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RENDERED: APRIL 25, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000655-MR

TERRENCE S. SILLAS — APPELLANT

V.

ON APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE DENNIS FOUST, JUDGE
NO. 11-CR-00045

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Terrence S. Sillas was convicted of first-degree burglary, second-degree assault, and being a first-degree persistent felony offender. Appellant raises four issues on appeal. Because this Court holds that the trial court did not commit error, Appellant's convictions are hereby affirmed.

I. Background

Chuck Wynn testified that Appellant and Cortez Beckman entered his Murray, Kentucky home during the night of July 12, 2010 and demanded money from him. Appellant and Beckman were armed with guns. After a physical struggle in which both intruders hit Wynn with their guns, Wynn eventually told them that his wallet was in his truck in the garage. Wynn retrieved the wallet and handed it to Beckman. When Beckman put his gun in his waistband to grab the wallet, Wynn reached for a gun he kept in the door of the truck. Beckman alerted Appellant that Wynn was reaching for something.

Wynn slammed Appellant with the truck door and fired four shots, hitting Appellant twice in the shoulder. The men fled and Wynn called 911.

Wynn identified Appellant and Beckman as the intruders to police. Police were alerted that Appellant was at the Marshall County Hospital being treated for the gunshot wounds. Police arrested Beckman a few hours later.

Appellant was charged with attempted murder, first-degree burglary, first-degree robbery, and being a first-degree persistent felony offender (PFO). Beckman and Appellant were tried together. At trial, Beckman took the stand and denied being involved. Appellant did not testify.

After hearing all the evidence, the jury convicted Appellant of first-degree burglary and second-degree assault. Following the penalty phase, the jury also found Appellant guilty of being a first-degree PFO and recommended that he be sentenced to a total of thirty years. The trial court adopted the jury's recommendation and sentenced him to thirty years in prison. Beckman was acquitted of all charges.

Appellant now appeals as a matter of right. *See* Ky. Const. § 110(2)(b). Further factual background will be developed below.

II. Analysis

Appellant alleges four errors on appeal: (1) the trial court erred by denying his motion for a separate trial from Cortez Beckman; (2) the trial court erred by denying his objection to the venire on the grounds that it was not a fair cross-section of the community; (3) the trial court erred by denying his motion to exclude his medical records from Marshall County Hospital from the night of the incident; and (4) the trial court erred by allowing the

Commonwealth to introduce certified and self-authenticating copies of Appellant's prior convictions from Illinois during the penalty phase for the purpose of proving the elements of the PFO offense.

A. Separate Trials

Appellant claims that the trial court erred in denying his motion to sever his trial from Cortez Beckman's. Appellant and Beckman, along with Haley Petty, Laken Knight, and Monta Harper, were charged with crimes arising from the home invasion at Chuck Wynn's. Petty, Knight, and Harper pleaded guilty to their involvement in the events. Appellant and Beckman pleaded not guilty and were set to be tried together.

Appellant filed a motion for separate trials pursuant to RCr 9.16[1] on November 22, 2010, making a broad allegation that he would be unduly prejudiced by the joinder of trials. The trial court denied the motion and noted that while it would be concerned that evidence may be admissible against one defendant but not the other, there was no indication that such evidence was present.

Appellant renewed the motion before trial when Beckman's counsel asserted that his defense would be at odds with Appellant's. The trial court again denied the motion on the same basis as its prior determination.

During opening statements, Beckman's counsel argued that Beckman was not involved in the home invasion. He claimed that Appellant went to

[1] "If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires." RCr 9.16.

Wynn's house with Monta Harper, not Beckman. Throughout trial, however, Appellant's defense was that he was not involved with the home invasion whatsoever. Because Beckman's defense and Appellant's defense were antagonistic in that Beckman accused Appellant of participating in the invasion and Appellant denied any involvement, Appellant contends that he was prejudiced by the joinder of trials. Further, Appellant claims that Beckman's counsel acted, in effect, as a "second prosecutor" by arguing that Appellant and another man carried out the home invasion and that his client had nothing to do with it.

As a general rule, persons jointly indicted should be tried together, and this Court has long expressed a strong preference for such joint trials. *Bratcher v. Commonwealth,* 151 S.W.3d 332, 340 (Ky. 2004); *Wilson v. Commonwealth,* 836 S.W.2d 872, 886-87 (Ky. 1992). A trial court's failure to grant a severance is reviewed for an abuse of discretion. *See Bratcher,* 151 S.W.3d at 340 (Ky. 2004).

This Court has previously held that antagonistic defenses are one factor for a trial court to consider when determining whether to sever trials. *See e.g., Foster v. Commonwealth,* 827 S.W.2d 670, 679 (Ky. 1991). But the Court has also held "in a case where one defendant denies any involvement in the crime and places all blame on the other, that the only claim of prejudice is that the defendants pointed the finger at each other may actually *justify* joinder" of trials. *Bratcher,* 151 S.W.3d at 341 (footnote omitted).

Appellant has cited case law from other jurisdictions stating that in these situations, the co-defendant's counsel becomes a second prosecutor. *See*

United States v. Tootick, 952 F.2d 1078, 1082 (9th Cir. 1991). But this Court has rejected this second-prosecutor claim. Thus, in *Bratcher* we stated that it "is simply a reiteration of the antagonistic defenses claim in that [the co-defendant's] attorney was trying to show [a]ppellant had committed the murder instead of his client."[2] *Bratcher*, 151 S.W.3d at 341. Because the defendant in that case had failed to show other prejudice, his conviction was affirmed. *Id.*

Like in *Bratcher*, that Appellant and Beckman had antagonistic defenses is not, by itself, sufficient grounds to hold that the trial court abused its discretion in denying Appellant's motions for separate trials. Appellant has shown no other prejudice that would establish an abuse of discretion by the trial court trying the cases together.

B. Fair Cross-Section Requirement

Appellant and Beckman are African-American. At the start of trial, the clerk called 35 names from the juror pool to form the jury panel, but none of the members of the panel were African-American. In fact, only one member of the jury pool was African-American. Appellant's counsel objected to the racial composition of the panel on the grounds that it was an underrepresentation of Appellant's distinctive group within the community and moved for a mistrial. The motion was denied and Appellant now appeals on the grounds that the jury pool was not a "fair cross-section of the community." *See Taylor v.*

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[2] Moreover, *Tootick* presented a different scenario than Appellant's case because there the co-defendants had mutually exclusive defenses, meaning that "acquittal of one co-defendant would necessarily call for the conviction of the other." 952 F.2d at 1081. The court was concerned about the possibility that both defendants could have been convicted while only one of them could have possibly committed the crime. Here, however, both men could have been convicted if the jury believed that each had participated in the crime.

Louisiana, 419 U.S. 522, 530 (1975) (recognizing the "fair cross-section" requirement as fundamental to the right to a jury trial).

In order to make a prima facie showing that the Commonwealth has violated the fair cross-section requirement, the Appellant must show three things:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). The burden is on the defendant to make all three showings. *Johnson v. Commonwealth*, 292 S.W.3d 889, 894 (Ky. 2009).

While Appellant satisfied the first prong, because African-Americans constitute a distinctive group in the community, *Rodgers v. Commonwealth*, 285 S.W.3d 740, 759 (Ky. 2009), he failed to prove the second and third prongs. Indeed, Appellant did not present any evidence to the trial court about the number of African-Americans in the community or the systematic exclusion of the group in the jury-selection process. The second and third prongs are not self-evident, nor are they proven merely by showing that the group claimed to be excluded is a distinctive group in the community. This Court has made clear that proving the second and third prongs requires census and other data about the members of the excluded group in the community. *See, e.g., Mash v. Commonwealth*, 376 S.W.3d 548, 552 (Ky. 2012). Appellant presented no data to the trial court or to this Court in his brief.

Because Appellant did not meet his burden of proving that the jury pool was not a fair cross-section of the community, the trial court did not err in denying his motion for a mistrial.

C. Medical Records

On July 13, 2011, a subpoena duces tecum, issued at the request of the Commonwealth, was served on the custodian of medical records at Marshall County Hospital, commanding her to appear in court on July 15, 2011, at a pre-trial hearing, and to produce all medical records for Appellant related to his treatment on the night of the home invasion. The Commonwealth subpoenaed the records for the pretrial hearing to allow them to be authenticated ahead of time and permit the records custodian not to have to attend the trial. The custodian of records complied with the subpoena.

Appellant's counsel objected to the admission of the records on the basis that they were untimely and Appellant had no time to challenge their authenticity. The Commonwealth argued that it had subpoenaed the records for trial, not discovery, and that any authenticity questions could be addressed immediately. Appellant's trial counsel eventually stipulated to the authenticity of the records.

However, when the Commonwealth moved to introduce the records into evidence at trial, Appellant objected on the grounds that they violated Kentucky

statutes pertaining to subpoenaing medical records, specifically KRS 422.305(1).[3] The trial court overruled the motion.

Appellant renews the claim that the trial court erred when it denied his motion to exclude his medical records because the Commonwealth did not comply with KRS 422.305(1). Specifically, Appellant argues that the Commonwealth did not properly notify him that it had subpoenaed the records in violation of the statutory language that "the attorney causing the service of the subpoena shall notify all other attorneys of record ... of the hospital's election." KRS 422.305(1).

In making this claim, Appellant misread the statute. The relevant provision states:

> When a subpoena duces tecum is served upon any employee of any hospital, requiring the production of any such medical charts or records at any action or proceeding, it is sufficient if the employee of the hospital charged with the responsibility of being custodian of the original thereof promptly notifies, in writing, the attorney for the party causing service of the subpoena, of the hospital's election to proceed under the provisions of KRS 422.300 to 422.330 and of the estimated actual and reasonable expenses of reproducing such charts or records. Upon such notification, the attorney causing the service of the subpoena shall notify all other attorneys of record or other parties if they are not represented by attorneys of the hospital's election. Following such election, the employee of the hospital charged with the responsibility of being custodian of the original charts or records specified in the subpoena shall hold the originals available at the hospital, and upon payment to the hospital of the estimated reproduction expenses by the party causing service of the subpoena, or by any other party, shall promptly deliver, by certified mail or by personal delivery, legible and durable copies, certified by said hospital

[3] Appellant also claimed at trial that the Commonwealth had violated the federal Health Insurance Portability and Accountability Act (HIPAA) in obtaining the records. This claim has not been presented on appeal.

> employee, of all medical charts or records specified in such subpoena to the person specified in the subpoena.

KRS 422.305(1).

The statute allows employees of a hospital to "elect" to proceed under KRS 422.300 to 422.330 by making the documents available in lieu of strictly complying with subpoenas duces tecum by producing them at court. Upon the hospital's "election," the attorney who caused service must notify all other attorneys of record of the hospital's decision.

Appellant reads this to require notice by the Commonwealth in all cases, i.e., when a hospital decides to comply with the subpoena and when a hospital decides to proceed under KRS 422.300 to .330. But that is not what is required. Notice is required only when the hospital elects to follow KRS 422.300 to .330, that is, decides against producing the documents and decides instead to make them available at the hospital.

Here, the hospital did not make such an election, and instead complied directly with the subpoena by bringing the documents to court. Thus, the procedural requirements of KRS 422.305(1) were not triggered and the Commonwealth was not required to give Appellant notice of an "election" that never occurred.

D. Evidence of Appellant's Prior Convictions

Appellant also claims that the trial court erred when it allowed the Commonwealth to admit records of prior convictions to establish Appellant's status as a persistent felony offender because he was not given sufficient time to investigate or rebut the records.

Appellant was indicted for first-degree PFO on August 19, 2010. The indictment stated that Appellant was convicted of one count of criminal trespass to a residence in 2008 and aggravated use of a weapon in 2009, both in Illinois. On July 14, 2011, five days before trial, Appellant served a motion to dismiss the PFO charge and a motion for discovery of any prior convictions pursuant to RCr 7.24. He asked the trial court to order the Commonwealth to provide him with copies of all documents it intended to introduce against him during the PFO stage of trial. He also asked the trial court to dismiss the PFO charge because the Commonwealth had not yet provided the documents.

The Commonwealth responded that it had requested the documents from Illinois some time before and that it had experienced some difficulty obtaining them, partly because of confusion over the spelling of Appellant's surname.[4] The trial court denied Appellant's motion to dismiss and told the Commonwealth to provide the records when it received them.

The Commonwealth received the records on July 18, 2011, and immediately faxed them to Appellant's counsel. The trial began on July 19, 2011, and the penalty phase began in the evening of July 20.

Appellant now claims that the trial court erred when it admitted these records at trial because of the small window of time he had to review them. This Court reviews discovery rulings for an abuse of discretion. *Beaty v. Commonwealth*, 125 S.W.3d 196, 202 (Ky. 2003).

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[4] In fact, the Commonwealth told the trial court that it emailed Appellant's counsel to discover the proper spelling of Appellant's surname, but received no response. Appellant's counsel did not deny this claim.

Although the precise grounds for Appellant's appeal are not apparent from his brief, it appears that he relies primarily on RCr 7.24(2). That rule provides a basis for a trial court, on motion of a defendant, to permit the defendant to inspect and copy documents that are material to the preparation of a defense. RCr 7.24(2) makes clear, however, that the provision pertains only to items "that are in the possession, custody or control of the Commonwealth." At the time of Appellant's request, the documents were not in the possession, custody or control of the Commonwealth. The trial court ordered the Commonwealth to provide Appellant with these records when they arrived from Illinois, which it did two days before the PFO stage of trial.

While this Court agrees with Appellant that discovery materials should be provided as early as possible, it cannot say that the trial court abused its discretion in allowing the Commonwealth to admit the records of Appellant's prior convictions, even if it was close in time to the beginning of trial. While mention in the indictment itself regarding which prior convictions the Commonwealth intended to prove was insufficient alone to comply with RCr 7.24, it certainly rebuts Appellant's claim that the Commonwealth engaged in "trial by surprise." Appellant knew which convictions the Commonwealth intended to use against him well before trial. This gave adequate notice and time to challenge those convictions to the extent they could be challenged.

This Court holds that the trial court did not abuse its discretion in allowing the Commonwealth to introduce records of Appellant's prior convictions.

III. Conclusion

For the foregoing reasons, the judgment of conviction and sentence entered by the Graves Circuit Court is affirmed.

All sitting. All concur.

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