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Supreme Court of Kentucky

FINAL

2013-SC-000278-MR

DATE 11-13-14 CIV Grounds DC

JAMES PRIVETT III

APPELLANT

V. ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL KENTON WINCHESTER, JUDGE
NO. 12-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Privett III, was found guilty of first-degree assault for beating his wife and cutting her face with a meat cleaver. The primary issue at trial related to Privett's claim that he had acted under extreme emotional disturbance. On appeal, Privett challenges his conviction on three grounds: (1) that the trial court should have granted him a continuance to review recordings of phone conversations between Privett and his wife, (2) that the trial court should have corrected alleged misstatements of law made during closing argument; and (3) that the underlying facts of his previous convictions should not have been presented during sentencing. Finding no error, this Court affirms.

I. Background

On February 20, 2012, James Privett brutally attacked his wife, Erica. In addition to punching and kicking her, Privett also cut Erica's face numerous times with a meat cleaver. Erica was eventually taken by ambulance to the hospital, where she was treated for multiple rib fractures and received over 1,000 stitches for the facial wounds. At the time, the couple was living with Erica's friend, Brenda Booth, and the assault took place in Booth's apartment.

Privett admitted to the attack, and the defense theory at trial was that Privett had "snapped" and thus acted under extreme emotional disturbance (EED), which would have reduced the first-degree assault conviction to a Class D felony. *See* KRS 508.040(2)(a). Defense argued that the assault was triggered when Privett discovered Erica had contracted a sexually-transmitted disease and would not stop prostituting herself for drugs. The Commonwealth's theory, on the other hand, was that Privett had become angry upon discovering that they were out of beer and accused Erica of giving the last beer to her brother-in-law, and that their ensuing argument escalated into physical violence by Privett.

Privett was charged with attempted murder and first-degree assault. In addition to the charged offenses, the jury was also instructed on EED. The jury ultimately found Privett not guilty of attempted murder and guilty of first-degree assault, concluding that he did not act under EED. He received the maximum sentence of 20 years.

Privett now appeals to this Court as a matter of right. *See Ky. Const.* § 110(2)(b). Additional facts will be developed as needed in our analysis below.

II. Analysis

A. The trial court did not abuse its discretion in failing to grant a continuance.

On the morning of trial, defense counsel orally requested a continuance. Counsel stated that his client had advised him for the first time in the afternoon of the day before that he and Erica had held many telephone conversations, in violation of a no-contact order, over the previous several months while Privett was in jail. Counsel explained that many of the recorded calls could be relevant to the defense and that he needed the continuance to obtain and review the recordings to prepare for trial.

Specifically, Erica had allegedly related to Privett a different recollection of the events surrounding the assault than she and Brenda Booth were expected to present to the jury. Booth's testimony was that when the argument escalated into physical violence by Privett, Booth tried to intervene but was elbowed or "addled" in some way by Privett. She testified that she then saw Privett leave Erica, retrieve the meat cleaver from the kitchen, and cut Erica's face upon returning. In contrast, Erica allegedly told Privett during their phone conversations that it had been Booth who had taken the meat cleaver from the kitchen and attempted to use it against Privett while he was attacking Erica; Privett then allegedly wrenched the meat cleaver from Booth's hands and, in a "blind rage," began cutting Erica's face with it. Defense counsel argued that Privett coming into possession of the meat cleaver in this manner was a

completely different scenario than him intentionally going to a different room to get it, and that this contradiction of Booth's version of events supported the defense theory of EED, or at least was consistent with it.

The trial court allowed defense counsel to question Erica regarding her recollection of the phone conversations prior to empanelling the jury. She denied remembering the alleged conversations in which she discussed Booth having the meat cleaver. Defense counsel argued that he needed an opportunity to review the recordings for possible impeachment. The trial judge denied the continuance, advising defense counsel that he could cross-examine the witness regarding what she allegedly told Privett during the conversations and that the jury could judge her credibility based on her responses.

The judge adjourned the first day of trial around 4:00 p.m. Defense counsel then obtained the jail recordings and spent eight hours listening to them that evening, but according to Appellant's brief, he was only able to "scratch[] the tip of the iceberg."¹ Apparently, none of the recordings defense counsel managed to review had contained the alleged conversations involving Booth and the meat cleaver, or at least none were used as impeachment, which suggests that none were found.

On the morning of the second day of trial, defense counsel renewed his oral motion for a continuance, stating that the defense was prejudiced by the failure to grant a continuance because he did not have an opportunity to

¹ Erica testified that she and Privett had spoken on the telephone almost every day for months up until about one week before the trial. Their conversations had typically lasted between 30 minutes and two hours.

review all the recordings and prepare for cross-examination of Erica and Booth. The trial judge again denied the continuance. The judge also overruled defense counsel's request for the prosecutor to be barred from arguing in closing that Privett had gone to the kitchen to retrieve the meat cleaver and, instead, be allowed to argue only that he had "grabbed the cleaver."

The trial court, however, did allow defense counsel to recall Erica to the stand and question her as a hostile witness to impeach her on several statements (irrelevant to the present appeal) she made during the conversations with Privett that were at odds with her previous testimony. Defense counsel concluded his questioning by asking Erica if she remembered saying in conversations with Privett that Booth had tried to strike him with the meat cleaver before he wrestled it away from her. Erica responded, "No."

Privett contends that the trial court abused its discretion by refusing to grant the continuance. He maintains that the judge's insistence upon expeditiousness was unreasonable and arbitrary and deprived him of his right to a fair trial and to present a defense. We disagree.

RCr 9.04 permits the trial court to, "upon motion and sufficient cause shown by either party, ... grant a postponement of the hearing or trial." The trial court has broad discretion under this rule, and a conviction will not be reversed based on the denial of a motion for a postponement or continuance "unless that discretion has been plainly abused and manifest injustice has resulted." *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) (quoting *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006)) (internal quotation

marks omitted). The following factors are often important when determining whether to grant a continuance: “length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.” *Id.* (quoting *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)). “Identifiable prejudice is especially important,” and “speculative contentions that additional time might prove helpful are insufficient.” *Id.* Furthermore, the rule unambiguously provides that a motion for a continuance sought “on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it.” RCr 9.04.

Privett argues that the Commonwealth committed a discovery violation by failing to advise defense counsel of the telephone conversations and failing to provide him with the recordings of the conversations, and that the trial court’s failure to remedy the discovery violation by granting a continuance was prejudicial error. But this is not a case of newly discovered evidence that could not have otherwise been discovered by exercising due diligence. Being a party to the conversations, Privett obviously had personal knowledge of the telephone conversations and could have easily requested copies of the recordings long before trial under RCr 7.24. Privett can hardly claim that due diligence was used to obtain the recordings when the reason he had not obtained them prior

to trial was his own failure to advise his counsel of the telephone conversations, which had apparently been going on for months, until the day before trial.

In addition, Privett's claim of prejudice resulting from the denial of a continuance is essentially nothing more than unsupported speculation. Privett claimed through counsel at trial, and continues to do so on appeal, that the denial precluded him from fully vetting the hours of recorded conversations to discover statements *allegedly* made by the victim that support the defense's theory of EED. The record, however, does not contain any of the recordings and, in any event, is silent on the *actual* content of the recordings. Given Privett's decision not to testify during the guilt phase, the record contains no testimony under oath of his own recollection of the recorded conversations. Nor did Privett comply with the affidavit requirement of RCr 9.04. *See Hudson*, 202 S.W.3d at 23 (compiling cases upholding denials of continuances for failure to comply with the procedural requirements of RCr 9.04). "Prejudice will not be presumed from a silent record." *Baze v. Commonwealth*, 965 S.W.2d 817, 824 (Ky. 1997) (citing *Walker v. Commonwealth*, 476 S.W.2d 630, 631 (Ky. 1972)).

Based on the record on appeal, we have no way of determining whether any actual prejudice resulted from the judge's refusal to grant a continuance. All the record contains is unsworn statements made by counsel at trial that the recording *might* have exculpatory statements and that his client told him that such statements were made during the telephone calls. This is insufficient for

this Court to conclude that the trial court abused its discretion by denying Privett's request for a continuance.

B. Statements made during closing argument were not prosecutorial misconduct.

Privett next takes issue with statements made by the Commonwealth during closing argument, and claims that the trial court's failure to correct the prosecutor's alleged misstatements of law requires reversal. We disagree.

During closing argument, the prosecutor made the following statement: "When you act angry, that's, you can't come in and say, 'That's extreme emotional disturbance. I was justified. I had a right to.'" Defense counsel objected, arguing that the prosecutor had misstated the definition of EED, and requested the statement be struck. The trial court overruled the objection and the prosecutor continued his closing argument. Privett also claims that the prosecutor again misstated the law on EED when he later stated, "[Privett] wants to say that he was crazy at that point, that he had an EED, that it was excusable to try to kill his wife."

Prosecutors have "wide latitude during closing arguments ... [and] may comment on tactics, ... on evidence, and ... on the falsity of a defense position." *Noakes v. Commonwealth*, 354 S.W.3d 116, 122 (Ky. 2011) (citations omitted) (internal quotation marks omitted). "Counsel may not, however, misstate the law or make comments on the law inconsistent with the court's instructions." *Padgett v. Commonwealth*, 312 S.W.3d 336, 351 (Ky. 2010).

This Court finds no prosecutorial misconduct with regard to Privett's allegations of improper closing argument. Simply put, these are not

misstatements of the law on EED. Rather, with respect to the first alleged improper statement, the prosecutor was merely commenting “on the falsity of a defense position,” *Noakes*, 354 S.W.3d at 122, while the second statement was nothing more than a “comment on [defense] tactics,” *id.* The prosecutor said nothing about the law on EED, nor were his comments inconsistent with the judge’s instructions on EED. Accordingly, no prosecutorial misconduct, reversible or otherwise, occurred during closing argument.

C. Admission of prior convictions during sentencing has not been shown to be error.

Finally, Privett claims that the introduction of the underlying facts of his prior convictions during sentencing was palpable error. During sentencing, the Commonwealth introduced without objection² certified copies of Privett’s prior conviction records. Defense counsel then requested that the records be circulated among the jury while Privett took the stand to testify to the specific circumstances leading to each conviction in an apparent attempt to mitigate the harmful effects of the convictions. Defense counsel began his questioning of Privett with the following:

You have a certain number of misdemeanor convictions there that the jury is looking at right now. And of those particular convictions, it basically shows the progress of the case through court and what the eventual outcome was. But it doesn’t say anything about what brought about the arrest in each of those particular cases.

² Not only was there no objection to the introduction of the records, but the defense even stipulated to their authenticity.

Privett's counsel then proceeded to have him explain in detail each of his convictions "because, on the face, it makes them sound serious."

The argument now put forth by Privett appears to be that, in light of his trial counsel's vague reference to the certified records "show[ing] the progress of the case through court," they must have been unredacted and thus showed the jury evidence of charges for which he was not ultimately convicted (i.e., charges that were dismissed or reduced to the ultimate convictions). Privett admits that this claim is unpreserved.

Under KRS 532.055(2)(a)(2), the Commonwealth is permitted to offer during sentencing evidence of "[t]he nature of prior offenses for which [the defendant] was convicted." But this does not include evidence of charges that have been dismissed or amended to other offenses. *E.g.*, *Martin v. Commonwealth*, 409 S.W.3d 340, 348 (Ky. 2013).

If, in fact, some dismissed or amended charges were presented to the jury during sentencing (which appellate counsel argues can be inferred from trial counsel's statements above), this Court has no way to review this alleged error. The record is silent on this issue because counsel apparently did not see fit to designate the conviction records for our review as part of the record in this appeal.³ And no dismissed or amended charges are ever mentioned during defense counsel's questioning of Privett in the sentencing phase. "Appellant has a responsibility to present a 'complete record' before the Court on appeal ...

³ The record as certified for appellate review merely includes the clerk's exhibit list documenting Commonwealth's Exhibits 26 to 32 as being "Certified Case Histor[ies] of J. Privett's."

[and matters not disclosed by the record cannot be considered on appeal.”

Hatfield v. Commonwealth, 250 S.W.3d 590, 600 (Ky. 2008) (citations omitted).

As we have repeatedly cautioned,

We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record. It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.

Moody v. Commonwealth, 170 S.W.3d 393, 398 (Ky. 2005) (quoting *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)). Accordingly, since we have been provided with no evidence to the contrary, this Court must assume the conviction records do not contain any improper reference to charges that were dismissed or amended.

Moreover, despite the absence of this evidence in the appellate record, the video record of the sentencing phase confirms that the certified conviction records did not provide any underlying facts of the offenses that resulted in convictions. To the contrary, such detail came from Privett himself in trying to take the sting out of the Commonwealth’s proof, under the theory that the convictions sounded worse than the underlying facts would suggest.

Therefore, this Court concludes that the record on appeal shows no error in the admission of the certified records of Privett’s prior convictions during the sentencing phase.

III. Conclusion

For the reasons set forth above, the judgment of the Whitley Circuit Court is affirmed.

All sitting. All concur.

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