

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000526-MR

DATE 5-10-07 *Elia Groum D.C.*

THOMAS E. TOLL, JR.

APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
04-CR-00206-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Thomas E. Toll, Jr., appeals from his conviction of manslaughter in the first degree, principal or accomplice; robbery in the first degree, principal or accomplice; two counts of tampering with physical evidence; and being a first-degree persistent felony offender. He appeals to this Court as a matter of right, asserting two claims of reversible error: permitting inadmissible hearsay testimony into evidence, and instructing the jury on complicity to manslaughter. We conclude that the statement at issue was properly admitted as nonhearsay, and that the court had sufficient evidence to instruct on complicity. Hence, we affirm.

On January 30, 2004, a body was discovered by a passerby in a snow bank in a parking lot in Covington, Kentucky. Police were called and the body was later identified as that of Jason Bourrage. A Crime Stoppers tip led police to appellant as a suspect in the death. On February 3, 2004, appellant came to the police station to be interviewed. In the interview, which was videotaped, appellant admitted that Bourrage had come to appellant's house for the purpose of a drug transaction and that Bourrage was killed there. Appellant claimed, however, that it was his nephew, Matthew Smith, who assaulted and killed Bourrage. Appellant denied participating in the assault, but admitted to helping dispose of Bourrage's body, clothing, and identification, as well as using Bourrage's money to buy crack cocaine.

Appellant was arrested, and an arrest warrant was issued for Matthew Smith. Ultimately, appellant and Smith were both indicted on charges of first-degree manslaughter, first-degree robbery, and tampering with physical evidence. Appellant was also charged with abuse of a corpse, two additional counts of tampering with physical evidence, and being a first-degree persistent felony offender.

Smith pled guilty to first-degree manslaughter, first-degree robbery, and tampering with physical evidence, and testified against appellant at appellant's trial. At trial, Smith gave a version of events which differed from appellant's, in that Smith claimed it was appellant who attacked Bourrage. Smith testified as follows. On the evening of January 30, 2004, appellant arrived at a bar where Smith was already present. Smith had been drinking and snorting

cocaine. Appellant was kicked out of the bar after about twenty or thirty minutes. Smith and appellant wanted to get some crack, and went to appellant's house, where appellant called his drug dealer, Bourrage. Smith was going to pay for the drugs. When Bourrage arrived, Smith was in the bathroom. Smith could hear appellant and Bourrage arguing. When Smith came out of the bathroom, he heard Bourrage tell appellant, "You ain't gettin' no more, you done owe me fuckin' money." Appellant swung at Bourrage, who tried to run. Appellant then grabbed Bourrage by the hair, and started choking him. Smith thought that appellant was robbing Bourrage. Appellant told Smith to hold Bourrage's legs since he was kicking a furnace, which Smith did. Bourrage died soon after.

After Bourrage was dead, Smith and appellant removed crack cocaine, money, a phone, and an identification card from Bourrage's body. Smith and appellant smoked the crack and discussed how to get rid of the body. Appellant called Smith's uncle to see if he could use his van. Appellant left to get the van, locking Smith in the house.¹ While appellant was gone, Smith threw up on Bourrage's pants. Smith removed Bourrage's outer clothes. Appellant, who had returned, helped put the clothes in a trash bag. Smith wiped the body down with alcohol. Appellant and Smith put socks over their hands and carried the body into the van. The two, with appellant driving, left in the van. Appellant drove to a park, backed the van up to a pile of snow in the parking lot, and dumped the body. After disposing of the body, the two returned to appellant's house, and appellant used Bourrage's money to buy more crack.

¹ Smith testified that the house had a gate and padlock on the door.

On cross-examination, Smith admitted that he may have participated more in the killing than simply holding Bourrage's legs, but that he did not know because he does not remember.

The videotape of appellant's aforementioned interview with police was played for the jury. Appellant's version of events therein was as follows. Appellant had called Bourrage, who was his drug dealer, to bring dope to his house. Appellant had been taking Klonopin earlier, and was drunk. When Bourrage arrived, Matthew Smith was in the bedroom. Smith had talked on previous occasions about wanting to rob drug dealers. As Bourrage handed appellant the dope, Smith came out of the bedroom, struck Bourrage from behind, and then was on him on the ground choking and hitting him. Appellant told Smith to leave Bourrage alone. Smith got up and kicked Bourrage a couple times. Bourrage died, after which appellant and Smith smoked the crack. Appellant then went to get the van, after which he and Smith carried the body to the van, and thereafter disposed of the body. Appellant used Bourrage's money to buy more crack. Appellant then disposed of Bourrage's clothes and identification card in a dumpster.

A state police forensic scientist testified that DNA retrieved from fingernail scrapings from Bourrage's left hand matched appellant's DNA. Appellant presented no evidence in his defense. The jury found appellant guilty of first-degree manslaughter, first-degree robbery, two counts of tampering with physical evidence,² and PFO I. The trial court sentenced appellant to 50 years'

² One count of tampering with physical evidence was dismissed by the court. The charge of abuse of a corpse was dismissed on motion of the Commonwealth.

imprisonment, in accordance with the jury's recommendation. Appellant appeals to this court as a matter of right.

Appellant raises two claims of error on appeal. First, appellant contends that the trial court erred by allowing Matthew Smith to testify that he heard Jason Bourrage tell appellant that he wouldn't front him any more drugs because appellant owed him money, i.e. "You ain't gettin' no more, you done owe me fuckin' money." The statement was repeated in various forms, over appellant's objection, several times during Smith's testimony. The trial court allowed the statement on grounds that it was not hearsay, but was part of the action or events, and not offered for the truth of the matter asserted therein. Appellant contends that the statement was hearsay which did not fall under any exception to the hearsay rule.

KRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The alleged statement by the deceased was not offered to prove the appellant owed Bourrage money, but was being offered as part of the details of an act or occurrence (the altercation) which in itself is relevant. See ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.05[3] (4th ed. 2003); Preston v. Commonwealth, 406 S.W.2d 398, 401 (Ky. 1966). Therefore, the statement was nonhearsay, and it was not error to allow the statement into evidence.

Appellant's second allegation of error is that the trial court erred in giving a complicity to manslaughter instruction. Appellant argues that while there

was evidence that Smith aided appellant in killing Bourrage, there was no evidence that appellant aided Smith in killing Bourrage. Testimony was introduced at trial that appellant was struggling with Bourrage when Smith entered the room, and that appellant requested Smith hold Bourrage's legs so as to hold him down. Clearly, the jury could have concluded that it took both appellant and Smith to complete the killing of Bourrage. Under KRS 502.020(1) a person is guilty of complicity when he "[a]ids, counsels, or attempts to aid such person in . . . committing the offense" Based on the evidence presented at trial, the jury could have concluded that appellant was either the principal or an accomplice. Credibility and weight of evidence are jury issues. Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). Therefore, the trial court did not err in including a complicity instruction.

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

All concur.

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