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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002188-MR

MICHAEL HARLEY APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 04-CR-01291

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Michael Anthony Harley (hereinafter "Harley") appeals from the final judgment and sentence of the Fayette Circuit Court entered on September 22, 2005, sentencing him to 14 years' imprisonment following a jury verdict convicting him of robbery in the first degree[1] and possession of a controlled substance in the first degree.[2] We affirm.

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1 Kentucky Revised Statutes (KRS) 515.020.

2 KRS 218A.1415.

On October 25, 2004, Harley was indicted by a Fayette County grand jury for robbery in the first degree and possession of a controlled substance in the first degree. At a jury trial held on August 17, 2005, the Commonwealth presented testimony from Lexington Police Officer Thomas Johnston (hereinafter "Officer Johnston"); Justin Jent (hereinafter "Jent"), assistant manager of the BP convenience store on Winchester Road in Lexington, Fayette County, Kentucky; and Cotasha King (hereinafter "King"), whose brother was Harley's friend. Testimony revealed that at 11:48 a.m. on September 4, 2004, Officer Johnston received a dispatch regarding an armed robbery that had occurred at the BP convenience store on Winchester Road. Jent had reported that a black male wearing dark clothing approached him on a bicycle, pointed a gun at him, and took a bank bag containing approximately $8,000.00 which Jent was taking to deposit at a bank. Jent had told the clerk inside the convenience store to call the police while he got into his car to follow the robber. When the robber turned and saw Jent following him, he ducked into some bushes and disappeared.

Officer Johnston was in the vicinity of the robbery when he was approached by a black male inquiring whether the officer was looking for someone wearing dark clothes and carrying a gun. When Officer Johnston told the unidentified man he was looking for such a person, the man pointed to King's apartment on Withrow Way and stated a person fitting that description had run inside the apartment. Another officer on scene approached the apartment and knocked on King's door. Upon answering the knock, King let the officers inside the apartment. When asked if anyone else was in

the residence, King told the officers Harley had run in through the front door and was upstairs in her daughter's bedroom. The officers then removed King and her children from the residence. Officer Johnston twice yelled for Harley to come downstairs. When Harley finally complied with the request, he came down the stairs wearing boxer shorts and a t-shirt. He stated he had been sleeping, but Officer Johnston noted that Harley was sweating profusely. Harley was handcuffed and read his *Miranda*[3] rights.

Officer Johnston then proceeded up the stairs to the room Harley had previously occupied. He located dark colored clothing, two .22-caliber handguns, and $8,435.00 in cash. A rock of cocaine was found in a pocket of one piece of the clothing. Jent was brought to the apartment and identified Harley as the person who had robbed him. When questioned as to whether anyone else was involved in the robbery, Harley refused to give the police any names.

At the close of the Commonwealth's case, Harley moved for a directed verdict of acquittal on all charges. He argued the Commonwealth had failed to prove the essential elements of all the charges against him. The trial court denied the motion.

Harley took the stand and testified he had committed the robbery because he was indebted to Demarco "Hump" Stubblefield (hereinafter "Stubblefield") for drugs. Harley's sister, Jenea, testified Stubblefield had forced her to call Harley on the morning of September 4, 2004, to arrange a meeting between the two men. Harley testified when the two men met that morning, they drank alcohol and smoked crack cocaine, and

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[3] *Miranda v. Arizona*, 396 U.S. 868, 90 S.Ct. 140, 24 L.Ed.2d 122 (1969).

Stubblefield had given him the rock of cocaine to sell. Harley claimed Stubblefield told him to commit the robbery or Stubblefield would kill him or harm his family. He stated Stubblefield initiated a conversation with Jent as Jent exited the store and then Harley approached Jent and robbed him. At the close of the case for the defense, Harley renewed his motion for a directed verdict of acquittal on the robbery charge which was again denied.

The trial court presented the jury with instructions for the defenses of duress[4] and choice of evils[5] based on defense witness testimony. However, the jury found Harley guilty of both robbery in the first degree and possession of a controlled substance in the first degree. The jury fixed his punishment at ten years in prison on the robbery charge and four years in prison on the possession of a controlled substance charge, with the terms to run consecutively to one another. On September 16, 2005, Harley was sentenced according to the jury's recommendation and final judgment was entered on September 22, 2005. This appeal followed.[6]

In his first argument to this Court, Harley claims the trial court erred when it denied his motion for a directed verdict of acquittal on the robbery charge. He contends this error caused substantial prejudice to him and violated his rights under the

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[4] KRS 501.090.

[5] KRS 503.030.

[6] The delay between the filing of the notice of appeal and the case being submitted to a panel of this Court for a decision occurred due to both parties' filing numerous motions for extensions of time during the briefing process.

Sixth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution. In *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), our Supreme Court restated the rule as applied to a motion for a directed verdict of acquittal as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

In our review of the denial of a directed verdict, we must determine "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . then the defendant is entitled to a directed verdict of acquittal" [citation omitted]. *Benham*, 816 S.W.2d at 187. Based on the conflicting testimony presented by both parties, we hold the trial court correctly denied the directed verdict motion on the robbery charge.

Harley admitted facts constituting the elements of the offense of robbery. He testified he was forced to commit the robbery in the face of a substantial risk that either he or his family would be harmed or killed by Stubblefield. He contends this evidence "overwhelmingly indicated that [he] was operating under duress or a choice of evils[,]" and therefore it was clearly unreasonable for the jury to find him guilty of the robbery. We disagree and hold to the contrary. Based on the conflicting testimony

presented, the trial court was correct in allowing the jury to determine Harley's innocence or guilt. The jury has the sole responsibility to weigh the evidence and judge the credibility of all witnesses. It is not bound to accept the testimony of any witness, including the accused, as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941). A jury may believe or disbelieve all or any part of a witness' testimony. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926). The trial court also provided the proper means for the jury to reach a decision by including instructions on the defenses of duress and choice of evils. As the fact-finder, the jury could have chosen to accept or reject Harley's testimony. Jurors chose to reject it in finding him guilty. Such a finding was not clearly unreasonable based upon the testimony presented. Accordingly, we find no error in the trial court's denial of the directed verdict, or in the jury's verdict of guilty on the robbery charge.

Harley's second argument relates to a question posed by a member of the jury which he claims was answered "without consulting counsels, without the defendant present, and not in open court." Since Harley claims there was no opportunity to preserve this alleged error, he urges our review of this issue under the palpable error standard of review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. "A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). For an error to be palpable it must have been "easily perceptible, plain, obvious and

readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1998) (citing Black's Law Dictionary (6th ed. 1995)). Moreover, "the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief." *Partin*, *supra* (citing *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986)).

The record on appeal contains a handwritten question from juror number 703. The question states: "Your honor, I do have a question regarding cocaine blood (or urine) level of defendant. Did somebody check it on 9/4/2004? If yes, was this level high?" A careful review of the record fails to reveal when during the trial this note was sent to the trial judge, although Harley states, without any citation to the record, that "the question arose during guilt phase deliberations." Further, there is no indication of whether, when, or how the trial court answered the question. Because the record is silent on this issue, we must assume that if any action was taken by the trial court, it was nonprejudicial. *See Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985) (holding that appellate courts must assume the omitted record supports the decision of the trial court). Thus, the alleged error does not rise to the level of palpable error.

Third, Harley argues "the Commonwealth's use of curative admissibility to enter evidence of a robbery committed by the defendant as a juvenile was improper and overtly prejudicial to the defendant." We disagree.

On redirect examination, counsel asked Harley if his use of cocaine made it easier or more difficult to commit the robbery. Harley replied that taking the cocaine

made it easier to rob Jent. Before recross-examination of Harley, the Commonwealth Attorney initiated a bench conference and explained to the trial judge that defense counsel had "opened the door" for her to question Harley regarding two prior robberies he had committed and to ask whether Harley was "high" when he committed those robberies. Defense counsel did not object, and instead told the Commonwealth Attorney to ask her questions. The Commonwealth Attorney then asked Harley "[l]ast time you committed a robbery were you high too?" Harley's response was simply "[d]unno." At that point, defense counsel asked for a bench conference where he argued that the effect of the question asked by the Commonwealth was more prejudicial than probative. Defense counsel did not ask for a mistrial, but was allowed to question Harley as to his age at the time of the previous robberies and to indicate that those proceedings were in juvenile court.

Opening the door, more formally referred to as curative admissibility, occurs when one party introduces false, misleading, or inadmissible evidence that opens the door to impeachment by the other party using equally inadmissible evidence to challenge the witness's credibility and to correct false or misleading evidence. *Purcell v. Commonwealth*, 149 S.W.3d 382 (Ky. 2004). In this case, it is irrelevant whether defense counsel opened the door for questioning regarding past crimes or criminal behavior because the Commonwealth gave prior notice of her intention to ask the question and defense counsel failed to object. Rather, defense counsel consented to the Commonwealth Attorney's line of questioning. There was no request for an admonition

to the jury, and although the trial court stated that it was overruling the motion for a mistrial, defense counsel never actually requested a mistrial. The trial court could not grant any relief that was not requested; thus, there is no error for us to review. *See Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998) (holding that appellate courts only review claims of error brought to trial court's attention).

Finally, Harley argues that the trial court erred by failing to excuse certain jurors for cause after those jurors had stated that they could not conceive of any circumstances which would justify a robbery. We disagree.

The defense objected to four of the prospective jurors based upon the answers they gave during *voir dire*. During a bench conference, Juror number 590 stated that if the trial court issued a jury instruction on alternate defenses to robbery, and after hearing all the evidence she was convinced the defendant was not guilty, she would follow the instructions and vote not guilty. Juror number 590 was not drawn when the venire was randomly narrowed to 31 persons.

Juror number 578 and Juror number 647 both stated they would vote not guilty based on the trial court's instructions on alternate defenses to robbery if the evidence presented supported such a finding. These two jurors were struck by peremptory strikes exercised by the defense.

Juror number 567 hesitated when asked whether he could vote not guilty based on the trial court's instructions on alternate defenses to robbery after hearing all the

evidence, but ultimately stated he would follow the trial court's instructions when given. Juror number 567 was also struck by peremptory strike of the defense.

In reviewing the decision to excuse prospective jurors for cause, we must defer to the trial court unless its decision is found to be an abuse of discretion. *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994). If the trial court abused its discretion in not excusing a juror for cause, such is reversible error even if the defendant ultimately used a peremptory challenge to remove the juror from the panel. *Id*. Along with giving due deference to the decision of the trial court, we must look at the totality of the evidence in determining whether the challenged jurors possessed a mental attitude of "appropriate indifference." *Id*. at 671. "The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Id*.

Although a juror who would otherwise be disqualified as biased cannot be rehabilitated upon further questioning by the Commonwealth, *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-18 (Ky. 1992), the record here does not show that any of the challenged jurors exhibited such a bias that they could not follow the requirements of the law and render a fair verdict. "A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination." *Mabe*, 884 S.W.2d at 671. The fact that the aforementioned jurors did not initially feel there was any circumstance that justified a robbery does not justify automatically excusing them for cause. A review of the entirety

of their responses confirms their ability to listen to the facts and consider all the evidence and jury instructions as a whole. Therefore, we cannot say that the trial court abused its discretion in failing to excuse any of these jurors for cause.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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