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Supreme Court of Kentucky

2013-SC-000694-MR

DEREK LYNELLE FERGUSON

APPELLANT

V. ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAMES A. WETHINGTON, II, JUDGE
NO. 12-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Derek Lynelle Ferguson appeals as a matter of right from a Judgment of the Daviess Circuit Court convicting him of first-degree burglary, first-degree assault, and being a Persistent Felony Offender in the first degree. Ky. Const. § 110(2)(b). Ferguson raises two issues on appeal. First, he argues that he was entitled to a directed verdict of acquittal because the Commonwealth failed to produce sufficient evidence to prove that he was guilty of assault and burglary. Second, Ferguson alleges that the trial court abused its discretion when it allowed a booking photograph from the day of his arrest to be introduced into evidence. We conclude that the trial court properly denied the motion for a directed verdict, and further find that the trial court did not abuse its discretion when it allowed the booking photograph to be admitted. Accordingly, we affirm.

RELEVANT FACTS

Sometime around Thanksgiving in 2011, Daviess County resident Tracey Belcher invited Vincent Hampton¹ to his home for the purpose of purchasing cocaine. Belcher had bought drugs from Hampton before, but on this occasion Hampton was accompanied by a man whom Belcher had never met. On November 27, 2011, Belcher contacted Hampton to arrange another drug buy. After Hampton arrived and attempted to sell Belcher a baggie filled with fake cocaine, the two men had an altercation, leading Belcher to dispose of the fake drugs and contact a different drug dealer on a nearby pay phone. As Belcher waited at home for the drugs to be delivered, he heard a knock at the door. When he opened the door, a man with a handgun entered and demanded that Belcher give him all of his money and drugs. Belcher recognized the man as the stranger who had accompanied Hampton to his home days earlier. When Belcher explained that he did not have any money or drugs, the man shot him in the abdomen. Belcher surrendered approximately \$2000.00 cash in a bank bag to the intruder. The man fled, stopping briefly at Belcher's truck to take several rolls of gold coins out of the vehicle's ashtray. Belcher sought help from a neighbor who called 9-1-1. He was rushed to the hospital where he underwent emergency surgery to treat the gunshot wound to his abdomen and spent several days in the intensive care unit.

Belcher was interviewed by law enforcement officers several times, and during those interviews, Belcher's description of the shooter varied. However,

¹ The parties often refer to Hampton by the moniker "Powers."

detectives soon identified appellant Derek Ferguson as a potential suspect. When presented with a photo array, Belcher immediately identified Ferguson as the perpetrator. Detectives also spoke with Genny Dennis, Hampton's girlfriend, who stated that she was with Ferguson and Hampton on the day of Belcher's assault. Dennis explained that she rode with Hampton and Ferguson to Belcher's street, where Ferguson exited the vehicle. A short time later, Dennis and Hampton returned to pick Ferguson up. As he entered the vehicle, Ferguson exclaimed, "I shot him, man I shot him." Ferguson then gave Hampton a cell phone, keys, and a bank bag filled with cash. Dennis and Hampton discarded the items after dropping Ferguson off. A gun was later found in the yard of a home where Ferguson was staying, but ballistics tests on the gun were inconclusive.

A grand jury indicted Ferguson on counts of first-degree burglary, first-degree assault, possession of a handgun by a convicted felon,² and the status offense of being a Persistent Felony Offender ("PFO") in the first degree. Belcher and Dennis were among the witnesses who testified at Ferguson's trial. The jury deliberated and found Ferguson guilty of first-degree burglary and first-degree assault. The jury recommended a sentence of ten years on the burglary conviction, and fifteen years on the assault conviction, enhanced to twenty years and twenty-five years, respectively, by virtue of his PFO status.

² The possession of a handgun by a convicted felon charge was severed prior to Ferguson's trial.

The jury further recommended that Ferguson's sentences run concurrently.

The trial court sentenced him accordingly, and this appeal followed.

ANALYSIS

I. The Trial Court Properly Denied Ferguson's Motion for a Directed Verdict.

As his first issue on appeal, Ferguson contends that the trial court erred in denying his motion for a directed verdict on the charges of first-degree burglary and first-degree assault. He asserts that the Commonwealth failed to produce evidence of substance to show that he was the perpetrator who assaulted and committed burglary against Belcher. The Due Process Clause of the Fourteenth Amendment demands that the Commonwealth prove every element of a criminal offense beyond a reasonable doubt before an accused may be convicted. *In Re Winship*, 397 U.S. 358, 364 (1970); *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). A movant is entitled to a directed verdict of acquittal if the Commonwealth produces no more than a mere scintilla of evidence to support a conviction. *Benham*, 816 S.W.2d at 187. On a motion for a directed verdict, the trial court must construe all evidence in favor of the Commonwealth. *Id.* The test on appellate review is whether if under the evidence as a whole, it would be clearly unreasonable for the jury to find guilt. *Id.*

At trial, Belcher testified that the intruder was a black male with dreadlocks, removable gold teeth, and a letter "C" tattooed between his eyes.

On cross-examination, Ferguson attempted to draw out the inconsistencies in Belcher's police interviews. Of specific importance to Ferguson's defense was Belcher's apparent failure to identify the distinctive "C" tattoo in his early interviews. In fact, Belcher never mentioned the tattoo until he identified Ferguson in a photo array during his final interview with Detective Art Maglinger. During three of the six interviews, Belcher informed detectives that he had shared a holding cell with the perpetrator at some point prior to the burglary. He recounted that memory at trial, testifying on cross-examination that he remembered the "C" tattoo from that jail-house encounter. Detectives, however, were unable to verify that Ferguson and Belcher were held in jail at the same time. Belcher also provided varying descriptions of the perpetrator's skin tone, clothing, and misidentified a facial scar.

Ferguson now relies on these inconsistencies to support his argument that he was entitled to a directed verdict of acquittal. Ferguson maintains that Belcher's descriptions of him were so inconsistent that the Commonwealth essentially failed to present evidence of substance implicating him, thereby leaving a rational juror with reasonable doubt as to his guilt. He also complains that Belcher and Dennis' testimonies were inherently unreliable given the fact that both were under the influence of drugs during the times that the crimes took place and immediately thereafter.

Having reviewed the record and pertinent authorities, we are not persuaded that Ferguson was entitled to a directed verdict. Inconsistencies in police interviews notwithstanding, Belcher immediately identified Ferguson in a

photo array as the man who shot him on November 27. At trial, he again identified Ferguson as the perpetrator. Furthermore, Genny Dennis's testimony placed Ferguson on Belcher's street before and after the attack. She testified that Ferguson made an incriminating statement (*i.e.*, "I shot him man, I shot him") and that she witnessed Ferguson giving Hampton items related to the burglary. Unlike Belcher, Dennis could not identify Ferguson from a photo array, as she was unable to discern his distinctive "C" tattoo. She told the detectives that she had been told by Hampton that Ferguson had a "C" tattoo between his eyes.³ When Detective Maglinger presented Dennis with a close-up photograph of Ferguson's face, she identified him immediately as the person who rode in Hampton's car on the day of the shooting.

When viewing this evidence in the light most favorable to the Commonwealth, the inconsistencies in Belcher's description do not support a directed verdict of acquittal. *See Malone v. Commonwealth*, 364 S.W.3d 121, 129 (Ky. 2012) (inconsistent pretrial descriptions of a witness did not support a directed verdict of acquittal). A juror considering the consistent elements of Belcher's description (*i.e.*, dreadlocks, gold teeth, slim build, short stature), Belcher's photo array and in-court identifications, and Dennis's testimony could reasonably conclude that Ferguson was the man who shot Belcher and took his money. Questions concerning why Belcher failed to identify Ferguson's tattoo in early interviews and the impact of drug use by the

³ Dennis had been around Ferguson on at least two occasions but refrained from looking at him closely because Hampton was exceedingly jealous.

witnesses are matters of credibility reserved for a jury to consider. *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005). The directed verdict standard does not require a trial court to discard inconsistent or varying witness identifications, or to automatically discount the testimony of witnesses who used drugs at the time of the crime; rather, the trial court must construe the evidence in the light most favorable to the Commonwealth. *Benham*, 816 S.W.2d at 187. Here, the trial court correctly assessed that a reasonable juror could deduce from the evidence presented that Ferguson perpetrated the crimes committed against Belcher. There was no error.

II. The Introduction of a Photograph of the Appellant was Harmless.

During Detective Maglinger's direct examination, the Commonwealth sought to admit a "booking" photograph of Ferguson taken on the day of his arrest at the detention center. Defense counsel objected to the introduction of the photograph, arguing that it had not been disclosed during discovery. During an in-chambers conference, defense counsel claimed that the particular picture of Ferguson was omitted from the discovery materials submitted by the Commonwealth. The Commonwealth denied that claim, insisting that the prosecutor had complied with the ongoing discovery order and had disclosed the photograph. The trial court overruled the objection, noting that all parties were on notice that a photograph of Ferguson after his arrest was likely to be admitted into evidence.

On appeal, Ferguson contends that the Commonwealth violated Kentucky Rule of Criminal Procedure (RCr) 7.24 and the trial court's ongoing

discovery order when it failed to produce the booking photograph prior to trial.⁴ He argues that the trial court erred when it overruled the defense objection to the introduction of the photograph, denying Ferguson his right to confrontation, right to effective assistance of counsel, right to present a defense, and his right to due process and a fair trial. On appeal, a trial court's ruling concerning a discovery violation is reviewed for an abuse of discretion. *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003). Reversal is not automatic, rather, in order to succeed on appeal, the party alleging the discovery violation must prove some prejudice resulting from the admission of the evidence. *Id.* at 202. Where there is no prejudice, the error is harmless. *Id.*

We agree with the Commonwealth's assertion that proof of a discovery violation is not supported by the record. At the in-chambers conference, the prosecutor insisted that a version of the booking photograph, if not the exact photograph in question, was disclosed in compliance with the ongoing discovery order. Ferguson's counsel denied that claim. The trial court did not rule on whether a discovery violation occurred, but allowed the photograph to be introduced. The record in this case does not contain the discovery materials that were tendered to Ferguson. Any factual conflicts created by an omission in the record are resolved in favor of the trial court's ruling. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Aside from the in-chambers conference (which is a veritable he-said-she-said account of whether the

⁴ An Agreed General Discovery Order was entered on January 24, 2012.

photograph was tendered per the discovery order), Ferguson fails to substantiate the claim that a discovery violation occurred.

Perhaps more importantly, even if the Commonwealth had in fact failed to comply with RCr 7.24, the introduction of the booking photograph was harmless. Though not explicitly explained by either Ferguson's counsel at trial or on appeal, the import of the booking photograph appears to lie in the depiction of Ferguson's hair— that is, the booking photograph pictured Ferguson with dreadlocks, thus matching Belcher's description of the assailant. At trial, Ferguson appeared with short hair. When asked by the trial court about whether the photograph was a "surprise," Ferguson's counsel conceded that she intended to use a photograph of Ferguson with dreadlocks, but that she had never seen the booking photograph before. Also, the photo array picturing Ferguson with long dreadlocks was already in evidence by the time the booking photograph was introduced and this issue arose.

Furthermore, testimony establishing that Ferguson had dreadlocks at the time of the crime had been admitted prior to the introduction of the booking photograph. Therefore, the trial court properly found that the introduction of the photograph did not constitute a "trial by surprise" as alleged by Ferguson. *See Matthews v. Commonwealth*, 997 S.W.2d 449, 455 (Ky. 1999).

The introduction of the booking photograph did not hinder Ferguson's right to present a defense. Throughout the trial, the defense maintained that Belcher mistakenly identified Ferguson as the man who shot him. The cross-examination of Leah Leach (the homeowner of the residence where Ferguson

was living) revealed that other associates of Hampton also wore their hair in long dreadlocks. A photograph corroborating the witnesses' accounts of Ferguson's dreadlocks did not prevent the defense from arguing that Belcher was attacked by a different individual with similar hairstyle.

In sum, the trial court properly ruled on the introduction of Ferguson's booking photograph, and he suffered no prejudice as a result of its introduction. There was no abuse of discretion, and reversal is unwarranted.

CONCLUSION

Despite his allegations of error, Ferguson was in fact properly tried, convicted and sentenced. Accordingly, we affirm the judgment of the Daviess Circuit Court.

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

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