COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judges Annunziata and Humphreys
Argued at Alexandria, Virginia

HENRY G. PERRY, S/K/A
HENRY GARFIELD PERRY BEY

v. Record No. 2409-00-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE ROSEMARIE ANNUNZIATA
JANUARY 15, 2002

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
William T. Newman, Jr., Judge

Matthew T. Foley for appellant.

Paul C. Galanides, Assistant Attorney General (Randolph A. Beales, Acting Attorney General; Leah A. Darron, Assistant Attorney General, on brief), for appellee.

Henry Garfield Perry Bey appeals his conviction of possession of a firearm by a convicted felon. He alleges that the trial court erroneously: (1) refused to exclude evidence not properly disclosed to him; and (2) refused to grant a mistrial where the jury heard evidence of similar crimes without a cautionary instruction. For the reasons that follow, we affirm his conviction.

A. Exclusion of Evidence in Violation of Discovery Order

Bey contends that the trial court erred by allowing the Commonwealth to introduce into evidence an inculpatory statement

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

that was disclosed the morning of trial. We hold that Bey waived this objection.

"[W]here an accused unsuccessfully objects to evidence which he considers improper and then on his own behalf introduces evidence of the same character, he thereby waives his objection, and we cannot reverse for alleged error." Hubbard v. Commonwealth, 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992); see also Bynum v. Commonwealth, 28 Va. App. 451, 459, 506 S.E.2d 30, 34 (1998). The record, viewed in the light most favorable to the Commonwealth, see Winckler v. Commonwealth, 32 Va. App. 836, 844, 531 S.E.2d 45, 49 (2000), makes evident that Bey, after objecting to the admission of his statement that he committed the crime with a .32 caliber gun, asked Detective Carrig on cross-examination, "[W]hat caliber gun is that? Carrig responded, "[I]t is a silver . . . .32 caliber revolver."[1] Later, Bey again asked, "What caliber gun is it?" and Carrig responded, "[I]t appears to me to be, from the picture, a .32." Because Bey elicited the same evidence that he claims should have been excluded, we will not consider his objection on appeal.

B. Motion for Mistrial

Bey appeals the trial court's denial of his motion for a mistrial on the ground that Detective Carrig's testimony on redirect examination referring to Bey as "involved in a series of

[1] As the parties are familiar with the record, we state only those facts necessary to an understanding of this opinion.

robberies in Northern Virginia," prejudiced his defense. The Commonwealth contends that Bey's motion was untimely and that Bey invited the alleged error. We agree.

Although Bey promptly objected to this testimony, he did not move for a mistrial until the prosecutor asked several more questions. Hence, Bey failed to make "the motion [for a mistrial] when the objectionable words were spoken." Yeatts v. Commonwealth, 242 Va. 121, 137, 410 S.E.2d 254, 264 (1991) (internal quotations and citations omitted); accord Bennett v. Commonwealth, 29 Va. App. 261, 281, 511 S.E.2d 439, 448-49 (1999). As a result, his motion was untimely, and the trial court's denial was not error.

Moreover, the court's denial was proper because Bey invited the alleged error. See Luck v. Commonwealth, 30 Va. App. 36, 46, 515 S.E.2d 325, 329 (1999) (defendant may not invite error and take advantage of that error). The record shows that before Carrig referred to Bey as "involved in a series of robberies in Northern Virginia," Bey, during his cross-examination of Detective Carrig, elicited testimony regarding a robbery he committed in Fairfax County. Bey thus "opened the door" to the trial court's admission of evidence of other crimes and failed to show that Detective Carrig's subsequent statement on redirect examination required the trial court to grant a mistrial. See Clark v. Commonwealth, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979) ("The defendant, having agreed upon the action taken by the

trial court, should not be allowed to assume an inconsistent position."); Commonwealth v. Beavers, 150 Va. 33, 142 S.E. 402 (1928) (noting that defendant may not assume inconsistent positions at the trial or appellate level); Luck, 30 Va. App. at 46, 515 S.E.2d at 329 (holding that a criminal defendant may not "approbate and reprobate –- . . . invite error . . . and then to take advantage of the situation created by his own wrong" (internal quotation omitted)). We thus conclude that the court did not abuse its discretion in denying Bey's motions for a mistrial. See Bunch v. Commonwealth, 225 Va. 423, 438, 304 S.E.2d 271, 279-80 (1983) (holding that where a defendant opens the door to a subject by soliciting testimony, the scope of examination on that subject is within the trial court's sound discretion).

Finally, Bey complains on appeal that the judge did not instruct the jury to disregard this portion of the witness' testimony. Because Bey did not request such an instruction, he cannot now raise the issue. See Clanton v. Commonwealth, 223 Va. 41, 54, 286 S.E.2d 172, 179 (1982) (holding that it is defense counsel's duty to move for a cautionary instruction where such an instruction is deemed necessary).

For the reasons stated, we affirm Bey's conviction.

Affirmed.