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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001399-MR

BRENT MARCEL COLEMAN, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CR-00664

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2003-CA-001458-MR

ANTONIO REMONE TAYLOR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 02-CR-00664

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Brent Marcel Coleman Jr., brings Appeal No. 2003-CA-001399-MR from a July 1, 2003, judgment of the Fayette Circuit Court on a jury verdict convicting him of manslaughter in the first degree and other related crimes. Antonio Taylor brings Appeal No. 2003-CA-001458-MR from a June 24, 2003, judgment of the Fayette Circuit Court on a jury verdict convicting him of complicity to commit manslaughter in the second degree and other related crimes. We affirm.

On the evening of April 7, 2002, Coleman and Taylor were involved in the shooting death of Shan Howell. The events that culminated in Howell's death are not completely clear. Apparently around 10:30 p.m. that evening, Howell received a phone call from his daughter, who wanted to be picked up from a friend's house at 2069 Tammy Court. Howell was intoxicated so his girlfriend, Donetta Tyler, drove him in his white Nissan. Neither Howell nor Tyler was familiar with the neighborhood so they stopped at a residence on Ward Drive to ask for directions. While the two were stopped, Howell noticed a black Chevrolet pull in behind them. Howell and Tyler felt they were being followed so Howell exited the white Nissan and retrieved a Mossberg rifle from the trunk. The black Chevrolet immediately sped away. Howell returned to his vehicle and he and Tyler proceeded to pick up his daughter from the home on Tammy Court.

For disputed reasons, Coleman and Taylor believed that Howell may have attempted to rob Taylor's "brother." Taylor went to the house where Coleman was staying and shouted for Coleman to come with him. In response to Taylor's request, Coleman retrieved a shotgun and left with Taylor. Coleman, Taylor, and two others left in the black Chevrolet. In an attempt to locate Howell, the four returned to Ward Drive. Howell had also returned and was spotted by Coleman and Taylor.

Upon noticing the presence of the black Chevrolet, Howell told Tyler to pull over. Howell exited his vehicle from the passenger's side with a rifle. It is not clear whether Howell said anything to the men, whether he pointed the gun at them or whether he even fired a shot. What is clear is that over twenty shots were fired and Howell was dead.

Coleman and Taylor were subsequently indicted by a Fayette County Grand Jury. Coleman was indicted upon one count of murder, three counts of wanton endangerment in the first degree, one count of tampering with physical evidence and one count of giving an officer a false name. Taylor was indicted upon one count of murder, three counts of wanton endangerment in the first degree, and one count of tampering with physical evidence.

Coleman and Taylor were tried jointly. See Ky. R. Crim. P. (RCr) 9.12. Following the jury trial, Coleman was

found guilty of manslaughter in the first degree, tampering with physical evidence, and three counts of wanton endangerment in the first degree. Coleman received a total sentence of ten (10) years' imprisonment. Taylor was found guilty of complicity to commit manslaughter in the second degree, three counts of wanton endangerment in the first degree, and tampering with physical evidence. Taylor was sentenced to a total of fourteen (14) years' imprisonment. These appeals follow.

Appeal No. 2003-CA-001399-MR

Coleman brings eight allegations of error on appeal. We summarily reject seven of those allegations as being clearly without merit; however, Coleman raises one allegation of error that is somewhat troublesome - whether the circuit court erroneously qualified the instruction on self-defense with the initial aggressor instruction. For reasons hereafter elucidated, we conclude the trial court properly included the limiting language of the initial aggressor instruction to the self-defense instruction.

Kentucky Revised Statutes (KRS) 503.050 codifies the defense of self-protection and states, in relevant part, as follows:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is

necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat.

The limitation of initial aggressor instruction is found in KRS 503.060 and states, in relevant part, as follows:

Notwithstanding the provisions of KRS 503.050, the use of physical force by a defendant upon another person is not justifiable when:

. . . .

(2) The defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person[.]

It is well established that before the limiting language of the initial aggressor instruction may be properly given, there must be sufficient evidence to justify the instruction. Stepp v. Commonwealth, 608 S.W.2d 371 (Ky. 1980). To determine "whether an instruction on self-defense is proper or whether an instruction on self-defense with limitations is proper," the circuit court must consider the "whole circumstances" surrounding the incident. Id. at 374.

In the case sub judice, there was testimony presented that Coleman and Taylor had planned to confront Howell, that

Coleman was armed, and that Coleman had intentionally returned to Ward Drive seeking Howell. There was also evidence that Howell never fired a single shot while Coleman unloaded his weapon. When considering the “whole circumstances” surrounding the incident that led to Howell’s death, we are of the opinion the circuit court properly instructed the jury upon self-defense with the initial aggressor limitation. Simply put, there was sufficient evidence establishing that Coleman provoked the use of force by Howell and did so with the intent of causing serious physical injury or death. Accordingly, we conclude the trial court properly instructed the jury upon the defense of self-protection.

Appeal No. 2003-CA-001458-MR

Taylor contends the trial court committed error by denying his motion for directed verdict of acquittal upon the charge of criminal complicity to commit second-degree manslaughter. We disagree.

A directed verdict of acquittal is proper if viewing the evidence as a whole it would have been clearly unreasonable for the jury to have found guilt. See Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The elements of manslaughter in the second degree are set forth in Kentucky Revised Statutes (KRS) 507.040 and are, in relevant part, as follows:

- (1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's

Complicity has been defined in KRS 502.020 as:

- (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; or
 - (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

At trial, Derlando Ragland testified that he was a passenger in the vehicle with Taylor shortly before the shooting took place. Ragland testified that codefendant Coleman stated he was "going to kill him." The evidence also indicated that Taylor carried a "TEC 9" and fired several rounds. Taylor points to the fact that Howell's body contained three pellets from a shotgun, which was the type of gun carried by Coleman. However, Taylor admitted that he and Coleman both fired their weapons. Both Taylor and Coleman believed the victim had attempted to rob Taylor's "brother." Taylor and Coleman were in pursuit of Howell because of this belief. Based upon these facts, we are of the opinion that a jury could have reasonably

found that Taylor was guilty of complicity to commit manslaughter in the second degree. Even though shots fired by his gun did not ultimately kill Howell, the evidence clearly establishes that Taylor aided and counseled Coleman in the commission of said offense. As such, we are of the opinion the trial court did not commit error by denying Taylor's motion for directed verdict of acquittal upon the charge of complicity to commit manslaughter in the second degree.

Next, Taylor argues the trial court improperly denied his request for a jury instruction upon criminal facilitation to commit manslaughter. Criminal facilitation is defined in KRS 506.080(1) as:

A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Essentially, Taylor contends the trial court erred in refusing to instruct the jury on criminal facilitation as a lesser included offense of complicity. An instruction upon a lesser included charge is proper only if a reasonable jury could entertain a reasonable doubt of defendant's guilt upon the greater charge, but still believe beyond a reasonable doubt that

defendant is guilty of the lesser charge. Luttrell v. Commonwealth, 554 S.W.2d 75 (Ky. 1977).

In Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993), the Court held:

The principal distinctions between the two offenses [facilitation and complicity] are that a) facilitation requires *knowledge* that another intends to commit a crime, while complicity requires an *intention* to promote or facilitate commission of the offense; and b) facilitation requires provision of means or opportunity for commission of the crime, while complicity requires either solicitation, conspiracy, assistance, counsel, etc.

Evidence introduced at trial indicated that Taylor clearly intended to promote and/or aid Coleman in the shooting death of Howell. Howell had allegedly attempted to rob Taylor's "brother," and Taylor admits to firing his gun at the same time Coleman fired at Howell. Moreover, the evidence collected from the scene revealed that Taylor fired his weapon several times. Clearly, Taylor possessed more than a simple knowledge that Coleman was going to commit the crime, but rather Taylor actively aided and engaged in the commission of the crime. Therefore, we do not believe that a reasonable jury could have found Taylor guilty of criminal facilitation.

Taylor also argues the trial court committed reversible error by admitting into evidence the entire audiotaped statement of Derlando Ragland. Following the

testimony of Ragland, the Commonwealth sought to introduce a previously taped statement of Ragland's interview with a police detective. The Commonwealth argued that this audiotape was admissible under Ky. R. Evid. (KRE) 801A, as a prior inconsistent statement. While portions of the audiotape may have been admissible under KRE 801A, Taylor maintains it was error to play the entire audiotape to the jury.

While it may have been better practice for the trial court to have limited the audiotape to only those portions containing prior inconsistent statements, we are, nevertheless, compelled to conclude that any error was harmless. RCr 9.24. Considering the evidence amassed against Taylor, we are simply unable to conclude there exists a reasonable probability the jury's verdict would have been different absent the admission of the entire audiotape. See Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987).

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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