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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000028-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 98-CR-00018

DEBBIE CARDWELL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: The Commonwealth appeals from the order of the Butler Circuit Court granting Debbie Cardwell's motion to sever and to try separately two counts of manslaughter contained in an indictment against her. Having carefully reviewed the record on appeal, we affirm the judgment of the circuit court.

In March 1998, Debbie Cardwell (Cardwell) was indicted by the Butler County Grand Jury for two counts of manslaughter in the first degree. She was charged with causing the deaths of her infant daughter, Tori Cardwell, and of her infant son, Adam Ray Cardwell. The indictment against Cardwell was the result of an investigation (conducted by the Cabinet for Human Resources and

the Kentucky State Police) initiated at the time of the birth of her fifth child. The investigation was based upon her family history: Cardwell had given birth to four other children, three of whom had died as infants. One surviving child (the first born) is mentally retarded due to an incident as an infant; the second surviving child (the fifth born) is the child whose birth launched the investigation by the Cabinet for Human Resources.

Cardwell's first child, a daughter born in 1983, suffered an oxygen deprivation episode around the age of five months and is mentally retarded as a result. Three years later, in 1986, she bore her second child, a daughter, who died at seven weeks of age; the cause of death was listed as Sudden Infant Death Syndrome (SIDS) without an autopsy having been performed. In 1988, Cardwell gave birth to her third child, Adam Ray Cardwell, who died on January 26, 1989, at seven weeks of age. An autopsy was performed, and SIDS was cited as the cause of death. Cardwell's fourth child, Tori Caldwell, was born in 1996. That infant died at the age of five months, and the cause of her death was undetermined. Based upon these facts, the Cabinet for Human Resources and the Kentucky State Police launched an investigation of Cardwell after the birth of her fifth child in June 1997. Subsequently, Cardwell was indicted on two counts of manslaughter in the first degree for the deaths of Tori Cardwell, her fourth child, and Adam Ray Cardwell, her third child; she was not charged concerning the death of her second child. Additionally, CHR initiated an action to remove the fifth child from Cardwell's home, and at the time of the filing of the

Commonwealth's brief in this appeal, the infant had been removed from her care.

On October 8, 1998, Cardwell filed a motion for separate trials of the counts contained in the indictment against her. She argued that the two charges constituted two separate and unconnected offenses and that to try both counts at the same time would prejudice her, leading to an unjust result. The court entered an order on December 21, 1998, granting Cardwell's motion and ordering that the two counts in the indictment be severed and that separate trials be conducted as to each count. This appeal followed.

The Commonwealth argues on appeal that the court erred in granting Cardwell's motion for separate trials on the two counts contained in the indictment and that severance is unreasonable and unfairly prejudicial to its case against her. The Commonwealth contends that the two charges are sufficiently related in nature and circumstances to justify a joint trial.

RCr 9.16 provides, in pertinent part:

If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

In considering a motion pursuant to RCr 9.16, the trial court is vested with the discretion to determine whether the defendant or the Commonwealth will be prejudiced by joinder. "Prejudice is a relative term. In the context of a criminal proceeding it can mean only that which is unnecessarily or unreasonably hurtful."

Romans v. Commonwealth, Ky., 547 S.W.2d 128, 131 (1977). The extent to which evidence of one offense would be admissible in a trial of the other offense is a critical factor in determining whether joinder is prejudicial. Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993). The trial court has broad discretion in regard to joinder, and its decision in such matters will not be overturned absent a showing of prejudice and clear abuse of discretion. Violet v. Commonwealth, Ky., 907 S.W.2d 773 (1995).

In the case before us, the only issue on appeal is whether the Commonwealth is unnecessarily or unfairly prejudiced by severing the two counts against Cardwell. In arguing that severance is prejudicial, the Commonwealth contends that the counts must be tried together in order to present the jury with a full and accurate picture of the alleged crimes. It maintains that as to both counts of manslaughter against Cardwell, it will be necessary to portray to the jury her complete psychological profile, including the following elements: her suffering from low self-concept, paranoia, and feelings of inadequacy and insecurity; the statistical improbability of one family's experiencing three infant deaths from SIDS; and the similar circumstances and pattern surrounding the children's deaths. The severing of the two counts does not preclude the Commonwealth from introducing such evidence at each of the trials on the two counts. The fact that it may be more efficient, more convenient, or more judicially economical to try the two counts jointly does not constitute unreasonable or unfair prejudice to the Commonwealth within the meaning of RCr 9.16.

The Commonwealth bears the burden of proving the elements of manslaughter as to each of the counts against Cardwell. It must accomplish this task through the introduction of competent and admissible evidence, and there is nothing in the record to indicate that the Commonwealth's ability to do so will be prejudiced by severance. The Commonwealth has failed to demonstrate a clear abuse of discretion by the trial court in ordering that the two counts of manslaughter against Cardwell be severed and tried separately.

We affirm the judgment of the Butler Circuit Court.

ALL CONCUR.

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