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Supreme Court of Kentucky

2018-SC-000426-MR

LEON FRANKLIN MONTGOMERY III

APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA JEAN ECKERLE, JUDGE
NO. 16-CR-000823

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Leon Franklin Montgomery appeals as a matter of right¹ from the Jefferson Circuit Court judgment convicting him of first-degree manslaughter, second-degree wanton criminal abuse, second-degree persistent felony offender (PFO-2) and sentencing him to thirty years' imprisonment. On appeal, Montgomery alleges the trial court abused its discretion by (1) allowing the Commonwealth to amend its indictment and (2) instructing the jury on first-degree manslaughter. After review of the facts and applicable law, we affirm.

¹ Ky. Const. § 110(2)(b).

I. Factual and Procedural Background.

Montgomery lived with his long-term girlfriend, Brittney Ballard, and Ballard's two children, 5-month-old N.J. and her four-year-old daughter. Though N.J. was not his biological son, Montgomery assumed the role of a parental figure and caretaker in N.J.'s life. Montgomery and Ballard lived upstairs in a house owned by Teisha Scott, who let them stay there when they fell on hard times and needed a place to stay. Teisha lived downstairs with her spouse, Zamillia Scott, Zamillia's three children, and Teisha's sister, Tiffany Hall. The Ballard family and the Scott family shared the living room, kitchen and a bathroom.

On the evening of March 13, 2016, N.J. was upstairs with Montgomery and Ballard for most of the evening. No other adults were upstairs that night. Around 8:30 the next morning, Ballard called 911 and informed the dispatcher that N.J. was "not comprehending" and "not being responsive." Following the dispatcher's instructions, Montgomery performed CPR on N.J. Unfortunately, by the time the paramedics arrived, N.J. was in grave condition. The paramedics noted several injuries on N.J.: bruising on his right side, forehead, and eye; swelling on his eye; and swelling on his right arm. None of the information provided by Ballard and Montgomery explained N.J.'s injuries. At some point, Montgomery disappeared from the scene and never returned.

Two days later, N.J. died from his head trauma. Based on the medical evaluation and the lack of any identifiable cause or explanation for the source

of his injuries, the injuries were diagnosed as inflicted abuse in separate stages of healing, which implied that at least two events had caused the injuries.

On March 23, 2016, Montgomery was arrested in Indiana on an outstanding bench warrant for a pending marijuana charge. After Indiana authorities turned him over to Louisville authorities, Detective Chris Rutherford interviewed Montgomery about N.J.'s death. During the interview, Montgomery cried, professed his love for N.J., and said he did not want to believe Ballard had done this. Montgomery admitted to once picking up N.J. by the arm, and once by the leg, and admitted that it had caused N.J. pain and swelling. Montgomery discussed a time N.J. fell from an infant swing as a possible explanation for N.J.'s rib fractures. He also mentioned that he had accidentally hit N.J.'s head on the stair railing while taking him downstairs one time. Det. Rutherford arrested Montgomery, who was charged with murder and first-degree criminal abuse.

Ballard was arrested and indicted in a separate case for multiple counts of criminal abuse of N.J. The Commonwealth sought to plead Ballard to lesser charges and have her testify against Montgomery. Prior to Montgomery's January 2018 trial, Ballard removed her home incarceration monitor and disappeared. As a result, the Commonwealth sought and received a continuance of Montgomery's trial.

In May 2018, Ballard was arrested and reindicted in a superceding indictment that charged her with complicity to murder. Prior to commencement of Montgomery's trial on May 8, 2018, the Commonwealth

sought to amend his indictment to include complicity charges for murder and first-degree criminal abuse and to expand the dates of the alleged criminal abuse from “on or about March 14, 2016” to “between February 1, 2016 and March 14, 2016.” Over Montgomery’s objection, the trial court granted the Commonwealth’s motion and amended the indictment the morning of Montgomery’s trial. The trial court offered Montgomery a continuance, which he declined. At the conclusion of Montgomery’s trial, he moved for a directed verdict of acquittal on both the murder and criminal abuse charges, which the trial court denied. Montgomery also objected to the Commonwealth’s tendered instruction on first-degree manslaughter, arguing that the offense was not a lesser-included offense to murder and that the Commonwealth had presented insufficient evidence of his intentional conduct to support such an instruction. The trial court overruled Montgomery’s objection and allowed the jury to be instructed on first-degree manslaughter. Ultimately, the jury convicted Montgomery of first-degree manslaughter, second-degree wanton criminal abuse, and PFO-2 and recommended a sentence of thirty-years’ imprisonment, which the trial court imposed. This appeal followed.

II. Analysis.

a. Montgomery Waived His Claim Regarding Amendment of the Indictment.

Montgomery claims the trial court committed reversible error by granting the Commonwealth’s motion to amend the indictment. We review a trial court’s decision to permit amendment of an indictment for an abuse of discretion. *Herp v. Commonwealth*, 491 S.W.3d 507, 510 (Ky. 2016). An abuse

of discretion occurs if the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

With respect to the complicity charges, Montgomery maintains that the amended indictment interfered with his planned defense, as he had planned on implicating Ballard as the perpetrator. Montgomery similarly complains about the lack of opportunity to prepare and investigate the expanded time frame for the criminal abuse charge. However, the record shows that Montgomery declined the very relief offered by the trial court that would have cured any potential prejudice resulting from the amended indictment: a continuance. "Generally, a party is estopped from asserting an invited error on appeal." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011). "[I]nvited errors that amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review." *Id.* at 38. In other words, Montgomery cannot argue that he lacked adequate time to prepare his defense to the amended charges when he refused a continuance that would have afforded him that opportunity. *See Herp*, 491 S.W.3d at 511-12 (holding that trial court did not abuse its discretion by permitting a late amendment but did abuse its discretion by denying the defendant a continuance). Thus, we decline to review this alleged error any further.

b. An Instruction on First-Degree Manslaughter was Warranted.

At trial, the Commonwealth tendered an instruction on first-degree manslaughter based on a subsection of KRS 507.030(1)(c) which provides that a defendant commits the offense when:

Through circumstances not otherwise constituting the offense of murder, he or she intentionally abuses another person or knowingly permits another person of whom he or she has actual custody to be abused and thereby causes death to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

Montgomery objected to this instruction on grounds that first-degree manslaughter was not a lesser-included offense of murder and that the Commonwealth had not presented sufficient evidence of intentional conduct to justify the instruction. The trial court overruled his objection and the jury was instructed as follows:

Manslaughter in the First Degree: If you did not find the Defendant guilty under Instruction Nos. 1A [intentional murder] or 1B [wanton murder], you will find Defendant guilty of Manslaughter in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

That in Jefferson County, Kentucky on or about March 14, 2016, Defendant, acting alone or in complicity with another, killed N.J.;

AND

That in doing so, Defendant intentionally abused N.J., and thereby caused his death;

AND

That N.J. was at that time a child 12 years of age or less of whom Defendant had actual custody.

Kentucky law is clear that in a criminal trial,

the trial court is obligated to instruct the jury on the whole law of the case, and this rule requires instructions applicable to every

state of the case deducible or supported to any extent by the testimony. This obligation extends to lesser-included offenses and affirmative defenses, but is dependent upon there being sufficient evidence to warrant the giving of an instruction. We review a trial court's rulings regarding instructions for an abuse of discretion.

Turner v. Commonwealth, 544 S.W.3d 610, 625 (Ky. 2018).

In other words, “[a]n instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant’s guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.”

Commonwealth v. Day, 983 S.W.2d 505, 508 (Ky. 1999); *see also* KRS 505.020(2)(a) (a lesser-included offense is “established by proof of the same or less than all the facts required to establish the commission of the offense charged”). Both murder and manslaughter require proof that the defendant caused death; the distinction between the two offenses is the *mens rea*. Murder under KRS 507.020(1)(a) requires proof of intentional conduct that causes death whereas first-degree manslaughter under KRS 507.030(1)(c) requires evidence of intentional abuse or knowingly permitting another to be abused that causes death.

Montgomery argues that the Commonwealth’s evidence was purely circumstantial and too attenuated to permit a finding of intentional abuse or knowingly permitting another to be abused, but direct proof is not necessary to sustain a conviction. “It has long been the law that the Commonwealth can prove all the elements of a crime by circumstantial evidence.” *Commonwealth v. Goss*, 428 S.W.3d 619, 625 (Ky. 2014). Circumstantial evidence “is sufficient

to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt.” *Id.* at 626 (quoting *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994)).

In this case, the Commonwealth presented sufficient evidence for the jury to convict on first-degree manslaughter. The evidence showed that Montgomery and Ballard were the only two people who had contact with N.J. in the hours preceding his death; N.J. died as the result of trauma that occurred within hours of his death; N.J. had healing fractures to his arm and leg that occurred within 7-10 days prior to his death; N.J. was primarily in the care and control of Ballard and Montgomery at all times; neither Ballard nor Montgomery were able to consistently explain how N.J.’s injuries occurred; and Montgomery fled the scene after medical personnel arrived. While Montgomery offered explanations for fleeing the scene (he had a pending marijuana charge against him), and for some of N.J.’s injuries (he admitted picking N.J. up by his arm one time, his leg another time, and striking N.J.’s head on a stair railing), the task of assessing the weight and credibility of the evidence presented is within the province of the jury.

A jury is entitled to draw all reasonable inferences from the evidence . . . and if there [is] competent and relevant evidence affording a reasonable and logical inference or conclusion of a definite fact, this court will not invade the jury’s province to weigh conflicting evidence, judge the credibility of witnesses and draw the ultimate conclusion.

Clark v. Commonwealth, 567 S.W.3d 565, 569–70 (Ky. 2019) (citations omitted).

Based on the evidence, a jury could have reasonably inferred that Montgomery intentionally abused N.J., or knowingly permitted him to be abused, which led to his death. Thus, an instruction on first-degree manslaughter was warranted.

III. Conclusion.

The judgment of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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