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Supreme Court of Kentucky

2015-SC-000501-MR

DEIONTA HAYES

APPELLANT

V. ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 12-CR-00628-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Fayette County jury convicted Deionta Hayes of one count of murder, two counts of second-degree assault, and theft of a firearm. He argues on appeal that the trial court erred by: (1) limiting testimony from Hayes's mother; (2) denying his motion for a mistrial; (3) instructing the jury regarding the initial aggressor doctrine on the assault charges; (4) not permitting counsel to use a diagram while questioning an expert witness; and (5) not sending a report prepared by a penalty phase witness to the jury. Having reviewed the arguments of the parties, we affirm.

I. BACKGROUND.

On March 17, 2012, several friends/acquaintances – Laroz Mitchell (Laroz), James Mitchell, Dominique Godfrey, Chaz Black, DeAngelo Yarborough, and Garfield Starnes – gathered at an apartment being rented by Amber Toomer. Throughout the night they “hung out” and smoked marijuana, and at

least two of them, Laroz and Godfrey, shot dice. They all spent the night and, at approximately 9:00 a.m., Koree Smith arrived at the apartment. At approximately 10:00 a.m. several of the men went to a nearby gas station/convenience store to buy food and drinks. When they returned, Godfrey and Laroz again began shooting dice. At some point after that, Godfrey went outside and returned with his cousin, Hayes, who joined the dice game. The witnesses' versions of what happened next differed but there is no dispute that Hayes pulled out a gun and shot Smith, Laroz, and Black, wounding Smith and Laroz, and killing Black. Hayes and Godfrey fled.

After interviewing the witnesses, the police arrested Hayes and charged him with assaulting Smith and Laroz, with killing Black, and with taking a handgun that Smith had with him. Several weeks later, the police arrested Godfrey and charged him with being complicit in the murder, assaults, and theft. The court tried Hayes and Godfrey together.¹ We set forth additional background as necessary below.

II. STANDARD OF REVIEW.

The issues raised by Hayes require us to apply different standards of review. Thus, we set forth the appropriate standard as we analyze each issue.

III. ANALYSIS.

A. Limitation of testimony from Hayes's mother.

Hayes did not deny shooting Smith, Laroz, or Black, rather he argued that he was acting in self-defense. In support of that defense, Hayes called his

¹ We note that the jury found Godfrey not guilty of all charges.

mother, Sheryl Burnett, who testified that someone had shot at her house twelve times. The Commonwealth's attorney objected, arguing that such testimony was not relevant. Hayes argued that the testimony was relevant to show his state of mind and why he believed it was necessary to carry a gun when out in public. The court sustained the objection, finding that the testimony was not relevant.

Burnett then testified by avowal that Hayes was present during three of the shootings and that two of the shootings took place after Hayes had been arrested for Black's murder. Burnett stated she notified the police after each shooting, but there had been no arrests. We note that, with the exception of the two post-arrest shootings, Burnett did not state specifically when the other shootings occurred. Hayes now argues that the evidence was necessary to prove his state of mind when he shot Smith, Laroz, and Black. The Commonwealth argues Hayes has changed his argument on appeal and that the issue is not properly preserved.

We agree with the Commonwealth that this issue is not properly preserved. An appellant cannot make one argument to the trial court and a different argument to the appellate court. *Carrier v. Commonwealth*, 142 S.W.3d 670, 677 (Ky. 2004). Hayes argued to the trial court that the evidence was necessary to show why he carried a gun, not why he shot Smith, Laroz, and Black. Therefore, we review this issue for palpable error. Kentucky Rule of Criminal Procedure (RCr) 10.26. "When we engage in palpable error review, our focus is on what happened and whether the defect is so manifest,

fundamental and unambiguous that it threatens the integrity of the judicial process.” *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006)).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Kentucky Rule of Evidence (KRE) 401. Hayes argues that his mother’s testimony was necessary to establish that he acted in self-defense. Kentucky Revised Statute (KRS) 503.050(1) provides that: “The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.” KRS 503.050(2) provides that a defendant is justified in using deadly physical force when he “believes that such force is necessary to protect himself against death [or] serious physical injury” Therefore, to be relevant, evidence of shots fired into Hayes’s house had to have some connection to his alleged belief that physical force was necessary to defend himself against imminent threats posed by Smith, Laroz, and Black. There was no evidence that Smith, Laroz, Black, or anyone in the apartment in March 2012 was associated with the house shootings. Furthermore, there was no evidence that Hayes was in fear because of the house shootings or that his actions in March 2012 were motivated by those shootings. Because there was no connection between the house shootings and the events of March 2012,

evidence of the house shootings was irrelevant and the trial court properly excluded it. Thus, there was no error, palpable or otherwise.

B. Mistrial.

As noted above, Hayes and Godfrey were tried together. In a statement to the police, Godfrey, who was at first uncooperative, eventually identified Hayes as the shooter. Because that part of Godfrey's statement inculpated Hayes, he moved to exclude it pursuant to *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, . . . the United States Supreme Court held that a confession by a defendant which inculpates a non-confessing codefendant is inadmissible in a joint trial unless the confessing defendant elects to testify and is thus available for cross-examination as to the confession.

Murphy v. Commonwealth, 50 S.W.3d 173, 183 (Ky. 2001).

Godfrey objected, noting that the Commonwealth's case against him depended to a significant degree on presenting him as an uncooperative witness. According to Godfrey, he needed evidence that he eventually identified Hayes in order to rebut any inference of guilt the jury might draw from his initial failure to cooperate. The court, noting *Bruton*, excluded any statements by Godfrey that inculpated Hayes.

Hayes's counsel made the first defense opening statement and admitted that there was no dispute that Hayes had shot Smith, Laroz, and Black. According to Hayes's counsel, the only dispute was whether those three posed direct threats to Hayes sufficient to justify the shootings. During his opening statement, Godfrey's counsel stated Godfrey had initially been uncooperative

with the police, but Godfrey eventually cooperated and ultimately gave the police Hayes's name. Hayes immediately objected. During a bench conference, Hayes argued that this statement by Godfrey's counsel violated the court's order excluding statements by Godfrey that inculpated Hayes. The court noted that Godfrey's counsel had already advised the jury that Godfrey eventually cooperated and stated that was appropriate. However, the mention of Godfrey's inculcating statement was not; therefore, the court sustained the objection. The court then noted that the parties could revisit the issue, if necessary, when Godfrey's statement to police was admitted. Hayes did not ask for an admonition or a mistrial at that point. Furthermore, because the Commonwealth redacted Godfrey's identification of Hayes from Godfrey's statement, Hayes did not object when that statement was played for the jury.

At the close of proof, Hayes moved for a mistrial. In support of his motion, Hayes returned to the opening statement by Godfrey's counsel. Hayes argued that, because Godfrey had not testified, he was deprived of his constitutional right to confront Godfrey regarding his identification of Hayes. The court denied Hayes's motion, finding that, in light of the overwhelming evidence that Hayes shot Smith, Laroz, and Black, Godfrey's opening statement was not unduly prejudicial to Hayes.

Hayes argues on appeal this error was of constitutional magnitude and must be reversed. The Commonwealth argues that any error could have been cured by an admonition and, absent a request for an admonition, there was no error. We agree that counsel for Godfrey should not have mentioned Godfrey's

inculpatory statement unless Godfrey intended to testify. However, that error was harmless, and the trial court correctly denied Hayes's motion for a mistrial.

It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion. Moreover, a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings

Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004). Any such defect must be one that could not be removed otherwise and of such magnitude that it deprived the defendant of a fair trial. *Id.* However, an error of constitutional magnitude will be reversed unless it is deemed to be "harmless beyond a reasonable doubt." *Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998). An error is not harmless beyond a reasonable doubt if it "played a prominent enough role in the Commonwealth's case to raise a reasonable possibility that it contributed to the conviction." *Staples v. Commonwealth*, 454 S.W.3d 803, 827 (Ky. 2014).

In support of his argument that this error is harmful, Hayes states:

No one present in the apartment at the time of the shooting testified that they were friends with [Hayes] or knew him well. Some people recognized him or had seen him around. Others had never met him. This testimony means the jury likely concluded that these people did not identify . . . Hayes as the shooter to the police. The comment by Godfrey's attorney in opening statement provided the missing information for the jury – that Godfrey gave [Hayes's] name to [the police]. Reversal is required.

There are at least three problems with Hayes's argument. First, what Godfrey's counsel said in opening statement was not testimony. *See Tackett v.*

Commonwealth, 445 S.W.3d 20, 30 (Ky. 2014). In fact, there was no testimony that Godfrey identified Hayes because any reference to that identification was redacted from Godfrey's statement. Second, several of those who were present in that apartment, including Smith and Laroz, eventually identified Hayes as the shooter. Finally, and perhaps most importantly, if anyone "provided missing information" to the jury, it was Hayes's counsel, who admitted at the very beginning of his opening statement that Hayes shot Smith, Laroz, and Black. In the face of that admission, we cannot conceive how Godfrey's identification of Hayes as the shooter could have played any role in Hayes's conviction, let alone a prominent role. Therefore, we discern no error in the court's denial of Hayes's motion for a mistrial.

C. Jury instructions.

The apartment had a front door and a sliding-glass back door. The witnesses generally agreed that, a short time before Hayes began shooting, Smith picked up a handgun that was sitting in front of him on a coffee table, said, "Fuck this," and put the gun in his waistband. The witnesses also generally agreed Hayes started toward the front door, stopped, and moved hurriedly toward Smith. When he got to Smith, Hayes put his arm on Smith's chest, told him not to move, and then shot Smith in the shoulder. After that shot was fired, Laroz ran toward the sliding-glass door and, when he was in the doorway, he turned back toward Hayes. Hayes then shot Laroz in the right thigh. Hayes then shot Black, who was either getting up from a chair, standing, or charging at Hayes. Hayes argued to the jury that Smith's

statement was provocative, and he shot Smith in self-defense to keep Smith from getting to the gun in his waistband. According to Hayes, he then shot Laroz and Black, who were charging at him, in self-defense.

Based on the evidence, the trial court instructed the jury on self-defense as to the murder and assault charges. The court included an instruction regarding the “initial aggressor doctrine” for all three of those charges. Hayes objected to inclusion of the initial aggressor doctrine instruction in the assault instructions, and he argues on appeal that inclusion of the initial aggressor doctrine instruction was not supported by the evidence.

Self-defense “is a complete defense to the infliction of bodily or deadly injury.” *Barker v. Commonwealth*, 477 S.W.3d 583, 587 (Ky. 2015). However, KRS 503.060(3) provides that the use of physical force, which might otherwise be justifiable in defense of self, is not justifiable if:

The defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:

(a) His initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or

(b) He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.

Hayes does not dispute that there was evidence that he was the initial aggressor toward Smith. However, he argues that there is no evidence that he was the initial aggressor toward Laroz or Black. We disagree.

In determining whether a limitation to a self-defense instruction is proper, the trial court must consider the circumstance surrounding the incident as a whole. *Stepp v. Commonwealth*, 608 S.W.2d 371, 374 (Ky. 1980). Here, nine adults were in a 12' x 15' room that contained a couch, a love seat, a coffee table, an end table, a kitchen table and chairs, and a television. Hayes went up to one of the two people sitting on the love seat and shot him in the chest. Within less than five seconds, Hayes shot Laroz and Black, who were in different parts of the room. No dispute exists that sufficient evidence supported a finding that Hayes was the initial aggressor toward Smith. Furthermore, based on the circumstances as a whole, Hayes's act of aggression, although arguably only aimed directly at Smith, was an act of aggression against all of those in the apartment.

The purpose of the initial aggressor doctrine, like the "provocation doctrine", is to prevent a defendant from instigating a course of conduct then claiming he was acting in self-defense when that conduct unfolds. Giving Hayes the benefit of his argument that Laroz and Black were coming toward him, by shooting Smith, Hayes started that course of conduct. Thus, the trial court correctly found that, if the jury believed that Hayes was the initial aggressor, he was not entitled to the protection provided by self-defense as to any of his victims.

D. Use of diagram by expert witness.

Dr. Victoria Graham, the Commonwealth's medical examiner, testified that the bullet that killed Black entered the left side of his chest and travelled

from left to right in a downward path. In its path, the bullet damaged two of the chambers and two of the valves in Black's heart, causing nearly instantaneous death.

Hayes called Dr. George Nichols to testify regarding the autopsy results in order to establish that Black was charging toward Hayes when Hayes shot him. Dr. Nichols agreed with Dr. Graham's statements regarding the path of the bullet, and he testified that, after being shot, Black would have been able to take only one or two steps before he lost consciousness. Dr. Nichols also testified that, due to the downward angle of the bullet's path, it was not likely that Black and Hayes were standing and facing each other when the gun was fired. However, because the bullet had remained in Black's body, Dr. Nichols could not give an opinion regarding where Black and Hayes were in relationship to each other when the bullet was fired. He could only state that the bullet traveled at a downward angle, which meant the gun had to be pointed at a downward angle or that Black was in a bent-forward position when struck by the bullet. Dr. Nichols agreed with Hayes that, if Black was in a bent-forward position charging at Hayes, the bullet would have travelled at a downward angle. He also agreed with the Commonwealth that the bullet would have travelled at a downward angle if Black had been seated and bent forward when shot.

While examining Dr. Nichols, Hayes sought to use a diagram of the apartment. The Commonwealth objected, and the court sustained the objection. On appeal, Hayes argues that no specific rule prevented the use of

the diagram and the trial court's ruling prevented Dr. Nichols from "present[ing] his expert opinion in the necessary and proper context of events of the apartment. Rather, he was forced to speak in a dry hypothetical." The Commonwealth argues that Dr. Nichols specifically testified that he could not tell where Black and Hayes were relative to each other; therefore, the court did not abuse its discretion by precluding use of the diagram. We agree with the Commonwealth.

A witness is permitted to refer to "appropriate visual aids," *Stringer v. Commonwealth*, 956 S.W.2d 883, 887 (Ky. 1997), and the diagram was an indisputably accurate representation of the apartment. However, as Hayes noted throughout the trial, the witnesses did not agree where Black was in the apartment when the shooting started. That, coupled with Dr. Nichols's statement that he could not tell where Black and Hayes were relative to each other when the fatal shot was fired, supports the court's ruling that Hayes could not use the diagram. Furthermore, we note that Hayes referred to the diagram during his closing argument while discussing Dr. Nichols's testimony. Therefore, while use of the diagram may have made Dr. Nichols's testimony less "dry," Hayes was not prejudiced by the court's ruling.

E. Exclusion of grant proposal from jury room.

During the penalty phase, Hayes called Kathleen O'Neil, an urban planner, to testify regarding the Bluegrass-Aspendale public housing complex, which is where Hayes lived as a child. O'Neil testified that the housing complex was designed and built after World War II as a "separate community." Since

then, urban planners have learned that such designs lead to feelings of isolation and lack of community and result in high crime rates. As part of the grant application, O'Neil gathered crime statistics for the complex, which indicated that violent crime in Bluegrass-Aspendale was eight times greater than in the rest of Lexington. As a result of the grant, Bluegrass-Aspendale was razed and replaced with a more open, mixed housing development.

Following O'Neil's testimony, Hayes sought to introduce the grant application. The Commonwealth objected, arguing that the application contained photographs, site development plans, and other attachments that were beyond O'Neil's expertise. The trial court likened the grant application to an expert's report and stated that it would be admitted as a "court exhibit" but would not be given to the jury during deliberations.

Hayes argues that the grant proposal should have been given to the jury because it was a "non-testimonial" exhibit. The Commonwealth argues that the issue was not properly preserved and that the trial court did not abuse its discretion by excluding the proposal from the jury. We agree with the Commonwealth that the trial court did not abuse its discretion.

RCr 9.72 provides that, "[u]pon retiring for deliberation the jury may take all papers and other things received as evidence in the case." Thus, whether to permit evidence to go to the jury room is discretionary. *See McAtee v. Commonwealth*, 413 S.W.3d 608, 620 (Ky. 2013). However, the Court has carved out certain exceptions and "in practice, some testimonial exhibits such as expert opinion letters or summaries, depositions, recorded witness

statements, and the like may be marked and admitted for preservation purposes but not given to the jury because doing so would be akin to sending a witness back to the jury room.” *Id.*

We agree with the trial court that the grant proposal was akin to an expert’s report. Although not qualified as an expert by way of a *Daubert*² hearing, O’Neil provided expert opinions about the causes of high crime rates in communities like Bluegrass-Aspendale and the reasons why community members have a reluctance to call and cooperate with the police. Permitting the jury to take the grant proposal, which O’Neil testified was more than one hundred pages in length, would have put undue emphasis on the report. Furthermore, the proposal contained information that was not germane to this case, including plans for what would be built in place of Bluegrass-Aspendale, which could have led to confusion among the jurors. Finally, we note that the jury recommended a total sentence of thirty-five years’ imprisonment, which is less than the maximum life sentence the Commonwealth sought – a result that likely explains why Hayes has not specified exactly how he was harmed by the court’s ruling.

IV. CONCLUSION.

For the foregoing reasons, we affirm.

All sitting. All concur.

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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