

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000400-MR

EDWARD OUTLAW

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
INDICTMENT NO. 00-CR-01057

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Edward Outlaw was charged in an indictment with the offenses of murder,<sup>1</sup> possession of a handgun by a convicted felon<sup>2</sup> and tampering with physical evidence.<sup>3</sup> These charges stemmed from Outlaw's conduct of August 14, 2000, when

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<sup>1</sup> Ky. Rev. Stat. (KRS) 507.020.

<sup>2</sup> KRS 527.040.

<sup>3</sup> KRS 524.100.

he shot and killed Jonah Davis following a cocaine transaction in Lexington, Kentucky.

On August 14, 2000, Outlaw telephoned his friend, Gilbert Campos, and asked Gilbert to pick him up at his girlfriend's house. Outlaw made this request because he was stranded at that location after an argument with his girlfriend, Angela Faulkner. After speaking with Outlaw, Gilbert and his wife, Tracey, agreed to travel from their residence in McKee, Kentucky, to Faulkner's home in Lexington. Upon arriving at Faulkner's house, Gilbert saw Outlaw and Faulkner standing outside the residence shouting at each other. Gilbert and Tracey eventually got Outlaw into Gilbert's sport utility vehicle and left Faulkner's residence. At some point, Gilbert asked Outlaw to drive because Gilbert did not know Lexington.

After driving around Lexington, Outlaw drove to the corner of Georgetown and Douglas Streets, where he stopped the vehicle in front of Shalash's Market. Prior to exiting the vehicle, a decision<sup>4</sup> was made to purchase cocaine from a street-level dealer within this vicinity. When Gilbert and Outlaw left their vehicle, they noticed several young, black men, later identified as Davis, Robert Dawson, Rico Leach and Kenneth

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<sup>4</sup> During the trial, Gilbert and Outlaw both testified that the other wanted to stop and purchase cocaine. Gilbert and Outlaw both denied that the cocaine was for their individual use. Tracy testified that Gilbert and Outlaw purchased the cocaine for themselves, but she did not use any.

Edwards, standing on the sidewalk near the store. Upon recognizing Gilbert, Leach informed his friends "these are my people."<sup>5</sup> Gilbert then requested \$50.00 worth of cocaine. At this point, Edwards, Leach and Gilbert went around the corner of the market, while Dawson served as the "lookout" for the transaction. According to all witnesses, Davis was not involved in the transaction. Leach and Edwards took \$50.00 from Gilbert in exchange for the cocaine. Leach and Edwards, however, decided to "fleece" Gilbert and gave him a substance that was not cocaine. In any event, Gilbert accepted what he believed to be cocaine.

After the transaction was completed, Outlaw and Gilbert attempted to enter Shalash's Market. Seeing this, Davis yelled at Gilbert and Outlaw and told them that they were on the "west side," and advised them to leave the area. Dawson testified that Davis yelled at Gilbert and Outlaw because Davis wanted to protect their "turf." In response to Davis's actions, Gilbert returned to his vehicle. Outlaw, however, asked Davis what he had said. At this point, Dawson pushed Davis into the market because Dawson did not want Davis to get into trouble because of his "smart mouth." Outlaw eventually returned to the vehicle and, along with Gilbert and Tracey, left the area.

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<sup>5</sup> Edwards testified that Leach knew Gilbert because they were lodged in the same jail at some point.

Outlaw began driving north on Georgetown Street toward New Circle Road. At some point during this drive, the occupants of the vehicle discovered that the substance Gilbert purchased was not cocaine. A decision was made to return to Shalash's Market and demand a refund from Leach and Edwards.<sup>6</sup> Outlaw found Edwards, Leach, Dawson and Davis walking down Douglas Street. At this point, Gilbert asked the men if the cocaine was real and demanded his money back. One of the men replied, "I don't know what you're talking about." Outlaw then exited the vehicle and demanded a refund. In response to this request, Davis called Outlaw a "crackhead" and told him "[you] ain't gettin' shit back."

Outlaw testified that, at this point, Davis began threatening him. Davis told Outlaw that, "You better get the hell out of here before I fuck you up." Outlaw testified that he returned to the vehicle and retrieved a gun to intimidate Davis and get Gilbert's money back. Dawson, Leach and Edwards ran from the scene. Davis, however, stepped off the sidewalk and appeared to move toward Outlaw. Believing Davis was coming toward him, Outlaw removed the gun from his waist and began firing as he lifted it up. When the shooting stopped, Davis

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<sup>6</sup> Gilbert testified that Outlaw wanted to return to the market, while Outlaw testified that Gilbert demanded that they return to the market.

died from five gunshot wounds to the neck, trunk and extremities.

Several witnesses disputed this version of the shooting. Kasada Brackin and Marcus Miller testified that Outlaw demanded his refund, then shot first at Leach before turning the gun toward Davis. According to both Brackin and Miller, Outlaw fired between six and nine shots at Davis and stopped firing only after running out of ammunition. Gilbert testified that Outlaw was calm while shooting Davis.

On December 6, 2001, a jury found Outlaw guilty of manslaughter in the second degree<sup>7</sup> and acquitted him of tampering with physical evidence.<sup>8</sup> The circuit court, on January 16, 2002, sentenced Outlaw to ten years' imprisonment. This appeal followed.

Outlaw contends on appeal that the circuit court erred by failing to allow him to introduce evidence of Davis's reputation for violence. At trial, Outlaw's counsel informed the judge that she intended to call two witnesses who would testify that Davis had a reputation for violence. According to counsel, the first witness would testify that Davis held a gun on another person while two others beat and robbed that person.

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<sup>7</sup> KRS 507.010.

<sup>8</sup> Outlaw was not tried for the offense of possession of a handgun by a convicted felon. He later entered a guilty plea to this charge.

The second witness was a teacher from Lafayette High School who would testify that Davis was disruptive during class and had a reputation for violent behavior. The Commonwealth objected to the introduction of this evidence, arguing that the evidence was not only irrelevant, but was also inadmissible since Outlaw was not aware of Davis's reputation for violence.<sup>9</sup> The court agreed with the Commonwealth and ruled that the proffered testimony was irrelevant and not admissible. At this point, Outlaw's counsel informed the court that she would make no effort to bring these witnesses before the court since the testimony would not be admitted. At no time did Outlaw's trial counsel move to place the testimony into the record by avowal pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.52.<sup>10</sup>

The Commonwealth argues that Outlaw, by not placing the testimony from his two witnesses into the record by avowal, failed to preserve this issue for appellate review. Ordinarily, a trial court ruling excluding evidence must be preserved for

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<sup>9</sup> On appeal, Outlaw concedes that he had no knowledge of Davis' reputation for violence prior to shooting Davis on August 14, 2000.

<sup>10</sup> Ky. R. Crim. Proc. (RCr) 9.52 provides that, if an objection to testimony from a witness is sustained, the examining attorney, upon request, may elicit such testimony from the witness out of the hearing of the jury.

appellate review by an avowal of the witness.<sup>11</sup> The rationale behind this rule is to provide the reviewing court with the opportunity to know exactly what testimony was excluded and whether the exclusion was prejudicial to the offering party.<sup>12</sup> Side-bar avowals with respect to excluded testimony will not preserve a defendant's evidentiary issues for appellate review.<sup>13</sup>

A circuit court cannot prohibit a defendant from introducing disputed evidence by avowal. A defendant who is denied an opportunity to make excluded testimony available by avowal is deprived of the remedy of appeal.<sup>14</sup> Thus, the refusal to allow an avowal constitutes reversible error.<sup>15</sup>

In this case, there is no indication that the circuit court refused to allow Outlaw to submit testimony by avowal. Once it became apparent that the court would not allow these witnesses to testify, Outlaw's counsel informed the court that she would not produce the witnesses.<sup>16</sup> By not submitting these witnesses' testimony by way of avowal, Outlaw failed to preserve

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<sup>11</sup> Ky. R. Evid. (KRE) 103(a)(2); Commonwealth v. Ferrell, Ky., 17 S.W.3d 520 (2000).

<sup>12</sup> Ferrell, id., at 525.

<sup>13</sup> Noel v. Commonwealth, Ky., 76 S.W.3d 923, 931 (2002).

<sup>14</sup> Powell v. Commonwealth, Ky., 554 S.W.2d 386, 390 (1977).

<sup>15</sup> Perkins v. Commonwealth, Ky. App., 834 S.W.2d 182 (1992).

<sup>16</sup> Outlaw's trial counsel made this decision in order to shorten his defense and save time during the trial.

this issue for appellate review.<sup>17</sup> Hence, we will not address the merits of this issue.

Outlaw also asserts that the circuit court erred by permitting the Commonwealth to introduce evidence of his prior criminal convictions<sup>18</sup> during the trial's penalty phase. Outlaw contends that the Commonwealth did not provide copies of these prior judgments of conviction prior to trial. In response, the Commonwealth argues that it had no duty to provide copies of these convictions to Outlaw because he failed to file a motion for discovery. The Commonwealth also contends that Outlaw was given an opportunity to review these convictions prior to the beginning of the penalty phase.

The applicable rule on discovery is RCr 7.24(2), which provides that on motion of a defendant the court may order the Commonwealth to "permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth . . . ." RCr 7.24(9) sets forth the sanctions that the trial court may impose for a discovery violation:

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<sup>17</sup> Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

<sup>18</sup> Outlaw had been convicted of numerous criminal offenses in Kentucky and New York.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

Although we found no written motion for discovery in the record requesting copies of Outlaw's prior criminal convictions, the circuit court, on October 24, 2000, entered a pre-trial conference agreement wherein Outlaw requested and the Commonwealth agreed to provide discovery. Upon entry of this agreed order, the Commonwealth was required to provide Outlaw information concerning any prior convictions it wished to introduce during the penalty phase of his trial.

While the Commonwealth failed to comply with this discovery agreement, a violation thereof did not automatically result in the exclusion of the evidence. Pursuant to RCr 7.24(9), the circuit court had various options available to it, including: allowing the defendant to inspect the documents,

granting a continuance, or excluding from evidence the undisclosed documents.

While it is clear that the Commonwealth failed to disclose evidence of Outlaw's prior judgments of conviction, upon objection, the court permitted Outlaw to review these documents and provided him with as much time as he required to conduct his review. Outlaw reviewed and discussed the undisclosed judgments of conviction with counsel for approximately four minutes. Afterward, Outlaw did not object to the authenticity or accuracy of these records and did not object to their introduction.

It does not appear that the Commonwealth withheld these documents from Outlaw in an attempt to surprise him at trial; and these prior convictions were clearly relevant, admissible evidence in the penalty phase. Among the options available to the circuit court at that point were giving Outlaw an opportunity to inspect the documents or grant him a continuance; Outlaw failed to seek any other relief. Even if the Commonwealth violated the discovery order, the circuit court was not required to exclude the evidence nor grant an extended continuance. When there has been a discovery violation, RCr 7.24 grants the circuit court discretion for determining the appropriate sanction. The court's remedy for this discovery violation, allowing Outlaw the opportunity to review the

convictions with counsel for as long as necessary, was not an abuse of discretion.

The judgment is affirmed.

ALL CONCUR.

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