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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002175-MR

DANNY PAUL TRENT

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
INDICTMENT NO. 99-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

DYCHE, JUDGE: On February 11, 1998, someone murdered David Koch while he was at the home of Jimmy Arthur "Bo" Bush in Pendleton County, Kentucky. On September 16, 1999, a Pendleton County Grand Jury indicted Danny Paul Trent, a paraplegic bound to a wheelchair, on one count of murder, KRS 507.020; and one count of tampering with physical evidence, KRS 524.100. On August 28, 2001, Trent proceeded to jury trial. At trial, the Commonwealth

moved to amend the count of tampering with physical evidence to one count of complicity to tamper with physical evidence.

According to the Commonwealth, Koch trafficked in marijuana. The Commonwealth opined both Bush and Trent knew that Koch trafficked in drugs and often carried large sums of money. The Commonwealth alleged that Bush and the paraplegic Trent conspired to lure Koch to Bush's trailer in order to kill then rob him. According to testimony from Bush's ex-wife, Terry Bush, and Trent's estranged wife, Rosa Trent, on February 11, 1998, Bush, with Trent present, called Koch regarding approximately \$6,000.00 worth of marijuana. Koch eventually arrived at the trailer. Bush took Koch outside to show Koch the engine of his Mustang. When the two re-entered the trailer through the back door, Trent, who was hiding in a hallway bathroom, rolled out and shot Koch twice in the head with a .22 caliber rifle.

After the murder, Bush called his wife, Terry, who was at Trent's trailer visiting with Rosa. Bush told Terry that Trent needed Rosa's help. According to Rosa, both she and Terry went to Bush's trailer, but, according to Terry, Rosa went to the trailer alone. Regardless, Rosa testified that when she arrived at the trailer, Trent threatened her with a rifle and ordered her to help Bush load Koch's body into the bed of Koch's truck. According to both Rosa and Terry, after loading the

body, the four then drove to Menifee County. According to both, Bush drove Koch's truck with Trent as a passenger and Terry drove her vehicle with Rosa as a passenger. Trent's young daughter and Bush's young daughter also rode with Terry and Rosa.

Once in Menifee County, Bush and Terry drove along the back roads in the Daniel Boone National Forest. Eventually, Bush and Trent briefly separated from Terry and Rosa. According to testimony, Bush and Trent unloaded Koch's body in a secluded spot and set it ablaze. They then rejoined Terry and Rosa, and Trent joined the women in Terry's vehicle. Bush then went off alone and disposed of the truck by burning it as well. According to their testimony, neither Rosa nor Terry witnessed the disposal of the body or the truck.

Rosa testified that, after the two men had dumped the body but before Bush burnt the truck, she and Trent argued over the stereo in Koch's truck. According to Rosa, Trent wanted the stereo but could not remove it. He ordered Rosa to remove it but she refused. In a fit of anger, Trent allegedly grabbed Rosa and held a knife, supposedly stolen from Koch's truck, to her throat and threatened to kill her because she refused him. However, Terry, who would have been present during this altercation, failed to mention the incident when she testified.

After Bush burnt the truck, he rejoined the others, and they returned to Pendleton County. According to both Rosa and Terry, on the way home, Trent stated he could not believe he had gotten away with "it" and how easy "it" was. In reply, Bush told Trent to shut up. After two brief stops, they eventually returned to Pendleton County.

In his defense, Trent testified he participated in neither the murder nor the disposal of evidence. According to Trent, on February 11, 1998, he went to Bush's trailer to smoke some marijuana with Bush. When he arrived, Trent found Bush with Timmy Bush (Timmy), his brother. After they smoked some marijuana, Bush made a phone call. Shortly thereafter, Koch arrived. Koch entered the trailer, but Bush and Timmy took Koch outside to show him Bush's Mustang. Trent remained inside. After Bush, Koch, and Timmy exited, Trent heard a car engine start followed shortly by a gunshot. Trent went to a window but saw nothing. He then heard another shot. Trent testified that he saw neither shooting, but when he went to the hallway he saw Koch lying near the back door. According to Trent, Bush and Timmy rifled Koch's pockets looking for \$6,000.00.

Trent then retreated to the living room in fear that he too would be shot since he had approximately \$4,000.00 on his person. Trent testified that Bush made another phone call and after a few minutes both Rosa and Terry arrived. Bush, Rosa,

and Terry then loaded the body into Koch's truck and left. Trent then left the trailer and went home. He adamantly denied going to Menifee County to dispose of Koch's body and truck.

The jury convicted Trent of complicity to tamper with physical evidence but acquitted him of murder. On September 4, 2001, the Pendleton Circuit Court sentenced Trent to five years on the complicity conviction. Trent subsequently appealed to this Court.

On appeal, Trent presents four assignments of error. Trent first argues the Pendleton Circuit Court erred when it denied him the right to assert the marital privilege regarding Rosa's testimony. During trial, Rosa, Trent's wife, testified that he stated to her on numerous occasions that he had shot Koch. She testified that Trent threatened to shoot her if she did not help Bush move the body. Trent moved to assert the marital privilege and prevent Rosa from testifying pursuant to KRE 504. After an evidentiary hearing, the circuit court held that the privilege did not apply to Rosa's proposed testimony.

Trent argues that the marital privilege in KRE 504 provides that a defendant can prevent his or her spouse from testifying against said defendant. Trent points out there are but three exceptions to this rule. One, the privilege does not apply if sufficient evidence shows the spouses conspired or acted jointly to commit the crime charged. KRE 504(c)(1). Two,

the privilege does not apply if in the court action one spouse has been charged with domestic violence against the other. KRE 504(c)(2). Third, the privilege does not apply in a court action where the spouses are adverse to one another. KRE 504(c)(3). Trent argues that none of these exceptions apply. Trent argues that, during the hearing, Rosa denied acting jointly with Trent and, in fact, testified she was forced to help move the body. Thus, the first exception does not apply. Trent argues he was charged with murder not domestic violence; thus, the second exception did not apply. Finally, Rosa was not an adverse party to him; thus, the third exception did not apply.

Trent concedes that statements overheard by a third party are generally not privileged, citing State v. Whitaker, No. CA97-12-123, 1998 Ohio App. LEXIS 4838 (rendered Oct. 12, 1998), and State v. Payton, 124 Ohio App. 3d 552, 706 N.E.2d 842 (1997). According to Trent, while Rosa stated at the hearing that Trent's statements were made in the presence of either Bush or Terry or both, Terry testified only about one statement made by Trent. No witness testified regarding the other statements. Thus, Trent argues that the privilege applied to those other statements since the Commonwealth failed to prove the privilege did not apply.

We find Trent's arguments lacking. KRE 504¹ sets forth two privileges regarding spouses, the spousal testimony privilege and the marital communications privilege. Trent attempted to assert the marital communications privilege found in KRE 504(b). However, on appeal, Trent misstates this privilege. According to Trent, this privilege allows one spouse to prevent the other spouse from testifying against him. However, the privilege allows a spouse to prevent the other spouse, "from testifying to any confidential communication made by the individual to his or her spouse during the marriage." KRE 504(b). According to KRE 504(b), "[a] communication is

¹ Husband-wife privilege.

(a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

(b) Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

(c) Exceptions. There is no privilege under this rule:

(1) In any criminal proceeding in which sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charged;

(2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:

(A) The other;

(B) A minor child of either;

(C) An individual residing in the household of either; or

(D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence. The court may refuse to allow the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected; or

(3) In any proceeding in which the spouses are adverse parties.

confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person."

The circuit court held that the marital privilege did not apply to any statements Trent made to Rosa while in the presence of third persons. All the statements made by Trent to which Rosa testified before the jury had been made in the presence of either Bush or Terry or both or in the presence of Bush's and Trent's children. Given this, Trent had no expectation of confidentiality in the statements he made; thus, he was not entitled to the marital privilege found in KRE 504(b). The circuit court did not err in denying the privilege to Trent.

Trent next argues that the statements made by him to which Rosa testified were inadmissible hearsay that did not relate to any recognized hearsay exception. Trent argues that according to Slaven v. Commonwealth, Ky., 962 S.W.2d 845 (1997), even if the marital privilege does not apply, a statement may still be inadmissible if it does not fall under a recognized exception to the hearsay rule. Trent points out that the United States Supreme Court has held that the confession of an accomplice is presumptively unreliable and lacks the sufficient independent indicia of reliability to overcome such unreliability. Calvert v. Wilson, 288 F.3d 823, 830 (6th Cir.

2002), citing Lee v. Illinois, 476 U.S. 530, 539, (1986).

Pursuant to this, Trent argues that Rosa's testimony was inadmissible. Trent argues that his statements were not really against his penal interests. Moreover, he claims Rosa testified against him to avoid further "legal jeopardy" for herself.

In his brief, Trent states, "The facts attendant to this issue (regarding hearsay) were preserved and treated by the court as part of the marital privilege. Neither the court nor counsel addressed the hearsay issue." An issue is either preserved or not preserved. Obviously, if neither the trial court nor counsel addressed an issue, then it could not have been preserved. We have reviewed the record, and find that Trent's trial counsel never objected to Rosa's testimony on the basis of hearsay. Thus, Trent failed to preserve this issue for appellate review. Furthermore, Trent fails to argue palpable error pursuant to RCr. 10.26.

Trent argues that he was "substantially harmed" when the Commonwealth solicited testimony from Rosa regarding alleged incidents of domestic violence. Trent cites five statements made by Rosa regarding acts of domestic violence Trent allegedly committed against her. Trent argues that evidence of other criminal activities is not admissible against a criminal defendant merely to show criminal disposition. Trent points out that such evidence is admissible only to show motive, intent,

knowledge, identity, plan, or absence of mistake. Furthermore, the probative value of such evidence must outweigh its prejudicial effect. O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 156 (1982). Trent argues these five statements were solicited to show Trent's alleged criminal disposition not to show motive, intent, knowledge, identity, plan, or absence of mistake. Further, these statements were highly prejudicial and not probative at all.

While Trent correctly states the law, we must again take Trent to task on preservation. Trent states that his trial counsel objected to Rosa's statements at page 195, volume II of the trial transcript. His counsel did object. However, Rosa made no statements regarding domestic violence immediately before or after this objection. She had testified to a statement made by Trent to her regarding shooting Koch. Trent's counsel objected to this statement based on his prior motion to assert Trent's marital privilege. Thus, Trent failed to preserve the issue regarding alleged domestic violence. Furthermore, Trent failed to request this Court to consider this as palpable error pursuant to RCr 10.26.

Trent finally argues that the circuit court erred when it denied his motion for a directed verdict since the evidence was insufficient. Trent argues that he is a paraplegic in a wheelchair who is in poor health and physically incapable of

helping Bush dispose of a dead body. He argues that Rosa testified inconsistently and she lacked credibility since she was romantically involved with Bush's brother, Timmy. Trent argues that virtually no evidence linked him to the tampering charge and points out the jury acquitted him of murder. He states the evidence merely shows that he may have been in the vehicle when Bush moved the body.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 187 (1991), the Supreme Court of Kentucky succinctly restated the rule regarding directed verdicts:

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.

(Citation omitted.) According to KRS 524.100:

(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[.]

According to KRS 502.020:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense[.]

After reviewing the evidence, we find that the jury reasonably convicted Trent of complicity to tamper with evidence.

According to the record, Rosa testified that Trent threatened to shoot her if she did not help Bush load Koch's body into Koch's truck. Both Rosa and Terry testified that Trent willingly rode with Bush in Koch's truck, which held Koch's body, to Menifee County. Trent then willingly went with Bush to dump and subsequently burn the body. Both Rosa and Terry testified that on the trip back to Pendleton County, Trent stated he could not believe he got away with it and how easy it was. While the Commonwealth assumed Trent meant shooting Koch, given the timing of the statement, the jury could have reasonably concluded Trent meant disposing of the evidence, Koch's corpse. Given the evidence, the circuit court did not err in denying Trent's motion for directed verdict.

For the foregoing reasons, this Court finds that the Pendleton Circuit Court did not err and we affirm Trent's conviction for complicity to tamper with physical evidence.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Clare
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

J. Gary Bale
Assistant Attorney General
Frankfort, Kentucky