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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000762-MR

OLEG USHYAROV — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CR-001916

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Oleg Ushyarov appeals his conviction of second-degree burglary and wanton endangerment in the second degree in the Jefferson Circuit Court. Upon review, we affirm.

Ushyarov and the Commonwealth disagree about the events of May 7, 2008. Indisputably, however, DeJuan and Lynnette Pride returned home from work with their two children and noticed that the window of their apartment was

open. Pride told his wife and children to remain in the car while he investigated. He entered his apartment through the window and saw the burglars exiting with some of the family's belongings. Pride followed them to Ushyarov's car. As Pride leaned into Ushyarov's car, Ushyarov drove away, dragging Pride for a short distance. Police officers pulled over Ushyarov and found the Prides' belongings in the back seat. A juvenile, O.V., was in the front seat.

In the meantime, Pride went to the apartment of his juvenile neighbor, E.K., whom he knew to be friends with Ushyarov and O.V. Pride persuaded E.K. to turn over more of his stolen belongings. He then took E.K. outside to wait for the police. Before the police arrived, Pride struck E.K. on his head. The responding police officer, Officer Davis, accompanied E.K. to the hospital, where E.K. received staples for a head laceration. E.K. told Officer Davis that he, Ushyarov, and O.V. together had burglarized the Prides' apartment.

Ushyarov and O.V. were taken to the police station. O.V. gave a statement in which he declared that he, Ushyarov, and E.K. had all entered the Prides' apartment and taken property. Ushyarov, however, denied being in the apartment; he stated that he learned of the burglary while en route to pick up E.K.

E.K. and O.V. both testified at Ushyarov's trial and contradicted their previous statements. They both said that they had committed the burglary and that Ushyarov had simply driven the car. Pride testified that he had seen Ushyarov and O.V. in his apartment and that he followed them to Ushyarov's car. Ushyarov testified on his own behalf. He also contradicted his earlier statement and said that

he had been completely ignorant of the burglary. After listening to all of the testimony, the jury found Ushyarov guilty of second-degree burglary and wanton endangerment in the second degree. Afterward, Ushyarov pled guilty to being a persistent felony offender and was sentenced to ten-years' incarceration. This appeal follows.

Ushyarov's first argument is that the trial court should have provided the jury with an instruction concerning the voluntariness of E.K.'s and O.V.'s statements to the police on the night of the incident. He tendered an instruction advising the jury that they could not consider O.V.'s and E.K.'s statements unless they believed that the statements were voluntary. The trial court declined to offer this instruction to the jury, and Ushyarov now argues that its refusal was erroneous. We disagree.

Our standard in reviewing jury instructions by a trial court is an abuse of discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006) (citations omitted). Our Supreme Court has defined abuse of discretion as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Ushyarov bases his argument on *Bradley v. Commonwealth*, 439 S.W.2d 61 (Ky. 1969), which held in part that a trial court should admonish a jury as to the voluntariness of confessions. However, Kentucky Rule[s] of Civil Procedure (RCr) 9.78 – adopted in 1978, nine years after *Bradley* – has abolished that procedure. *See Hamilton v. Commonwealth*, 580 S.W.2d 208, 210 (Ky. 1979).

The pertinent provision of RCr 9.78 allows a defendant to move the court to suppress a confession that he has made to police. "The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge." *Id*.

Ushyarov never made a motion for suppression, and with valid reason: RCr 9.78 only applies to statements made by the *defendant*. Here, Ushyarov is disputing statements made by *witnesses*. Testimony was given during trial concerning the circumstances surrounding the statements. The jury had the opportunity to hear from both of the witnesses and to judge their credibility. It also listened to testimony from the officers who Ushyarov claims coerced O.V.'s and E.K.'s statements. It was entirely within the jury's province as finder of fact to determine who was telling the truth. *Commonwealth v. Swift*, 237 S.W.3d 193, 196 (Ky. 2007). Therefore, the trial court did not abuse its discretion when it declined to utilize Ushyarov's proposed instruction.

Ushyarov's second claim is that the trial court committed error by not providing the jury with an instruction regarding self-protection. He contends that he believed Pride was going to hurt him when Pride leaned into his car.

In this case, the trial court declined to give the jury a self-protection instruction because the charge was wanton endangerment, an unintentional crime. In the past, Kentucky law directed that self-protection was a defense available only for intentional crimes. However, that restriction has been explicitly lifted by our

Supreme Court in its decision of *Elliott v. Commonwealth*, 976 S.W.2d 416, 422 (Ky. 1998). Therefore, we must determine whether the court erred in denying Ushyarov a self-protection jury instruction.

The trial court has the duty to instruct the jury on the whole law of a criminal case, including "instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). However, in order for a trial court to be required to instruct on an alternate defense theory, the defense must have supported that theory with substantial evidence during the trial. *Meadows v. Commonwealth*, 178 S.W.3d 527, 534 (Ky. App. 2005). Additionally, a special instruction is not required if the submitted instruction "completely covers the defense of the accused." *Blevins v. Commonwealth*, 258 S.W.2d 501, 502-03 (Ky. 1953).

Here, Ushyarov relies on a provision of Kentucky Revised Statute[s] (KRS) 503.055,[1] Kentucky's "Castle Law," which provides that an occupant of a vehicle may reasonably assume that he is in great peril if another unlawfully enters the vehicle. Refining and distinguishing that law, however, is KRS 503.055(2)(c), which does not allow that presumption if the occupant of the car is engaged in unlawful activity. Even if Ushyarov had not been inside the Prides' apartment, as he contends, he was nevertheless engaged in unlawful activity at the point of the confrontation in the parking lot. Stolen goods were in the back seat of his car, and he was presumably prepared to drive away with the stolen property. Therefore, the

[1] We note that KRS 503.055 also allows homeowners to defend their homes.

presumption of peril did not apply to Ushyarov and cannot be invoked as a defense.

Furthermore, the jury instructions included a definition of *wanton*. According to the submitted definition, the jury had to determine if Ushyarov had acted "wantonly with respect to a result or to a circumstance when he [was] aware of and consciously disregard[ed] a substantial and unjustifiable risk that the result [would] occur or that the circumstance exist[ed]." If the jury found that he indeed had acted wantonly, they were to find Ushyarov guilty. If, however, they thought that Ushyarov acted according to a justifiable risk, they were to have found him not guilty. Therefore, Ushyarov's theory of self-protection was adequately covered by the jury instructions. The trial court did not err when it declined to submit the self-protection instruction to the jury.

We conclude that the trial court did not abuse its discretion as to the jury instructions regarding witnesses' testimony and a self-protection theory. Therefore, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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