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RENDERED: DECEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000518-MR

ANTONIO ELLISON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES LOUIS CUNNINGHAM, JR., JUDGE
NO. 09-CR-03445

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Around seven p.m. on October 20, 2009, several Louisville Metro Police Officers were engaged in a traffic stop on the interstate 64 on-ramp near Portland and Lytle streets in Louisville. During the traffic stop, the officers heard gunshots from a nearby alley. They observed what was later determined to be a green Mazda leaving the alley. The officers pursued the vehicle in their police cruisers. After the Mazda eventually stopped, the Appellant "T.J." Ellison exited the vehicle and fled the scene. One of the officers unsuccessfully pursued him on foot. The officers remaining at the scene arrested the vehicle's driver, Clinton Jones, and the backseat passenger, Dontay Rice. A revolver, a small amount of cocaine, and multiple cell phones were discovered in the vehicle.

The body of the victim, Ricco Cunningham, was found in the alley from which the Mazda had exited. He died as a result of two gunshot wounds to the face. Ellison was eventually apprehended and arrested.

Ellison was indicted by a Jefferson County grand jury for complicity to murder; complicity to first-degree trafficking in a controlled substance while in possession of a firearm; and first-degree fleeing or evading the police. Jones and Rice were indicted for complicity to murder; complicity to first-degree trafficking in a controlled substance while in possession of a firearm; and possession of a handgun by a convicted felon. Jones was additionally charged with operating a motor vehicle without a license. Rice, Jones, and Ellison were all tried together.

The first jury trial began on November 29, 2011, and resulted in a mistrial. The second joint trial took place in February, 2013. Upon conclusion of the second trial, a Jefferson Circuit Court jury found Ellison guilty of complicity to murder; facilitation to first-degree trafficking in a controlled substance while in possession of a firearm; and first-degree fleeing or evading the police. The jury recommended a sentence of life imprisonment for the complicity to murder conviction, 12 months for the facilitation to trafficking conviction, and three years for the fleeing or evading conviction. All sentences were ordered to run concurrently for a total sentence of life imprisonment. Ellison now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Five issues are raised and addressed as follows.

Double Jeopardy

The first jury trial began on November 29, 2011. After selecting and swearing in the jury, the parties presented opening statements. Upon conclusion of opening statements, the Court adjourned for the day. The next day, Rice and Jones moved for a mistrial and a lengthy bench conference ensued.

The reason for the mistrial arises from the Commonwealth's decision to introduce Rice and Jones' pretrial confessions. The Commonwealth had not intended to use them until after hearing Ellison's opening statement, wherein he asserted a self-defense theory. Apparently, this was not the defense that the Commonwealth expected Ellison to present. Rice and Jones argued that admitting this evidence would result in substantial prejudice because they had not litigated or prepared their cases in anticipation that these statements would be admitted. After a recess and much discussion, the court ordered a mistrial.

The trial court issued an "Order Granting Defendants' Unanimous Motion for a Mistrial After Waiver of Double Jeopardy Rights," stating as follows:

> [A]lthough the Commonwealth had indicated in preliminary discussions before the Court that it did not intend to use the statements, it indicated that this decision was subject to alteration if one or more of the Defendants took a position at trial which made the evidence necessary. The Court then inquired of opposing counsel if there was a way, by means of narrowly limiting such testimony, to proceed without unfairly prejudicing the Defendants by reason of tactical decisions already made and implemented. They all contended it was not possible.

> A continuance was not possible because: a) it will take some time to resolve the underlying suppression/redaction issues; b) the jurors were already near the end of their required service; and c) the Defendants had already staked out an initial position before the jury.

Ellison did not contest the findings in this order and did not take additional steps regarding this issue until September, 2012, when he filed a motion to dismiss. After a hearing on the issue, the court denied the motion.

Ellison argues that the second trial violated his constitutional right against double jeopardy. This issue is properly preserved because Ellison raised it prior to the second trial by filing a Motion to Dismiss for Violation of Double Jeopardy. Also, the very nature of a jeopardy violation results in manifest injustice regardless of preservation. *Beaty v. Commonwealth,* 125 S.W.3d 196, 210 (Ky. 2003). In the present case, however, there was no jeopardy violation.

In Kentucky, "jeopardy attaches when the jury is impaneled and sworn." *Cardine v. Commonwealth*, 283 S.W.3d 641, 645 (Ky. 2009) (citations omitted). It is undisputed that the jury was impaneled and sworn here. Once jeopardy attaches, *Cardine* instructs as follows:

> [the] prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial *or* 2) the defendant either requests *or* consents to a mistrial. *Id.* (Emphasis added and citation omitted).

Prior to the trial court's order granting a mistrial in the present case, Ellison's counsel expressly stated the following regarding the double jeopardy issue:

"just to make sure that the record is clear, yes, we do waive that argument as it relates to double jeopardy for mistrying the case to this jury." He also stated he had advised Ellison of the issue and that Ellison was present during the proceedings. Therefore, the record unequivocally demonstrates that Ellison's counsel consented to the mistrial on behalf of his client. Thus, there is no need to address whether there was manifest necessity for a mistrial or whether Ellison requested a mistrial.

However, Ellison argues his counsel's consent to the mistrial was insufficient because Ellison did not personally waive his double jeopardy defense. Specifically, Ellison contends that the trial court erred by not engaging him in an extensive colloquy in order to determine whether his waiver was knowing and voluntary. Yet, Ellison has failed to present any authority stating that the double jeopardy defense cannot be waived through counsel. This Court is also unaware of any such authority. Therefore, we hold that the trial court did not err by denying Ellison's motion to dismiss on double jeopardy grounds.

Right to Counsel

Next, Ellison argues that the trial court erred by restricting his ability to consult with counsel in violation of his Sixth Amendment rights. Ellison testified on his own behalf at trial. After his direct examination, he was cross-examined by Jones' attorney. The court then recessed for lunch. Because Ellison's testimony was still in progress, the trial court limited consultation between Ellison and his attorney to the issues concerning Ellison's jail phone

calls that the Commonwealth sought to introduce. It appears that these issues had arisen after Ellison began his testimony, and were, therefore, new issues that Ellison's counsel had not previously had the opportunity to discuss with him. The trial court also admonished counsel not to "coach" Ellison or prepare him for cross-examination.

"[T]he United States Supreme Court has held that a court cannot prevent a criminal defendant from having any consultation with his attorney during an overnight recess . . . ." *Beckham v. Commonwealth*, 248 S.W.3d 547, 553 (citing *Geders v. United States,* 425 U.S. 80, 91(1976)). However, "it is constitutionally permissible for a trial court to bar a testifying defendant from consulting with his attorney during a briefer recess." *Beckham*, 248 S.W.3d at 553 (citing *Perry v. Leeke,* 488 U.S. 272, 283–84 (1989)). In either situation, consultations with counsel concerning a defendant's ongoing testimony are not permitted. *Id.* In the present case, the jury's lunch recess lasted for approximately 75 minutes. Therefore, this case is much more analogous to a brief recess as in *Perry* rather than the overnight recess in *Geders*.

Ellison contends that this distinction is inherently arbitrary and provides for inconsistent outcomes when applied by trial judges. As in *Beckham*, the trial court in the present case did not bar all consultation between Ellison and his attorney. *Beckham*, 248 S.W.3d at 553 (noting that "*Geders* involved the trial court's complete denial of a defendant's right to consult with his attorneys during an overnight recess."). In contrast, the trial court in the present case merely qualified the issues which were proper for discussion and correctly

excluded consultation regarding Ellison's testimony. *Id.* Here, as in *Bekham* "the trial judge's actions attempted to protect the integrity of the proceedings and did not impermissibly limit all attorney-client contact during the . . . recess." *Id.* at 554. Furthermore, we held in *Moore v. Commonwealth* that a trial judge's decision not to allow defendant to consult with his attorney about the defendant's direct testimony during lunch recess, did not deny the defendant effective assistance of counsel. 771 S.W.2d 34, 39-41 (Ky. 1988) *overruled on other grounds by McGuire v. Commonwealth,* 885 S.W.2d 931 (Ky. 1994). Therefore, we hold that the trial court's admonition to counsel did not violate Ellison's Sixth Amendment right to counsel.

Joinder and Statements of Co-defendants

Ellison further asserts that the trial court erred by refusing to sever his trial from that of his co-defendants. His sole basis for this alleged error is that joinder in this instance violated his right of confrontation when the Commonwealth introduced his co-defendants' statements. Ellison presents these arguments as his third and fourth claims of error. Both issues are properly preserved. However, for purposes of our review, these interrelated issues will be analyzed together. According to Ellison's argument, joinder was proper if no confrontation violation occurred. Thus, we will first examine the confrontation issue.

The Right of Confrontation

In a joint trial, the Confrontation Clause of the U.S. Constitution precludes the pretrial confession of one defendant from being admitted against

the other "unless the confessing defendant takes the stand." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *see also Bruton v. United States*, 391 U.S. 123 (1968); *Crawford v. Washington*, 541 U.S. 36 (2004). At their foundation, the distinctions between *Bruton* and *Crawford*, involve the purpose for which the out of court statements are being introduced—either to incriminate the declarant defendant or, to incriminate the non-declarant co-defendant. *See Commonwealth v. Stone*, 291 S.W.3d 696, 699-701 (Ky. 2009).

In the present case, Jones and Rice did not testify. However, redacted portions of transcripts documenting Jones' police interrogation by Detective Scott Russ were read aloud during trial. This redacted recitation of the transcripts revealed that, on the date of the murder, Jones stated that he drove his car all over Louisville until around 5 p.m., when he picked up a 19 or 20 year old young man he knew only as Li'l Mikey. Jones further stated that he drove Li'l Mikey around while he and Li'l Mikey sold drugs, and that Li'l Mikey was seated in the front passenger seat of the vehicle. Jones denied being in the alley where the murder occurred and also denied hearing gunshots. Furthermore, Jones said that the gun and drugs discovered in the car belonged to Li'l Mikey and that Li'l Mikey was the person who ran from the car when stopped by the police. Based on this testimony, Ellison further alleges that the prosecutor's statements during closing arguments were improper because they referenced drug deals, information that Ellison claims was only introduced through Jones' interrogation transcripts.

Ellison also asserts that a question posed by the jury during deliberations demonstrated that the jury was using Jones' statements against Ellison. During deliberations, the jury inquired of the court as follows: "Does the charge only involve what happened at the scene of the murder or does it include what they were doing earlier in the day." At that time, Ellison renewed his motion to sever and moved for a mistrial. Both motions were overruled. The judge provided a written response to the jury that they were to follow the jury instructions as provided and that the court cannot elaborate on those instructions.

Furthermore, Ellison contends that the trial court erred by admitting Detective Kyle Willett's testimony concerning Rice's interrogation. Detective Willett testified that during the interrogation, Rice stated that he rode in the back seat of the Mazda and that they did not make any stops. Willett further testified that Rice denied knowing anyone named Li'l Mikey and also denied that there was a gun in the car.

Considering the several incidents of alleged error, Ellison's primary claim arises from the introduction of the redacted transcripts documenting Jones' police interrogation. Specifically, Ellison argues that merely replacing "Antonio Ellison" with "Li'l Mikey" does not satisfy the *Bruton* standard for redaction. *See Gray v. Maryland*, 523 U.S. 185 (1998) (holding that co-defendant's statement which was redacted with a blank or the word "deleted" was inadmissible under *Bruton*). In *Richardson*, however, "the Court upheld the admission of a co-defendant's confession notwithstanding the fact that in

conjunction with other evidence introduced at trial the confession became inculpatory of the defendant." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 27 (Ky. 2011). While the references to "Li'l Mikey" constitute insufficient redaction, this error is harmless beyond a reasonable doubt. *See Sparkman v. Commonwealth*, 250 S.W.3d 667, 670 (Ky. 2008).

Ellison's trial theory was self-defense. He testified that he was the person sitting in the front passenger seat of the Mazda and that he contacted the victim on the night of the murder in order to buy drugs from him. On cross, he admitted that he had recently engaged in narcotics trafficking during the month of October, 2009. Ellison also admitted to fleeing from the police after the murder. While fleeing, he discarded the 9mm hand gun that was used to kill the victim. A forensic expert determined that the two shell casings found near the victim's body were fired from that weapon. Evidence was also introduced that, while in jail awaiting trial, Ellison wrote letters and made phone calls attempting to enlist his friends to take action that would prevent a key witness from testifying.

The trial court also admonished the jury that certain evidence may be considered for one defendant but not for another, and repeatedly instructed the jury concerning the appropriate use of the co-defendants' statements prior to the admission of each. A similar admonition was presented in the jury instructions. It is well-settled that a jury is presumed to follow an admonition and that an "admonition cures any error." *Combs v. Commonwealth*, 198

S.W.3d 574, 581 (Ky. 2006) (citing *Mills v. Commonwealth,* 996 S.W.2d 473, 485 (Ky. 1999).

The error resulting from the admission of Jones' improperly redacted interrogation was harmless beyond a reasonable doubt. Regarding the other instances for which Ellison complains, there was no error.

Joinder

As previously noted, Ellison's argument that the trial court erred in refusing to sever the trials arises solely from the alleged violation of his right of confrontation resulting from the admission of his co-defendants' confessions. Because we have already determined that the latter issue did not constitute reversible error, we also hold that the trial court did not abuse its discretion in denying Ellison's motions to sever the trials. *Shepherd v. Commonwealth,* 251 S.W.3d 309, 313 (Ky. 2008) (applying abuse of discretion standard when reviewing a trial court's denial of a motion to sever).

Limiting Instruction

Ellison further complains that the trial court committed reversible error when it included the following jury instructions:

> Similarly, you have heard evidence about certain instances of misconduct by Defendant Antonio Ellison. Evidence of these acts may be considered solely as it relates to whether Mr. Ellison is guilty or not guilty. Moreover, you may not consider these acts to infer that Mr. Ellison acted in a similar fashion on the date in question. You can only consider that evidence as potential evidence of intent, means, or motive.

This issue is properly preserved because Ellison objected to the instruction at trial and in his Motion for a New Trial. He now requests de novo review of the

trial court's alleged error. We recognize that "[o]ur case law regarding the proper standard of review when reviewing alleged errors in jury instructions is inconsistent." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 193 n.6 (Ky. 2013). In any event, we find no error here under either an abuse of discretion or de novo standard.

In *Quisenberry*, we held that "a limiting instruction should always be given upon the defendant's request." We further stated as follows:

> "while not required, there is certainly nothing inappropriate about the trial judge informing counsel of his or her intent to provide such admonition *sua sponte* absent an objection from the defendant or defendants for whose presumed benefit it would be given." *Quisenberry*, 336 S.W.3d at 29.

Thus, *Quisenberry* only holds that a limiting instruction should be given when requested, not the inverse. In the absence of authority presented by Ellison in support of his argument here, we decline to extend our holding in *Quisenberry* to require trial courts to omit any limiting instruction to which the defendant objects. It was not error in this instance for the trial court to deny Ellison's objection and to admit the limiting instruction.

Furthermore, the contested instruction did not identify or draw attention to any specific instances of misconduct that had been previously introduced into evidence. In contrast, the trial court properly admonished the jury in an attempt to clarify the proper application of prior bad acts evidence. *Alexander v. Commonwealth*, 369 S.W.2d 110, 111-2 (Ky. 1963) ("When such evidence is admitted for the purpose of proving intent, etc . . . it becomes the duty of the

court to admonish the jury the purpose for which . . . [it was] admitted."). Therefore, we hold that there was no error here.

Cumulative Error

Lastly, Ellison presents a brief statement of cumulative error that is undeveloped and interjected into a previous argument. The error here certainly does not constitute cumulative error requiring reversal. *Brown v. Commonwealth,* 313 S.W.3d 577, 631 (Ky. 2010).

Conclusion

For the foregoing reasons, the judgment of the Jefferson Circuit Court is hereby affirmed.

All sitting. Minton, C.J.; Cunningham, Keller, Noble, Scott, and Venters, JJ., concur. Abramson, J., concurs in result only.

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