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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001036-MR

CHRISTOPHER GORDON APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 09-CR-001028

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Christopher Gordon appeals from the final judgment of the Jefferson Circuit Court sentencing him to ten years' imprisonment for his convictions of reckless homicide and tampering with physical evidence. For the following reasons, we affirm the conviction of reckless homicide, reverse the

conviction of tampering with physical evidence, and direct the trial court to enter a new judgment and sentence.

Norman Beals was shot and killed over a dispute concerning the ownership and use of a stolen moped. Thereafter, a Jefferson County grand jury indicted Gordon on the charges of murder and tampering with physical evidence. One week after the shooting, Gordon turned himself in, claiming he shot Beals in self-defense. Gordon presented the theory of self-defense at trial, and admitted to having left the scene of the crime with the gun he used to shoot Beal. The gun was never found. At the end of trial, the jury found Gordon guilty of reckless homicide and tampering with physical evidence and recommended a ten-year sentence, which the trial court imposed. This appeal followed.

On appeal, Gordon raises three claims of error. He first claims the trial court erred by denying his motions for a directed verdict of acquittal on the charge of tampering with physical evidence, which he made at the close of the Commonwealth's case-in-chief and at the close of all the evidence. Specifically, he argues the evidence presented by the Commonwealth was insufficient to prove he intended to conceal the gun he used to shoot Beals so as to support a tampering conviction. We agree.

Upon consideration of a motion for a 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 . . . 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 of 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted); *accord Banks v. Commonwealth*, 313 S.W.3d 567, 570 (Ky. 2010).

KRS[1] 524.100 provides, in relevant part:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with
>
> intent to impair its verity or availability in the official proceeding[.]

Gordon directs us to *Mullins v. Commonwealth*, 350 S.W.3d 434 (Ky. 2011), for the proposition that a defendant's act of leaving the scene of a crime with the weapon is inadequate to prove tampering in the absence of evidence establishing the defendant's intent to conceal the weapon. In *Mullins*, eyewitnesses testified to observing the defendant leaving the scene of the shooting with the gun, which was never found. *Id.* at 442. Mullins argued on appeal that a verdict should have been directed in his favor on this charge since his leaving the scene of the crime with the gun was not sufficient to prove his intent to conceal it, especially since the police

[1] Kentucky Revised Statutes.

did not make an effort to locate the gun until several months later and the gun was never found. *Id.*

The Kentucky Supreme Court reversed Mullin's tampering conviction, holding the jury could infer from the evidence presented that Mullins was the shooter and that he carried the gun with him when he left the scene, but his "walking away from the scene with the gun is not enough to support a tampering charge without evidence of some additional act demonstrating an intent to conceal." *Id.* In so ruling, the Court reaffirmed its decision in *Commonwealth v. Henderson*, 85 S.W.3d 618 (Ky. 2002), with respect to the importance of **where** the defendant places evidence, a "conventional" or "unconventional" location, and the type of evidence at issue. 350 S.W.3d at 443.

In *Henderson*, the Court upheld the defendant's tampering conviction on grounds that the defendant's act of placing stolen money in his shoe insole during a police chase constitutes an additional step of placing evidence in an "unconventional" location so as to make the evidence unavailable. 85 S.W.3d at 620. The Court noted that while some people do carry money in their shoes, the placement of money in the insole of a shoe while being pursued by police was an "unconventional" location sufficient to support a tampering conviction. *Id.* In *Mullins*, the Court expanded on its discussion in *Henderson*,

> "removal" of evidence under KRS 524.100 must be construed differently for different defendants. If a defendant walks away from the scene in possession of evidence, this does not necessarily lead to a violation of the statute. When a crime takes place, it will almost

> always be the case that the perpetrator leaves the scene with evidence. If this amounted to a charge of tampering, the result would be an impermissible "piling on."
>
> Instead, intent to impair availability of evidence, believing that an official proceeding may be instituted, is the standard required under KRS 524.100. . . . where the person charged is the defendant, it is reasonable to infer that the primary intent when a defendant leaves the scene of a crime is to get *himself* away from the scene and that carrying away evidence that is on his person is not necessarily an additional step, or an active attempt to impair the availability of evidence.
>
> * * * *
>
> The Commonwealth cannot bootstrap a tampering charge onto another charge simply because a woefully inadequate effort to locate the evidence was made by the police. It is often the case that evidence will not be found. However, it is insufficient to bring a charge of tampering based solely on the fact evidence was not found when there were insufficient steps to locate that evidence, and there is no proof that the defendant acted with the intent to prevent evidence from being available at trial.
>
> This is not to say that failure to locate evidence means that a defendant cannot be charged and convicted of tampering when there is evidence of an active attempt by the defendant that demonstrates intent to impair the availability of the evidence. *See Commonwealth v. Nourse*, 177 S.W.3d 691 (Ky. 2005) (throwing bullet casings down a drain); *Williams v. Commonwealth*, 336 S.W.3d 42 (Ky. 2011) (swallowing a bag of cocaine).

350 S.W.3d at 443-44.

In the case at bar, Gordon testified that he went to his sister's house after shooting Beals and left the gun on her kitchen counter. Gordon's sister testified

that when Gordon arrived at her house, he was in a state of shock and disbelief. She removed the gun from her countertop and placed it under the kitchen sink because she had children in the house and did not want them to be harmed. The following morning, Gordon left her house, and she called a friend to come over and she gave the gun to him. She testified that she did not sell the gun to her friend, and that she had no idea what he did with it. She further testified that her motive for giving the gun to her friend stemmed from safety concerns. A week after the shooting, when Gordon had gathered enough money to hire an attorney, he turned himself in. Gordon denied deliberately concealing or hiding the gun so that it could not be used as evidence in a court of law.

We find Gordon's act of fleeing the crime scene for his sister's house and placing the gun on her kitchen counter insufficient evidence for a jury to infer that Gordon intended to conceal the gun for available use in an official proceeding so as to support a tampering charge. Gordon's sister admitted to moving the gun from the countertop where Gordon placed it, to a cabinet, and then having it removed from her house. We find it material that she was not charged with tampering. Furthermore, had the police entered her house before she moved the gun, they would have found it in a conventional location. These facts do not reasonably support the inference, under *Mullins* and *Henderson*, that Gordon was attempting to conceal the gun; he simply had gotten *himself* away from the crime scene with the gun, and placed it on his sister's counter.

The police never located the gun, despite being told by Gordon's sister to whom she delivered it. *Mullins*, 350 S.W.3d at 444 (police made "woefully inadequate effort" to locate weapon). The evidence did not show that after entering his sister's house and placing the gun on the counter, Gordon ever touched the gun again or directed its placement elsewhere. Thus, Gordon's placement of the gun on the kitchen counter does not constitute "putting the evidence in an unconventional place, which manifested an intent to make it unavailable." *Id.* at 443 (citing *Henderson*, 85 S.W.3d at 620). Accordingly, we believe the trial court should have directed a verdict in Gordon's favor on this charge.

Next, Gordon argues the trial court erred by not *sua sponte* declaring a mistrial after alleged improper contact with jurors occurred, in violation of KRS 29A.310(2). He concedes this claim of error was not preserved and requests that we review it under the palpable error standard of RCr[2] 10.26. Under that rule,

> an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." An error is "palpable," we have explained, only if it is clear or plain under current law and in general a palpable error "affects the substantial rights of a party" only if 'it is more likely than ordinary error to have affected the judgment." An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable."

[2] Kentucky Rules of Criminal Procedure.

Commonwealth v. Jones, 283 S.W.3d 665, 668 (Ky. 2009) (internal citations omitted).

KRS 29A.310 addresses admonitions to juries upon separation and provides, in part:

> (1) If the jury is permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, nor allow themselves to be addressed by, any other person on any subject of the trial; and that, during the trial, it is their duty not to form or express an opinion thereon, until the case is finally submitted to them.
>
> (2) No officer, party, or witness to an action pending, or his attorney or attorneys shall, without leave of the court, converse with the jury or any member thereof upon any subject after they have been sworn.

The Kentucky Supreme Court has previously addressed alleged violations of KRS 29A.310(2), stating: "A mistrial is not warranted if the conversation between the witness and the juror was 'innocent' and matters of substance were not involved. 'The true test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial.'" *Talbott v. Commonwealth*, 968 S.W.2d 76, 86 (Ky. 1998) (internal citations omitted).

Gordon directs us to two instances of alleged violations of KRS 29A.310(2). The first occurred on the second day of trial. The Commonwealth alerted the court that there had been an interaction between a juror and a witness, but that the conversation did not involve the merits of the case. The court questioned the juror about her conversation with the witness and the juror informed the court that the

witness had only asked her what college she attended and that the conversation had nothing to do with the case. The juror stated that at the time of the conversation, she did not realize that this particular person was a witness and that the conversation would have no bearing on her decision in the case.

The second alleged violation of KRS 29A.310(2) occurred on the third day of trial. A juror alerted the court that a man had approached him in the hallway and said "you're on that jury up there where they're having that trial." The juror said he responded, "well, I'm a juror." The juror stated the man then said, "you're on that jury where they're trying that dude that shot my little cousin." The juror could not remember if the man said "little cousin" or "little nephew," but he informed the court that he backed away from the man when he realized he was talking about Gordon's trial and immediately stepped on the elevator and came up to the courtroom. When questioned by the trial court, the juror indicated the interaction would not affect his judgment in the case.

Neither of these alleged violations delved into matters of substance and, in both instances, the jurors were questioned by the trial court and assured the court that the contact would not affect their decision in the case. We do not find any chance of prejudice by either of these alleged violations and certainly do not believe the alleged violations rise to the level of palpable error. As a result, a mistrial was not warranted and the trial court did not err by declining to grant one *sua sponte*.

Lastly, Gordon argues the trial court erred by overruling his objection to the Commonwealth's line of questioning during cross-examination asking him to characterize the testimony of other witnesses as lies. We disagree.

Generally,

> [a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997).

A review of the record in this case discloses that the Commonwealth did not ask Gordon to characterize another witness's testimony as lies. Rather, the Commonwealth asked Gordon whether he had actually seen a gun in Beals' hand, to which Gordon answered no. The Commonwealth then asked Gordon whether he had been present throughout the entire trial and whether he had heard the testimony of all the witnesses, to which Gordon answered yes. The Commonwealth then asked Gordon whether any of the witnesses stated that they had seen a gun in Beals' hand. At this point, counsel for Gordon objected, arguing that the Commonwealth improperly asked Gordon to speculate or comment on the testimony of other witnesses. The trial court overruled his objection on the basis that the Commonwealth may ask Gordon if he heard any of the witnesses say they saw a gun in Beals' hand.

We believe the Commonwealth's line of questioning was properly allowed, and in substance is no different from asking Gordon whether anyone could corroborate his account. This line of questioning is distinguishable from asking Gordon whether any of the witnesses who disagreed with him were lying, as prohibited by *Moss*. As a result, the trial court did not err by overruling Gordon's objection.

For the foregoing reasons, we affirm Gordon's conviction of reckless homicide, reverse his conviction of tampering with physical evidence, and direct the Jefferson Circuit Court to enter a new judgment and sentence.

ALL CONCUR.

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