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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001084-MR

ANGELA HOUCHIN

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 07-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CAPERTON, AND KELLER, JUDGES.

KELLER, JUDGE: Angela Houchin (Angela) appeals her convictions of second-degree arson, insurance fraud, and second-degree wanton endangerment, arguing that the trial court erred: (1) when it permitted the Commonwealth to introduce expert testimony on rebuttal; (2) when it failed to instruct the jury on facilitation; and (3) when it granted the Commonwealth's motion to try Angela with her husband (David). For the reasons set forth below, we affirm.

FACTS

On April 16, 2007, a grand jury indicted Angela for arson in the first degree, fraudulent insurance acts, and wanton endangerment in the first degree. These charges arose from a fire that essentially destroyed a house owned by the Houchins.

At trial, Margaret Lasley, one of the Houchins' neighbors, testified that she saw smoke coming from the Houchins' house at approximately 6:00 a.m., and she called the fire department. Volunteer firefighter Jim Kinser testified that when he arrived on the scene there was heavy smoke. It took approximately thirty minutes to get the fire under control and, although no firefighters were injured, they were at risk of serious bodily injury while fighting the fire. Ronald Johnston, another firefighter, testified that the joists and floor were burned, which he thought was unusual. Because of this, Johnston recommended calling in an investigator to determine the cause of the fire.

Deputy Fire Marshall Buddy Steel (Steel) testified that he examined the fire scene and saw a hole in the living room floor. Steel testified that the hole was the point of origin for the fire. Such a hole is unusual and indicates something was poured on the floor because a fire generally "burns up and out." A hole in a floor indicates that something was poured on the floor. Following his examination, Steel contacted a state arson investigator. That arson investigator, Detective Scott, testified that the fire originated at the hole in the floor and appeared to be incendiary, not accidental.

The Commonwealth also presented testimony from Tremain Smith (Tremain), a representative from the Houchins' insurer, Allstate, and from Robert Smith (Robert), an arson investigator retained by Allstate. Tremain testified regarding the terms of and payments made under the insurance policy. Robert testified regarding his investigation of the fire and his conclusion that the fire was incendiary and not accidental.

Four of Angela's coworkers testified that Angela complained about financial difficulties before the fire and indicated that she believed she would lose the house through foreclosure. Three of the coworkers also testified that Angela complained about "bad wiring" and/or "hot spots" in the house before the fire. One of the coworkers testified that Angela stated that the house would burn before the bank could foreclose.

The Houchins' daughter (Debra) testified that she had moved from the house in May 2006 because she had graduated from high school and wanted to live with a friend. When she moved, Debra took a number of her late sister's belongings with her. Debra admitted that she spoke with investigators but stated that she could not remember saying that her parents were having marital difficulties, that her parents talked about moving, or that her father had asked her to move from the house shortly before the fire. Detective Scott testified that Debra made those statements to him. The Commonwealth played a recording of Debra's statement to Detective Scott to the jury, which contradicted Debra's testimony and was consistent with Detective Scott's.

Angela read the statement from a neighbor, Stanley Decker, indicating that he saw Angela leave her house at 4:00 a.m. the morning of the fire, which was a little earlier than usual.¹ Angela called no other witnesses.

David called several witnesses, only one of whom, Victor Thomas Tharp (Tharp), is pertinent to this appeal. Tharp, a master electrician, testified that, based on his review of one of the photographs of the fire scene, the wiring was faulty. Specifically, Tharp noted sharp edges on the junction box and the absence of a “Romex connector” which would have prevented the wires from coming into contact with the edges of the junction box. According to Tharp, the wiring method shown would have resulted in “low level arcing,” leading to overheating and a fire. Finally, Tharp stated that, in his opinion, the fire was the result of the faulty wiring.

On rebuttal, the Commonwealth called Thomas Eaton, Ph.D. (Eaton). Eaton testified that he participated in the investigation of the fire, at the request of Allstate’s investigator, to determine if the electrical system was a possible cause or source of the fire. Following his investigation, Eaton determined that the fire was not caused by an electrical failure or by an electrical accident. Furthermore, Eaton testified that the fire was hotter than would be expected because the copper wire near the origin of the fire melted. According to Eaton, the temperature of a “normal” house fire will not reach a level that would melt copper wiring.

Following the presentation of the majority of the evidence, Angela made several motions regarding the charges. The court granted Angela’s motion to

¹ We note that Mr. Decker was present for trial; however, because of scheduling problems, the parties agreed to let Angela read his statement in lieu of live testimony.

reduce the arson charge from first degree to second degree. The court also determined that instructions on both first- and second-degree wanton endangerment were appropriate. Based on the evidence, the jury found Angela guilty of second-degree arson, insurance fraud, and second-degree wanton endangerment.

STANDARD OF REVIEW

The issues raised by Angela on appeal involve different standards of review; therefore, we will set forth the appropriate standard as we analyze each issue.

ANALYSIS

1. Expert Testimony

On appeal, Angela argues that the trial court erred when it permitted Eaton to testify on rebuttal. In support of this argument, Angela states that Eaton “introduced a new premise regarding the fire, by testifying to the presence of melted copper wires” as evidence that the fire was considerably hotter than would be expected. Angela faults the Commonwealth for not disclosing this prior to Eaton’s testimony thus depriving her of the ability to adequately prepare a cross-examination.

We review a trial court’s rulings regarding the admission or exclusion of evidence for abuse of discretion, whether the evidence is offered as part of a case in chief or on rebuttal. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); and *Pilon v. Commonwealth*, 544 S.W.2d 228, 231 (Ky. 1976). “The test

for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Angela's argument that the Commonwealth failed to timely disclose Eaton's testimony is somewhat disingenuous. At the end of the second day of trial, Angela objected to introduction of any testimony from Eaton in the Commonwealth's case in chief. In her objection, Angela argued that she had no prior notice that Eaton would testify, had no report from Eaton, and therefore would be unable to adequately cross-examine Eaton. The Commonwealth admitted that it had not previously disclosed Eaton because it did not intend to call Eaton as a witness until it learned that David intended to call Tharp as a witness. Furthermore, the Commonwealth stated that it did not have a report from Eaton and that, beyond saying that the fire was not electrical in origin, the Commonwealth did not know what Eaton's testimony would be. Because of scheduling difficulties and questions about whether Tharp would testify or be permitted to testify, the Commonwealth offered a compromise. At the Commonwealth's suggestion and after the jury was dismissed for the day, Eaton was brought into the courtroom and the attorneys for David and Angela were permitted to discover from him the bases of his opinions. Although the court initially suggested that the proceedings be on the record, David's counsel objected and the parties agreed to conduct the "interview" of Eaton off the record.

Therefore, it appears that both David and Angela were given ample opportunity to discover the bases of Eaton's opinions prior to his testimony at trial.

Angela's argument that Eaton introduced a new premise regarding the cause of the fire is also unpersuasive. David, by calling Tharp to testify that the fire was electrical in nature, introduced this premise. Eaton simply testified to rebut that premise. In doing so, he offered the bases for his opinions, which the parties were given an opportunity to explore before his testimony. Therefore, we discern no abuse of discretion by the trial court in permitting Eaton to testify on rebuttal.

2. Jury Instructions

Angela argues that the trial court erred by not giving an instruction on facilitation. Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981).

A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Kentucky Revised Statute (KRS) 506.080(1). “Facilitation reflects the mental state of one who is ‘wholly indifferent’ to the actual completion of the crime.” *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1996).

Angela argues that, while there is no evidence that she started the fire, the jury could have concluded from the evidence that David had made up his mind to start the fire and that Angela was merely facilitating David’s actions by telling coworkers about wiring problems in the house and the Houchins’ financial difficulties. The trial court determined that the evidence would not support a finding of facilitation. We agree.

Angela’s actions, telling coworkers about financial difficulties and wiring problems before the fire, if anything, establish that Angela took part in planning the fire. These actions do not establish that Angela, while indifferent to David’s intent, provided him with the means or opportunity to commit a crime. Therefore, we discern no error in the trial court’s refusal to give an instruction on facilitation.

3. Separate Trials

Angela argues that the trial court erred when it granted the Commonwealth’s motion to consolidate her case with David’s for trial. In support of her argument, Angela states that the following factors mitigated in favor of separate trials: (1) she argued at trial that the evidence against David was stronger than the evidence against her; (2) her request for a facilitation instruction was antagonistic to David; (3) David’s defense of “actual innocence” was antagonistic

to her; (4) statements from Angela and David were played for the jury, although Angela does not indicate how David's statement directly prejudiced her; and (5) that Angela's coworkers testified about Angela's statements regarding the Houchins' financial difficulties and her fear the house would burn.

In Kentucky, joint trials are favored when charges arise from the same set of facts. *Foster v. Commonwealth*, 827 S.W.2d 670, 679 (Ky. 1991). "In order to justify the granting of a severance, it must appear that the defendants have antagonistic defenses, or that the evidence as to one defendant tends directly to incriminate the other." *Id.* (citing *Tinsley v. Commonwealth*, 495 S.W.2d 776, 780 (Ky. 1973)). "If it appears that a defendant or the Commonwealth is or will be prejudiced by . . . joinder for trial, the court shall . . . grant separate trials of defendants or provide whatever other relief justice requires." Kentucky Rules of Criminal Procedure (RCr) 9.16. "The trial judge has broad discretion to determine whether the risk of prejudice requires severance and such a decision will be overturned only upon a clear showing of an abuse of discretion." *Epperson v. Commonwealth*, 809 S.W.2d 835, 838 (Ky. 1990).

Having reviewed the record and Angela's arguments on appeal, we discern no error in the trial court's decision to try Angela and David together. Angela and David both argued that the fire was accidental. Therefore, neither claim of innocence was antagonistic to the other. A facilitation instruction for Angela may have been antagonistic to David; however, the court gave no such instruction. Furthermore, any complaint regarding such an instruction would have

properly been David's, not Angela's, as would any complaint regarding the testimony from Angela's coworkers. Finally, although the jury heard the statements given by Angela and David, neither blamed or accused the other, thus avoiding any potential problems under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Based on the above, we discern no error in the court's determination to try Angela and David together.

CONCLUSION

As set forth above, we discern no error in the trial court's determination to permit Eaton to testify on rebuttal; its refusal to instruct the jury on facilitation; or in its determination to try the Houchins together. Therefore, we affirm.

ALL CONCUR.

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