RENDERED: MARCH 12, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000910-MR

MATTHEW MUSARD — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 02-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Matthew Musard has appealed from the final judgment and sentence of imprisonment entered by the Kenton Circuit Court on April 17, 2002, which convicted him of assault in the second degree[1] and wanton endangerment in the first degree.[2] Having concluded that the sole claim of error raised by Musard on appeal was not properly preserved for appellate review, we affirm.

[1] Kentucky Revised Statutes (KRS) 508.020.

[2] KRS 508.060.

During the early morning hours of October 13, 2001, Musard was involved in an altercation with Keon Smith in the parking lot of a Family Dollar Store in Kenton County, Kentucky. As a result of the altercation, Smith suffered several stab wounds to his chest and back. On January 4, 2002, Musard was indicted by a Kenton County grand jury and charged with assault in the second degree and wanton endangerment in the first degree. Musard entered a plea of not guilty and the case proceeded to trial.

Several witnesses testified on behalf of the Commonwealth at trial. Smith testified that after he and Musard exchanged words in the parking lot of the Family Dollar Store, Musard came after him with a knife. Smith stated that he then swung a stick at Musard in self-defense. Smith explained that he was not aware that he had been stabbed until he took his shirt off and noticed that he was bleeding. Smith further testified that after the altercation Musard tried to chase him down in his truck. Jodi Thompson testified that she observed the altercation between Smith and Musard, who was her ex-boyfriend.[3] Thompson indicated that she was positioned between the two men when the fight broke out and she stated that Musard threw the first punch. Thompson explained that she never saw Musard stab Smith but that she heard Smith say that he had been

[3] Apparently, there was jealousy between Musard and Smith regarding Thompson.

stabbed during the altercation. Thompson further stated that shortly after the fight broke out she noticed that her right arm was covered in Smith's blood. Thompson testified that shortly before the police arrived Musard and another person fled the scene in Musard's truck.[4] Jackie Haskins also testified that she witnessed the altercation between Musard and Smith. Haskins stated that she never actually saw Musard stab Smith but that she heard Smith say that he had been stabbed during the altercation. Haskins further testified that shortly before the police arrived Musard and another person fled the scene in a truck.[5]

Detective Ted Edgington of the Covington Police Department also testified on behalf of the Commonwealth. Det. Edgington stated that he interviewed Thompson and Haskins as well as several other witnesses who were in the parking lot when the altercation between Musard and Smith took place. In addition, Det. Edgington testified that he obtained a statement from Smith on November 1, 2001. During cross-examination, defense counsel asked Det. Edgington if he remembered coming across any statements made by Smith during the course of his investigation indicating that the stabbing was gang-related.

[4] Thompson stated that Musard "did donuts" around Smith in the parking lot before fleeing the scene.

[5] Haskins stated that Musard chased Smith around the parking lot in the truck before fleeing the scene.

Det. Edgington stated "that was the first [he had] heard about it being gang-related." Defense counsel then presented Det. Edgington with an investigative report prepared by Officer Eric Higgins of the Covington Police Department and asked him to read certain statements contained in the report. The Commonwealth objected, arguing that the proffered testimony was inadmissable hearsay. After a brief discussion at the bench, the trial court sustained the Commonwealth's objection. Defense counsel never asked for permission to proceed with this line of questioning by way of an avowal outside of the presence of the jury and he failed to have the investigative report admitted into evidence as an avowal exhibit.[6] Musard did not present any witnesses for his defense.

The jury found Musard guilty of assault in the second degree and wanton endangerment in the first degree as charged in the indictment. On April 17, 2002, the trial court entered its final judgment and sentence of imprisonment. The trial court sentenced Musard to prison for a term of five years on the conviction for assault in the second degree and one year on the

[6] At one point, defense counsel did attempt to have an offense report prepared by Officer Higgins admitted into evidence. We are unable to discern, however, whether the offense report defense counsel attempted to have admitted into evidence is the same report that was presented to Det. Edgington during cross-examination as the discovery inventory contained in the record indicates that the defense was provided with an investigative report and an offense report, both of which were prepared by Officer Higgins. Regardless, we are not required to resolve this issue as defense counsel withdrew his request to have the offense report admitted into evidence before the judge issued a ruling.

conviction for wanton endangerment in the first degree. As recommended by the jury, the trial court ordered the sentences to be served concurrently for a total of five years. This appeal followed.

Musard contends that the trial court erred by not allowing Det. Edgington to testify as to the statements contained in Officer Higgins's report. We are unable to address the merits of Musard's argument as he has failed to preserve this issue for appellate review by way of an avowal.

KRE[7] 103 outlines the procedures for preserving issues regarding rulings made at trial as to the admissibility of evidence for appellate review. The rule provides, in relevant part, as follows:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> . . .
>
> (2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.
>
> (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct

[7] Kentucky Rules of Evidence.

> the making of an offer in question and answer form.

RCr[8] 9.52 describes the procedures for preserving evidentiary issues for appellate review in a criminal trial when the trial court sustains an objection to certain testimony. The rule provides:

> In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his or her answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

The Supreme Court of Kentucky has consistently read KRE 103 and RCr 9.52 as requiring an offer of avowal testimony in order to preserve a ruling made at trial as to the admissibility of evidence for appellate review.[9] In Cain v. Commonwealth,[10] the Supreme Court explained that "without an

[8] Kentucky Rules of Criminal Procedure.

[9] See Hart v. Commonwealth, Ky., 116 S.W.3d 481, 482-84 (2003); Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 15 (2001); Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 523-24 (2000); and Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996).

[10] Ky., 554 S.W.2d 369 (1977).

avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial."[11] Nevertheless, Musard contends that there was no need for an avowal in the case sub judice since the contents of the statements he sought to introduce "w[ere] contained in a written report that was available for the trial court to consider[.]" This argument is disingenuous at best as one of the primary reasons for requiring an avowal is to provide appellate courts with a meaningful basis for reviewing decisions made at trial concerning the admissibility of evidence.[12] As previously discussed, Officer Higgins's investigative report was not admitted into evidence as an avowal exhibit and counsel failed to elicit the statements contained in the report from Det. Edgington by way of an avowal. Thus, we have no way of conducting any meaningful form of review of the trial court's ruling regarding the admissibility of the statements contained in the report. As the Supreme Court stated in Partin, supra, "[c]ounsel's version of the evidence is not enough. A reviewing court must have the words of the witness."[13]

---

[11] Id. at 375.

[12] See Hart, 116 S.W.3d at 483 (quoting the 1992 commentary to KRE 103).

[13] 918 S.W.2d at 223. See also Garrett, 48 S.W.3d at 15 ("[w]hile KRE 103(a)(2) and RCr 9.52 are both couched in terms of preserving oral testimony as opposed to real evidence, a fair reading of those rules requires avowal testimony to authenticate the document or object, then a tender of the document or object to the court as an avowal exhibit" [emphasis added]).

That is to say, "[a] reviewing court requires more than the general substance of excluded evidence in order to determine whether a defendant has suffered prejudice."[14] Simply put, "[w]ithout an avowal, or a crystal ball, reviewing courts can never know with any certainty what a given witness's response to a question would have been if the trial court had allowed them to answer."[15]

Musard urges us to review this issue pursuant to RCr 10.26, which "provides that an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice."[16] Musard's contention that we should review the trial court's evidentiary ruling in the case sub judice for palpable error simply underscores the problem caused by his failure to properly preserve this issue. In sum, Musard has asked this Court to determine, without knowing the substance of the statements he sought to have introduced through the testimony of Det. Edgington, that a manifest injustice resulted from the trial court's ruling with respect to the admissibility of those statements. We are not permitted or inclined to engage in such guesswork.

[14] Hart, 116 S.W.3d at 483.

[15] Ferrell, 17 S.W.3d at 525, n.10.

[16] Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 11 (2002).

Based on the foregoing reasons, the final judgment and sentence of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bruce A. Brightwell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Brian T. Judy
Frankfort, Kentucky