

Commonwealth Of Kentucky

Court Of Appeals

NO. 97-CA-0987-MR

LARRY BRYAN FRALEY

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
CRIMINAL ACTION NO. 96-CR-000064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Larry Bryan Farley (Fraley) appeals from a final judgment and sentence of imprisonment entered by the Johnson Circuit Court on April 14, 1997, following a jury trial in which he was found guilty of theft by failure to make required disposition. We affirm.

This case arises from the attempt of John George Reffett (Reffett) to prearrange his funeral. Fraley testified at trial that Reffett, who spent a great deal of time at a funeral home owned by Fraley, told him he wanted to pre-arrange his funeral. Fraley told Reffett he was not licensed to handle

prearranged funerals. At that point Reffett allegedly became somewhat belligerent and told Fraley that no one was going to tell him what he could do with his money. When Fraley advised Reffett to inform his family that he wanted Fraley to handle his funeral, Reffett allegedly stated "I don't want my damn family to have nothing to do with it."

Fraley stated that Reffett showed him what he wanted to be buried in, and then told him he didn't have a lot of money. Reffett also told Fraley he had some type of funeral benefits available from the United Mine Workers of America (UMWA). The total cost of what Reffett wanted was \$4,320, and Reffett was to be responsible for \$1,820 of that amount. Reffett indicated that he would come in every month and make payments. Fraley told Reffett he didn't want him to do that, at which point Reffett allegedly became belligerent again and said "I'll do what I damn well please." When Fraley instructed him to put the money in the bank, Reffett allegedly stated "If I had wanted it in a damn bank, I would put it in the bank."

At that point Fraley testified that he contacted Family Federal Bank about the possibility of setting up a pre-need funeral account. The bank told him that they didn't handle that type of account, and he relayed that information to Reffett, who allegedly responded "Well, I'll just leave my money here."

Fraley told Reffett that they needed to put their agreement in writing and have it witnessed. Fraley also told Reffett that one of his children needed to know about the

arrangements, at which point Reffett allegedly stated "Well, be sure you don't tell George, Jr. none of my gd business." Reffett finally agreed to put the name of one his daughters on the contract.

According to the terms of the pre-arranged funeral contract (the contract) between Fraley and Reffett, Eva Woodcock, who was Raffett's daughter, or Edna Price were to be notified upon Reffett's death. The contract provided "burial Fund to be paid to Funeral Home at Time of Death Balance [sic] \$1,810.00 to be paid \$200.00 amonth [sic] for 9 months." The contract further provided "In the event that FRALEY AND SON FUNERAL HOME should cease operate a funeral service, all monies paid toward this service will be refunded in full." The contract was signed by Reffett and Fraley and witnessed by Edna Price.

Fraley testified that he told all of his employees to make sure they gave Reffett a receipt every time he brought in money showing his balance. According to Fraley, he told Reffett he would put the money in an envelope and keep it for him.

Before Reffett made his last payment, Fraley testified that he had a confrontation with Reffett's son, George. Fraley stated that George essentially cornered him one day and asked "How much money has the old s-o-b paid you on his funeral?" When Fraley informed George that Reffett told him not to discuss his arrangements with him, George allegedly stated "I just don't want to get stuck with the old s-o-b's funeral bill."

Fraley testified that following his confrontation with George, he told Reffett he didn't want to get in the middle of a family problem. He stated that he gave Reffett his money back and told him he no longer wished to be responsible for it. At that point, Reffett allegedly became angry and told him their friendship was over. He stated that this occurred in late 1992 or early 1993.

Fraley testified that he had no further contact with Reffett. George called him once in June of 1994 and again asked how much Reffett had paid him. Fraley told George he would have to ask Reffett. Fraley told George he was no longer in the funeral business, but that he could handle the arrangements through another funeral home.

Reffett died in 1996. Prior to his death, Fraley testified that he was contacted by Pauline Tackett, Reffett's former daughter-in-law. Tackett allegedly told him that Reffett wasn't doing well, and asked about Reffett's funeral arrangements. Fraley stated that he told her he had given Reffett's money back to him and told her about his falling out with Reffett. Fraley got Eva Woodcock's number from Tackett and called her and told her what happened.

Fraley stated that Clifford Gullett, Randall Hayes, and Mary Branham were present when he refunded Reffett's money. Fraley stated that at the time he and Reffett entered into the contract he had applied for a pre-need license but never received one and that he told Reffett he didn't have a pre-need license.

On cross-examination Fraley testified that the contract went for longer than nine months because on some months Reffett didn't make a full payment. He testified that he tried to set up a bank account to handle the transaction, but was unable to do so and that Reffett was aware of this. Fraley admitted that money for pre-need funeral contracts is suppose to be kept in a trust fund. Fraley testified that he returned Reffett's money in 1992, not long after Reffett made his last payment. He did not get a receipt when he returned it because due to Reffett's behavior he "thought it was best to leave well enough alone[.]" He stated that Reffett drove himself to the funeral home the day he returned his money.

Fraley testified that he spoke with Eva Woodcock several weeks after his initial contact with her. She told him that Reffett was missing some money they couldn't account for. He told her "If you think that I have cheated your father or cheated your family, you tell me exactly how much money that it was and I'll be happy to pay you because I don't want no problems." He further told her he didn't want to get into trouble with the Attorney General's Office. Woodcock allegedly replied "Well, we can't take your money, Mr. Fraley."

Jerry Robinson, who is employed in the Consumer Protection Division of the Attorney General's Office, testified that she is the program coordinator for the cemetery and funeral home section. She stated that Fraley filled out an application to obtain a pre-need license, but the application was filed

incomplete, was returned to Fraley, and was never approved. She also testified that if a funeral home goes out of business an existing pre-need contract would still be valid and any license would remain intact. She stated that the closing of a funeral home is not addressed in the applicable statutes.

Robert Hughes, former Chief Inspector for the Consumer Protection Division of the Attorney General's Office, testified that he received a complaint regarding Reffett's contract with Fraley's funeral home in April, 1996. He contacted several banks in the area and was unable to find any account established for Reffett through Fraley and/or his funeral home. Hughes testified that several of the receipts given to Reffett showed that the money was deposited with Family Federal Savings. He also obtained Reffett's driving record from the Department of Transportation which showed that Reffett's license was surrendered on August 24, 1992, and never renewed.

George Reffett (George) testified that the signature on the contract was his father's, and acknowledged that Reffett received receipts in return for the payments he made. He stated that Reffett was buried by another funeral home, and that there was no money available from the contract between Reffett and Fraley. Reffett's children paid the funeral expenses in full and were reimbursed by the UMWA. George testified that he did not have a good relationship with his father, he never accompanied Reffett to Fraley's funeral home, and he had no personal

knowledge as to whether Reffett gave money to Fraley or whether Fraley returned the money.

Edna Price (Price), a good friend of Fraley's, testified that she helped him manage his affairs. She acknowledged that she signed the contract as a witness. Price stated that she had a lock box in her house in which she kept documents for Reffett, including his copy of the contract and the receipts. It was her understanding that the money paid by Reffett was to be kept at First Federal. She eventually gave all of the documents to George following Reffett's death. According to Price, she was with Reffett on several occasions when he made payments. However, she further testified that if Fraley ever returned the money to Reffett he never said anything to her about it. She testified that she handled Reffett's money and she would have known if he would have ever received \$1,800 in cash.

Eva Woodcock (Woodcock) testified that she was aware of the contract between Reffett and Fraley, and stated that Reffett paid what was due under the contract in full. Woodcock stated that her father died on April 2, 1996. Fraley called her on March 31, 1996, and during this conversation told her that he had given the money back to Reffett. She also spoke with Fraley on April 20, 1996. Woodcock testified that on that date he offered to refund the money, but she told him she could not take his money. She has no personal knowledge as to whether Fraley returned the money to Reffett. Fraley told her he did not get a receipt from Reffett when he returned the money. Woodcock also

testified that he told her he wanted to pay the money back because he didn't want any more problems with the Attorney General's Office.

Pauline Tackett (Tackett) testified that when she called Fraley to ask who was handling his pre-paid funerals he told her he had refunded Reffett's money. Tackett also testified that Woodcock told her that Reffett told her that the money paid to Fraley was in a bank under Woodcock and Fraley's name. According to Tackett, when she told Fraley that it was her understanding that the money was in a bank, Fraley told her that he kept the money in a drawer.

John Childers, a funeral director at Preston Funeral Home, testified that he handled Reffett's funeral. He stated that Reffett's children paid for the funeral, and that he never received any money from a pre-need funeral contract.

Clifford Gullett (Gullett) testified that he was part of the regular crowd that kept company at Fraley's funeral home. He stated that he saw Reffett give money to Fraley for payment of his burial expenses. Gullett further testified that one day Fraley handed Reffett an envelope and said "Here's your money back." Reffett took the envelope and left.

Mary Branham testified that she worked at the funeral home in 1993. She stated she came into work one morning and Fraley was upset about his arrangement with Reffett and the confrontation with Reffett's son. Fraley indicated to her that

he had given the money back to Reffett. She did not actually see Fraley give Reffett his money back.

The jury found Fraley guilty of the charge against him. Fraley was sentenced to one year in prison. This appeal followed.

Fraley argues that the trial court erred in allowing the introduction of hearsay testimony. Fraley's complaint centers on Hughes' testimony concerning what he learned from the Department of Transportation and that Reffett's family was under the impression that he was to receive \$2,500. Fraley also points to the trial court allowing Tackett to testify as to what Woodcock said her father said about the money.

Under Kentucky Rules of Criminal Procedure (RCr) 9.24, any error in the admission or exclusion of evidence which does not affect the substantial rights of the defendant is deemed to be harmless and, as such, is not grounds for granting a new trial or setting aside a verdict. If there is no reasonable possibility that the outcome of the case would have been any different absent admission of the questioned evidence, the error is harmless. Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 797 (1995).

On appeal, Fraley contends that he is entitled to relief because the hearsay testimony was inadmissible. He makes no claim that his substantial rights were adversely affected, nor does he make any claim that he was unduly prejudiced by its admission. Furthermore, we have reviewed the trial transcript in

this case and are not persuaded that a different verdict would have been reached in the absence of the testimony. Therefore, even if the trial court did err in admitting the questioned testimony, the error was harmless and furnishes no basis for relief on appeal.

Fraley also contends that the trial court erred in granting a directed verdict on the ground that the evidence did not establish that he committed a criminal act. Fraley maintains that the Commonwealth failed to prove criminal intent on his part or that he had committed a criminal act under the charging statute. We note that the standard of review of a denial of a motion for directed verdict is "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Under KRS 514.070, a person is guilty of theft by failure to make required disposition of property when:

(a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and

(b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

Again, we have reviewed the transcript of the trial and find that it was not clearly unreasonable for the jury to find Fraley guilty.

We agree with Fraley that the offense requires a breach of trust stemming from a contractual relationship. Commonwealth v. Jeter, Ky., 590 S.W.2d 346, 347 (1979). As set forth in Jeter, "The commentary to KRS 514.070 explains '[i]t is not the purpose of this statute to impose a criminal sanction on the relationship of debtor and creditor. To constitute an offense there must be a breach, of trust, growing out of a contract or confidential relationship.'" 590 S.W.2d at 347. The trial court found, and we agree, that "there is ample evidence to show the existence of a contract" between Reffett and Fraley. Additionally, there was sufficient evidence presented at trial there was "a breach of trust, growing out of a contract or confidential relationship." Thus, the trial court did not err in refusing to grant a directed verdict in Fraley's favor.

Having considered the parties' arguments on appeal, the judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul L. Pack
Paintsville, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Kent T. Young
Assistant Attorney General
Frankfort, KY