

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002152-MR

ANTHONY J. CLARK

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 99-CR-00171

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Anthony Clark appeals from a judgment of the Henderson Circuit Court, entered April 11, 2000, convicting him of facilitating the murder of Kenneth Harrigan¹ and sentencing him as a persistent felony offender² to ten years' imprisonment. Clark contends that the evidence against him was insufficient as a matter of law to sustain his conviction and that his trial was rendered unfair by an ambiguous jury instruction and by the improper admission into evidence of statements he made to the

¹ KRS 506.080 and 507.020.

² KRS 532.080.

police. Finding none of these contentions persuasive, we affirm the trial court's judgment.

At about midnight July 28, 1999, Russell Allen shot and killed Kenneth Harrigan. The shooting occurred in Henderson, Kentucky, near the intersection of Alves and Martin Luther King Streets. Although the several witnesses who described the incident at trial differed in their recollection of some of the details, they agreed that shortly before midnight Harrigan and Allen had wrestled and fought in Alves Street and that after the fight Allen had driven away in Anthony Clark's car. Ten to fifteen minutes later he had arrived in Clark's car back on Alves Street accompanied by Clark. The two had exited the car and at least one of them had shouted angry words at people along the street. Allen had been armed with a handgun. Both Clark and Allen had rapidly approached Harrigan where he was standing talking with others, and Allen had opened fire at him, chasing him through a yard and down an alley where Harrigan had finally fallen. The autopsy revealed that Harrigan had been shot four times including a probably fatal shot to the chest.

The Commonwealth alleged that Clark and Allen had both intended Harrigan's death and that Clark had acted in furtherance of that intention by transporting Allen to the scene, by possibly providing Allen with the gun, and by attempting, as he and Allen approached Harrigan, to prevent

Harrigan's escape. These allegations, in turn, were based to some extent upon statements witnesses had allegedly given the investigating officer shortly after the event. The officer testified, for example, that witnesses had reported hearing Clark shout angrily at Harrigan just prior to the shooting, and one witness, according to the officer, had described Clark's approach to Harrigan as an attempt to circle around behind him and prevent him from running away.

At trial, however, the witnesses to whom these statements were attributed denied having told the officer that Clark had said anything to Harrigan or that he had impeded Harrigan's flight. Clark's role, rather, they testified, was possibly to have shouted at some of the onlookers and to have walked toward Harrigan with Allen. As they drew near Harrigan, Allen and Clark had separated, the witnesses agreed. Clark had gone around a car near which Harrigan was standing, and Allen had gone straight toward Harrigan. One witness testified that Clark might have tried to distract Harrigan. But rather than interfering with Harrigan's movement, Clark had become embroiled with one of Harrigan's friends. Once the shooting and the chase had begun, these witnesses testified, Clark had gone back to his car and driven away, or at least had attempted to drive away, for he had been stopped by the police before he had gone more than two or three blocks.

Clark contends that he was entitled to a directed verdict of acquittal. He concedes that such a verdict is appropriate only if no rational juror could be persuaded by the evidence beyond a reasonable doubt that the defendant is guilty of the charged offense or of a lesser-included offense.³ The Commonwealth charged Clark with complicity to murder. Clark could be found guilty of complicity if the Commonwealth proved that he assisted the commission of the crime intending that the crime be committed.⁴ Facilitation is a lesser-included offense of complicity.⁵ It requires proof of a less culpable state of mind. Clark could be found guilty of facilitation if the Commonwealth proved that he knowingly assisted the commission of the crime knowing that the crime was intended, even though he may not have shared that intention.⁶ Clark maintains that there was essentially no proof that he either shared Allen's murderous intentions or knew of them, and thus that there was no rational basis for the jury to find him guilty of either complicity or facilitation. We disagree.

A party's mental state, his intention or his knowledge, may be inferred from his acts and the circumstances

³ Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Campbell v. Commonwealth, Ky., 564 S.W.2d 528 (1978).

⁴ Commonwealth v. Suttles, Ky., 80 S.W.3d 424 (2002).

⁵ Chumbler v. Commonwealth, Ky., 905 S.W.2d 488 (1995).

⁶ *Id.*

in which he acts.⁷ From the evidence that Allen carried his gun openly and that Clark's demeanor as he and Allen approached Harrigan was angry and defiant, it was reasonable for a juror to infer that Clark at least knew of Allen's intent to shoot Harrigan. From the evidence that Clark may have attempted to distract Harrigan or to hinder his escape, a juror could reasonably have inferred that Clark not only knew of Allen's intention, but shared it. Because these inferences were among those available to a rational juror, the trial court did not err by denying Clark's motions for a directed verdict.

Clark next contends that the trial court presented the facilitation charge to the jury in an ambiguous instruction that created the risk of a non-unanimous verdict. Because he did not raise this ground of objection before the trial court, the asserted error has not been preserved for this Court's review.⁸ We may observe, however, that a court may instruct the jury on alternative theories of an offense provided that all of the alternatives are supported by the evidence.⁹ Here the court instructed the jury, in part, that it should find Clark guilty of facilitating the murder if it believed either (1) that he drove Allen to the scene knowing of Allen's intent to kill Harrigan and knowing that the transportation would further that

⁷ Marshall v. Commonwealth, Ky., 60 S.W.3d 513 (2001).

⁸ RCr 9.54; Chumbler v. Commonwealth, *supra*.

⁹ Hudson v. Commonwealth, Ky., 979 S.W.2d 106 (1998).

intent, or (2) that Clark knowingly hindered Harrigan's escape with knowledge that the hindering would assist the killing. As noted above, the evidence supported both of these alternatives. The instruction, therefore, was not improper.

Finally, Clark contends that statements he made to the investigating police officers should not have been admitted into evidence. Police responded to the shooting within minutes. Two of the many witnesses of the shooting pointed out Clark's departing car to one of the officers. That officer stopped Clark as a suspect. He testified that Clark had denied any knowledge of the incident, but had claimed to have merely been driving through the area. This officer detained Clark at the police station for further questioning. About four hours later, the detective assigned to the case questioned Clark. He testified that Clark had again denied any involvement. Clark maintains that both the initial stop and the four-hour detention were unjustified and thus that any evidence derived from them should have been excluded.

We agree with Clark that his being stopped by the police and detained at the police station amounted to an arrest, notwithstanding police assertions that he had not been arrested until shortly after his 4:00 a.m. interview with the detective.¹⁰

¹⁰ Florida v. Royer, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); Dunaway v. New York, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

We are persuaded, however, that the arrest was supported by probable cause and thus did not violate Clark's fourth-amendment rights. Eyewitnesses at the scene implicated Clark by reporting his involvement directly to the officers and pointing to his car. Such face-to-face reports are far more reliable than anonymous tips, to which Clark likens the initial identification, and will generally support a finding a probable cause.¹¹ The officer can assess the reporting eyewitness's demeanor, and the witness exposes himself to sanctions if his report is false. Clark has suggested no reason to make an exception of the eyewitness identification in this case.

The officer who stopped Clark testified at the suppression hearing that he could not recall advising Clark of his Miranda rights, although it was his practice to so advise people he detained. Even if we assume that Clark's fifth-amendment right was violated and his statement to this officer should not have been admitted in evidence, we are persuaded that the error was harmless beyond a reasonable doubt. The evidence of Clark's knowing participation in this crime was overwhelming. Suppression of his brief statement to the officer would not have affected the result.¹²

¹¹ Pasiewicz v. Lake County Forest Preserve District, 270 F.3d 520 (7th Cir. 2001).

¹² RCr 9.24; Darnell v. Commonwealth, Ky., 558 S.W.2d 590 (1977).

In sum, we are persuaded that Clark received a fair trial at which the Commonwealth produced ample evidence of his facilitation of the shooting of Kenneth Harrigan. Accordingly, we affirm the April 11, 2000, judgment of the Henderson Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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