

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky **FINAL**

2004-SC-0605-MR

DATE 9-15-05 ELLA Graves + P.C.

JOHN ROBERT TILLMAN II

APPELLANT

V. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
2003-CR-0145

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, John Robert Tillman II, was convicted by a Graves County jury of first-degree manslaughter and sentenced to twenty years' imprisonment. He appeals to this Court as a matter of right, asserting the following trial court errors: (1) instructing the jury on first-degree manslaughter, (2) allowing the Commonwealth's Attorney to comment on matters not in evidence during closing argument, and (3) allowing comments on Tillman's post-arrest silence. For the reasons set forth herein, we affirm Tillman's conviction.

Facts

In October 2002, Tillman was indicted for trafficking in a controlled substance. While this drug charge was pending, Tillman became a confidential informant for the Graves County Sheriff's Office. He continued to maintain relationships with several individuals involved in drug trafficking, known by their street names as "Face," "Skeet,"

"Yellow," and "Murder One." Meanwhile, for safety reasons, Tillman's wife and children left Kentucky for Mississippi, Tillman's childhood home. In their absence, Tillman began a relationship with Misty Wright.

On February 28, 2003, Tillman wore a wire while performing a controlled purchase of drugs with Murder One. Face, Skeet, and Yellow were also present. The transaction ended abruptly, however, when a member of the group spotted what he believed was the police. Everyone departed before the transaction could be completed. The house where the attempted transaction took place was burned down immediately thereafter. A few days after the attempted controlled purchase, Face, Skeet, and Yellow came to Tillman's house. Because of the botched transaction, Tillman was concerned the other men had learned that he was an informant.

Tillman testified that he went into the living room of his home while Face, Skeet, and Yellow remained in the dining room. Through a series of wall mirrors, Tillman saw Face and Skeet give Yellow a hand gesture to draw his gun. Face and Skeet then departed, leaving only Tillman and Yellow, whose given name is Carlos Walker. According to Tillman, the two men began to play a game of dice. At one point, Walker threw the dice a little further than was necessary and, while Tillman retrieved them, Walker drew a gun from his pocket. Tillman stated that he grabbed a hammer that had been used earlier that day for household repairs and hit Walker twice in the head. Walker died immediately. Tillman testified that he did not call the police because he feared losing his chance for parole. Instead, he called a friend and the two of them disposed of Walker's body and the hammer used to cause his death.

At trial, the Commonwealth disputed Tillman's version of events. Though Tillman testified that he buried the gun and a quantity of money with the body, neither was

found. The Commonwealth also emphasized the testimony of Misty Wright, Tillman's girlfriend. Wright testified that Tillman had told her a very different version of events. According to Wright, after Walker pulled the gun, Tillman hit him on the head with the hammer then retreated to the bathroom to wash blood off himself. When he returned, Walker had apparently survived that blow and managed to pull himself onto the couch. Tillman then began hitting Walker again with the hammer until he died. To further undermine Tillman's self-defense theory, the Commonwealth also highlighted the physical differences between Tillman and Walker: Tillman is more than six inches taller than Walker and outweighs him by forty pounds.

Following the incident, Tillman left Kentucky for Mississippi, purportedly to visit his wife and children. When he learned of the charge, Tillman surrendered himself to law enforcement and waived extradition. Kentucky State Police Detective Shawn Ramage traveled to Mississippi and brought Tillman back to Kentucky for trial. He was thereafter indicted by a Graves County Grand Jury. He was tried and found guilty of first-degree manslaughter. Further facts will be developed as necessary.

First-Degree Manslaughter Instruction

Tillman first argues that it was error for the trial court to instruct the jury on manslaughter in the first degree as a lesser-included offense to murder. He seems to argue that it was error to give this instruction because there was no evidence of any extreme emotional disturbance. The record reveals, however, that the jury was not instructed on first-degree manslaughter while acting under extreme emotional disturbance. Only one first-degree manslaughter instruction was given and it read, in pertinent part:

If you do not find the Defendant, John Robert Tillman, II, guilty of Murder under Instruction No. 3, you will find the Defendant guilty of First-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond reasonable doubt all of the following:

A. That in this county on or about February 28, 2003, and before the finding of the indictment herein, he killed Carlos D. Walker by striking him in the head with a hammer; AND

B. That in so doing he did not intend to kill Carlos D. Walker but intended to cause serious physical injury to Carlos D. Walker; AND

C. That he was not privileged to act in self-protection.

Therefore, the jury in this matter was instructed on first-degree manslaughter pursuant to KRS 507.030(a), not KRS 507.030(b).

Tillman also seems to assert that the trial court erred in giving a first-degree manslaughter instruction, as the evidence supported only a murder instruction. We disagree. The trial court is required to not only instruct on the law as to the indicted offense, but on the law as to any offense supported by the evidence. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). "Where the evidence is such that the jury could come to any of several conclusions, the trial court is required to submit the instructions on the various alternatives." Id. at 549.

The first-degree manslaughter instruction required a finding that Tillman did not intend to kill Walker but intended to cause serious physical injury. Tillman's own testimony provided sufficient basis for the giving of this instruction: he testified that he was only trying to disarm Walker, and that he was "just hitting" with the hammer. Later, Tillman testified that he was swinging the hammer in an attempt to disarm Walker, but that he was not aiming for any particular part of Walker's body. This testimony was

more than sufficient to support a jury's finding that Tillman did not intend to kill Walker, but only intended to cause serious physical injury. Therefore, the trial court did not err.

Prosecutor's Comments During Closing Arguments

Tillman's second argument is that the trial court erred in allowing the Commonwealth's Attorney to refer to matters not in evidence during his closing argument. The issue is preserved by defense counsel's objection during the Commonwealth's closing argument, which was overruled. The issue was raised again in defense counsel's subsequent motion for a new trial, which was also denied. While we conclude that it was error for the trial court to permit certain portions of the Commonwealth's closing argument, the error does not require reversal.

Defense counsel delivered the first closing argument, during which he noted that Tillman's family was in the courtroom to support him, while Walker's family was absent. Defense counsel then offered, by way of explanation, that Walker's only family was his fellow drug dealers and that they had essentially abandoned him. During his closing argument, the Commonwealth's Attorney stated that he wanted to respond to defense counsel's comments concerning Walker's family. The Commonwealth explained that Walker did, in fact, have a family but that they were financially unable to attend. The Commonwealth's Attorney went on to explain that his wife was the victim's advocate in the case, and that Walker's family was indeed upset over his death. The Commonwealth's Attorney recounted that his wife had frequent conversations with Walker's mother, and that she cried every night over his death.

At the outset, we reiterate the principle that attorneys are afforded great latitude in making their closing arguments. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). When the alleged misconduct occurs during closing arguments, "we must

determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." Id. at 411-12 (citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). On appeal, we focus on the overall fairness of the trial, as opposed to the culpability of the prosecutor. Id. Furthermore, in some instances, a defense argument may invite a response that otherwise may be improper. Rupyard v. Commonwealth, 475 S.W.2d 473 (Ky. 1971).

Upon thorough review of both closing arguments, we conclude that Tillman was not denied due process of law as a result of the Commonwealth's statements during closing argument. The Commonwealth's remark that Walker's family was not financially able to attend, though unsupported by the evidence, was clearly made in response to defense counsel's assertion that Walker had no family other than his colleagues. In short, this statement was invited by defense counsel's prior remarks. See Rupyard, supra. See also White v. Commonwealth, 394 S.W.2d 770, 773 (Ky. 1965) (finding prosecutor's commentary on defendant's silence permissible as it was clearly in response to defense counsel's statements).

The Commonwealth's Attorney exceeded the limits of proper closing arguments, however, by referencing his wife as the victim's advocate, and relaying her tearful conversations with Walker's mother to the jury. These conversations had not been admitted into evidence and therefore were not available for commentary during closing arguments. Attorneys must limit their closing remarks to commentary and explanation of the evidence presented, and reasonable inferences to be drawn from it. Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001). Here, the Commonwealth commented on matters that were not in evidence, and that were plainly irrelevant to the issue of Tillman's guilt. It is axiomatic that reference to matters not in evidence threatens the

fairness of the proceedings. The Commonwealth is well aware that such statements bear the potential to inflame the jury or otherwise unduly prejudice a criminal defendant.

Nonetheless, we cannot conclude that the Commonwealth's statements were so egregious as to deny Tillman due process of law. Examining the Commonwealth's closing argument in its entirety, we note that the improper statements constituted a very brief portion of an otherwise proper argument. See *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978). Also, though the Commonwealth improperly recounted the conversations between the victim's advocate and Walker's mother, the substance of the conversations contained no incriminating evidence. Cf. *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993) (defendant was denied due process of law when, during closing arguments, prosecutor referred to incriminating evidence that had been excluded from trial). Most importantly, we note the substantial and compelling evidence of Tillman's guilt, in part: his incriminating statements to Misty Wright, his surreptitious burial of Walker's body and subsequent departure to Mississippi, his failure to inform police of Walker's death despite his relationship with the Graves County Sheriff's Department, and the fact that Walker's gun was never located either at the scene of the crime or with Walker's body. By contrast, Tillman offered little evidence to support his claim of self-defense other than his own testimony. Upon review of the entire case, it is clear that Tillman received a fundamentally fair trial. Reversal is not required.

Reference to Tillman's Post-Arrest Silence

Tillman's final assignment of error is that Detective Ramage was improperly permitted to twice reference Tillman's post-arrest silence during his testimony. Though defense counsel's objection to the first reference was sustained, no objection was made to the second reference. Tillman also argues, herein, that the error resulting from

Ramage's testimony was compounded by the Commonwealth's additional reference to Tillman's post-arrest silence during its closing argument. He maintains that reversal is required.

During direct examination, Detective Ramage explained that he arrested Tillman in Mississippi and returned him to Kentucky, and that Tillman did not make any statements about the case during that trip. Defense counsel objected to the testimony and an admonishment was delivered to the jury, but defense counsel declined to seek a mistrial, citing tactical reasons. Later, during cross-examination, defense counsel questioned Ramage about whether Tillman had been charged with an unrelated double homicide in Mississippi, a claim that Tillman had made to Misty Wright, among others. The Commonwealth returned to this subject during its re-direct examination, asking Ramage if he had found any record of these prior charges, which he had not. Essentially, the Commonwealth was seeking to establish that Tillman had a habit of telling untruthful stories that tended to give him a "tough" persona. To this end, the Commonwealth asked Ramage if he had been able to verify any of these "stories." Ramage's response can only be described as long-winded and rambling. At one point Ramage explained that he had not been able to verify certain statements attributed to Tillman by other witnesses because, "I had no statement from [Tillman]. There's nothing wrong with that. That's his prerogative." Though defense counsel did not object to this second reference to Tillman's silence, the trial court sua sponte halted Ramage's testimony as non-responsive. Later, in chambers, defense counsel requested an admonition; the request was denied.

We find no error in the trial court's refusal to give a second admonition to the jury. No contemporaneous objection was made pursuant to RCr 9.22; in fact, the trial

court interrupted Ramage and directed the Commonwealth to move on with the witness. Furthermore, the jury had already been cautioned to disregard any reference to Tillman's post-arrest silence. There is no indication that the trial court acted outside the limits of its discretion in denying Tillman's request.

We also do not detect that any palpable error resulted from Ramage's second reference to Tillman's post-arrest silence as to require reversal. RCr 10.26. "The usual situation where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool." Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983). There is no evidence that the Commonwealth was using Tillman's silence as a prosecutorial tool; in fact, Ramage's second reference to Tillman's silence was completely unsolicited. Ramage also qualified his statement by adding that it was Tillman's prerogative to remain silent, which further lessened any chance of prejudice.

Furthermore, we are not convinced that any alleged prejudice was compounded by the Commonwealth's reference to Tillman's silence during its closing arguments, as Tillman maintains. The Commonwealth commented during closing argument that Tillman's testimony at trial was the "first time" he had told that version of events, emphasizing the very different story he had told Misty Wright. We find this comment to be a permissible and reasonable attack on Tillman's credibility based on the evidence presented. See Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001).

For the foregoing reasons, the judgment of the Graves Circuit Court is affirmed.

All concur.

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