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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000071-MR

MAURICE L. DEAL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CR-002748

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Maurice L. Deal was found guilty of complicity to second-degree manslaughter by a Jefferson County jury. Following the jury's guilty verdict, the Jefferson Circuit Court sentenced Deal to ten years of imprisonment. On appeal, Deal raises a jury instruction issue and an evidentiary issue. For the following reasons, we affirm.

According to testimony presented at trial, Deal had an ongoing dispute with the victim, Joseph Keith Otis, which stemmed from Otis's allegation that Deal hit his vehicle sometime in 2014. Deal and Otis both patronized a bar called Club Cedar in Louisville. Over the course of the next year, Deal recalled Otis made remarks to him about paying for the damage to his vehicle, and the dispute persisted because Deal denied hitting Otis's vehicle.

On October 3, 2015, Otis engaged Deal in a physical altercation at Club Cedar, which ended when Otis knocked Deal unconscious. On October 6, 2015, Deal and Otis arrived at Club Cedar around the same time. Upon seeing Otis, Deal stated he wanted Otis to see how it felt to be "sucker punched." Deal started a fight with Otis. At some point during the altercation, someone produced a gun and began firing. Deal was shot in the hand and started running from the scene. Otis was shot in the neck and died at the scene. Deal returned to his home, and his wife drove him to the hospital. Two officers separately visited the hospital, and Deal told them he did not know Otis had been shot until they informed him. After Deal returned home, he was arrested for his involvement in the events that led to Otis's death.

Deal's brother was also at Club Cedar the night Otis was killed. Cell phone records indicate there were at least eight calls made between Deal and his brother that day, two prior to and six after the incident. Deal admitted to police in

his statement that immediately before the shooting, he told his brother about Otis knocking him unconscious a few days earlier, and his brother asked if he wanted to "whoop" Otis.

It is unclear who shot Otis, but the Commonwealth inferred that it was Deal's brother. The Commonwealth presented testimony indicating Deal's brother was the shooter, the two formulated a plan, and carried it out. In his statement to police, Deal said he did not know if his brother had a gun and did not know if his brother was the one who fired the fatal shot. However, when Deal spoke to his brother on the phone immediately after the incident, his brother said he did not have to worry about Otis anymore. Deal asked his brother what he did, but his brother did not respond.

During trial, the Commonwealth informed the Court that it intended to play a video of Deal's statement to police in which he was dressed as an inmate. Deal objected, arguing only the audio should be played because it was prejudicial for him to be seen in an orange jumpsuit. The trial court overruled Deal's objection, stating "everybody's in custody, eventually, especially after a murder investigation."

At the close of evidence, the trial court discussed jury instructions with counsel. Deal requested that the court instruct the jury on facilitation of murder and facilitation of second-degree manslaughter as lesser-included offenses

of complicity to murder and complicity to second-degree manslaughter. The court denied Deal's request on the basis that the evidence did not support instructions on facilitation.

The jury found Deal guilty of complicity to second-degree manslaughter, and he was sentenced to ten years of imprisonment. This appeal followed.

"[A]buse of discretion applies in . . . situations where, for example, a court is empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions." *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004) (internal quotation marks and citation omitted). "The trial court's decision not to give a jury instruction is reviewed for abuse of discretion." *Hunt v. Commonwealth*, 304 S.W.3d 15, 31 (Ky. 2009) (citation omitted). Likewise, "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Deal raises two issues on appeal: (1) the trial court erroneously denied his request to instruct the jury on facilitation of murder and facilitation of

second-degree manslaughter; and (2) the trial court erroneously permitted the jury to view a video of Deal's statement in which he was dressed as an inmate without good cause.

Deal argues the evidence supported instructions on the lesser-included offenses of facilitation of murder and facilitation of second-degree manslaughter in addition to the instructions on complicity to murder, complicity to second-degree manslaughter, and complicity to reckless homicide, but the trial court disagreed. "An instruction on a lesser-included offense is appropriate if and only if 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 v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993) (citing *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977)). A person is complicit in the criminal act of another when he "(a) [s]olicits, commands, or engages in a conspiracy with such other person to commit the offense; or (b) [a]ids, counsels, or attempts to aid such person in planning or committing the offense[.]" Kentucky Revised Statute (KRS) 502.020(1). Facilitation is defined as "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. "Facilitation reflects

the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150-51 (Ky. 2001) (quoting *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995), *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996)).

The trial court correctly found that no reasonable juror would believe Deal was guilty of facilitation based on the evidence presented. In a statement played for the jury, Deal described his version of the events the night of Otis's death. Deal made clear in his statement to police he intended to engage Otis in a physical altercation the night Otis was killed, and he formulated a plan with his brother to do so. Based on his own account, Deal was not "wholly indifferent" to the outcome of the fight; he clearly sought revenge against Otis for knocking him unconscious a few nights earlier. In denying Deal's request for instructions on facilitation, the trial judge explained:

> The evidence supports that [Deal] had the intent to approach the decedent under the cover of subterfuge to initiate an assault. You can call it what you want, but it was a criminal act. It was an assault, and his brother was somehow, the evidence supports an argument that he was there, and that they, in fact, did that and assaulted the decedent. And in the course of that assault, although brief, he was killed, so there's no question there was a homicide. So the evidence also supports that [Deal] didn't know [his brother] was armed, and that [Deal] didn't expect the presence of a weapon. But initiating a criminal act and then wanting it to go your way and not

> any other way, that's the classic definition of either wantonness or recklessness. So that's what I see, and I think that's what the evidence supports.

Although the outcome was not what Deal intended, he planned the assault with his brother who was the alleged shooter. The trial court's decision to exclude instructions on facilitation was not an abuse of discretion as it was based on sound legal principles and the evidence submitted during trial.

Deal argues his right to a fair trial and presumption of innocence were compromised when the trial court permitted the jury to view a video of him dressed as an inmate. He further argues the trial court should have played only the audio portion instead, and that the trial court should have admonished the jury that Deal's appearance as an inmate was not evidence of his guilt. Deal's argument is based on an unpublished opinion in which the Supreme Court of Kentucky affirmed a conviction because the trial court admonished the jury before a video of the defendant dressed as an inmate was played. *See Burton v. Commonwealth*, 2013-SC-000476-MR, 2014 WL 4160221, *3 (Ky. Aug. 21, 2014).

The Supreme Court of Kentucky has held "it would be impossible as a practical matter to conduct a trial without the jury seeing some sign that the defendant [is] not entirely free to come and go as [he] please[s]." *Shegog v. Commonwealth*, 142 S.W.3d 101, 109 (Ky. 2004) (internal quotation marks and citation omitted). Because of this, the Supreme Court of Kentucky has affirmed a

conviction when the trial court allowed the Commonwealth to introduce "a photograph of [the defendant] at the time of his arrest in which he was handcuffed." *Estep v. Commonwealth*, 663 S.W.2d 213, 216 (Ky. 1983). There, the appellant "acknowledged that the jury already knew that he had been placed under arrest and handcuffed at the time the photograph was introduced." *Id.* The trial court allowed the Commonwealth to introduce the photograph but "admonished the jury that the handcuffs had no significance." *Id.*

Furthermore, a more recent unpublished opinion conflicts with the opinion cited by Deal. In *Bryan v. Commonwealth*, 2015-SC-000467-MR, 2017 WL 1102825, *6 (Ky. Mar. 23, 2017), our Supreme Court affirmed a conviction, but does not discuss whether the trial court admonished the jury as to the depiction of the defendant as an inmate in a video.

Deal points out that the trial court did not admonish the jury that his appearance in the video was not an indication of his guilt, yet he did not request such an admonition. "[A] defendant who wants the court to admonish the jury must ask for such relief; otherwise, his failure to request it will be treated as a waiver or as an element of trial strategy." *Hall v. Commonwealth*, 817 S.W.2d 228, 229 (Ky. 1991), *overruled on other grounds by Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996). Although Deal objected to the Commonwealth playing the video, the issue is unpreserved because he did not request an

admonition and did not request review for palpable error under Kentucky Rule of Criminal Procedure 10.26. The trial court did not err when it failed to admonish the jury because the trial court is not required to do so *sua sponte*. *Id.*

Here, as in *Estep*, the jury already knew Deal had been arrested when the video of him dressed as an inmate was played. The decision to play the video as requested by the Commonwealth was reasonable, and the trial court was not required to give the jury an admonition when Deal did not request one. Thus, the trial court did not abuse its discretion when it admitted the video, and if there was any error, it was harmless. *See, e.g.*, *Moss v. Commonwealth*, 949 S.W.2d 579, 582-583 (Ky. 1997).

For these reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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