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Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001311-MR

JEFFREY S. MUNDT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 10-CR-001867

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2013-CA-001331-MR

COMMONWEALTH OF KENTUCKY

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 10-CR-001867

JEFFREY S. MUNDT

CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

COMBS, JUDGE: Jeffrey Mundt appeals his convictions of facilitation to robbery in the first degree and tampering with evidence. After our review, we affirm.

On June 17, 2010, Mundt placed a call to 911. He said that Joseph Banis, his boyfriend, was trying to kill him with a knife. When the police arrived, they found Mundt locked in a bathroom. The officers caught Banis as he was fleeing the house. They separated the two men for questioning. During their separate conversations with officers, both Mundt and Banis mentioned that a body was buried in the basement of the home.

At that point, police took the men to headquarters for interrogation. Banis provided the name of the victim: James Carroll. After police confirmed that Carroll had been missing for several months, they returned to Mundt's house. They followed a map of the house which Banis had drawn to direct them to Carroll's body.

The basement had a partial dirt floor. After extensive digging in the area indicated by Banis, police excavated a blue plastic storage box. They transported the box to the medical examiner's office where it was opened. Carroll's partially decomposed body was in the container. The medical examiner determined that

Carroll had been shot in the neck and that he had suffered multiple stab wounds.

Three of the stab wounds were fatal.

At Mundt's trial, Banis testified that on the night of December 14, 2009, Mundt and Banis asked Carroll to bring them some methamphetamine. Carroll did, and after using the drug, the three men engaged in sex. Sometime during the night, they ran out of methamphetamine. Carroll left to obtain more.

According to Banis, while Carroll was away, Mundt mentioned that no one would miss Carroll if he were gone. The two decided to rob Carroll of his drugs and money. After Carroll returned, the three resumed using drugs and having sex.

Mundt and Banis both accused the other of suggesting the robbery of Carroll. They also claimed that the other unexpectedly attacked Carroll and inflicted the fatal injuries. However, they agreed that they purchased the plastic tub together -- along with lime and foam sealant; that they both placed Carroll's body in the tub; and that they both dug the hole where they buried Carroll.

On June 22, 2010, Mundt and Banis were indicted for complicity to murder, complicity to first-degree robbery, and tampering with evidence. The court held separate trials. Banis was tried first, and Mundt testified in Banis's trial in exchange for the Commonwealth's not seeking an aggravated penalty. Banis was convicted of complicity to murder, and he also entered into an agreement to testify at Mundt's trial in order to receive a more lenient sentence -- in his case, life without the possibility of parole for twenty years.

The jury acquitted Mundt of the complicity to murder charge but found him guilty of complicity to robbery and tampering with evidence. He received a sentence of eight-years' incarceration. This appeal follows.

Mundt first argues that the trial court committed reversible error when it gave the jury an instruction for facilitation to robbery. Mundt was charged with complicity to commit robbery, which consists of the same elements, relies on the same evidence, and carries the same penalty as a charge of robbery. Kentucky Revised Statute[s] (KRS) 502.020.

Facilitation is a lesser-included offense of complicity. *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993). It is a lower class of crime and carries a lighter penalty than the principal crime. KRS 506.080(2).

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.

KRS 506.080(1).

An instruction for facilitation is appropriate when “on the given evidence a reasonable juror could entertain reasonable doubt of the defendant’s guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Skinner, supra*.

Mundt argues that the evidence presented at trial did not support a finding of facilitation; rather, it only supported an “all or nothing” conclusion. According to

Mundt, the Commonwealth's theory was that he actively planned and committed the murder and robbery. His defense was that he was merely an innocent bystander. Thus, a finding that he was aware of Banis's intent to rob Carroll would be inconsistent with his defense and the evidence supporting his defense. However, contrary to Mundt's argument, a jury may "infer the defendant's knowledge from the defendant's conduct." *Hall v. Commonwealth*, 337 S.W.3d 595, 610 (Ky. 2011).

In this case, the facilitation instruction was supported by evidence presented at trial. There was testimony that Mundt knew that Banis intended to rob Carroll. The jury heard Mundt's statement to the police in which he admitted that Banis wanted drugs from Carroll but that Mundt did not have money for them. There was testimony that Mundt and Banis discussed Carroll's upcoming court date and that no one would miss Carroll if he were gone. One witness testified to an admission made by Mundt. He had told the witness that he and Banis planned on robbing Carroll as retaliation for "running his mouth." As the court noted, there was testimony that Carroll left Mundt's house for a period of time and then returned, a hiatus in time that created an opportunity for Mundt and Banis to do some planning.

Additionally, Mundt never disputed that he engaged in sexual acts with Carroll that night. There was no question that Mundt provided the house where the robbery occurred and in which Carroll was buried. Finally, evidence was

presented throughout the trial which contradicted many of the statements made to the police--including his drug use.

Mundt contests the veracity of the evidence. However, credibility and weight of the evidence are decided by the jury. In light of the cumulative effects of the evidence, it was reasonable for the jurors to infer that Mundt knew of Banis's intent to rob Carroll.

Mundt next claims that the wording of the facilitation instruction was erroneous. The jury was instructed to consider whether Mundt "assisted and/or aided" Banis in an intentional robbery of Carroll. Mundt argues that the jury should have been asked to decide whether the defendant provided "the means or opportunity" for another person to commit the crime. Mundt cites *Cooper's Instructions to Juries* regarding the mandatory nature of the wording. However, that treatise is not binding authority on the courts of this Commonwealth. See *Goncalves v. Commonwealth*, 404 S.W.3d 180, 193 fn. 5 (Ky. 2013).

Instead, we turn to well established case law. In *Webster v. Commonwealth*, 508 S.W.2d 33, 38 (Ky. 1974), Justice Palmore explained as follows:

[t]he function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (and in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof.

Thus, Kentucky uses the "bare bones" approach to instructions. However, they must conform to the evidence and the pertinent statute. *Wright v. Commonwealth*, 391 S.W.3d 743, 746 (Ky. 2012).

As we discussed, the facilitation instruction in this case was supported by the evidence. The statute also defines facilitation as providing “means or opportunity . . . which in fact *aids* such person to commit the crime.” KRS 506.080(1) (emphasis added.) Providing means or opportunity inherently aids and assists another person to commit a crime. We are unable to perceive a discrepancy between the instructions and either the evidence or the statute. Furthermore, Mundt does not provide any proof that he was prejudiced by the wording of the instruction. We cannot conclude that the facilitation instruction was erroneous.

Parenthetically, we note that Mundt claims that the Commonwealth requested the facilitation instruction on the sole basis that it is a lesser-included charge of complicity. We agree with Mundt that such a request would be an improper application of the law. *White v. Commonwealth*, 178 S.W.3d 470, 490 (Ky. 2005). However, we have scoured the record and the briefs, and we are unable to determine that the Commonwealth now makes that argument or that it so argued to the trial court. It explained its basis for requesting the instruction with specific references to the facts presented by the evidence. Therefore, there is no merit to this aspect of Mundt’s argument.

Mundt’s next argument is that the trial court erred in allowing Banis to testify. As mentioned, after he was convicted of murder, Banis entered into an agreement with the Commonwealth in which he promised to testify at Mundt’s trial. In exchange, the Commonwealth agreed that it would not seek the death

penalty at his sentencing. On Monday, May 20, 2013, Banis appeared at Mundt's trial but refused to testify in direct contravention of his agreement.

Following the close of court on the evening of Tuesday, May 21, Banis's counsel sent a message to the Commonwealth's attorney requesting a meeting. The Commonwealth's attorney and Detective Jon Leshar, the Commonwealth's prosecuting witness, met with Banis and his attorney to discuss what Banis's testimony would be. On Wednesday, May 22, the Commonwealth informed Banis's attorney that they would honor the sentencing agreement, regardless of whether Banis chose to testify or not. Detective Leshar was sworn in and began his testimony that day.

Following the close of court on Wednesday, May 22, Banis's attorney informed the Commonwealth that Banis wanted to testify according to the terms of the sentencing agreement. The Commonwealth so notified Mundt's counsel. Before testimony began on Thursday, May 23, Mundt objected to the admission of Banis's testimony. The court agreed that Banis should not testify.

After testimony was completed on Thursday, the Commonwealth renewed its motion to admit Banis's testimony. After lengthy discussion, the court agreed to allow Banis to testify. On Friday, May 24, Mundt made a motion to exclude the testimony, which the court denied. Mundt now appeals, arguing that the meeting on Tuesday, May 21, violated the separation-of-witnesses rule. Specifically, he contends that it was impermissible for Detective Leshar to attend the meeting.

Kentucky Rule[s] of Evidence (KRE) 615 allows a court to order witnesses to remain outside the courtroom when they are not testifying. Its purpose is to prevent witnesses from being influenced by the testimony of other witnesses. *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky. 2004).

An exception to the rule is “[a]n officer or employee of a party which is not a natural person designated as its representative by its attorney[.]” KRE 615(2). The Commonwealth’s Attorney designated Detective Leshner to represent the Commonwealth. Arguably, Detective Leshner’s presence at the Commonwealth’s meeting with Banis was permissible under the exception. Nonetheless, we will undertake additional analysis.

First, the Commonwealth met with Banis in order to prepare its witness--an established and recognized right. *Radford v. Lovelace*, 212 S.W.3d 72, 83 (Ky. 2006) (*overruled on other grounds by Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009)). The Commonwealth advised the court that it asked Banis what his testimony would be and if he had knowledge concerning certain pieces of evidence. It did not suggest that it or Detective Leshner gave him any information about what had transpired during the trial up to that point.

Our Supreme Court has held that KRE 615 does not prohibit interaction between or among witnesses outside the courtroom. *Woodard v. Commonwealth*, 219 S.W.3d 723 (Ky. 2007) (*overruled on other grounds by Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010)). The Court explained that any interaction could be cured by cross-examination of the witness when such a contact had

occurred. *Id.* at 728. The trial court allowed the cross-examination in this instance; therefore, we are unable to conclude that it committed error under the *Woodard* reasoning.

Mundt's remaining arguments concern admission of exhibits provided by the Commonwealth. Our standard of review for evidentiary issues is whether the trial court abused its discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). Our Supreme Court has defined abuse of discretion as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." KRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice[.]" KRE 403. All relevant evidence is prejudicial to the party against whom it is offered. Robert G. Lawson, *Kentucky Evidence Law Handbook*, § 2.10(4)(b) at 89 (4th Edition 2003). However, evidence that is ***unduly prejudicial*** "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *Id.* (*quoting Carter v. Hewitt*, 617 S.W.2d 961, 972 (3rd Cir. 1980)).

First, Mundt claims that it was improper for the trial court to allow the admission of a transcript of hundreds of text messages among Mundt, Banis, and some third parties. Mundt claims that the texts messages were hearsay and that they were unauthenticated and irrelevant. He also claims that the sexual nature of many of the texts was unduly prejudicial.

Mundt is precluded from arguing that the texts were unauthenticated because the record reveals that he stipulated to the authenticity of materials from electronic devices which were seized by the Commonwealth. Additionally, he has not specifically pointed to the texts that he deems to be objectionable, and we may not speculate.

As to his argument that the text messages were irrelevant, we disagree. They were relevant to demonstrate the nature of his relationship with Banis. Mundt's defense was that he was terrorized by Banis and that he lived in fear of him. The Commonwealth presented the texts to reveal a relationship that was not based on fear as Mundt had contended. Finally, the Commonwealth did not refer to any of the sexual texts in its arguments. Thus, we hold that the trial court did not err by allowing admission of the text messages.

Mundt claims that the court should have excluded a video of him and Banis engaging in sexual acts as well as a photograph of Mundt wearing a latex shirt. He argues that both items were more prejudicial than probative.

The trial court permitted the video for the same reason as the texts -- to give the Commonwealth an opportunity to refute Mundt's defense theory. Mundt

claimed that he had assisted Banis in the crimes and cover-up because of the abuse and threats that Banis constantly inflicted on him. The video, however, showed Mundt in a dominant role. He did not appear to be threatened by or afraid of Banis.

The court recognized the probative value of the video and ordered measures to reduce the prejudicial impact of the sexually explicit video. According to the direction of the court, the Commonwealth showed only portions of the video. It also switched off the video at certain points, playing only the audio portion for the jury.

Mundt urges us to examine *Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995), for guidance. The Supreme Court reversed the defendants' convictions in *Chumbler* because the trial had included gratuitous and graphic evidence of an alleged sexual relationship between two of the defendants. However, unlike from the case before us, neither of the defendants claimed to be the victim of domestic violence inflicted by the other. Additionally, in this case, the crime itself was connected to sexual activity -- Carroll was murdered during a three-way sexual encounter with Banis and Mundt. It was probative for the Commonwealth to demonstrate to the jury that Banis was not the dominant partner.

The photograph of Mundt wearing a latex shirt was taken by the Chicago Police Department when he was arrested a few months after the robbery and murder of Carroll. An officer of the department testified that when Mundt was arrested, police initially thought that he was wearing body armor. The

Commonwealth introduced the photograph in order to prevent any accusations that the police had jumped to conclusions about Mundt. It was shown for a very short amount of time during a trial that lasted approximately two weeks. Mundt has not offered any evidence that the photograph was unduly prejudicial. Therefore, we are not persuaded that the trial court abused its discretion.

The Commonwealth has filed a cross-appeal in which it argues that the trial court erred in excluding the testimony that Mundt had given in Banis's trial. Mundt made an agreement to testify in Banis's trial in exchange for the promise that the death penalty not be considered in weighing his possible sentences. As part of the agreement, Mundt waived his Fifth Amendment protection against self-incrimination. Mundt fulfilled his obligation and testified at Banis's trial.

When Mundt went to trial (the object of this appeal), the Commonwealth sought to present his previous testimony. Mundt now objected, and the trial court sustained his objection because it believed that the agreement concerning the parameters of the Fifth Amendment waiver was ambiguous. Therefore, the Commonwealth could not use Mundt's previous testimony. The Commonwealth challenges that ruling of the trial court in this cross-appeal.

While we believe that the substance of the Commonwealth's argument may have some merit as to the clarity of the waiver, we are nonetheless prohibited from considering it.

Section 13 of the Kentucky Constitution reiterates the sacrosanct rule against self-incrimination enshrined in the Fifth Amendment of the United States

Constitution. Our Section 13 provides as follows: “[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb....” This principle is codified in KRS 505.020. Case law has long upheld the same line of reasoning, further defining the inception of jeopardy as follows: “...an accused person had been put in jeopardy after a jury has returned a verdict of not guilty....” *Commonwealth v. Mullins*, 405 S.W.2d 28, 29 (Ky. 1966). Thus, jeopardy has attached for purposes of constitutional implications after a verdict has been rendered by a jury.

Mundt has gone before a jury, which rendered a verdict acquitting him of complicity to murder. Thus, the cross-appeal, seeking to resurrect the specter of the murder charge by way of this testimony (regardless of the waiver), is wholly inappropriate. Additionally, the issue is moot.

Although the doctrine of mootness alone would suffice for our disposition of this cross-appeal, we have nonetheless elaborated upon the Fifth Amendment issue at the heart of this challenge because of the impropriety of the fact that it was raised at all by the Commonwealth.

We affirm the Jefferson Circuit Court in all respects.

ALL CONCUR.

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