



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

STATE OF MISSOURI,)	No. ED100807
)	
Respondent,)	Appeal from the Circuit Court
)	of Franklin County
vs.)	
)	Honorable Keith Sutherland
JEFFREY WEINHAUS,)	
)	
Appellant.)	FILED: January 27, 2015

Before Patricia L. Cohen, P.J., Roy L. Richter, J., and Robert M. Clayton III, J.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT.
IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR
OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER
COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER
TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED
TO ANY SUCH MOTION.

Jeffrey Weinhaus ("Appellant") appeals from a jury verdict finding him guilty of: possession of morphine and marijuana, in violation of Section 195.202, RSMo (2011)¹; assault of a law enforcement officer in the first degree, in violation of Section 565.081²; and armed criminal action, under Section 571.015³ relative to Appellant's actions toward Sergeant Henry James Folsom. The jury acquitted Appellant of assault of a law enforcement officer in the first degree and armed criminal action related to Corporal Scott Mertens. The trial court granted Appellant's Motion for Judgment of Acquittal as to two counts; tampering with a judicial officer, in violation of Section 565.084⁴, and resisting arrest, in violation of Section 575.150⁵. Appellant alleges that insufficient evidence was presented to convict him of any of the charges against him; and that the trial court plainly erred in submitting Instruction No. 8 on first-degree assault to the jury, in overruling his motion to sever from the other charges the count of judicial tampering, in failing to declare a mistrial, and in allowing in prejudicial evidence about Appellant's weapons not involved in the crime. We affirm.

I. Background

As we presume the parties' familiarity with the facts of the case, we will proceed directly to Appellant's allegations of error.

II. Discussion

Appellant raises eight points on appeal. Points I, II, IV, and V argue that insufficient evidence was presented at trial to sustain his convictions. Appellant's point III argues that the

¹ All further statutory references to Section 195.202 of the Revised Statutes of Missouri are to RSMo 2011, unless noted otherwise.

² All further statutory references to Section 565.081 of the Revised Statutes of Missouri are to RSMo 2012, unless noted otherwise.

³ All further statutory references to Section 571.015 of the Revised Statutes of Missouri are to RSMo 2000, unless noted otherwise.

⁴ All further statutory references to Section 565.084 of the Revised Statutes of Missouri are to RSMo 2009, unless noted otherwise.

⁵ All further statutory references to Section 575.150 of the Revised Statutes of Missouri are to RSMo 2009, unless noted otherwise.

trial court plainly erred in submitting Instruction No. 8 regarding first-degree assault to the jury. Appellant's point VI claims the trial court abused its discretion in overruling his motion to sever the count of judicial tampering; he alleges the jurors were likely to improperly consider the inflammatory YouTube video, resulting in substantial prejudice to Appellant. In point VII, Appellant claims the trial court should have declared a mistrial *sua sponte* after Appellant's Motion for Judgment of Acquittal was sustained as to judicial tampering, as he argues that was the only charge where the YouTube video was relevant. Finally, in point VIII Appellant argues the trial court further abused its discretion in overruling his objections to the introduction of evidence about other weapons Appellant had in his vehicle, but which were unrelated to the crimes charged.

Sufficiency of the evidence

First, we will address Appellant's sufficiency of the evidence claims in Points I, IV and V together. "This Court's review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." State v. Miller, 372 S.W.3d 455, 463 (Mo. banc 2012) (quoting State v. Letica, 356 S.W.3d 157, 166 (Mo. banc 2011)). "The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict." Miller, 372 S.W.3d at 463, quoting State v. Belton, 153 S.W.3d 307, 309 (Mo banc. 2005). We will not act as a "super-juror" with veto powers, and will give great deference to the trier of fact. Miller, 372 S.W.3d at 463.

A. Assault and armed criminal action – Point I

"A person commits the crime of assault of a law enforcement officer . . . in the first degree if such person attempts to kill or knowingly causes or attempts to cause serious physical

injury to a law enforcement officer" Section 565.081.1. For a defendant to be guilty of an attempt to commit an offense, he must, "with the purpose of committing the offense," perform an "act which is a substantial step towards the commission of the offense." Section 564.011.1, RSMo (2000). "A 'substantial step' is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." Section 564.011.1. A mere threat alone is not enough to constitute an attempt to commit a crime; there must be "strongly corroborating evidence that it was the defendant's conscious object to carry out the threat."

" . . . [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action" Section 571.015.

Appellant argues the State failed to prove that he possessed the requisite intent to kill or cause serious physical injury to Sergeant Henry James Folsom ("Sgt. Folsom"). He argues that there was no evidence he had any intent to aim his gun at or shoot at the officers. However, his "mental state may be determined from evidence of [his] conduct before the act, from the act itself, and from [his] subsequent conduct." State v. Hineman, 14 S.W.3d 924, 927-28 (Mo. banc 1999) (citing State v. Johnson, 948 S.W.2d 161, 166 (Mo. App. E.D. 1997)). In looking at Appellant's conduct before and during the act, it is clear that sufficient evidence existed for a reasonable juror to find Appellant guilty beyond a reasonable doubt. Appellant's YouTube video repeatedly references the potential violent overthrow of specific government officials, and in one video Appellant says he "should have placed a bullet in [Sgt. Folsom's] head." Further, Appellant brought three loaded guns to a meeting with police officers, and then proceeded to open his holster and rest his hand on his gun, even after officers ordered him to the ground.

Appellant also told Sgt. Folsom, "You're going to have to shoot me" in response to Sgt. Folsom pointing his weapon at Appellant and ordering him to the ground.

Appellant cites State ex rel. Verweire⁶ and State v. Dublo⁷ to support his argument that merely threatening violence was not a substantial step towards the commission of first-degree assault. The defendants in those cases were not displaying weapons at the time law enforcement officers arrived and caused no harm to their potential victims. What differentiates this case is that Appellant never abandoned his threatening behavior – the only thing that stopped him from pulling out his gun and shooting the officers was that the officers shot him first.

The evidence on the record was sufficient such that reasonable jurors could certainly conclude that Appellant intended to shoot Sgt. Folsom, and that unfastening the holster and placing his hand on his gun was a "substantial step" toward the commission of that act.

Appellant's Point I is denied.

B. Possession of morphine and marijuana – Points IV and V

Except under certain exceptions, "it is unlawful for any person to possess or have under his control a controlled substance." Section 195.202.1. Someone who knows "of the presence and nature of a substance, has actual or constructive possession of the substance." Section 195.010.34. "A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Id.

Here, both controlled substances were found in what Appellant referred to as his "command center" in his basement. Officers found in his desk drug paraphernalia, a set of scales, a Tupperware-type tub containing marijuana, smoking pipes, and a small tin containing

⁶ 211 S.W.3d 89 (Mo. banc 2006).

⁷ 243 S.W.3d 407 (Mo. App. W.D. 2007).

pills that were subsequently revealed to be morphine. Officers also found another bag of marijuana just outside the "command center" in Appellant's basement, and they could detect the odor of marijuana coming from Appellant's house and on Appellant himself.

The State had to prove "at a minimum the defendant had access to and control over the premises where the substance was found." State v. Riley, 440 S.W.3d 561, 565 (Mo. App. E.D. 2014) (citing State v. Power, 281 S.W.3d 843, 848 (Mo. App. E.D. 2009)). Where, as here, there is evidence of joint control over the premises, "the State must present additional evidence that connects the defendant to the controlled substance." Power, 281 S.W.3d at 848. This could include:

[R]outine access to the area where the substances are kept, the presence of large quantities of the substance at the arrest scene, admissions by the accused, being in close proximity to the substances or drug paraphernalia in plain view of the law enforcement officers, the mixing of defendant's personal belongings with the drugs, or flight by a defendant upon realizing the presence of law enforcement officials.

Id. We will consider the totality of the circumstances in determining whether sufficient incriminating circumstances exist. Id.

Here, the bulk of the controlled substances were found in a desk in Appellant's basement, an area he referred to as his "command center." Appellant's videos all were filmed with him sitting in the "command center." On the day of the search, officers said Appellant smelled of marijuana, and further that once he was handcuffed, that he yelled into the house that the police were coming in to look for drugs. A reasonable juror could readily find from sufficient evidence on the record that Appellant had routine access to the area where the drugs were found, that his

personal belongings were mixed in with the drugs, and therefore, that Appellant exercised control over the area and likely the drugs themselves. Appellant's points IV and V are denied.

C. Issues with jury instruction No. 8 – Points II and III

In his second and third points, Appellant argues that the trial court plainly erred in submitting Instruction No. 8 to the jury, as it required the jury to find that Appellant actually shot at Sgt. Folsom, and there was insufficient evidence to support a conviction if this was the instruction submitted to the jury. As Appellant failed to raise this issue at trial, he requests plain error review. Plain errors "affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20. "Rule 30.20 is no panacea for unpreserved error, and does not justify review of all such complaints, but is used sparingly and limited to error that is evident, obvious, and clear." State v. Phillips, 319 S.W.3d 471, 476 (Mo. App. S.D. 2010) (quoting State v. Smith, 293 S.W.3d 149, 151 (Mo. App. S.D. 2009)). A defendant must show that the plain error complained of is outcome-determinative error. Phillips, 319 S.W.3d at 476. Plain error review is solely within our discretion. Id.

A document entitled "Instruction No. 8" included in the legal file as the instruction on first-degree assault reads, in relevant part: "the defendant attempted to cause serious physical injury to Sgt. Folsom by shooting him[.]" However, the trial transcript reflects that at trial, the judge read from the instructions submitted to him, and the pertinent language read: "the defendant attempted to cause serious physical injury to Sergeant Folsom by trying to draw a weapon to shoot Sergeant Folsom[.]" Appellant's trial counsel did not object to the instruction at trial, nor in the motion for new trial. It is clear that the document included in the legal file is not the actual instruction that was submitted to the jury. There is no notation from the judge

indicating the instruction about which Appellant now complains was accepted and submitted to the jury, and we find it difficult to believe the judge would orally alter the submitted written jury instructions on the fly. We find no manifest injustice or miscarriage of justice from this alleged discrepancy. Appellant's points II and III are denied.

D. Severance of judicial tampering charge – Point VI

Appellant's sixth point alleges that the trial court abused its discretion in overruling his motion to sever the count of judicial tampering from the remaining counts because it allowed the jurors to see the inflammatory YouTube video, which he alleges would have been inadmissible in a trial on the other charges. Appellant claims he was substantially prejudiced by the jurors seeing the YouTube video when it was not relevant to all the other charges against him.

"Whether joinder is proper is a question of law," and "[l]iberal joinder of criminal offenses is favored." State v. McKinney, 314 S.W.3d 339, 341 (Mo. banc 2010) (citing State v. Morrow, 968 S.W.2d 100, 109 (Mo. banc 1998)). Rule 23.05 states:

All offenses that are of the same or similar character or based on two or more acts that are part of the same transaction or on two or more acts or transactions that are connected or that constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts.

Section 545.140.2 also covers joinder of criminal offenses, and states:

[T]wo or more offenses may be charged in the same indictment or information . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Appellant claims the YouTube video should have been shown to the jury only for the judicial tampering charge, and that the jury seeing it with the other charges substantially prejudiced him. However, Appellant ignores the language in both the rule and the statute about offenses being "connected." Offenses can be connected "by time, by similarities in the manner they were committed, by motive, and 'by their dependence and relationship to one another.'" McKinney, 314 S.W.3d at 341, quoting Morrow, 968 S.W.2d at 109. "Charges may be 'connected' for reasons other than sharing a common time or location." McKinney, 314 S.W.3d at 341.

Here, we find that joinder of the charges was proper. Every crime with which Appellant was charged traces its origin back to the YouTube video – the piece of evidence that set into motion the whole investigation into Appellant. Without the YouTube video, officers never would have gone to Appellant's home, never would have smelled marijuana and obtained a search warrant to seize his computer and drugs, and never would have set up a meeting to ostensibly give his computer equipment back, thus likely preventing the eventual shooting. The “relationship” to the YouTube video sufficiently connected the crimes charged such that joinder was proper.

In some cases, however, joinder can be proper, but "severance may be necessary to prevent substantial prejudice to the defendant that could result if the charges are not trial separately." McKinney, 314 S.W.3d at 342. Severance is left to the trial court's discretion and we will reverse the decision not to sever only if there is a clear showing of prejudice and an abuse of discretion. Id. We will find an abuse of discretion only where the ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable

as to shock the sense of justice and indicate a lack of careful consideration." Id., citing State v. Fassero, 256 S.W.3d 109, 115 (Mo. banc 2008).

We will consider "the number of offenses joined, the complexity of the evidence, and the likelihood that the jury can distinguish the evidence and apply it, without confusion, to each offense." Morrow, 968 S.W.2d at 109. "[A]ny prejudice may be overcome where the evidence with regard to each crime is sufficiently simple and distinct to mitigate the risks of joinder." Id., quoting State v. Conley, 873 S.W.2d 233, 238 (Mo. banc 1994).

We believe the jury could readily distinguish the evidence and apply it to each offense individually, and that the evidence was "sufficiently simple and distinct to mitigate the risks of joinder." Morrow, 968 S.W.2d at 109. We believe the jury was more than capable of considering the judicial tampering charge separately from the other charges, and further, we question the assertion that the YouTube video would have been inadmissible in a trial without the judicial tampering charge, as it was relevant to paint an accurate picture of the entire series of events.

We find no manifest injustice or miscarriage of justice occurred in the trial court refusing to sever the judicial tampering charge from the other charges. Appellant's point VI is denied.

E. Trial court's failure to declare mistrial after acquittal on judicial tampering charge – Point VII

In his seventh point on appeal, Appellant argues that the trial court plainly erred in not declaring a mistrial *sua sponte* after it granted the Motion for Judgment of Acquittal on the judicial tampering charge, and in failing to instruct the jury to disregard the YouTube video. Appellant claims the video was relevant only to the judicial tampering charge, and that showing the video to the jury was a "bell that could not be unrung" and resulted in substantial prejudice and manifest injustice to him.

Appellant's trial counsel failed to request a mistrial after the trial court granted the Motion for Judgment of Acquittal on the judicial tampering charge, and also failed to request that the judge instruct the jury to disregard the YouTube video as to the other charges. As Appellant failed to raise this issue at trial, he requests plain error review. As stated previously in this memorandum, plain errors "affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20

"The declaration of a mistrial is a drastic remedy which should only be employed in the most extraordinary circumstances." State v. Drewel, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992) (citing State v. Young, 701 S.W.2d 429, 434 (Mo. banc 1985)). "*Sua sponte* action should be exercised only in exceptional circumstances." Drewel, 835 S.W.2d at 498.

The trial court has broad discretion in admitting or excluding evidence at trial, and we will reverse a ruling admitting evidence only if the trial court clearly abused its discretion. State v. Young, 367 S.W.3d 641, 644 (Mo. App. E.D. 2012). An abuse of discretion occurs only when a "ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." Id., quoting State v. Thompson, 341 S.W.3d 723, 731 (Mo. App. E.D. 2011).

Generally, evidence of prior bad acts or uncharged crimes is inadmissible for the purpose of showing a defendant's criminal character or propensity to commit a certain crime. Young, 367 S.W.3d at 645. However, if such evidence is logically and legally relevant it may be admitted. Id. The evidence must have "some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial" and its probative value must outweigh its prejudicial effect. State v. Bernard, 849 S.W.2d 10, 13 (Mo. banc 1993). Some common uses for uncharged crimes

are to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity. Young, 367 S.W.3d at 645. These exceptions are not exhaustive and such evidence may be admitted without falling under one of the listed exceptions, as long as it is logically and legally relevant. *Id.* Evidence of uncharged crimes "may be admitted 'to present a complete and coherent picture of the events that transpired.'" *Id.*, quoting State v. Primm, 347 S.W.3d 66, 70 (Mo. banc 2011).

We believe the YouTube video did just that – it helped "to present a complete and coherent picture of the events that transpired." Young, 367 S.W.3d at 645. As discussed above, the YouTube video is the piece of evidence that set this whole series of events in motion. It helped establish Appellant's guilt of first-degree assault by showing his potential motive or intent to harm Sgt. Folsom, and its probative value outweighed any prejudicial effect it had on Appellant. We find no miscarriage of justice or manifest injustice present here. Appellant's point VII is denied.

F. Evidence of the other weapons – Point VIII

In his final point, Appellant argues the trial court abused its discretion in allowing the State to present testimony and evidence about the two other guns that Appellant had in his car the day he met with Sgt. Folsom. Appellant claims this evidence had no probative value and was substantially prejudicial to him.

The trial court has broad discretion in evidentiary decisions and we will reverse a ruling admitting evidence only if the trial court clearly abused its discretion. Young, 367 S.W.3d at 644. An abuse of discretion occurs only when a "ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.*

Generally, weapons "not connected with the defendant or the crime are not admissible unless they possess some probative value." State v. Speaks, 298 S.W.3d 70, 81 (Mo. App. E.D. 2009) (quoting State v. Wynne, 182 S.W.2d 294, 299 (1944)). However, weapons found at or near a crime scene are generally properly admissible when the evidence "throws light upon a material fact in issue." Speaks, 298 S.W.3d at 81.

In this case, Appellant's act of bringing three loaded guns to a meeting with police officers is relevant information toward establishing his intent to commit an assault. Since the State had to prove that Appellant intended to cause serious physical injury to Sgt. Folsom, the fact that Appellant brought not only the gun on his hip, but two other loaded guns, has probative value in establishing Appellant's intent. Therefore, the weapons were in fact connected to Appellant and the crime he committed, and were thus properly admitted into evidence. We find no abuse of discretion by the trial court in admitting into evidence the two guns found in Appellant's car. Appellant's final point is denied.

III. Conclusion

For the above reasons, the judgment of the trial court is affirmed pursuant to Rule 30.25(b).

PER CURIAM.