

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002025-MR

ANTONIO MCFARLAND

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 13-CR-000604

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: J. LAMBERT, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Antonio McFarland brings this appeal from an October 24, 2014, judgment upon a jury verdict of the Jefferson Circuit Court finding him guilty of reckless homicide and tampering with physical evidence and sentencing him to a total of nine-years' imprisonment. We affirm.

On the evening of June 11, 2012, Ty'Sha Spearman, who was fifteen years old, was shot and killed by a .22 caliber bullet in a Louisville neighborhood. The events leading to her death were vigorously disputed at trial. Nonetheless, it is clear that Ty'Sha accompanied Reginae Williams to Main Street Liquors in Louisville, Kentucky. Around the same time, Antonio McFarland and his roommate, Dwight Myles, also went to Main Street Liquors. While at the liquor store, Williams brazenly confronted Myles accusing him of previously breaking into her home. At trial, a surveillance tape from the liquor store was played, and it appeared that Williams attempted to become physical with both Myles and McFarland. Williams also telephoned her boyfriend, Cecil Spearman, during her confrontation with Myles and McFarland. Due to the confrontation, Myles and McFarland left the liquor store.

Myles and McFarland's home was a few blocks from the liquor store and was on the corner of North 18th Street and Crop Street. Although the reasons were in controversy, it is clear that Williams, Spearman, Ty'Sha, and another man, Cephus Gore, congregated near Myles and McFarland's home at North 18th Street and Crop Street. McFarland's girlfriend and Myles' girlfriend left the home to go to the store, and an argument ensued in front of the home between the two women and Williams. At this point, McFarland testified that he saw either Spearman or Gore loading or cocking a gun. So, McFarland exited the side door of his home

armed with a .22 caliber rifle. Myles also went outside, but he denied being armed with a weapon and insisted that he left his loaded .22 caliber rifle inside the home.¹

It was controverted who fired the first shot but eventually Spearman, Gore, and McFarland admitted to firing their weapons. Spearman and Gore were armed with .40 caliber and .45 caliber handguns. The evidence established that Spearman and Gore fired toward McFarland and Myles while McFarland testified that he fired one shot toward Spearman and Gore. At the scene, police collected six spent .22 caliber shell casings and a total of seven spent .45 and .40 caliber shell casings. During the firestorm of bullets, Ty'Sha was mortally wounded by a single .22 caliber bullet that entered through her back. Neither McFarland's .22 caliber rifle nor Myles' .22 caliber rifle were recovered by police, so it was impossible to forensically determine which .22 caliber rifle actually fired the fatal shot.

McFarland was indicted by the Jefferson County Grand Jury upon: (1) murder or complicity to commit murder (Kentucky Revised Statutes (KRS) 507.020; KRS 502.020), (2) first-degree wanton endangerment or complicity to commit first-degree wanton endangerment (KRS 508.060; KRS 502.020), and (3) tampering with physical evidence (KRS 524.100).² A jury trial ensued, and the

¹ At trial, a neighbor testified that a man was in the backyard of Antonio McFarland and Dwight Myles' home after the shooting and asked the neighbor to take his gun. The neighbor refused. The neighbor further testified at trial that the man was the same man arrested by the police later that night and removed from the home. At trial, it was established that Myles was arrested and taken from the home.

² Cecil Spearman and Reginae Williams were co-indicted along with Antonio McFarland upon the above offenses. Later, the Commonwealth of Kentucky moved to consolidate for trial the above indictment with the indictment in Action No. 13-CR-1049 against Cephus Gore. The motion to consolidate was granted by order entered December 12, 2013. Eventually, by

jury ultimately found McFarland guilty of reckless homicide and tampering with physical evidence. By judgment entered October 24, 2014, the circuit court sentenced McFarland to a total of nine-years' imprisonment. This appeal follows.

McFarland initially contends that the jury instruction upon reckless homicide was erroneous. In particular, McFarland believes that the circuit court improperly instructed the jury upon complicity to commit reckless homicide.

According to McFarland, the circuit court committed error by:

[I]nstructing the jury that it could find [McFarland] guilty of homicide under a theory that he caused death “alone or in complicity with another or others.” This created the likelihood that the jury convicted on the grounds that [McFarland's] accomplices were Reginae Williams, Cecil Spearman and Cephas [sic] Gore.

McFarland's Brief at 10. McFarland maintains that “a person cannot be convicted of homicide on a theory that he and the people who were trying to kill him were acting in concert and that their combined efforts resulted in the death of a non-combatant.” McFarland's Brief at 11.

It is well-established that the trial court has a duty to properly instruct the jury upon the offenses supported by the evidence introduced at trial and to reject any proposed jury instructions that do not accurately reflect the law.

Sanders v. Com., 301 S.W.3d 497 (Ky. 2010); *Holland v. Com.*, 466 S.W.3d 493

(Ky. 2015). In Kentucky, we follow the bare bones approach to jury instructions

and generally require instructions in criminal cases to “conform to the language of

agreement with the Commonwealth, McFarland was tried separately from the other defendants. The record indicates that Spearman and Williams were found guilty of wanton endangerment in the first degree.

the [relevant] statute.” *Wright v. Com.*, 391 S.W.3d 743, 746 (Ky. 2013) (quoting *Parks v. Com.*, 192 S.W.3d 318, 326 (Ky. 2006)). And, an erroneous jury instruction is presumed to be prejudicial, but such presumption may be rebutted by demonstrating that “the error did not affect the verdict or judgment.” *Harp v. Com.*, 266 S.W.3d 813, 818 (Ky. 2008) (citation omitted); *see also Ragland v. Com.*, 476 S.W.3d 236 (Ky. 2015).

In this case, the relevant jury instruction upon reckless homicide read:

If you do not find the Defendant, ANTONIO D. MCFARLAND, guilty under Instruction No. 1 or Instruction No. 2, then you will find the Defendant guilty of Reckless Homicide under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

(a) That in this county, on or about the 11th day of June, 2012, he, acting alone or in complicity with another or others, killed Ty’Sha Spearman;

AND

(b) (i) That in so doing, he was acting recklessly, as that term is defined in Instruction No. 7;

OR

(ii) Though otherwise privileged to act in self-protection the Defendant was mistaken in his belief that it was necessary to use physical force against a person(s) in the alley in self-protection, or in his believe in the degree of force necessary to protect himself and that when he killed Ty’Sha Spearman, he failed to perceive a substantial and unjustifiable risk that he was mistaken

in belief, and that his failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation.

Under the above reckless homicide instruction, the jury was instructed to find McFarland guilty if they believed beyond a reasonable doubt that McFarland “acting alone or in complicity with another or others, killed Ty’Sha.” And, a subsequent jury instruction defined complicity as:

[A] person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of an offense, he solicits, commands, or engages in a conspiracy with such other person to committing the offense.

A closer examination of this definition of complicity reveals that it precisely parrots the statutory language of KRS 502.020(1)(a), which provides:

(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[.]

Our Supreme Court has interpreted accomplice liability under KRS 502.020(1)(a) as requiring evidence that “another committed the charged offense and . . . that the defendant [accomplice] intended for another to commit that offense.” *Harper v. Com.*, 43 S.W.3d 261, 266 (Ky. 2001). Relevant to disposition of this appeal, it

must be emphasized that pursuant to KRS 502.020(1)(a), the accomplice must possess the intent that the principal actor commit the charged criminal offense.

As to McFarland's argument, he complains that by utilizing the term "others" in the reckless homicide instruction the jury may have found him guilty of reckless homicide by erroneously finding that he acted in complicity with Williams, Spearman, and/or Gore. But, at trial, there was no evidence introduced that Williams, Spearman, or Gore intentionally promoted the commission of reckless homicide by either soliciting, commanding, or engaging in a conspiracy with McFarland or Myles to kill Ty'Sha. Williams, Spearman, and Gore clearly possessed no such intent as to the killing of Ty'Sha. As no evidence existed that Williams, Spearman, or Gore were acting in complicity with McFarland as defined by the jury instructions, we must view the term "others" in the reckless homicide instruction as constituting superfluous language.

Our Supreme Court has held that superfluous language existed in a jury instruction when it "contain[ed] language describing theories of liability that do not relate to any evidence presented . . . at trial." *Travis v. Com.*, 327 S.W.3d 456, 462 (Ky. 2010). When superfluous language is found in a jury instruction, the Supreme Court observed that the error is harmless unless there is a reasonable probability that the jury relied upon the "erroneous theory:"

[T]he error resulting only from superfluous language does not present a pure unanimity problem. On the contrary, such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory

in reaching their verdict. If that can be shown, then a unanimous verdict has been denied and the verdict must be overruled. However, if there is no reasonable possibility that the jury actually relied on the erroneous theory – in particular, where there is no evidence of the theory that could mislead the jury – then there is no unanimity problem. Though such a case presents an error in the instructions, namely, the inclusion of surplus language, the error is simply harmless because there is no reason to think the jury was misled.

Id. at 463.

In the case *sub judice*, the circuit court’s addition of the term “others” in the reckless homicide instruction constituted harmless error. *See Travis*, 327 S.W.3d 456. As hereinbefore pointed out, there was absolutely no evidence to support the theory that McFarland acted in complicity with either Williams, Spearman, or Gore per the jury instructions. Consequently, as in *Travis*, 327 S.W.3d 456, there is no reasonable possibility that the jury was misled by the superfluous language. *See Smith v. Com.*, 366 S.W.3d 399 (Ky. 2012). Accordingly, we are of the opinion that any error by including the term “others” in the reckless homicide instruction was merely harmless. *See Travis*, 327 S.W.3d 456; *Smith*, 366 S.W.3d 399.

McFarland next asserts that the circuit court erred by denying his motion for a directed verdict of acquittal upon the offense of tampering with physical evidence. In particular, McFarland believes the evidence introduced during the trial was insufficient to support the jury’s guilty verdict. McFarland

points to his testimony that after firing the .22 caliber rifle he placed the rifle inside the doorway of his home and had no knowledge of the rifle's location thereafter.

A directed verdict is proper when viewing the evidence most favorable to the Commonwealth a reasonable juror could not have found beyond a reasonable doubt that defendant was guilty of the criminal offense. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991). The offense of tampering with physical evidence is set forth in KRS 524.100, which reads:

(1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

In the instant case, the evidence demonstrated that McFarland fired his .22 caliber rifle and then fled before police arrived. McFarland testified that he left the scene after the shooting and went with his friend, Justin, to a store. The Commonwealth introduced a recorded telephone conversation between Justin and McFarland where McFarland instructs Justin "you know what to do with that one thing." Commonwealth's Brief at 15. Upon the whole, we believe there existed sufficient direct and circumstantial evidence that McFarland knowingly committed the offense of tampering with physical evidence. The jury could have reasonably believed that McFarland was the last person with the .22 caliber rifle and reasonably believed that he fled the scene with the rifle in hand. While fleeing the

scene in possession of the rifle is insufficient by itself to support a conviction of tampering with physical evidence, the jury could have reasonably inferred McFarland's intent to conceal or destroy evidence from McFarland's recorded statement to Justin. *See McAtee v. Com.*, 413 S.W.3d 608 (Ky. 2013). Hence, we are of the opinion that the circuit court properly denied McFarland's motion for directed verdict of acquittal upon the offense of tampering with physical evidence.

For the forgoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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