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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002049-MR

BONNIE L. PARTIN

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00239

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Bonnie Partin appeals from a judgment of the Bell Circuit Court convicting her of first-degree assault and sentencing her to ten years' imprisonment. She argues the trial court should have held a pretrial hearing regarding her unhappiness with defense counsel. Further, Partin contends the trial court acted improperly by questioning Partin during her testimony, allowing hearsay testimony by the victim's daughter, and sustaining the prosecutor's objection to evidence of the

victim's character. We disagree and affirm the trial court's judgment.

The events in question took place on June 17, 2003. Partin went to the trailer of Bruce Hecht, who had been a friend of her late husband. The witnesses disagree as to her purpose for visiting Hecht that night. Regardless, while Partin was in Hecht's trailer, his fiancée, Laura Lovett arrived and the two women had a confrontation which resulted in Lovett being stabbed several times in the abdomen. Partin was indicted on a charge of first-degree assault. Her first trial date was March 25, 2004; however, it ended in a mistrial after she was carried out of the courtroom on a stretcher claiming to be seriously ill. A second trial ended in mistrial after the trial court realized the jury had been improperly instructed.

Partin's third trial took place on August 19, 2004. Prior to the trial, defense counsel informed the trial court that Partin and her daughter were trying to pick a fight with him over whether she had a legal duty to retreat before using force against Lovett. The trial court declined to hold a hearing and found that Partin's unhappiness with her counsel amounted to nothing more than another delay tactic. The trial proceeded as scheduled with Partin, Hecht, Lovett and Lovett's daughter testifying as to the events which took place the previous June.

Hecht testified that he had known Partin's late husband through work. About a week before she attacked Lovett, Partin had come by Hecht's trailer while Lovett was there. Hecht told her to leave and not come back. The night of the incident, Partin returned with some knives which she wanted Hecht to buy. He told the jury that he was interested in two of the knives and was negotiating with Partin when he heard Lovett arrive. Because he did not want trouble between the two women, Hecht told Partin to leave through the back door and watched her exit. Hecht then let Lovett in.

Lovett told Hecht she needed a ride to work and to get some of her clothes from his bedroom. Hecht testified that he next heard Lovett scream that she was being stabbed. He ran to the bedroom where he saw Partin standing over Lovett and heard her threatening to kill Lovett. Hecht knocked Partin down and carried Lovett to the couch.

On cross-examination, Hecht testified that he had been engaged to Lovett for three years, but they had recently postponed the wedding indefinitely. He admitted that he was drinking the night of the incident and that he tried to stop Lovett from going into the bedroom because she was upset with him. He also told the jury that he had locked the trailer's front door while Partin was there, but that he always kept it locked.

Lovett testified that she was Hecht's fiancée. She told the jury she had been trying to call Hecht for a couple of hours about getting a ride to work. Unable to reach Hecht, Lovett rode over to his trailer with her daughter and her best friend. The first time they went by the trailer, Hecht's truck was gone. After shopping for a couple of hours, Lovett decided to leave a note on Hecht's door, but this time his truck was parked in front of the trailer. Hecht let Lovett in and she told him that she needed a ride to work and to pick up some clothes. Lovett testified that she discovered Partin hiding in the bedroom closet with a knife and that Partin attacked her, stabbing her three times in the abdomen, and once in the arm. As a result of her injuries, Lovett suffered a punctured liver and a perforated colon and intestines. Lovett spent eight days in the hospital, the first seventy-two hours in intensive care. She was forced to endure multiple surgeries and, at the time of trial, was still facing surgery to remove scar tissue from around her liver. Lovett also was only able to eat a diet of blended food.

Lovett's daughter testified that, as she walked up to the door of Hecht's trailer, she saw him heading towards the back of the trailer with another woman. She followed her mother into the trailer and heard her ask for a ride to work and to get some clothes. After Lovett screamed, both her daughter and

Hecht ran back towards the bedroom. Lovett's daughter saw Partin stab her once in the groin area and once in the arm as Lovett was trying to shield herself.

Partin testified in her defense that she had recently renewed her acquaintance with Hecht after thirty years. According to her, the two exchanged phone numbers and went out together several times. Partin claimed that Hecht told her he had broken up with his last girlfriend and that they had intimate relations on two occasions shortly before the June 2003 incident. The night of the incident, Partin and Hecht rode around for a while in his truck before returning to the trailer. Hecht was interested in pocket knives so Partin had brought some of hers over to show him. Five minutes after they arrived, Lovett knocked at the door. Hecht told Partin that Lovett was his ex-girlfriend and asked her to hide in the bedroom closet to avoid trouble. Partin said she used the phone in the bedroom to call her daughter for a ride.

Partin testified that she heard a noise "like a team of horses" coming down the hall and that Lovett hit her in the head and "addled" her. When she came to, Lovett was on top of her, and Partin was holding an open knife which she had been showing Hecht. Partin said that Lovett was acting wild and that Partin thought she might have been drunk or taken pills. She claimed that Lovett fought Hecht's attempts to separate the two

women and that Hecht said he had told Lovett not to come back to his trailer. After Hecht carried Lovett to the couch, she refused to lie down and was cursing. Partin offered her a ride to the hospital, but Lovett said that their rides were coming— Lovett's being an ambulance and Partin's a police car. Partin left the trailer in Hecht's truck, stopping at the convenience store in Middlesboro to call her daughter. Since the convenience store did not have a pay phone, she walked to a nearby grocery store where she was arrested without incident.

Partin testified that did not believe she had stabbed Lovett because she did not have any blood on her. She painted herself as the victim of the attack saying that she merely shoved Lovett away. Finally, Partin conceded that, if she did in fact stab Lovett, it was done in self-defense. However, when she was arrested, Partin told a detective that Lovett threw herself on the knife. The detective informed Partin that Lovett had been stabbed four times. He asked if Lovett had thrown herself on Partin's knife that many times and Partin responded affirmatively. At the conclusion of the evidence, the jury convicted Partin of first-degree assault. She was sentenced to ten years' imprisonment, and this appeal followed.

Partin first argues that the trial court should have held a hearing when defense counsel stated that Partin was unhappy with him. Prior to the start of the third trial,

defense counsel stated that Partin and her daughter were trying to pick a fight with him. They had been researching legal issues on the internet and disagreed with defense counsel that Partin had a legal duty to retreat before using force against Lovett. Defense counsel asked whether the trial court wanted Partin to make a statement on the record regarding her dissatisfaction with her attorney. The trial court, citing Partin's history of delay tactics, expressed the opinion that this was another ruse to delay her trial and declined to hold a hearing. Partin made no specific complaint that defense counsel was ineffective either before trial or on appeal. We find no error in the trial court's decision declining to hold a hearing on the morning of trial to assess Partin's disagreement with her counsel.

Partin next asserts that the trial court improperly assumed a prosecutorial role in questioning her and inserted its own opinion about the case while instructing the jury. Kentucky Rule of Evidence (KRE) 614(b) specifically allows the trial court interrogate witnesses. During Partin's testimony, the trial court asked her how many times she had been to Hecht's trailer, whether she had ever seen women's clothing in his home, and whether she had ever observed the condition of his back porch. Partin also claims error resulted when the trial court, in the course of instructing the jury, commented that the

difference between degrees of assault often depended upon the severity of the injury suffered by the victim. Partin did not object to either the questions or the comment at trial, but now asks for relief under Kentucky Criminal Procedure Rule (RCr) 10.26, the substantial error rule. RCr 10.26 allows appellate courts to review unpreserved palpable error "upon a determination that manifest injustice has resulted from the error." Given the strength of the evidence against Partin, these actions on the part of the trial court do not merit scrutiny under RCr 10.26.

In addition, Partin claims that the trial court erred by allowing hearsay testimony from Lovett's daughter after sustaining the defense's objection to such testimony. After the attack on her mother, Lovett's daughter, who was still a minor, was taken to the police station by her father to give a statement. She originally told police that she saw Hecht give Partin a knife before the stabbing. On the stand, she said that she did not see Hecht give Partin a knife. She explained this discrepancy by telling the jury that her father, Lovett's ex-husband, had directed her to lie. The trial court sustained Partin's objection to the witness' attempt to repeat what her father had told her. The Commonwealth was, however, permitted to ask Lovett's daughter whether or not her father told her what to say to the police, and she answered that he did. KRE 801(c)

defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The Commonwealth argues that Lovett's daughter was not permitted to repeat the statement allegedly made by her father to the jury, and thus, there was no hearsay testimony within the definition of the evidentiary rule. We find, however, that her testimony was not hearsay because the out-of-court statement was not offered in order to prove the truth of the matter asserted; i.e., what her father instructed her to tell the police.

Finally, Partin contends that the trial court erred by sustaining the Commonwealth's objection to her attempt to introduce evidence of Lovett's character. At trial, Partin attempted to paint Lovett as the initial aggressor and sought to introduce evidence of her propensity towards anger and violence. Defense counsel was permitted to ask Hecht whether Lovett had a bad temper, which he denied. However, the trial court sustained the Commonwealth's objection when defense counsel sought to ask Lovett's best friend about her temper. Partin argues that evidence of Lovett's violent nature would support her claim that she was acting in self-defense. However, Partin did not preserve this objection by introducing the evidence by avowal. The Kentucky Supreme Court has previously determined that failure to introduce evidence by avowal results in a failure to

preserve the issue for appellate review. Hillard v. Commonwealth, 158 S.W.3d 758 (Ky. 2005). Thus, Partin failed to establish a record for us to review in support of her contention that the trial court improperly excluded the evidence.

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

ALL CONCUR.

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