

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000647-MR

JAMES OSCAR MERRIMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 02-CR-01088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: James Oscar Merriman appeals from a final judgment of the Fayette Circuit Court wherein he was convicted of first-degree assault and sentenced to twelve years in prison following a jury trial. We affirm.

On August 23, 2002, Merriman, age sixteen at the time, shot Chad Hager in the face with a .357 magnum handgun, with the result that Hager lost his right eye. The incident occurred at the residence where Hager lived with his mother. Hager's mother was not at home at the time, and the two boys as well as six of their friends were present when the shooting occurred. All of

those present were between the ages of twelve and sixteen, and many had been drinking during the afternoon and evening. They were also preparing to smoke marijuana cigarettes at the time.

Prior to the shooting, Hager brought out a loaded .357 magnum handgun from his closet to show to the others. He testified that he told everyone the gun was loaded, and at least one witness corroborated this testimony. Other witnesses indicated they knew the gun had been loaded at one time because they saw it being unloaded. Although Hager indicated that Merriman reloaded the gun, several of the witnesses could not remember who, if anyone, had reloaded it.

The conversation around the dining room table where the shooting occurred increased in volume as those present prepared the marijuana for smoking. One of the children present stated that the next person who talked would not get to smoke the marijuana. A short time later, Merriman stated that "the next person who talks gets shot." In response to this statement, Hager said, "Shut-up, I like to talk when I'm getting drunk." Merriman then pointed the gun at Hager and shot him in the face.

Merriman was indicted and convicted by a jury on the charge of first-degree assault. In responding to the court's instructions to the jury, the jury determined guilt due to Merriman's "wantonly engaging in conduct which created a grave

risk of death to another and thereby injured Chad Hager under circumstances manifesting extreme indifference to human life." The jury recommended a sentence of twelve years in prison, and the court sentenced Merriman accordingly. This appeal followed.

Merriman testified at trial that he knew the gun was loaded when Hager brought it out, but that he saw Hager unload it and put the bullets on the table. He further stated that he went to find some rolling papers for the marijuana and that when he returned, the gun was still on the table. Merriman testified that he did not remember anyone saying that the next person to talk would get shot, and he further testified that he did not think the gun was loaded since he had seen Hager unload it. Further, he stated that when he pulled the trigger he did not intend to shoot anyone.

Merriman first argues that the trial court erred by prohibiting him from introducing evidence that Hager had stolen the gun used in the shooting as well as four other guns that were found in the residence and by prohibiting him from introducing evidence that all the children knew the guns were stolen. Merriman's counsel argued at trial that he should have been allowed to have evidence introduced that the guns were stolen because it might have helped explain the reluctance of the witnesses to give statements to the police following the shooting. Rather than pursue this argument on appeal, Merriman

argues that the evidence was admissible in order to determine whether any deals had been made with Hager or other witnesses concerning the stolen guns in exchange for their testimony. In support of his argument, Merriman cites Williams v. Commonwealth, Ky., 569 S.W.2d 139 (1978), wherein the Kentucky Supreme Court stated that "a defendant has a right to expose the fact that a witness has criminal charges pending against him and thereby possesses a motive to lie in order to curry favorable treatment from the prosecution." Id. at 145.

We reject this argument for several reasons. First, there is no indication in the record that any charges had been filed against Hager or any other witness in connection with the stolen guns and no evidence that any deals had been made by the prosecution with any of them. In other words, it is merely speculation that the questioning of Hager and the other witnesses concerning the fact that the guns were stolen would have led to testimony that any of them had been charged or any deals had been made. Without an avowal to show what Hager or the other witnesses would have said, we have no basis for determining whether any alleged error in excluding the testimony was prejudicial. See Cain v. Commonwealth, Ky., 554 S.W.2d 369, 375 (1977).

A second reason for rejecting this argument is that it was not raised to the trial court. See Kennedy v. Commonwealth,

Ky., 544 S.W.2d 219, 222 (1976). As we have noted, Merriman's counsel argued to the trial court that the presence of stolen of guns may have explained the reluctance of the witnesses to give statements to the police. Since all witnesses gave statements to the police, we fail to perceive how testimony concerning the witnesses's knowledge that the guns were stolen would be probative of whether they were reluctant to give statements concerning what they had witnessed. It is more likely that any reluctance on the part of the witnesses as to what they had seen was based on the fact that they had been present in an environment that included drugs, alcohol, guns, and a shooting.

Furthermore, we conclude that the prejudicial impact of evidence that the gun was stolen outweighed its probative value. The fact that the gun used in the shooting as well as the other guns found in the house were stolen had no relevance to the shooting itself. Likewise, the evidence that the guns were stolen was irrelevant to Hager's status as a victim of the shooting. In short, we find no error in the trial court's ruling excluding evidence that the guns were stolen, that Hager had stolen them, and that the witnesses knew the guns were stolen.

Merriman's second argument is that the trial court erred by not permitting one of the witnesses, Steve Kidwell, to testify that the shooting was an accident and that Merriman did

not know the gun was loaded. During cross examination of the witness by Merriman's counsel, Kidwell admitted that he may have told police in an earlier statement that Merriman was just playing around and did not know the gun was loaded. Kidwell then testified that he believed the shooting was accidental. Counsel for the parties approached the bench, and the court sustained the Commonwealth's objection to the testimony and offered to admonish the jury to disregard it. The Commonwealth declined the admonition. Merriman's counsel then again asked Kidwell about his earlier statement to police that Merriman did not know the gun was loaded. Counsel for the parties again approached the bench, and the court sustained the Commonwealth's objection that Kidwell could not testify as to what Merriman did or did not know. Again, no admonition was given to the jury.

We reject Merriman's argument for several reasons. First, since the objections were sustained at the bench and no admonition was given to the jury, the jury heard the testimony and was unaware that the Commonwealth's objections had been sustained. Therefore, there could be no prejudice resulting from the court's rulings. Second, we agree with the Commonwealth that the testimony was not valid opinion evidence that is allowed under KRE¹ 701. Even though Kidwell was seated at the dining room table where the shooting took place, he

¹ Kentucky Rules of Evidence.

testified that he did not see Merriman pull the trigger. He did testify that Merriman said that the next person who talks gets shot. The authorities cited by Merriman in his brief do not convince us that Kidwell should have been permitted to testify that Merriman shot Hager accidentally or that Merriman did not know the gun was loaded. Therefore, we find no error by the trial court in excluding this testimony from Kidwell.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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