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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002453-MR

STEPHEN R. MURPHY

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 01-CR-00162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant, Stephen R. Murphy, appeals the judgment of the Boyd County Circuit Court sentencing him to ten (10) years in prison. On September 25, 2002, the jury returned a verdict finding appellant guilty of second degree manslaughter for the death of Michael Shawn Johnson ("Johnson"). For the reasons stated hereafter, we affirm.

On August 3, 2001, appellant and Johnson entered a Marathon gas station where they first met Pauletta Whitt

("Pauletta").¹ Both appellant and Johnson soon learned that Pauletta was trying to turn herself in to the police for a criminal incident that occurred in Martin County.² Pauletta testified that appellant persuaded her to forego meeting with the police until she first discussed the matter with an attorney. Subsequently, Pauletta left with appellant and Johnson en route to appellant's house.

Upon arriving at the house, appellant, Johnson and Pauletta began to drink alcohol, and Pauletta also consumed several narcotic pills and smoked marijuana. Pauletta testified that she soon passed out in the living room after trying to eat a plate of food that appellant had made for her. Pauletta awoke in the bedroom, wearing only her bra and underwear, after appellant apparently tried to have sexual intercourse with Pauletta. After this incident, appellant left the room because Johnson was knocking on the kitchen door. Pauletta wrapped herself in a blanket and sat on the living room couch near Johnson.

¹ Appellant argues that Pauletta knew Johnson prior to meeting at the gas station. However, Pauletta testified that she lied to the police about knowing Johnson because she feared that the police would think wrongly of her for leaving with two men that she had never met.

² After learning that warrants were issued for her arrest, Pauletta left Columbus, Ohio on a Greyhound Bus on her way to Ashland, Kentucky. Pauletta testified that she first phoned the Pikeville Police Department, but the officer was unable to find any warrants for her arrest. After contacting the Kentucky State Police, Pauletta was told by a dispatcher to wait at the gas station because an officer was on the way. Pauletta never met the officer.

Pauletta testified that up to this point, appellant was very nice to her and in a good mood. However, upon Johnson's return to the house, appellant had become very mean. Pauletta testified that appellant threatened her with a gun, and also threatened Johnson stating that if he did not return "the gun," then appellant would kill them both.

Appellant contends that at sometime during the evening, Johnson stole a gun from his house. Pauletta testified that Johnson repeatedly assured appellant that he did not steal the gun.³ Appellant testified that prior to Johnson returning to the house, appellant retrieved his .410 rifle for protection and placed it in the living room. This is the rifle that was ultimately used to kill Johnson.

Pauletta testified that prior to the killing, she and Johnson went into the bedroom and shut the door because they became afraid of appellant's intentions. As soon as the door closed, two bullets were shot through the door that barely missed Pauletta's head. Appellant maintains that he was intending to fire into the ceiling. However, a ballistics expert testified that the shots were fired at approximately the same height as that of Johnson's head.

³ Apparently Johnson borrowed appellant's car so that he could drive to work that evening; however, Johnson returned to the house during the night and knocked on the kitchen door. Appellant maintains that Johnson stole his .38 caliber pistol prior to leaving the house.

Subsequently, a fight erupted in the living room area between appellant and Johnson. Pauletta testified that she heard Johnson yelling, "don't do this. I love you. You're my best friend." Pauletta next remembered the gun exchanging hands from appellant, to Johnson, and back to appellant before appellant eventually shot Johnson in the neck. A medical examiner determined that Johnson's cause of death was a gunshot wound to the lower left side of the neck.

The jury returned a verdict finding appellant guilty of second degree manslaughter.⁴ The trial court sentenced appellant in conformity with the jury's ten (10) year recommendation. This appeal followed.

Appellant first argues on appeal that the trial court erred when it did not permit defense counsel to question Pauletta about her criminal past, which would have exposed bias. Appellant has requested that we review this issue for palpable error.⁵ RCr 10.26.

In *Commonwealth v. Pace*, Ky., 82 S.W.3d 894, 895 (2002), the court held that the palpable error rule "is not a substitute for the requirement that a litigant must

⁴ Appellant was on trial for two indictments: one, charging appellant with the offense of murder for the shooting of Johnson and two, charging appellant with first degree wanton endangerment for pointing the gun at Pauletta. Appellant received a not guilty verdict as to the first degree wanton endangerment charge.

⁵ Appellant initially argued that this issue was preserved for our review. However, in appellant's reply brief, he requests review for palpable error.

contemporaneously object to preserve an error for review." In looking at the language of RCr 10.26, the Court stated that "[a]n appellate court may consider an issue that was not preserved if it deems the error to be a 'palpable' one which affected the defendant's 'substantial rights' and resulted in 'manifest injustice.'" *Id.* at 895 (citing RCr 10.26). In determining whether an error is palpable, our review is "whether on the whole case there is a substantial possibility that the result would have been any different." *Id.* (citing *Commonwealth v. McIntosh*, Ky., 646 S.W.2d 43, 45 (1983)). See also *Brock v. Commonwealth*, Ky., 947 S.W.2d 24, 28 (1997).

In the instant case, appellant sought to show the existence of possible bias of Pauletta contending that Johnson and she had devised a plan to steal appellant's gun but it was unexpectedly interrupted when Johnson was killed. To prove this, appellant intended on questioning Pauletta about the indictments pending against her in Martin County; however, the trial court denied this request.⁶

Appellant specifically contends the trial court denied his right to cross-examine witnesses against him in violation of Section 11 of the Kentucky Constitution and the Sixth Amendment

⁶ The Martin County incident involved a fight between some intoxicated men in which one of them was severely beaten. Subsequently, one of the fighters stole an automobile and a gun owned by the injured man. Pauletta was apparently a passenger in this stolen vehicle.

to the United States Constitution. And, appellant argues that he was denied due process because the Martin County incident was admissible under KRE 404 (b)(1).⁷ The trial court found the matter irrelevant to the case. We agree with the trial court.

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) (citation omitted). See also *Caudill v. Commonwealth*, Ky., 777 S.W.2d 924, 925-26 (1989).⁸ "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront

⁷ Kentucky Rules of Evidence ("KRE") 404 (b) provides: "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"

⁸ Appellant cites *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974), for the rule that "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Nonetheless, the holding in *Davis* is specific, as the Confrontation Clause "does not authorize a general exploration of other criminal activity on the part of a witness where there is no showing that the cross-examination would expose some motivation for the testimony being given." *Bray v. Commonwealth*, Ky., 703 S.W.2d 478, 479 (1985). See also *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293, 304 (1997).

and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). See also *Justice v. Commonwealth, Ky.*, 987 S.W.2d 306, 313 (1998). Additionally, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (emphasis in original).

In the instant case, however, the trial court's decision to preclude appellant from cross-examining Pauletta about the Martin County incident did not cause him manifest injustice. RCr 10.26. As cognizant as we are of the fundamental importance of the constitutional right to confront witnesses, we are not convinced that appellant was prejudiced.

Appellant first requested whether he could question Pauletta about her involvement in the Martin County incident during a pre-trial conference. In recognizing the lack of similarity between the two incidents, the prosecutor indicated to the trial judge that he interviewed the Martin County investigating officer who indicated that their case against Pauletta was weak. Even so, during a bench conference at trial, defense counsel sought to narrow the issue by asking Pauletta if

the charges pending in Martin County were felony or misdemeanor.

In response, the trial court stated:

Well, it's like trying to impeach her on something that's not final . . . I'm not going to allow that. Not at this time. As we agreed at the pre-trial, if you develop this further to where I see enough similarities in this triangle madness down there in Martin County then we'll revisit it.

Particularly important here is the rule that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435. Given that Pauletta's involvement in the Martin County incident was considered weak and irrelevant to appellant's current indictment, the trial court was clearly concerned about the Martin County incident confusing the jury. Accordingly, upon a careful review of the record, the trial court did not err, as there is little, if any, possibility that the result of appellant's trial would have been any different if the questions were permitted. *Pace*, 82 S.W.3d at 895.

Next, appellant argues that the trial court erroneously overruled a motion for exculpatory evidence

concerning Johnson's past criminal acts, specifically regarding Johnson's character for violence and drunkenness. The trial court held that if it granted the motion, "it would require the Commonwealth to prepare part of the defendant's investigation for him. The Commonwealth is already legally bound to turn over any binding material." Again, we agree with the trial court.

Appellant relies on *Brady v. State of Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), for the rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also *Ballard v. Commonwealth, Ky.*, 743 S.W.2d 21, 22 (1988).

Brady concerns a situation in which the prosecution holds information that the defense does not and the prosecution's failure to disclose the information deprives the defendant of a fair trial. 373 U.S. 83, 83 S.Ct. 1194. Therefore, "reversal is required only where 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome.'" *Bowling v. Commonwealth, Ky.*, 80 S.W.3d 405, 410 (2002) (quoting *United*

States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985)).

Here, it is highly unlikely that information regarding Johnson's drinking habits would have changed the result of the trial. Both prior to and during trial, defense counsel had ample opportunity to question the witnesses about their familiarity with Johnson's violent and intoxicated tendencies. Appellant also failed to produce any evidence contrary to the trial court's reasoning. As such, there is simply nothing in the record to suggest that the trial court abused its discretion in overruling the motion.

Therefore, the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Roberts Horsman
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Ian G. Sonogo
Assistant Attorney General
Office of Attorney General
Frankfort, Kentucky