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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002076-MR

TOMMY DOTSON — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 99-CR-00324-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: On September 26, 1999, Steve Akers discovered a partially decomposed human corpse on an undeveloped hill in the Cedar Creek area just outside Pikeville in Pike County. An autopsy revealed that the body was that of Chad Ratliff, who had been reported missing about a week earlier. The autopsy also revealed that Ratliff had died from a gunshot wound to the head. Tommy Dotson and Curtis Murphy were charged with Ratliff's murder. In June 2000, Dotson was tried separately for his part in the alleged offense, and the jury convicted him of first-

degree manslaughter[1] and first-degree robbery.[2] By judgment entered August 29, 2000, the Pike Circuit Court sentenced him to concurrent terms of imprisonment totaling twelve years. Dotson contends that he was entitled to a directed verdict of acquittal and that his trial was rendered unfair when several people were not allowed to testify that they had heard Murphy claim responsibility for Ratliff's death. The first contention is without merit, and the second was not properly preserved. Accordingly, we affirm.

At Dotson's trial, Murphy testified for the Commonwealth to the effect that during the early evening of September 18, 1999, he, Dotson, and Ratliff had driven up the remote hill in Cedar Creek, and all of them had taken oxycodone intravenously. An argument had then erupted between Dotson and Ratliff over drug debts. Dotson had drawn a gun prompting the others to do the same, and Murphy had incurred Ratliff's ire by trying to intervene in the argument. In the ensuing gun battle, Ratliff had been felled by a shot to the chest, then, when the wounded Ratliff had tried to sit up, Dotson had shot him in the head. According to Murphy, Dotson had dragged the body among some tall weeds and had picked up Ratliff's gun. Dotson and Murphy had then divided a vial of pills from Ratliff's pocket.

[1] KRS 507.030.
[2] KRS 515.020.

The Commonwealth also presented evidence that Dotson had mortally threatened Ratliff the day before the shooting and that he had confessed the killing to a fellow inmate at the Pike County Jail.

Against this evidence, Dotson's wife testified that she and Dotson had been home entertaining in-laws on September 18, 1999. She admitted that Dotson had gone out for cigarettes near the time of the shooting, but maintained that he was not gone long enough to permit his participation in the crime. To show that Murphy had a motive for the killing, Dotson presented evidence that the night before the shooting Ratliff had taunted Murphy by claiming to have received sexual favors from Murphy's girlfriend. And to discredit Murphy's account of the incident, Dotson questioned Murphy at length regarding several statements he had made to the Pike County Police, each one different from the others.

One of Murphy's statements in particular amounted to a confession. The investigating officers had videotaped this statement, and it was replayed for the jury. On the tape, an obviously intoxicated Murphy told the police that he, Dotson, and Ratliff had gone up the Cedar Creek hill to conduct a drug sale, that an argument over debts had erupted between himself and Ratliff, that Ratliff had pulled a gun, and that in the ensuing melee Dotson had thrown his gun to Murphy, who had used

it to shoot Ratliff. When confronted with this statement at trial, Murphy claimed to have little recollection of it, because he had been intoxicated at the time he made it. He also claimed, however, that he had falsely minimized Dotson's role because he had been afraid that if he told the truth Dotson would retaliate against him or his family.

Dotson contends that he was entitled to a directed verdict. He concedes that a trial court is to direct a verdict only if no rational juror could believe the defendant guilty beyond a reasonable doubt.[3] And he concedes further that ordinarily a witness's credibility is something for the jury to assess.[4] Here, obviously, a juror persuaded that Murphy's trial testimony was credible could reasonably conclude that Dotson is guilty. Under the general rule of deference to jury credibility assessments, therefore, the trial court correctly denied Dotson's motions for a directed verdict.

Against this result, Dotson notes that courts are not to permit patently untrue testimony to provide the basis for a jury verdict,[5] and he contends that Murphy's string of inconsistent statements to the police renders his trial testimony so inherently unreliable as to invoke this narrow exception to the general rule of deference. We disagree.

[3] Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).
[4] *Id.* Taylor v. Commonwealth, 301 Ky. 109, 190 S.W.2d 1003 (1945).
[5] Holland v. Commonwealth, Ky., 272 S.W.2d 458 (1954).

Although Murphy gave differing accounts of the shooting, the account he testified to at trial was not illogical or so at odds with ordinary experience as to be patently untrue. On the contrary, a juror could reasonably have believed that, as Murphy claimed, his earlier accounts had been more-or-less fabricated--attempts to down-play either his own role in the killing or Dotson's role--but that by the time of Dotson's trial he had abandoned such attempts and was then telling the truth. Because Murphy's trial testimony cannot be characterized as patently untrue, it was for the jury to decide whether to believe him. The trial court thus did not err by denying Dotson's motions for a directed verdict.

Dotson next contends that he was denied a meaningful opportunity to confront Murphy's testimony because the trial court improperly excluded, on hearsay grounds, testimony by several other witnesses who allegedly heard Murphy claim responsibility for Ratliff's killing. Murphy testified that after the shooting he had returned to the residence he shared with his girlfriend, Angela Newsome. He had been visibly upset, but when Newsome had asked him what was the matter, he had told her only that they would not be seeing Chad Ratliff any more. Later that night, according to Murphy, he and Newsome had gone to the residence of Julie McCoy where they had visited with Julie; with Julie's brother, Clifford Dean McCoy; and with

Clifford's wife, Kimberly McCoy. Murphy testified that during the visit he had said to the McCoys and Newsome that something bad had happened that night, that he had shot Ratliff, and that Dotson had killed him. During cross-examination, Dotson asked Murphy if he had not told Newsome and the McCoys that he, Murphy, had killed Ratliff. Murphy denied that he had said so.

During his case-in-chief, Dotson called Julie McCoy, Kimberly McCoy, and Angela Newsome as witnesses and attempted to ask each of them what Murphy had said about the shooting that night. In each instance, the Commonwealth objected to the testimony on the ground that Murphy's out-of-court statements were hearsay and thus inadmissible under KRE 802. The trial court sustained the objections. On appeal, Dotson claims that these witnesses would have testified that Murphy had admitted killing Ratliff, and he contends that the trial court erred when it excluded their testimony.

His argument is in two parts. He first asserts that out-of-court statements by a witness inconsistent with the witness's in-court testimony are admissible notwithstanding the general rule excluding such hearsay. He then devotes much of his brief to observing that a criminal defendant has a fundamental right to confront the accusations against him with evidence tending to show that the accusations are false. In effect, the second part of his argument is that if the hearsay

rule required exclusion of the testimony concerning Murphy's alleged prior statements, then the hearsay rule is to that extent unconstitutional.

We need not address this second part of Dotson's argument because we agree with his first contention. The hearsay rule did not require exclusion of Murphy's prior inconsistent statements. On the contrary, KRE 801A(a)(1) provides that a witness's prior inconsistent statement is not excluded under the hearsay rule as long as the witness is questioned about the prior statement and given an opportunity to explain the inconsistency.[6] Dotson duly asked Murphy about his prior statements to Newsome and the McCoys. Those witnesses' recollections of Murphy's statements soon after the shooting should therefore have been admitted.

The fact that Julie McCoy, Kimberly McCoy, and Angela Newsome were erroneously prevented from testifying about Murphy's prior statements does not end the inquiry, however. As our Supreme Court has recently reiterated, to obtain appellate review of a ruling excluding evidence, a litigant "must offer avowal testimony from the witness himself or herself."[7] Dotson did not offer Newsome's or the McCoys' testimony by avowal, and so the exclusion of their testimony may not serve as the basis

[6] Brock v. Commonwealth, Ky., 947 S.W.2d 24 (1997); Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969).
[7] Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 523 (2000).

for appellate relief. Without the avowal, this court simply has no way to assess the error's likely effect. Dotson's suggestion that we may infer what the witnesses would have said from their pre-trial statements to the police and from the testimony they were permitted to give at trial is contrary to the Supreme Court's recent holding:

> We find no such [inference] exception to the avowal requirement and reiterate today the holding we reached in Partin[8] – an alleged error in the trial court's exclusion of evidence is not preserved for appellate review unless the words of the witness are available to the reviewing court.[9]

In sum, the trial court did not err by denying Dotson's motions for a directed verdict. Murphy's eyewitness account of the crime was sufficient evidence of Dotson's guilt to justify submitting the case to the jury, particularly in conjunction with evidence of bad blood between Dotson and the victim the day before the crime and with evidence of Dotson's jailhouse admissions. Although there was conflicting evidence, the conflict was for the jury to resolve. It appears that the trial court did err by excluding under the hearsay rule evidence of Murphy's prior inconsistent statements. Because the excluded testimony was not offered by avowal, however, the apparent error

[8] Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).
[9] Commonwealth v. Ferrell, 17 S.W.3d at 524 (footnote inserted).

provides no basis for relief. Accordingly, we affirm the August 29, 2000, judgment of the Pike Circuit Court.

ALL CONCUR.

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