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Supreme Court of Kentucky

2009-SC-000183-MR

DAWAN FRANK MARTIN

APPELLANT

V. ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 08-CR-00398

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment in which Appellant was convicted of second-degree assault and PFO II for shooting the victim outside a nightclub. Appellant argues that his trial was tainted by the erroneous admission of hearsay and irrelevant evidence. We adjudge there was no error in the admission of the evidence in question. Hence, we affirm.

During the early morning hours of February 20, 2008, Tomago Daniels was walking out of The Brickhouse, a social club in Paducah, when he saw a white pickup truck pull up with Appellant, Dawan Martin, inside. Martin exited the truck and he and Daniels began talking. The conversation escalated into an argument, and Martin pulled out a semi-automatic pistol. Daniels began running, and Martin fired the gun at him three times. After the third

shot, Daniels fell to the ground. According to Daniels, Martin walked up to him and said, "What's happening now, nigger?" Daniels responded, "Go on and do what you're going to do." At that point, Martin shot Daniels three times in the leg at point blank range.

Daniels survived the shooting and was taken to a local hospital. He remained in the hospital for two weeks because of blood clots in his leg that developed as a result of the gunshots.

Martin fled the scene and ended up in Chicago, Illinois. Illinois police located Martin's sister, Felicia Drake, and went to talk to her about Martin's whereabouts. While at Drake's home, police used her phone to call Martin. During that phone call, Illinois State Police Sergeant Anthony Hoop informed Martin that there was a warrant for his arrest. Martin acknowledged there was "some drama" when he was in Kentucky the previous day at The Brickhouse. However, Martin stated that he "was not the person who did what they said [he] did." Martin made arrangements to turn himself in to Sergeant Hoop later that evening, but never did. Five months later, in July of 2008, Martin was apprehended by Illinois police and extradited to Kentucky.

Martin was indicted for first-degree assault and being a second-degree persistent felony offender (PFO II). The case proceeded to a jury trial in which Martin was found guilty of second-degree assault and PFO II. The jury recommended a ten-year sentence which was enhanced to twenty years for the PFO II conviction. The trial court sentenced Martin in accordance with the

jury's recommendation.

DETECTIVE SMITH'S TESTIMONY

During Martin's cross-examination of Tomago Daniels, the defense elicited from Daniels the fact that when Detective Matt Smith first interviewed Daniels at the hospital after the shooting, Daniels told Detective Smith that he did not know the name of the person who shot him. Defense counsel then asked Daniels if it was true that Detective Smith specifically asked him if the shooter's name was "Dawan Martin." Daniels testified that Detective Smith had indeed asked him that question and that, despite his initial claim that he did not know the name of the shooter, he had answered Detective Smith's question in the affirmative.

During the direct examination of Detective Smith, who was called as a witness immediately after Daniels, the Commonwealth questioned Detective Smith as follows:

Commonwealth: Based on the way the question was asked by [defense counsel] of Tomago Daniels when he was on the stand, you specifically directed a question to Mr. Daniels, "Was it Dawan Martin?"

Smith: I did.

Commonwealth: You knew to ask him that question, "Dawan Martin", and you knew to ask him that because you had already talked to Mr. Daniels' lady friend, Lola?

Defense Counsel: Again, I am going to object

Smith: Correct.

Defense Counsel: . . . because that particular aspect is clearly hearsay.

Commonwealth: It explains the circumstances.

A bench conference then ensued on Martin's objection to the hearsay testimony that Daniels' girlfriend, Lola Wilkes, told Detective Smith that Daniels had told her the shooter was Dawan Martin. The Commonwealth argued that it was entitled to ask how Detective Smith knew to ask Daniels if the shooter was Dawan Martin because defense counsel's questioning of Daniels insinuated that Detective Martin was a renegade cop suggesting the identity of the shooter to Daniels. The trial court overruled Martin's objection and allowed the following testimony:

Commonwealth: You recall [defense counsel] asked Mr. Daniels whether he at first identified to you the name of the person who had shot him?

Smith: Correct.

Commonwealth: And you recall [defense counsel] then asked Mr. Daniels, "Did Detective Smith say the shooter's name was Dawan?" He said, "yes."

Smith: Correct.

Commonwealth: And then, "Did Detective Smith then say the shooter's name was Dawan Martin?" Mr. Daniels, on the stand, said "yes."

Smith: Correct.

Commonwealth: My question is why, Detective Smith, were you able to ask Mr. Daniels at the hospital those questions?

Smith: Because I had spoken with Lola Wilkes first,

who is his significant other or his girlfriend. And, uh, she had given me an explanation of how things had transpired. And I knew that he was reluctant based on what Captain McManus had already told me, so I was just trying to get the facts.

Commonwealth: I don't want to get into what McManus told you.

Smith: Okay.

Commonwealth: But before talking to you, Mr. Daniels had identified to his lady, Lola, that the shooter was Ta-Dow¹?

Smith: Correct.

Martin argues that the trial court erred in allowing Detective Smith's hearsay testimony regarding what Lola Wilkes had told him. The Commonwealth contends that said testimony was allowed as an "investigative verbal act" pursuant to *Chestnut v. Commonwealth*, 250 S.W.3d 288, 294 (Ky. 2008).

In *Chestnut*, this Court recognized that, while investigative hearsay is disallowed, there are limited circumstances where a police officer may testify to statements made to him:

"The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case." *Sanborn [v. Commonwealth]*, 754 S.W.2d [534,] 541. Such testimony is then admissible not for proving the truth of the matter asserted, but to explain why a police officer took certain actions. *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky.2001).

¹ At trial, it was established that Ta-Dow was Martin's nickname.

250 S.W.3d at 294.

The Commonwealth argues that the defense opened the door to this testimony by insinuating that Detective Smith was suggesting to Daniels the identity of the shooter. The Commonwealth maintains that it was necessary for Detective Smith to testify that Lola Wilkes had told him that Daniels had identified Martin as the shooter to explain why Smith had asked Daniels if the name of the shooter was Dawan Martin. According to the Commonwealth, if the trial court had not allowed Detective Smith to testify about what Lola Wilkes told him, it would have unfairly allowed the defense to create the false impression that Detective Smith had told Daniels who to say the shooter was.

We agree with the Commonwealth that the defense's implication that Detective Smith had planted the name "Dawan Smith" with Daniels opened the door for allowing the Commonwealth to present what would otherwise be inadmissible hearsay testimony. The testimony about what Lola Wilkes told Detective Smith was admitted, not for the purpose of proving the truth of the statement (the identity of the shooter), but to explain how Detective Smith knew to ask Daniels if the shooter was Dawan Martin. The issue of why Detective Smith asked Daniels the question the way he did became an issue in the case only when the defense implied that Detective Smith suggested on his own the identity of the shooter to Daniels. *See Gordon v. Commonwealth*, 916 S.W.2d 176 (Ky. 1995) (holding that testimony by police officer that defendant

had become a suspect in a county-wide drug trafficking investigation was properly admitted to avoid implication that defendant had been unfairly singled out). Accordingly, the trial court did not err in overruling Martin's objection at trial.

BLOOD CLOT EVIDENCE

At trial, Daniels' treating physician, Dr. Sue Ellen Petty, testified via deposition. She testified that as a complication from the gunshot wounds, Daniels developed dangerous blood clots in his leg. She stated that she was concerned that one of the blood clots would break off, go to Daniels' heart or lung, and kill him. Dr. Petty testified that the clots created a substantial risk of death to Daniels during the first forty-eight hours, and diminished somewhat after that time. During Dr. Petty's testimony, the Commonwealth also introduced into evidence diagrams depicting the effect of a blood clot on the heart. Fortunately, Daniels' blood clots did not travel to his heart or his lungs.

Martin filed a motion in limine to prohibit admission of the diagrams, arguing that they depicted a hypothetical situation that did not materialize in this case. Thus, Martin contended that the exhibits were not relevant to the actual injury sustained by Daniels and would be unduly prejudicial. The trial court denied the motion. At trial, Martin renewed his motion to exclude the testimony of Dr. Petty regarding the danger that the blood clots posed to Daniels in the event they broke off and went to his heart or lungs. The trial court again denied the motion to exclude the evidence.

Martin argues that the trial court erred in allowing the admission of evidence of the potential danger posed by the blood clots, when that risk never materialized in this case. “When a trial court's evidentiary rulings as to relevancy are challenged, we review these rulings under an abuse of discretion standard.” *Johnson v. Commonwealth*, 231 S.W.3d 800, 807 (Ky. App. 2007) (citing *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001)). To convict Martin of first-degree assault, the Commonwealth was required to prove that he intentionally caused “serious physical injury” to Daniels. KRS 508.010(1)(a). “Serious physical injury” is defined in KRS 500.080(15) as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.”

Dr. Petty’s testimony regarding the risk of death from the blood clots was relevant in this case because “serious physical injury” is defined in terms of whether the injury “creates a substantial risk of death,” not in terms of what the actual outcome was. (emphasis added). Thus, the trial court properly admitted Dr. Petty’s testimony and the diagrams explaining how the blood clots could have killed Daniels.

UNREDACTED DEPOSITION

Prior to trial, the parties agreed to take the deposition of Dr. Petty because she was unavailable for trial. During the playing of the deposition at trial, defense counsel moved to have the CD of the deposition fast-forwarded

through various objections and legal arguments made by defense counsel, contending that the objections could be prejudicial. The trial court stated that it did not recall anything inherently prejudicial in the video and denied the motion.

Martin argues that it was error to permit the unredacted version of the deposition to be played because it allowed the jurors to see defense counsel in a posture of antagonism towards the trial court and likely eroded the jurors' view of Martin's defense. In viewing Dr. Petty's deposition played during the trial, we do not see anything in the defense's objections or legal arguments that was prejudicial to Martin. Accordingly, although it is generally the better practice to redact any exchanges between counsel and the trial court regarding objections, the trial court did not abuse its discretion in declining to redact those portions of the deposition in this case.

For the reasons stated above, the judgment of the McCracken Circuit Court is affirmed.

All sitting. All concur.

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