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RENDERED: AUGUST 20, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000806-MR

RONALD CAVANDA JOHNSON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 12-CR-002656

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

The grand jury indicted Ronald Cavanda Johnson on five counts of first-degree robbery stemming from events occurring at three locations. Despite Johnson's alleged perpetration serving as the only common element, all charges were tried in a single trial. The jury convicted Johnson of four counts of first-degree robbery and one count of second-degree robbery and recommended a sentence of fifty-seven years' imprisonment. The trial court entered judgment accordingly. Johnson now appeals from the judgment as a matter of right.[1]

A careful review of the evidence presented at trial convinces us that the joinder of these robbery charges in a single trial unduly prejudiced Johnson's right to a fair trial. So the judgment must be reversed and the case remanded to the trial court for further proceedings.

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[1] Ky.Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Yellow Cab Robbery.

One night in July 2012, a driver for Yellow Cab contacted dispatch to relay that his last customer for the evening had just robbed him. According to the driver, the assailant—described as a large African-American man—pressed a sizable serrated knife against his neck and demanded his wallet. The robber fled in the driver's taxicab.

The investigation eventually turned to Johnson, who was a former Yellow Cab driver. When shown a photopack including Johnson, the driver identified Johnson as the perpetrator. A local resident where the driver's cab was stolen identified Johnson as the individual who had used her cell phone that day, placing Johnson in the area.

Johnson was arrested for the robbery on July 25 and released on his own recognizance on August 7, 2012.

B. The Ervin Robbery.

William Ervin was Johnson's housemate. On August 19, 2012, Ervin agreed to loan Johnson $60, but the two argued and began fighting. According to Ervin, money was removed from his wallet during the fight. Johnson's roommate called police.

Neither Ervin nor Johnson's roommate saw Johnson with a weapon during the fight. Ervin did testify at trial that, to a small degree, he feared for his life. Of course, both Ervin and Johnson's roommate were able to identify Johnson as the perpetrator.

C. The Family Dollar Robberies.

A few days after the fight with Ervin, Johnson robbed a nearby Family Dollar store. Johnson entered the store, made a purchase, and exited the store. But Johnson quickly reentered and grabbed the cashier, told her he had a gun, and informed her this was a robbery. The cashier did not open the cash drawer and Johnson left in short order. Family Dollar's surveillance system caught the incident on tape.

Upon exiting the store, Johnson approached a woman as she was sitting in her car in Family Dollar's parking lot. Johnson demanded her car keys, forcibly removed her from the vehicle, and threatened the woman if she refused to turn over the keys.

Johnson also approached another Family Dollar patron who was sitting in his vehicle with his two children. Johnson reached into the patron's car and told him to exit the vehicle. The patron testified at trial that he refused to exit because of his children. He further testified that Johnson was armed with a five- or six-inch razorblade or box cutter. Johnson told the patron he had a gun, but the patron did not see it.

At this point, the police arrived. Police noticed Johnson throw something on the ground as they approached him. After Johnson's arrest, police found a box cutter on the ground.

II. ANALYSIS.

A. The Trial Court Committed Reversible Error by Improperly Joining Johnson's Charges.

Johnson alleges the trial court abused its discretion by consolidating his charges into a single trial. The issue is properly preserved for our review. At trial, Johnson sought to have the charges separated as follows: (1) Yellow Cab robbery, (2) Ervin robbery, and (3) Family Dollar robberies. It is evident to this Court that the trial court used Kentucky Rules of Criminal Procedure (RCr) 6.18 too liberally in finding the instant robberies to be "of the same or similar character."[2]

RCr 6.18 provides a wide scope of permissible joinder:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.[3]

We have repeatedly declared the rather obvious benefits of trying multiple crimes in a single trial. And with equal fervor, we have cautioned trial courts

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[2] RCr 6.18. There has been no argument presented—nor, we would argue, could there be—that Johnson's crimes were joined because they were "based on the same acts or transactions connected together or constituting parts of a common scheme or plan." That being so, we will not discuss the joinder of Johnson's crimes under those portions of RCr 6.18.

[3] We do well to note that RCr 6.18 works in conjunction with RCr 9.12. In the final analysis, "joinder is proper under both RCr 6.18 and RCr 9.12 when 'the crimes are closely related in character, circumstance, and time.'" *Chestnut v. Commonwealth*, 250 S.W.3d 288, 300 (Ky. 2008) (quoting *Seay v. Commonwealth*, 609 S.W.2d 128, 131 (Ky. 1980)). We focus on RCr 6.18 because the "same or similar character" language was the justification for the trial court's decision in this case; but our analysis applies with equal force to RCr 9.12.

against the prejudice associated with joining crimes together for trial. We will not repeat ourselves here. But it is important to offer a reminder that while RCr 6.18 permits the liberal joinder of crimes, joinder does not operate without parameters. There must exist a "sufficient nexus between or among"[4] the joined crimes before a single trial can be justified.

This joinder rationale is narrow in focus. As we have said before, "[o]ffenses are not of the same or similar character . . . simply because they involve conduct criminalized under the same chapter or section of the penal code."[5] More is required—the offenses must be *strikingly* similar.[6] We are unconcerned with the mere commonality of the *crimes*. Our focus is on the commonality of the *facts* constituting the crimes.[7]

In its attempt to justify joinder, the Commonwealth asserts that the crimes were committed within a very relatively confined geographic range and over the span of only a few days. We previously laid this argument to rest: "While temporal and geographic proximity will often be relevant considerations when the question is whether the 'acts or transactions are connected together or constitute parts of a common scheme or plan,' those factors often have little to do with whether the offenses are 'of the same or similar character.'"[8] Simply

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[4] *Peacher v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013).

[5] *Hammond v. Commonwealth*, 366 S.W.3d 425, 429 (Ky. 2012) (internal quotation marks omitted).

[6] *Id.*

[7] *See Dickerson v. Commonwealth*, 174 S.W.3d 451, 469 (Ky. 2005).

[8] *Hammond*, 366 S.W.3d at 429 (alterations omitted).

put, it is largely irrelevant that the crimes occurred close in time or space when they are alleged to be of similar character.

Beyond Johnson's alleged participation, there is simply no correlation between the Family Dollar robberies, the Ervin robbery, and the Yellow Cab robbery. They are all robberies, but they were not perpetrated in similar ways. In point of fact, the testimony of the victims is inconsistent as whether Johnson even had *a* weapon, let alone that he perhaps used the *same* weapon to commit the crimes. The joinder of Johnson's crimes was impermissible and constituted an abuse of the trial court's discretion because the decision to join the crimes was unsupported by sound legal principles. That said, Johnson's requested separation of charges—Yellow Cab robbery, Ervin robbery, and three Family Dollar robberies—was proper.

But improper joinder without actual prejudice is not reversible error.[9] In this context, because a degree of prejudice is inherent in the joinder of offenses, we look for *undue* prejudice, *i.e.*, that which is "unnecessarily or unreasonably hurtful"[10] to the defendant. In considering whether prejudice exists, we have often looked at "the extent to which evidence of one offense would be inadmissible in the trial of the other offense."[11] With the instant case, the answer is simple: there would be no mutual admissibility of evidence.

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[9] "[W]e have many times noted that an erroneous severance ruling does not justify appellate relief unless it resulted in actual prejudice to the party opposing the ruling." *Peacher*, 391 S.W.3d at 838.

[10] *Romans v. Commonwealth*, 547 S.W.2d 128, 131 (Ky. 1977).

[11] *Hammond*, 366 S.W.3d at 429 (quoting *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993)).

Evidence of Johnson's robberies does not meet any exception listed under Kentucky Rules of Evidence (KRE) 404(b). This lack of mutual admissibility is not dispositive, but it is highly indicative that Johnson was likely prejudiced.

In situations like this one where mutual admissibility is lacking, we have asked "whether the jury's belief as to either offense was substantially likely to have been tainted by inadmissible evidence of the other"[12] as a final test. Over time, we have mentioned various factors useful in answering this question; but two factors are particularly relevant here: (1) the extent to which a jury, whether through admonition or naturally, could compartmentalize the evidence; and (2) the strength of the evidence of the separate crimes.

Johnson alleges he was prejudiced because he was forced to present antagonistic defenses. According to Johnson, because he was arrested at the scene of the Family Dollar robberies, it was impossible for him to deny his involvement in those robberies; but he wished to deny his involvement in the other robberies, especially the Yellow Cab robbery. By Johnson's estimation, then, the taint of essentially admitting to one robbery permeated the trial and undercut the credibility of any argument that he was not involved in the other robberies. We are unconvinced that Johnson was compelled to present antagonistic defenses, but we do agree with his argument—prejudice is likely when "weaker evidence of one offense is improperly bolstered by the spillover of

[12] *Peacher*, 391 S.W.3d at 839 (alterations and internal quotation marks omitted).

strong evidence of [another] offense."[13] In truth, that is essentially what happened here.

In conclusion, we cannot ignore that Johnson received fifty-seven years' imprisonment for these crimes—a sentence the trial court acknowledged was rather substantial. Given the jury's reaction to the evidence presented, we find it difficult to comprehend that Johnson was not prejudiced by the trial court's impermissible joinder of charges. Accordingly, we find the trial court abused its discretion. Johnson's convictions must be reversed.

B. Issues Likely to Recur Upon Retrial.

Before ending, we will review issues that are likely to recur in the event Johnson is retried.

1. The Yellow Cab Tape was Inadmissible.

Yellow Cab contacted 911 and recounted its driver's description of the incident. Given the relative importance of Yellow Cab's 911 call, it seems highly likely to us that the Commonwealth will seek its admission again in the event Johnson is retried. After receiving word from its driver that he had been robbed, Yellow Cab phoned 911 and detailed the robbery per the driver's recitation. The identity of the Yellow Cab employee was never disclosed. Johnson alleges the trial court erred by allowing the Commonwealth to play the tape of Yellow Cab's 911 call for the jury because it violated the right afforded him under the Confrontation Clause of the United States Constitution. In the alternative, even if the tape did not violate the Confrontation Clause, Johnson

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[13] *Id.* (citing *United States v. Lane*, 474 U.S. 438 (1986)).

alleges it was hearsay and not properly admissible under any of our recognized hearsay exceptions. We agree.

The Commonwealth actually concedes the tape was inadmissible hearsay but argues the error was harmless. Whether the admission of the tape in the instant case was harmless does not impact its admission on retrial. We need not confront Johnson's Confrontation Clause argument because we agree that the Yellow Cab 911 tape is inadmissible hearsay and should not be admitted in the event Johnson is retried. The 911 call does not fall within any of our exceptions to the general prohibition on hearsay statements.

The Yellow Cab tape is an example of double hearsay. When faced with multiple layers of hearsay, there must be a hearsay exception applicable to each layer before the evidence can be considered admissible. While the driver's statements to Yellow Cab could perhaps be conceived as either a present-sense impression or excited utterance, the same cannot be said for Yellow Cab's statements to the 911 operator. It is important to remember that with regard to the statements to the 911 operator, Yellow Cab, *not* the driver, is the declarant.[14] At trial, the Commonwealth, for whatever reason, was unable to produce the Yellow Cab employee who made the 911 call. We are forced, as a result, to fit the 911 call within the exceptions pertaining to those instances in which a declarant is unavailable to testify at trial. Listed in KRE 804, those

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[14] There was no present-sense impression because Yellow Cab did not have personal knowledge of the situation—Yellow Cab did not witness anything to describe. And Yellow Cab's statements to the 911 operator cannot be considered an excited utterance because there was no startling experience for which the unknown Yellow Cab employee would have been excited. *See* KRE 803(1)-(2).

exceptions are plainly inapplicable to the current situation as the 911 call was not former testimony, a statement under belief of impending death, a statement against interest, or statements of personal or family history.

If Johnson is retried for these crimes, the 911 tape should not be admitted because the Commonwealth can show no hearsay exception is applicable. This is not likely to prejudice the Commonwealth's case because the same evidence elicited from the 911 call can be elicited from the driver.

2. Other Matters Raised by Johnson.

Johnson presents several other allegations we do not deal with today: the trial court erroneously conducted an ex parte meeting with the jury; the trial court erroneously foreclosed cross-examination of Heather Thompson, one of the Family Dollar robbery victims, regarding her pending indictment; and the trial court erroneously required counsel to cross-examine witnesses regarding their violation of the court's separation-of-witnesses order. We do not deal with them because, in our view, they are unlikely to recur in the event Johnson is retried.

We trust that on remand, the trial court will not discuss anything, even a general admonition, with the jury in secret while the case is still ongoing. At the time of trial, Heather Thompson's indictment was so recent that she alleged she had not received notice of it. By the time Johnson is retried, Thompson should have notice and Johnson is permitted to cross-examine her to the extent consistent with our rules of evidence and case law. Finally, we offer no opinion on the trial court's handling of an outside-the-courtroom violation of its

separation-of-witnesses order because we will not speculate as to the likelihood of witnesses violating such an order.

III. CONCLUSION.

Johnson's multiple robbery charges were improperly joined in a single trial. Because of this, the judgment must be reversed. We remand the matter to the trial court for proceedings not inconsistent with this Opinion.

All sitting. All concur.

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