

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000508-MR

CHARLES JACKSON, II

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 09-CR-00402

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Charles Jackson, II (hereinafter Jackson) appeals directly from the Kenton Circuit Court's final judgment of conviction for second-degree burglary for which he received a sentence of five years' imprisonment. After careful review, we reverse and remand.

This case arises out of an event that occurred on April 24, 2009. On that day, Jackson was at his sister's home and had been outside washing a truck in her driveway. Jackson was twenty-three years old and had suffered from epilepsy since he was at least ten years old. On the day in question, he felt his head "clicking," which was a precursor to a seizure, so he went inside to rest and take some medicine. After resting, Jackson went back outside to mow his sister's lawn. The last thing Jackson remembered was cutting the grass, and he believes he then had a seizure.

When Jackson "came to," he saw a man in a blue shirt (later identified as Jason Chick), but he could not make out what the man was saying. He thought Mr. Chick was calling an ambulance, and he told Mr. Chick not to bother, he had suffered a seizure and would be okay in a few minutes. However, Mr. Chick was in fact calling the police.

Mr. Chick and his fiancé, Kelley Murphy, lived two doors down from Jackson's sister, Amanda Jackson. On the day in question, Mr. Chick and Ms. Murphy decided to take their dog and their neighbor's dogs for a walk. As they left the house, they left a window open but allegedly locked the front door. Mr. Chick and Ms. Murphy were gone for approximately ten to fifteen minutes. Upon their return, they observed Jackson walking out their front door. As neither Mr. Chick nor Ms. Murphy knew Jackson or had given him permission to enter their residence, Mr. Chick borrowed a neighbor's phone to call the police. Ms. Murphy asked Jackson if she could help him with something. In response, Jackson asked

her if he could help her with something and acted as if he was in his own house.

Ms. Murphy replied that this was her house and inquired as to what Jackson was doing there. Ms. Murphy later testified that Jackson's demeanor changed and he had a "melt down," becoming distraught, and saying he had suffered a seizure and needed his sister.

The police then arrived, and Jackson was placed under arrest and taken to the cruiser. The police walked with Ms. Murphy through her house. Murphy noticed that her bracelet and necklace were not on the nightstand where she testified she "always left them." The necklace and the bracelet were from Tiffany's, and Ms. Murphy testified that she put them on *every* morning and took them off *every* night and put them on her nightstand. However, for some reason on this particular day, Ms. Murphy was not wearing her jewelry and had allegedly left them on her nightstand. While walking through her home with the police, Ms. Murphy found the jewelry on the coffee table in the front room of the house. When questioned later at trial, Ms. Murphy could not remember for certain what she had done with the jewelry on that date, but testified that it was her habit to put her jewelry on her nightstand every evening. She was certain, however, that she did not put the jewelry on the coffee table that day.

The police also inspected the window that Mr. Chick had left open and determined that the screen was up on the window. They processed the window and windowpane for finger prints but were not able to obtain any finger prints.

Numerous photographs of the window and the scene were taken. One photograph

of the window shows a drill bit package and a screw driver (both belonging to the home owners) on the windowsill, undisturbed. Another photograph shows an undisturbed purse in the kitchen. The arresting officer did not notice any injuries on Jackson's person when he was placed into the patrol car during the arrest.

Jackson was indicted by the Kenton County Grand Jury and charged with second-degree burglary. At trial, in addition to the evidence presented above, Amanda Jackson testified on her brother's behalf. Ms. Jackson testified that she had witnessed her brother have many seizures. After a seizure, Jackson would be confused, scared, and unaware of his surroundings. She testified that he is off balance and does not recognize people unless they are immediate family members. Jackson also suffers memory loss after a seizure.

Ms. Jackson testified that on the day in question, she was upstairs in her bedroom when she heard a ruckus outside. She went outside and saw her brother two houses down, kneeling on the ground. Ms. Jackson could immediately tell her brother had just had a seizure—he was pale, flushed, and shaken. Ms. Jackson asked Mr. Chick not to call an ambulance, stating that her brother had suffered a seizure and had epilepsy. When Jackson made his way over to her, she observed a softball-sized purple mark on his forehead and scratches all over his back, which she observed because he was not wearing a shirt. She testified that those injuries had not been there prior to the time Jackson had left the house to mow the lawn.

Ms. Jackson testified that she could see the place in her backyard where Jackson's seizure had occurred and asked one of the officers to take a photograph of the location. No photograph was taken. She also asked an officer to take a photograph of Jackson's injuries, but she was told that a mug shot would be sufficient. In Jackson's mug shot, a purple mark on his forehead is somewhat visible, but it is largely hidden by his hair and it is hard to make out the full extent of any injuries.

Patricia Poe also testified in Jackson's defense. Ms. Poe was a neighbor and friend of Ms. Jackson's. She testified that she came out of the house and saw the police and other neighbors standing outside. She approached Jackson, but he did not know who she was. According to Ms. Poe, Jackson was sweating, confused, and had a knot on his forehead that she described as "blue" and swelling. She asked one of the officers if she could take a picture of Jackson's forehead with her camera phone, but as with his sister, the officer stated that the mug shot would be sufficient.

The arresting officer also testified to the above events and stated that he did not remember seeing any injuries on Jackson's back, nor did he take a photograph of Jackson's forehead. As described above, Ms. Murphy and Mr. Chick also testified. They could not remember which of them carried the key to the house in their pocket, but they remembered going out their back basement door with the dogs for the walk. Further, they testified that although they could not

remember which one of them had the key, they were *certain* they locked the front door to their house.

At the close of the Commonwealth's evidence, Jackson moved for a directed verdict, and he renewed that motion at the close of all the evidence. The trial court denied the motion, and the jury convicted Jackson of burglary in the second degree. In the penalty phase, the jury recommended the minimum sentence of five years' imprisonment, and the trial court ultimately imposed the jury's recommended sentence. Final judgment was entered on March 4, 2010, and this appeal now follows.

On appeal, Jackson first argues that the trial court improperly denied his motion for directed verdict. In support of this, Jackson argues that the evidence presented did not establish proof beyond a reasonable doubt that Jackson committed the charged offense, burglary in the second degree.

The Kentucky Supreme Court articulated the trial standard for a directed verdict in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

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.

On appellate review, the test for a directed verdict is “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Id.* (internal citation omitted). As an appellate court, we are not able to re-evaluate the evidence or substitute our judgment as to the credibility of the witnesses. *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994).

Thus, we are only permitted to reverse the trial court’s denial of Jackson’s motion for a directed verdict if it would have been unreasonable for the jury to find Jackson guilty of burglary in the second degree. Kentucky Revised Statutes (KRS) 511.030 provides that a person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.

The instant case clearly turned upon whether Jackson knowingly entered Mr. Chick and Ms. Murphy’s home with the intent to commit a crime. While we agree with Jackson that there was ample evidence that he did not knowingly enter the residence with the intent to commit a crime, we are not in the position to re-evaluate the evidence. In fact, the jury is charged with this task and is in the best position to judge the credibility of the witnesses who testified at trial. Given the evidence that a window was open, jewelry was allegedly out of place, and Jackson was observed coming out of the residence, it was not unreasonable for a jury to find Jackson guilty of burglary in the second degree. Thus, to this extent, the trial

court properly denied Jackson's motion for directed verdict, and we will not disturb that ruling on appeal.

Next, Jackson argues that the trial court abused its discretion when it prevented Jackson from testifying about a prior instance where he had wandered off to someone else's house following a seizure. During cross-examination, the prosecutor asked Jackson, "When you have seizures, do you wander aimlessly from time to time?" Jackson answered yes, it had happened before when he lived with his father. Jackson then asked the prosecutor if he would like him to explain what had happened, and the prosecutor said that was all he needed. On redirect examination, defense counsel asked Jackson to explain his answer. The trial court, *sua sponte*, asked the attorneys to approach the bench and inquired about the relevancy of this subject. Defense counsel stated that this testimony involved a similar act (wandering off after a seizure) and argued that the Commonwealth had opened the door for this testimony when it asked Jackson if this had ever happened before. The trial court agreed that the Commonwealth had opened the door, but held that the testimony was collateral.

We review decisions to exclude evidence under an abuse of discretion standard. *Mullins v. Commonwealth*, 956 S.W.2d 210, 213 (Ky. 1997).

As a general rule, redirect examination should be limited to questions explaining matters that have been developed on cross-examination. *E.g.*, *White v. Commonwealth*, 292 Ky. 416, 166 S.W.2d 873, 877 (1942). Nevertheless, "[t]rial courts have always had substantial discretion to allow departure from these norms. . . . The language of KRE 611(a), giving trial

judges ‘reasonable control over the mode and order of interrogating witnesses,’ is consistent with the wide discretion trial courts have always had over the nature and scope of redirect and recross examination.” Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 3.20[5], at 245 (4th ed. LexisNexis 2003) (quoting KRE 611(a)) (internal footnotes omitted).

Brown v. Commonwealth, 174 S.W.3d 421, 431 (Ky. 2005). In the instant case, the Commonwealth clearly opened the door when it asked Jackson whether he had ever wandered off after a seizure. Thus on redirect, Jackson was permitted to explain or give reasons for his conduct. While we are cognizant that “the door does not swing off its hinges to permit irrelevant and prejudicial testimony” on redirect, we simply cannot say that Jackson’s description of his conduct after a seizure was irrelevant or prejudicial. See *State ex rel Missouri Highway and Transp. Comm’n v. Sturmfels Farm Ltd. Partnership*, 795 S.W.2d 581, 589 (Mo. Ct. App. 1990) (internal quotations and citation omitted). Jackson’s defense to the crimes charged was that he suffered a seizure, became confused, and wandered into the wrong house. Without doubt, the fact that Jackson had suffered the same side-effect after a seizure on a previous occasion was relevant and probative. We agree with Jackson that it went to the heart of his defense as well as to his credibility. The jury should have been permitted to consider whether, given Jackson’s history of seizures, the same thing occurred in this case.

Jurors are “entitled to have the benefit of the defense theory before them so that they c[an] make an informed judgment as to the weight to place” on the evidence. *Davis v. Alaska*, 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347

(1974). A defendant’s due process rights involve “the right to a fair opportunity to defend against the State’s accusations” and to “confront and cross-examine witnesses and to call witnesses in one’s own behalf[.]” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The trial court erred to Jackson’s substantial prejudice and denied him the right to present his defense when it improperly excluded his testimony on redirect examination.

Accordingly, because the trial court abused its discretion in excluding Jackson’s testimony about his conduct after prior seizures, we reverse and remand this case for a new trial.

ALL CONCUR.

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