

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 91-CF-127, 91-CF-252
92-CO-905, 92-CO-944

LARRY D. EVERETT, APPELLANT,

v. F-11450-89, F-12616-89

UNITED STATES, APPELLEE.

Appeals from the Superior Court of the
District of Columbia
Criminal Division

(Hon. Steffen W. Graae, Trial Judge)

(Argued May 28, 1993

Decided June 7, 1993)

Before STEADMAN and FARRELL, *Associate Judges*, and BELSON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

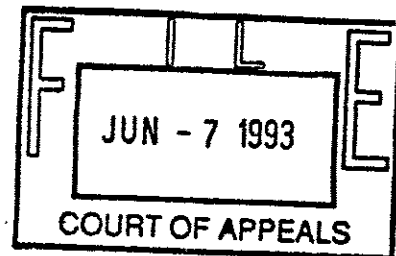
On appeal from his convictions for multiple offenses, primarily first-degree murder while armed (D.C. Code §§ 22-2401, -3202), appellant assigns a variety of errors in the conduct of his trial and also challenges the denial of his post-conviction motion alleging ineffective assistance of counsel. We affirm.

I.

Appellant was charged in two indictments which were consolidated for trial. The first alleged primarily that appellant assaulted Kathy Gaston on August 18, 1989, and minutes later took part in the murder of Gregory Jackson. The second alleged chiefly appellant's possession of an unregistered firearm (and carrying a pistol without a license) on October 1, 1989.

Theodore Smith, who was charged with the murder along with appellant, pled guilty before appellant's trial began and testified against appellant. Numerous other witnesses corroborated portions of Smith's testimony concerning the events leading up to and including the murder.

Smith testified that, prior to the murder, he had worked for appellant daily for two years selling cocaine. To "keep people from taking anything," appellant would supply Smith with a gun along with the drugs he was to distribute. Appellant received the proceeds from Smith's sales and in return gave Smith "spending



money" and promised someday to give him a Jaguar automobile and purchase a home for the two of them.

Early on August 18, 1989, appellant supplied Smith with a nine millimeter gun and cocaine to distribute; Smith was usually given one thousand dollars worth of cocaine to sell. While Smith was on the street selling the cocaine, he was approached by Gregory Jackson and asked whether he had any cocaine for sale. When Smith showed Jackson his supply, Jackson took possession of a rock of cocaine but did not pay for it; instead he displayed to Smith the handle of a gun he was carrying under his shirt.

When Smith met appellant later, he told him what had happened. Angry, appellant responded that Smith would have to recover the money Jackson owed him and shoot Jackson; if Smith did not shoot Jackson, appellant would do so himself. Both men set out to find Jackson, Smith armed with the nine millimeter supplied by appellant and appellant armed with a loaded .38 caliber revolver. Appellant chambered a round in the gun Smith was carrying.

While looking for Jackson, the two encountered Kathy Gaston, Tracey Glover, Gregory Roberts, and Ronald Pryor. All four witnesses testified at trial that appellant placed his gun against Gaston's head and threatened to shoot her. According to Pryor, appellant stated, "You all tell Greg [Jackson] if he ain't got my money in five minutes I will kill him. I will kill you all." Minutes later appellant and Smith found Jackson. Smith approached him and confronted him with the earlier theft, while appellant took a position across the street. Jackson admitted he had been wrong in stealing the cocaine, but explained that he now had no money to pay Smith. Smith then walked past Jackson, whereupon appellant called Smith's name and asked whether the man across the street was Jackson; on learning that he was, he ordered Smith to shoot Jackson. Smith then fired six rounds, striking Jackson in the back five times. Appellant in turn walked up to Jackson, who was still alive, and fired three shots, striking Jackson once. Appellant and Smith then ran back to appellant's car and sped away. Jackson was pronounced dead at 9:02 p.m. that night.

Smith testified that after the shooting appellant reloaded the nine millimeter used to kill Jackson and returned it to Smith, along with one thousand dollars worth of cocaine for him to sell. The following day, appellant returned to Smith's apartment and retrieved the nine millimeter gun. Shortly after that, Smith was arrested in his apartment.

Six weeks later, in the early morning of October 1, 1989, the nine millimeter gun used in the murder of Jackson was recovered from appellant's possession, along with a loaded .380 automatic pistol, \$3300 in cash, and seven ziplock bags of marijuana. An off-duty police officer asleep in her apartment had heard gunshots outside her window and observed appellant and Joseph Robinson

carrying guns.¹ The officer telephoned a description of the men to a police dispatcher. Officer Darren Broughton responded to the call and saw appellant and Robinson run inside a building in which appellant's mother lived. Broughton and his back-up units entered the building and apprehended the two men. The cash and marijuana were found on appellant's person and the guns were recovered from under a door mat on the landing in front of the mother's apartment. Broughton had seen the two men bend over this door mat as if to hide something. Appellant and Robinson were arrested and charged with several firearms offenses and possession with intent to distribute marijuana.²

II.

We consider first appellant's argument that the assault (Gaston) and murder (Jackson) charges were misjoined under Super. Ct. Crim. R. 8, and that these together were misjoined (or wrongly consolidated) with the charges stemming from appellant's October 1 possession of the gun and marijuana. Although appellant was charged jointly with a codefendant in each indictment, he proceeded to trial alone. We therefore analyze the joinder issue under Super. Ct. Crim. R. 8 (a) ("[j]oinder of offenses"),³ the relevant part of which states that "[t]wo or more offenses may be charged in the same indictment if . . . the offenses charged . . . are based on . . . 2 or more acts or transactions connected together" In determining whether two acts are "connected together," "[o]ur focus is on whether there is a substantial overlap of proof relevant to the offenses." *Gooch v. United States*, 609 A.2d 259, 264 (D.C. 1992). The required showing is only that "the proof of one crime constitutes a substantial portion of the proof of the other," *id.* (citation omitted); "[r]eciprocal admissibility is not the test in determining whether offenses can be joined properly under Rule 8 (a)." *Id.* (emphasis added). The test of substantial "connected[ness]" is clearly met here. The testimony that appellant threatened to kill Gaston (pointing a gun to her head) if she and the others did not convey appellant's ultimatum to Jackson was probative of appellant's participation in the murder

¹ Robinson was indicted with appellant for the October 1 events, but his case was severed from appellant's for trial.

² As we explain in part VI, *infra*, this indictment was purportedly -- though without the apparent recollection of the parties at trial -- superseded by another one reducing the drug charge to simple possession.

³ As appellant, Smith, and Robinson "were [not] tried together," *Ray v. United States*, 472 A.2d 854, 857 (D.C. 1984), there is no basis for appellant's argument that Rule 8 (b) governs the joinder analysis.

of Jackson, which occurred shortly thereafter. Similarly, the later recovery from appellant's joint possession of the gun with which Smith (aided by appellant) shot Jackson was further proof of appellant's complicity in the murder. *See Gooch*, 609 A.2d at 264.⁴

III.

Appellant challenges the denial of his motion to suppress the in-court and line-up identifications by Kathy Gaston, Tracy Glover and Diane Finch.⁵ Appellant contends that the line up from which the witnesses identified appellant⁶ was unnecessarily suggestive because he was the only member of the line up with green eyes. The trial judge, however, after an extensive hearing, found "not even the remotest scintilla of a suggestive procedure" and concluded that the in-court identifications were reliable in any event because each witness "had a thorough and reasonable opportunity to observe [appellant]." *See Stewart v. United States*, 490 A.2d 619, 622 (D.C. 1985). The record, including the photograph and video tape of the line-up, which we have viewed, firmly supports the judge's ruling in both respects. *Id.* at 623. The color of appellant's eyes was not obviously apparent in the line-up; and none of the witnesses testified that it was specifically appellant's eyes that caused them to select him. In addition, each witness had ample opportunity to observe appellant at the scene of the assault.

IV.

Appellant contends that police officers, at the instance of the prosecutor, violated his Sixth Amendment and Due Process rights by improperly intimidating three defense witnesses who were in jail with Smith and were prepared to testify that Smith had exculpated appellant. According to appellant, two of these witnesses were

⁴ We need not decide whether the drug possession charge stemming from appellant's possession of marijuana on October 1 was properly joined with the August 18 charges, because any prejudice from that joinder was negligible in view of the comparative gravity of the charges and the strength of the evidence of appellant's complicity in the assault and murder.

⁵ Gaston and Glover were witnesses to the assault and Finch observed appellant from her window after hearing the gun shots that killed Jackson.

⁶ After viewing the line up, Gaston identified appellant but was afraid that he could see her and therefore declined to inform the police at that time that she recognized her assailant. Approximately one year later, however, she viewed a video tape of the line up at police headquarters, whereupon she identified appellant for the police.

coerced into not testifying after detectives visited them in jail the night before they were expected to testify and threatened them with perjury charges if they testified falsely.

Appellant brought this matter to the attention of the trial judge, who conducted a voir dire of the prospective witnesses and the police officers involved. One of the defense witnesses, Tyrone Butler, explained that although he had originally told defense counsel that Smith had exculpated appellant, he had lied in saying so, because appellant pressured him to do so and because he was afraid of appellant. Butler insisted that in the jail conversation the detective had not pressured him in any way but had only told him to tell the truth when he testified. The second witness, Harold Hill, stated that a detective had informed him that if he lied for appellant, he would be subject to a perjury prosecution and a ten year prison sentence; the detective had also suggested that testifying for appellant might affect Hill's "getting out on parole or probation any time soon." Hill insisted, however, that what caused him to change his mind about testifying was his fear of a perjury charge "if [he] was to lie."⁷ The third witness, David Vines, explained that the police told him that "if they found me lying, I would get perjury," and that if he testified at trial they would "make some problems" for him regarding a case in which he was involved in Maryland. While Vines stated that he was reluctant to testify as a result of the officers' threat, he in fact testified at trial and exculpated appellant. Finally, Detective Porter of the Metropolitan Police explained that the prosecutor had asked him and two other officers to interview Butler, Hill and Vines at the D.C. jail to learn what they would say in their testimony. He stated that none of the officers threatened any of the men, but only explained to them the implications of committing perjury.

The trial judge denied the motion for a mistrial, reasoning that (1) Vines was willing to testify on appellant's behalf despite the alleged pressure; and (2) there was "no evidence . . . to support the proposition that improper efforts were made by the government to pressure [Hill and Butler] to keep them off the stand." The judge found that the actions of the police in merely advising the witnesses about the penalties for perjury were not coercive. Although the judge did not expressly consider Hill's acknowledgement that the detective had mentioned the possible effect of his testifying on his prospects for early release, the judge found decisive the testimony of both Hill and Butler that

⁷ Hill had originally told defense counsel that Smith said "he had to take the cop to [second degree murder], and in order to do that, he would have to turn evidence on [appellant]." Notably, however, Hill did not state that Smith had ever exculpated appellant.

they "didn't feel coerced" by anything the detectives had told them.

We find no basis here for reversal of the judge's refusal to declare a mistrial. It is clear from the record that the gravamen of the detectives' warnings to Hill and Butler was the consequences of their testifying falsely. Our decisions, and those of other courts, establish that apprising a prospective witness of the penalties of perjury does not result in violation of the defendant's Sixth Amendment right to present witnesses. *E.g., Yates v. United States*, 513 A.2d 818, 822 (D.C. 1986); *Reese v. United States*, 467 A.2d 152 (D.C. 1983); *United States v. Simmons*, 216 U.S. App. D.C. 207, 213, 670 F.2d 365, 371 (1982), *cert. denied*, 464 U.S. 835 (1983). Moreover, Judge Graae's finding after a lengthy factual inquiry that the witnesses were not coerced or intimidated by anything the detectives said must be sustained unless clearly erroneous. See *Parker v. United States*, 363 A.2d 975, 979 (D.C. 1976) ("judgment as to the credibility of the two witnesses [examined in voir dire by the judge in ruling on mistrial motion] was that of the trial court"). Here, although a detective went a step beyond advising Hill of the prospect of a perjury charge for false testimony, suggesting that his testimony might affect his release date from prison, the trial judge considered all of the circumstances -- including both witnesses' insistence that their change of mind about testifying was their own decision made to avoid the potential consequences of lying under oath -- in finding that the two witnesses had not been coerced. We sustain that finding and we agree further with the judge that any pressure brought to bear on Vines was inconsequential in that he testified as expected on appellant's behalf.

Nevertheless, we admonish the government that prosecutors proceed at their peril in allowing police officers to interview prospective defense witnesses without direction concerning the limited role of their investigation. As nearly all of the cases relied on by the parties imply, the line is a narrow one between merely advising a witness of the penalties for false testimony and intimidating the witness by invoking other possible adverse consequences of testimony, truthful or not. Implicit in the lengthy hearing the trial judge was obliged to conduct in this case is that the government should proceed with great caution in this area.

V.

Appellant was charged with both murder and being an accessory after the fact to that crime, and found guilty of both. At sentencing the trial judge vacated the latter conviction. Appellant now contends that it was plain error (or, alternatively, evidence of his attorney's ineffective assistance of counsel) for the judge not to require the government to elect between these

charges before submission of the case to the jury. This argument has no merit. The fact that accessory liability and principal (or aiding and abetting) liability are "fundamentally dissimilar," *Williams v. United States*, 478 A.2d 1101, 1106 (D.C. 1984), and that a conviction may not be had for both based upon the same conduct, does not at all mean both may not be submitted to the jury. We have impliedly rejected that argument in the analogous context of dual charges for larceny and receiving stolen property. *Franklin v. United States*, 392 A.2d 516, 519 & n.3 (D.C. 1978) (although legally inconsistent such that defendant may not be convicted of both for same conduct, these offenses may be submitted to jury under "rule of priority" instruction), *cert. denied*, 440 U.S. 948 (1979). See also *United States v. Huppert*, 917 F.2d 507, 510 (11th Cir. 1990) (indictment charging complicity as principal and complicity as accessory after fact "is permissible when the question of whether the defendant is a principal or an accessory is one of fact to be resolved by the jury. . . . However, the defendant may not be convicted of both"); *United States v. Day*, 533 F.2d 524, 526 (10th Cir. 1976), *cert. denied*, 444 U.S. 902 (1979). Appellant's contrary reliance on *Dean v. United States*, 377 A.2d 423 428 (D.C. 1977), is mistaken, for in that case we had no occasion to decide whether "election" is required as between principal liability and liability as an accessory after the fact.

Appellant contended for the first time at oral argument that, at a minimum, the judge should have instructed the jury that he could not be found guilty of both crimes. Appellant never requested such an instruction, however, and -- assuming for argument's sake that one would have been proper⁸ -- in the circumstances of this case there is no appreciable danger that the failure to so instruct caused a conviction for murder which the jury otherwise would not have returned.

VI.

Appellant contends that he was prejudiced by the admission of expert testimony by a police officer that the seven ziplock bags of marijuana which formed the basis for his possession conviction were packaged in such a way as to demonstrate his intent to distribute. Curiously, this evidence was admitted to support a charge of possession with intent to distribute which purportedly had been removed from the case by a superseding indictment charging appellant with simple possession only. The parties' (and the judge's) apparent mistaken assumption that the superseding

⁸ At most it appears that appellant (upon request) would have been entitled to an instruction for the jury to consider the murder charge first and, if they found him guilty on that, not to consider the accessory charge.

indictment tracked the original one also caused the count of possession with intent to distribute to be submitted to the jury, which convicted appellant of the lesser charge of simple possession.

Except for the oversight of the judge and the parties, the police expert's testimony most likely would have been excluded on relevance grounds. Any error in its admission was non-prejudicial,⁹ however, because evidence that appellant intended to distribute a small quantity of marijuana paled in comparison to the proof of his cocaine dealing and resultant violent behavior that were the focus of the August 18 charges. Moreover, it is implausible to say the least that the expert's testimony would have prejudicially influenced the verdict on the murder and assault charges but not on the drug distribution charge -- of which appellant was acquitted.¹⁰

The judgments of conviction are, in all respects,

Affirmed.

FOR THE COURT:



WILLIAM H. NG,
Clerk

⁹ It therefore provides no additional support for appellant's claim of ineffective assistance of counsel.

¹⁰ We find nothing approaching reversible error in: (a) the admission of testimony by a witness (Barksdale) who had personal knowledge of the drug dealing relationship between Smith and appellant; (b) the prosecutor's references in summation to appellant's "lies" before the grand jury; (c) the trial judge's failure *sua sponte* to strike a juror for cause; or (d) the judge's failure *sua sponte* to instruct the jury that it must agree unanimously on the facts upon which appellant's conviction for carrying a pistol without a license on August 18 was based. There was also no merit to appellant's claim of ineffective assistance of counsel. Finally, we reject appellant's argument that his two convictions for possession of a firearm during a crime of violence merge with the convictions for assault with a dangerous weapon and first degree murder. See *Thomas v. United States*, 602 A.2d 647, 655 (D.C. 1992); *Freeman v. United States*, 600 A.2d 1070, 1073 (D.C. 1991).

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