

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000028-MR

JOHN LOUIS CAVINS, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 02-CR-01287

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: John Louis Cavins, Jr. appeals from a jury verdict and judgment finding him guilty of second degree manslaughter and complicity to robbery first degree and sentencing him to fifteen (15) years imprisonment. Upon review, we affirm.

The facts of the case relevant to this appeal are as follows: On the evening of December 26, 2001, Wally Newstead was shot multiple times and killed in front of his home in a trailer park located at 1081 New Circle Road in Lexington, Kentucky.

Other residents at the trailer park reported hearing the gun shots and seeing a white car entering the area before the shooting and leaving immediately afterwards. A number of them also reported seeing three men wearing dark clothing and masks walking towards Newstead's trailer prior to the shooting. None of the residents, however, were able to identify at trial any of the three men involved.

One resident, April Perez, further testified that she saw Newstead running from his trailer with one man chasing after him before falling in the street following the gun shots. The three men apparently fled the scene in the white car following Newstead's collapse. Perez then went to Newstead to try to render assistance and found that he had been shot multiple times. Newstead made references to "my money" and told Perez that the three men wanted his money. When Perez asked him if he knew who the men were, Newstead told her that he did not know, and he then died as a result of the multiple gunshot wounds that he had sustained.

In October 2002, Richard Marshall and his brother, Aaron "Worm" Marshall, were arrested and questioned in connection with the subject incident after their names were given to the police by an apparent eyewitness. Aaron Marshall indicated to the police that Richard had told him that he was planning to rob Newstead, and that he had later told him that he

was involved in Newstead's death. Richard denied being the person who actually shot Newstead.

On October 4, 2002, Richard Marshall was questioned by the police about his role in the incident. He admitted helping to plan an intended robbery of Newstead with two other individuals—Richard Houp and Appellant Cavins—and indicated that they sought to carry out the planned robbery on December 26, 2001. Marshall stated that Newstead was known to be a drug dealer who kept quantities of money and pills in his trailer, and that the plan was to rob him of both. Houp would take the pills, while Marshall and Cavins would split the money that they obtained.

Richard Marshall told the police that he drove his vehicle to the trailer park on the night of Newstead's death, intending to rob Newstead, and that he had brought a mask and gloves to wear. He further indicated that Cavins had brought along a handgun to be used to threaten Newstead, and that a two-liter soda bottle was taped to the gun to act as a makeshift silencer. Marshall claimed that he did not know that a gun was going to be involved in the robbery until the individuals were on their way to Newstead's trailer park, and he denied having a gun of his own. He also denied that the men intended to shoot Newstead. Upon arriving at the trailer park, the three men walked to Newstead's trailer, and Houp asked Newstead to open

the door. Upon opening the door, Newstead saw the men, apparently realized that something was afoot, pushed his way through them, and ran from the trailer. At this point, according to Marshall, Cavins began firing shots at Newstead that ultimately caused him to collapse and fall. Cavins, Houp, and Marshall then fled the scene in Marshall's vehicle without taking anything from Newstead's person or home.

Following these interviews, Cavins was brought in for questioning about the Newstead death. He made no particular admissions to the police about his role in the events leading up to Newstead's death. Instead, he asked a number of hypothetical questions about possible punishments for the crimes in question, including the death penalty.¹

On December 9, 2002, Richard Marshall and Cavins were indicted by the Fayette County Grand Jury on charges of murder and first degree robbery.² Marshall was also indicted on a felony count of tampering with physical evidence.³ Both individuals pled "not guilty" to these charges and the matter

¹ A recording of this interview with Appellant was played for the jury at the trial of this matter. The audio of the recording is difficult to understand, and no transcripts were supplied in the record on review.

² Richard Houp was not indicted for the subject incident and was apparently the referenced "eyewitness" to the Newstead killing who had implicated the Marshall brothers and, eventually, Appellant Cavins. Houp ultimately refused to testify at the trial of this matter, invoking his Fifth Amendment rights.

³ The jury ultimately found Marshall to be "not guilty" of this offense.

proceeded to trial, which was conducted from November 3 to November 13, 2003.

At trial, Richard Marshall testified relatively consistently with his statements to the police, again admitting to his part in the intended robbery with Houp and Cavins but denying that he was the person who shot Newstead. Cavins did not testify, instead offering an alibi defense featuring the testimony of a number of friends and family members. The jury found both Cavins and Marshall guilty of second degree manslaughter and complicity to first degree robbery and sentenced each man to fifteen (15) years incarceration. Judgment was entered in accordance with this verdict. This appeal followed.

Cavins first argues that the trial court erred in refusing to admit a statement against penal interest purportedly made by Richard Houp to his girlfriend, Melissa Robinson. In that statement, Houp allegedly identified himself and the Marshall brothers as the three men involved in the death of Wally Newstead, implying that Cavins was not involved. Robinson was subpoenaed to testify at trial, but she apparently fled the area before being called to testify and could not be located prior to the conclusion of trial. Consequently, the proffered

statement is actually Cavins' attorney's summary of Robinson's anticipated testimony as to Houpp's purported statement⁴.

As an initial matter, we cannot perceive how Cavins intended to introduce the statement, given Robinson's absence. Cavins failed to identify another witness through whom this hearsay would be offered into evidence, or even to specify which hearsay exception would allow it to be introduced without Robinson's testimony. Unfortunately, neither counsel nor the trial court addressed this issue in any comprehensive manner. Nevertheless, assuming, arguendo, that this statement could have been introduced through another witness or hearsay exception, we find that the trial court did not err in refusing to admit it into evidence.

"It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion."

Commonwealth v. King, 950 S.W.2d 807, 809 (Ky. 1997) (citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1995) (citations omitted).

⁴ Cavins' brief refers to Robinson's statement as having been "preserved by avowal." There was no avowal, and there could have been none, because Melissa was absent and Houpp asserted his Fifth Amendment privilege. An avowal under the former rule required a "witness." See former Kentucky Rule of Criminal Procedure 9.52, deleted by order of the Kentucky Supreme Court effective January 1, 2005.

Accordingly, we will adhere to these standards in reviewing the trial court's decision to exclude the evidence in question.

The applicable evidentiary rule for statements against interest is KRE⁵ 804(b)(3), which provides:

KRE 804(b). Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

"In order for the hearsay exception for statements against penal interest to apply, the proponent of the statement must show that the declarant is unavailable." Marshall v. Commonwealth, 60 S.W.3d 513, 519 (Ky. 2001) (citing KRE 804(b); Justice v. Commonwealth, 987 S.W.2d 306, 313 (Ky. 1998)). "A declarant is unavailable if he is exempted from testifying by a ruling of the court on grounds of a privilege." Id. (citing KRE 804(a)(1); Taylor v. Commonwealth, 821 S.W.2d 72 (Ky. 1990)). Given that

⁵ Kentucky Rules of Evidence.

Houp invoked his Fifth Amendment privilege against self-incrimination and indicated that he would not answer any questions because of that privilege, he was unquestionably unavailable as a witness under the requirements of KRE 804(a)(1). See Taylor, 821 S.W.2d at 74.

The rule also requires that the offered statement against interest be averse to the declarant's penal interest in that it would subject him to criminal liability. Here, the purported statement by Houp implicated himself and the Marshall brothers as being involved in the death of Wally Newstead. Consequently, we are inclined to agree with Cavins that this requirement of KRE 804(b)(3) is satisfied here.

Of particular relevance in our examination, however, and the factor upon which the trial court gave the bulk of its attention, is the last sentence of KRE 804(b)(3), which requires that "corroborating circumstances clearly indicate the trustworthiness of the statement." See also Crawley v. Commonwealth, 568 S.W.2d 927, 931 (Ky. 1978) ("Trustworthiness of a statement against penal interest is a prerequisite to its admissibility."). A number of federal appellate courts, in interpreting FRE⁶ 804(b)(3), have explicitly held that trial courts are left with substantial discretion in determining the sufficiency of corroboration. See, e.g., United States v.

⁶ Federal Rules of Evidence.

Mackey, 117 F.3d 24, 29 (1st Cir. 1997); United States v. Garcia, 986 F.2d 1135, 1139 (7th Cir. 1993). The trial court here expressed particular concern over the trustworthiness of the statement from Houp and, given the facts and arguments presented at trial, we cannot conclude that the trial court abused its discretion in rejecting the introduction of the statement because of this concern.

We note from the record that counsel for Cavins spent a considerable amount of time in opening argument and in cross-examination of Detective Paul Williams characterizing Richard Houp as being completely untrustworthy due to the fact that he apparently gave multiple inconsistent statements to the police and to two girlfriends (including Robinson) about the events of December 26, 2001. Indeed, a sizable portion of Cavins' defense appeared to be directed toward discrediting Houp in the event that he decided to take the stand and testify for the Commonwealth. With this being the case, we can easily understand the trial court's hesitancy to admit into evidence a hearsay statement of this nature from a man that counsel for Cavins took great pains to otherwise label as a liar. Indeed, at least one court has held that the existence of conflicting statements by an unavailable witness whose statement is being offered under FRE 804(b)(3) indicated a lack of trustworthiness. See United States v. Groce, 999 F.2d 1189, 1191 (7th Cir. 1993).

Consequently, we cannot conclude that failing to allow the introduction of the purported statement made by Houp to Robinson was an abuse of discretion by the trial court.

Cavins' second contention is that the trial court's failure to allow the introduction of Richard Houp's purported statement against interest was unconstitutional in that it deprived him of a fair trial and his right to present a defense in his behalf.

The U.S. Supreme Court has long recognized that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 523 U.S. 303, 308 (1998) (citations omitted). The Supreme Court has further found "the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." Id. (citations omitted). The Supreme Court has also recognized that state and federal governments "unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." Id. at 309 (citations omitted).

Cavins states that his defense was premised on the fact that he was not involved in the death of Wally Newstead, but that Houp and the Marshall brothers had implicated him in an effort to protect Aaron Marshall from prosecution. Because Houp invoked his Fifth Amendment rights, Cavins argues that Robinson's testimony as to what was told to her by Houp was the only means of establishing that those other three men committed the charged offenses.

This, however, does not appear to be the case, as Cavins put on a number of alibi witnesses, including his mother and father, who testified that he was somewhere else on the night of December 26, 2001. Moreover, because Richard Marshall and Aaron Marshall both took the stand during the course of the trial, counsel for Cavins was able to engage in a thorough cross-examination of both men as to their role in the incident and as to any efforts to protect Aaron Marshall from prosecution. Consequently, Cavins was given ample opportunity to argue and present his theory of defense even without the evidence of Houp's statements to Melissa Robinson. The fact that one piece of favorable evidence presented by Cavins was excluded by the trial court does not mean that he was not given an ample and fair opportunity to defend himself. See Scheffer, 523 U.S. at 316. Furthermore, as discussed above, the trial court had legitimate concerns about the reliability of the

offered evidence and decided to exclude it because Haup had given multiple conflicting statements, a fact repeatedly emphasized by Cavins himself. Accordingly, we cannot conclude that the exclusion of this evidence "significantly undermined fundamental elements of the defendant's defense" so as to merit a reversal here. Beaty v. Commonwealth, 125 S.W.3d 196, 206-07 (Ky. 2003) (citation omitted).

Cavins' final contention is that the trial court erred in failing to give an "attempted robbery" instruction. As grounds for its decision not to give such an instruction, the trial court relied upon the case of Kirkland v. Commonwealth, 53 S.W.3d 71 (Ky. 2001), finding the facts of that case analogous to the situation at hand. The Commonwealth urges us to follow this decision here. Cavins, however, contends that Kirkland is distinguishable.

In Kirkland, two men entered a liquor store intending to rob the owner. A surveillance camera in the store showed that as one man went to take money from the cash register, the other fired a shot that passed through the register and struck the owner. Both men then fled the scene without taking any money. The store owner died as a result of the gunshot. Id. at 73. At trial, Kirkland testified in his own defense and admitted that he and his accomplice entered the store in order to take the money from the owner. Id. at 76. In finding that

no "attempted robbery" instruction needed to be given under these facts, the Kentucky Supreme Court held: "All the evidence indicates that McKee and Kirkland entered the store with a gun in order to steal money from the victim. The robbery was accomplished at that point. There was no evidence of any 'attempt.' Under the totality of the evidence, there was no basis for an attempt instruction." Id. (citing Commonwealth v. Collins, 821 S.W.2d 488 (Ky. 1991)).

In addressing this issue, we first note that a conviction of first degree robbery does not require that something be taken from the alleged robbery victim; that is, it does not require a completed theft. See Wade v. Commonwealth, 724 S.W.2d 207, 208 (Ky. 1986) (citations omitted); Lamb v. Commonwealth, 599 S.W.2d 462, 463-64 (Ky. 1980) (citations omitted). Accordingly, the fact that nothing was actually taken from Newstead in this case is of no consequence.

The testimony given by Richard Marshall at trial indicated that he and two other individuals, whom he named as Cavins and Houpp, went to Newstead's home with the intention of stealing money and pills from him. The evidence indicates that when Newstead saw the three men at his door, he clearly perceived a threat, attempted to flee, and was shot to death. He subsequently made a dying declaration that the men were after his money. We agree with the trial court that an "attempted

robbery" instruction was unnecessary here for the same reasons given in Kirkland. There is nothing in the record to support an "attempt" to rob. If the robbery was not completed at the moment the three men confronted Newstead at his home dressed in masks and dark clothing while armed with a gun, it certainly was when Newstead was shot and killed only moments after this confrontation after attempting to flee. Accordingly, we do not believe that the trial court erred in failing to give an "attempted robbery" instruction.

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

ALL CONCUR.

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