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Supreme Court of Kentucky

2018-SC-000178-MR

FINAL

DATE 7/5/19 *Kevin Redman, DC*

JEVONTAYE LAMAR TAYLOR

APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 17-CR-00328-1

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRM IN PART AND REVERSE AND REMAND IN PART

Jevontaye Taylor appeals from a judgment of the Fayette Circuit Court convicting him of first-degree robbery and of being a second-degree persistent felony offender. Taylor received a sentence of twenty years and was ordered to pay \$300 in restitution.

Taylor contends that reversible error occurred when the lead detective made impermissible comments about his post-*Miranda* silence, and that the trial court erred when it ordered him to pay \$300 in restitution without conducting a hearing on the issue.

For the reasons explained below, we affirm in part and reverse and remand in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Commonwealth's primary witness in this case, Chaka Hausley, is Taylor and his co-defendant Quandarious' aunt. On the night of the robbery Chaka and the victim, Myrna Curtis, got into an argument at Myrna's apartment. After the argument, Myrna gave Chaka a ride home. Ten to fifteen minutes after she returned to her apartment, Myrna heard a knock on her front door. Myrna opened the door and saw Chaka who said she left her headphones in the apartment. Myrna left the screen door locked and went to retrieve the headphones from her bedroom.

When Myrna opened the screen door to give the headphones to Chaka, two men rushed the door, and one put a gun to Myrna's forehead. The gunman told Myrna to shut up and backed her up against a wall. While Myrna was being held at gunpoint, the second man began stealing Myrna's wallet with about \$60 dollars in it, her cell phone, and a small Bluetooth speaker.

The robbers then ran out of the apartment and left the scene. Chaka started to leave too, but Myrna followed her and asked why Chaka had someone rob her. Chaka replied, "what was I supposed to do, protect you over somebody with a gun?" At that point Myrna went to a nearby friend's house and called the police. Chaka left the scene before the police arrived.

The lead detective in this case, Detective Merker, learned from the responding officer's report that Chaka was present at the time of the robbery and facilitated getting Myrna to open the door. Because of this, Det. Merker met with Chaka at her workplace about two weeks after the robbery. Chaka

told Det. Merker that her nephews, Taylor and Quandarious, were the ones who robbed Myrna, but she did not know they planned to do so. She also told him they threatened to kill her if she went to the police. Based on this information Det. Merker obtained arrest warrants for the brothers. They were arrested about a week later at their home.

The day after they were arrested, Det. Merker went to the detention center to get a statement from them. Quandarious told Det. Merker he drove Chaka to Myrna's apartment, but he denied any involvement in the robbery. Taylor declined to speak with Det. Merker.

Taylor was ultimately convicted of first-degree robbery and of being a second-degree persistent felony offender. He was sentenced to twenty years in prison and ordered to pay \$300 in restitution to Myrna jointly and severally with Quandarious. This appeal followed.

Additional facts are discussed below as necessary.

II. TESTIMONY CONCERNING POST-MIRANDA SILENCE

Taylor asserts that his conviction should be reversed because his Fifth Amendment right to remain silent was violated when Det. Merker testified that Taylor declined to be interviewed by him after Taylor was arrested and read his *Miranda* rights. We disagree.

It is a well-known and often repeated canon of American law that a suspect has a right to remain silent after he or she is arrested.¹ A necessary

¹ U.S. Const. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966).

component of this right is protection from the prosecution using the fact that a defendant invoked said right against him or her at trial.² However,

not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. The usual situation where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool.³

The alleged Fifth Amendment violation at bar arose during Det. Merker's testimony regarding his investigation:

CW:⁴ Now, after [the defendants] had been arrested, what do you do to further your investigation?

DET:⁵ The next morning I went down to the Fayette County Detention Center where they were lodged and attempted to make contact with them, see if they would provide statements.

CW: Were you able to talk to Javontaye?

DET: I was not able, I attempted to talk to Javontaye—

² *Vincent v. Commonwealth*, 281 S.W.3d 785, 790 (Ky. 2009) (“evidence that a defendant exercised his right to remain silent should not be admitted at trial[.]”); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding that “the use for impeachment purposes of petitioners’ silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.”).

³ *Hunt v. Commonwealth*, 304 S.W.3d 15, 36 (Ky. 2009), as corrected (Jan. 6, 2010), as modified on denial of reh'g (Mar. 18, 2010) (citing *Wallen v. Commonwealth*, 657 S.W.2d 232, 233 (Ky. 1983)(emphasis added)).

⁴ Commonwealth.

⁵ Det. Merker.

At this point defense counsel objected. During the side bench the defense requested a mistrial, asserting that the testimony was an impermissible comment on Taylor's right to remain silent. The trial court declined to grant the motion for a mistrial and allowed the testimony. When the examination resumed the entirety of the testimony on the subject was:

CW: Det. Merker were you able to talk to Javontaye?

DET: I was not able to. He did not wish to speak to me.

Based on these circumstances, *Hunt v. Commonwealth, supra*, clearly applies. Hunt was convicted in relation to the murder of his estranged wife.⁶ Like Taylor, Hunt argued that his Fifth Amendment right to remain silent was violated because an investigating officer testified that he tried to interrogate Hunt after he was arrested, and Hunt declined. *Id.* at 35. No reversible error was found because the investigating officer's comment on Hunt's choice to remain silent "was not repeated, emphasized, or used as a prosecutorial tool." *Id.* at 37.

Here, it cannot be said that Taylor's decision not to speak to Det. Merker post-arrest was repeated, emphasized, or used as a prosecutorial tool. It was not used to impeach Taylor, it was not discussed in the Commonwealth's opening statement or closing argument, and it was not used as a point of emphasis during the examination of the Commonwealth's other witnesses. Det. Merkel merely stated that he tried to interview Taylor as part of his

⁶ *Hunt*, 304 S.W.3d at 24-27.

investigation, and Taylor declined. We therefore have no reason to believe that Taylor was prejudiced by the testimony in any way.

While allowing the comment was certainly an error, “*Doyle*-type errors are subject to harmless error analysis pursuant to the constitutional harmless error standard.”⁷ Under this standard, we ask whether, absent Det. Merker’s testimony about Taylor’s post-Miranda silence, it is clear beyond a reasonable doubt the jury would have found Taylor guilty.⁸ Based on the foregoing, we believe it is and consequently affirm Taylor’s conviction.

III. RESTITUTION

Taylor also argues that the trial court erred by ordering him to pay \$300 in restitution to Myrna. We agree.

Taylor concedes this issue was not preserved, and has requested palpable error review in accordance with RCr⁹ 10.26:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

(emphasis added).

⁷ *Spears v. Commonwealth*, 448 S.W.3d 781, 787 (Ky. 2014).

⁸ *See Spears*, 448 S.W.3d at 787; *Nunn v. Commonwealth*, 461 S.W.3d 741, 751 (Ky. 2015) (“when reviewing for manifest injustice, the court must discern whether there is a substantial possibility that, but for the error, the verdict would have been different or resulted in a fundamentally unfair trial.”).

⁹ Kentucky Rules of Criminal Procedure.

At the end of Taylor's final sentencing hearing the following exchange took place between the trial court and the Commonwealth:

CW: Your honor we have also submitted the same restitution form for him as his brother, \$300 joint and several.

Court: Okay, thank you.

Thereafter the trial court ordered Taylor to pay \$300 in restitution to Myrna jointly and severally with Quandarious. Taylor remained silent during and after this exchange, and the Commonwealth argues this amounted to acquiescence. Taylor on the other hand argues that it was palpable error and violated the procedure for establishing restitution set forth in *Jones v. Commonwealth*.¹⁰

In *Jones*, we noted that “[i]n directing the courts to include restitution as part of the sentence in a criminal case, the legislature did not detail the sort of hearing it contemplated for making that determination.”¹¹ Therefore, the goal of *Jones* was to set forth the due process protections that must be provided in a restitution hearing, holding:

When the issue of restitution under KRS¹² 532.032 has not been resolved by an agreement between the Commonwealth and the defendant, constitutional due process requires an adversarial hearing that includes the following protections:

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of

¹⁰ 382 S.W.3d 22 (Ky. 2011).

¹¹ *Jones*, 382 S.W.3d at 31.

¹² Kentucky Revised Statutes.

restitution claimed and of the nature of the expenses for which restitution is claimed; and

- a hearing before a disinterested impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and
- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and
- the burden shall be on the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

Id. at 32.

In this case, no indication appears in the record that the Commonwealth and defense had a prior agreement about the amount of restitution to be paid, and the Commonwealth has not argued otherwise. Further, while restitution may be established by evidence presented at trial, *Id.* at 31, the only evidence presented at trial regarding the proper amount of restitution was Myrna's testimony that she had about \$60 in her wallet. There was no evidence about the monetary value of her cell phone or Bluetooth speaker. And, the exchange between the trial court and Commonwealth, *supra*, could in no way be construed as the kind of adversarial hearing envisioned by *Jones*. Therefore, Taylor's due process rights were violated, and we must reverse the trial court's

order of restitution and remand for a determination of restitution in accordance with this opinion.

IV. CONCLUSION

For the foregoing reasons, we affirm Jevontaye Taylor's conviction and reverse and remand for a hearing to determine restitution.

All sitting. All concur.

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