something covering half of his face, and the white man wore a hat.[2] The white man forced Jailah, at gunpoint, to lie down on the floor. She did not see the intruders and was unable to offer any identification during the investigation.

After looking around the house quickly, the intruders took Jailah to the bedroom where her father was. They continually demanded money and guns from the Keltees and threatened to beat Jailah to death if Keltee did not give

[2] A hat was found at the Keltee residence behind the TV, and Keltee testified that it was not there the day before the robbery. Sabrina Christian, of the Kentucky State Police Forensic Laboratory, testified that the DNA taken from the hat matched Carter's DNA profile and at least one other person.

them money. The white man even threatened to blow up the house. Finally, the men left the residence in what sounded like a truck. The intruders stole a TV, Wii, iPod, money, white laptop, cell phone, and multiple cameras. This incident occurred within eleven hours of the robbery at 1913 Beech Street, approximately 2.5 miles away.

C. Carter Arrested and Convicted of Robberies.

A few weeks after the robberies, Carter's cousin, Stephanie Carver, began to believe Carter and Jones were involved in these robberies. At the time, Jones's girlfriend, Ebony Powell, was living with Carver. New items being brought into the house, including a white laptop, piqued Carver's suspicion. Before going to the police, Carver decided to take a photo of Carter to the Keltee residence and show it to Keltee. Keltee testified that Carver told him Carter was the one who invaded his home.

Detective Matthew Crouch was the lead detective in the investigation of the two robberies. Carver and a relative of the Keltee family, Dyamond Taylor, approached Detective Crouch, relayed their suspicions, and told him Keltee had seen a photo of Carter. As a result of the information provided by Carver and Taylor, Detective Crouch prepared photo packs to show to the victims. The photo packs were created, using the "Mugs Plus" program, with five photos of similar description to Carter and five photos of similar description to Jones. Additionally, each photo pack included a picture of Carter and Jones for a total of six photos. Detective Crouch took a photo pack to Keltee who identified Carter as the man who invaded his home.

Detective Crouch testified that he did not suggest which photo to select, and Keltee said he was seventy percent sure about the identification. Because he was concerned the victims of the robberies had been in communication with each other,[3] Detective Crouch presented a different photo pack to Stacey Young. And Alvin McDowell received a different photo pack from Keltee and Young. While Young did not identify anyone, McDowell positively identified Carter.

Carter was arrested and indicted for six counts of complicity to first-degree robbery, two counts of complicity to possession of a handgun by a convicted felon, and one count of receiving stolen property over $500. And Carter was later indicted for being a PFO 2.

Before trial, Carter moved to sever for separate trials the charges involving the two locations of the alleged robberies. The trial court denied the motion because the trial court determined that the robberies were sufficiently related. The jury convicted Carter of five counts of complicity to first-degree robbery; and the jury fixed punishment at twelve years for each count, to run concurrently. The sentence was enhanced to twenty years for each count, to be served concurrently, as a result of the jury's conviction of Carter as a PFO 2. The trial court sentenced Carter to a total of twenty years' imprisonment, in accordance with the jury's recommendation.

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[3] McDowell testified that he received information from his neighbors across the street, also relatives of the Keltee family, regarding the robbery on Beech Street. Specifically, information about the hat found at the Keltee residence was what was conveyed to him. He testified that he did not bring it up to Detective Crouch.

II. ANALYSIS.

A. The Trial Court Properly Denied Carter's Motion to Suppress the Out-of-Court Identification.

Carter claims that the trial court should have suppressed any out-of-court and in-court identification of him because the procedure was so unduly suggestive that he was denied his right to due process and a fair trial.

Detective Crouch created arrangements of six photographs, known as photo packs, including Carter's photograph. Detective Crouch then exhibited the photo packs to the victims of both the Dumesnil and Beech Street robberies. Carter argues on appeal that the procedure was flawed because Detective Crouch knew that Stephanie Carver had visited with Jermaine Keltee and showed him a photograph of Carter. Additionally, Carter alleges that Detective Crouch was aware that the victims from the two robbery locations had communicated among themselves when he showed photo packs to Alvin McDowell and Stacey Young, the Beech Street victims.

Before trial, Carter moved to have evidence of the out-of-court identifications suppressed, properly preserving the issue for appeal. The trial court conducted an evidentiary hearing on the motion, at which the Commonwealth called Detective Crouch as its only witness. The trial court denied Carter's motion, noting a lack of improper police conduct. Evidentiary rulings by the trial court are to be reviewed under an abuse-of-discretion standard.[4]

[4] *See Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998).

The United States Supreme Court, in *Neil v. Biggers*,[5] outlined the test a court should use when determining if the introduction of eyewitness identifications violates a defendant's right to due process. This test is two-pronged. First, the trial court must determine whether the procedures used by the police in obtaining the identification were unnecessarily suggestive.[6] If the procedures were unduly suggestive, the court must then evaluate, in light of the totality of the circumstances and the five factors enumerated in *Biggers*, the possibility that the witness's identification is so tainted that it is unreliable and not admissible.[7] This analysis seeks to avoid "the very substantial likelihood of irreparable misidentification,"[8] the primary evil of identification evidence.

Given the circumstances presented here, we conclude that Carter's due process rights were not violated as a result of the admission of any out-of-court identification. In *Perry v. New Hampshire*, the United States Supreme Court emphasized that due process concerns only arise when the reliability of eyewitness testimony is tainted with improper state conduct.[9] Here, there is no

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[5] 409 U.S. 188 (1972).

[6] *See Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 724 (2012).

[7] *Id.* at 724-25.

[8] *Biggers*, 409 U.S. at 198 (citations omitted).

[9] *See Perry*, 132 S.Ct. at 726 ("The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. . . . [T]he Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification."). *See also Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (holding, in the Fifth Amendment context, that where the "crucial element of police overreaching" is absent, the admission of an allegedly unreliable confession is "a matter to be governed by the evidentiary laws of the

improper conduct by the police that renders the circumstances unduly suggestive. Detective Crouch was aware that Stephanie Carver had showed a photo of Carter to Keltee, but Detective Crouch had no part in the interaction between Carver and Keltee. Carver showed the photo to Keltee without Detective Crouch's consent or guidance. And, as further protection against claims of improper conduct, Detective Crouch showed different photo packs to Keltee, McDowell, and Young because he was concerned that the victims of the robberies may have been in communication. We find no error in the trial court's finding that the actions of the police did not taint the photo pack showups.

We agree with our court in *Wilson v. Commonwealth* and "fail to perceive a real danger to the defendant in such situations where the Commonwealth has not arranged the [identification] and there is no attempt by its agents to indicate to the witness(es) that 'that's the man.'"[10] We also agree with the *Wilson* court that such an out-of-court identification is "less suggestive than an in-court identification, where a witness need merely look to the defense table."[11] It is possible, maybe even probable, that the circumstances presented here, with Carver showing a photo of Carter to individuals who then identified him to police, were suggestive. But suggestive circumstances alone are not

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forum . . . and not by the Due Process Clause."). *Perry* involved a witness "spontaneously" walking to a window in her apartment building and making an identification "without any inducement from police."

[10] 695 S.W.2d 854, 858 (Ky. 1985).

[11] *Id. See also Perry*, 132 S.Ct. at 727 ("Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do.").

sufficient to implicate a due process violation. Some police or other state-actor conduct must create the suggestive circumstances.[12] Again, here, there was none. Without any improper police conduct, the rationale for excluding evidence involving identifications made under suggestive circumstances does not apply.[13] Excluding from trial potentially useful evidence because of the unsolicited actions of a citizen volunteer would greatly and unnecessarily hinder the administration of justice.[14]

Without improper police conduct, our analysis ends; and we find no need to test the reliability of the identifications by applying the *Biggers* factors. But

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[12] *See id.* at 857. ("We[,] therefore[,] hold that[] in order to establish that a pre-trial confrontation was unduly suggestive, the defendant must first show that the government's agents arranged the confrontation or took some action during the confrontation [that] singled out the defendant."). We note that we do not require that police intend to create suggestive circumstances. There is no *mens rea* requirement with today's opinion. *See Perry*, 132 S.Ct. at 721 n.1 ("[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive.").

[13] *See Perry*, 132 S.Ct. at 726 ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. Alerted to the prospect that identification evidence improperly obtained may be excluded, . . . police officers will guard against unnecessarily suggestive procedures. This deterrence rationale is inapposite in cases . . . in which the police engaged in no improper conduct.") (citations and internal quotations omitted).

[14] In *Perry*, the Supreme Court noted how easily "suggestive circumstances" might arise. "Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned 'theft suspect,' or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have 'suggested' to the witness that the defendant was the person the witness observed committing the crime." *Perry*, 132 S.Ct. at 727-28. Police cannot be expected to monitor all news stations, private conversations, Facebook posts, tweets, online discussions, or other forms of communication to which a witness may be exposed.

we would be remiss if we did not emphasize that our justice system and Constitution afford Carter other protections, short of excluding evidence, to ensure his due process rights are not violated and a fair trial is conducted. These safeguards include the Sixth Amendment's right to confront the eyewitness and the right to effective assistance of counsel, through which the jury can be adequately cautioned about any potential flaws in the eyewitness testimony in question. Cross-examination, opening statements, and closing arguments provide ample opportunity for an attorney to expose problems and raise doubt about the reliability of identification evidence. Also, the government is faced with a very high burden. Having to prove its case beyond a reasonable doubt protects defendants from convictions based on unreliable evidence. Finally, our rules of evidence provide judges with a safety valve to exclude evidence if the probative value is substantially outweighed by its prejudicial value. Carter took advantage of many of these safeguards during his trial.

We are unable to find any reason why Carter's right to due process or a fair trial was violated. The trial court did not abuse its discretion in denying Carter's motion to suppress the evidence of out-of-court identifications.

B. The Trial Court Properly Decided to Try the Robbery Charges in a Single Trial.

Carter further urges that the trial court abused its discretion and committed reversible error by failing to sever for separate trials the charges involving the Beech Street robbery and the Dumesnil Street robbery. The gravamen of Carter's complaint is that the robberies were not similar enough in

nature to warrant a single trial and that trying them together was highly prejudicial to him. As a result, Carter requests his conviction be reversed. Carter moved for separate trials before the jury was sworn, properly preserving the issue for appeal.[15]

Kentucky Rules of Criminal Procedure (RCr) 6.18 permits the joinder of multiple offenses in a single indictment if the offenses are (1) of the same or similar character or (2) based on the same acts or transactions connected together or constituting parts of a common scheme or plan.[16] If the requirements of RCr 6.18 are satisfied but the joinder would be prejudicial, the court may order separate trials under RCr 9.16.[17]

The underlying purpose of these rules is striking the proper balance between the prejudice inherent in the joinder of charges in a single trial and the interests in judicial economy. As such, our jurisprudence allows trial courts great discretion in questions of joinder. We will not overturn a trial court's joinder determination absent a showing of prejudice and a clear abuse of discretion.[18] This means that we must be clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to

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[15] *See Wilson*, 695 S.W.2d at 858.

[16] RCr 6.18.

[17] *See Cohron v. Commonwealth*, 306 S.W.3d 489, 493 (Ky. 2010) (*citing Sebastian v. Commonwealth*, 623 S.W.2d 880, 881 (Ky. 1981)).

[18] *Id.*

the trial judge that the refusal to grant a severance was an abuse of discretion.[19]

Traditionally, in determining if prejudice is present, we have weighed the extent to which evidence from one of the offenses would be admissible in a separate trial of the other offense(s).[20] This mutual admissibility of evidence is a significant factor, but its absence alone is not sufficient to warrant the overturning of a conviction. We must find more than simple prejudice—there must be a positive showing of undue prejudice.[21]

Carter argues that the Dumesnil and Beech Street robberies were wholly separate incidents and only seemed interconnected because of the communication among the victims. Further, Carter argues that evidence of the Beech Street robbery would not have been admissible in a separate trial regarding the Dumesnil Street robbery and vice versa. Carter cites the inadmissibility of evidence in both trials as a clear sign of prejudice. We reiterate that the absence of mutual admissibility does not alone suffice as undue prejudice. Further, we note that the evidence presented in this case overlaps to a measurable degree. Each robbery charge involves the same law enforcement and lay witnesses; the investigation was performed on the robberies as a whole, rather than individually; and the parties involved are significantly intertwined. Separating the charges for separate trials would

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[19] *Wilson*, 695 S.W.2d at 858 (*citing Rachel v. Commonwealth*, 523 S.W.2d 395 (Ky. 1975)).

[20] *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993). *See also Cohron*, 306 S.W.3d at 493.

[21] *Humphrey v. Commonwealth*, 836 S.W.2d 865, 868 (Ky. 1992)

involve multiplicitous testimony and witnesses. While Kentucky Rules of Evidence (KRE) 404 is ever lurking in a court's analysis of a motion for severance, we are not persuaded that Carter's evidentiary objection warrants the overturning of his conviction.[22]

As another indication of prejudice, Carter argues that the jury was more likely to find him guilty of both offenses after finding him guilty of one. The simple likelihood that a jury will find a defendant guilty of both offenses does not reach the requisite level of prejudice for this Court to overturn a conviction.[23] Unfortunately, the particular prejudice that Carter asserts is unavoidable in a criminal proceeding, maybe especially when indictments are joined for a single trial.[24] But, again, this level of prejudice is not, and cannot be, sufficient to warrant the overturning of a conviction under RCr 9.16. The defendant must show that the prejudice was "unnecessarily or unreasonably hurtful."[25] Carter has failed to meet this burden.

In summary, we agree with the trial court and see no reason to depart from this Court's long-standing tradition of affording wide discretion to the trial

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[22] *See Keeling v. Commonwealth*, 381 S.W.3d 248, 270-72 (Ky. 2012). The evidence presented in this case is intertwined to a degree that arguably satisfies KRE 404(b)(2). As such, we cannot say that the trial court abused its discretion.

[23] In *Rearick*, this Court held that a defendant need show there was a "substantial likelihood that the inadmissible 'other crimes' evidence tainted the jury's belief as to each of the crimes charged and that each additional unrelated charge took on a weight by virtue of being joined with the others whereby the whole exceeded the sum of its parts." *Rearick*, 858 S.W.2d at 188. Carter does not make any argument reaching this level.

[24] *See Romans v. Commonwealth*, 547 S.W.2d 128, 131 (Ky. 1977) (noting that a criminal defendant is prejudiced by simply having been indicted and having to stand trial).

[25] *Id.*

court in this area.[26] We cannot say that any abuse of discretion occurred or that Carter was unduly prejudiced by the joinder of these charges. Our predecessor court in *Brown* effectively outlined the reasoning we use today:

> The evidence of each crime was simple and distinct, the dates of the several offenses were closely connected in time[;] and even though such evidence of distinct crimes might not have been admissible in separate trials, the promotion of economy and efficiency in judicial administration by the avoidance of needless multiplicity of trials was not outweighed by any demonstrably unreasonable prejudice to the defendant as a result of the consolidations.[27]

The arguments presented by Carter attempting to prove prejudice fall short. In the vein of *Brown*, we find the scale to be tipped in favor of judicial economy. Put simply, Carter has not met his burden of showing undue prejudice. We affirm the conviction.

III. CONCLUSION.

For the foregoing reasons, we affirm Carter's conviction and sentence for five counts of complicity to first-degree robbery and being a PFO 2.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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[26] *See, e.g., Brown v. Commonwealth*, 458 S.W.2d 444, 447 (Ky. 1970).

[27] *Id.*

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