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Supreme Court of Kentucky

FINAL

2013-SC-000811-MR

DATE 3-10-16 EWA/Grouth, D.C.

EDWIN RUSSELL III

APPELLANT

V.

ON APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
NO. 12-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

The Appellant, Edwin Russell III, was convicted of complicity to murder, attempted murder, and two counts each of first-degree robbery, first-degree burglary, and first-degree wanton endangerment, for which he was sentenced to a total of twenty-five years in prison. He raises three claims of error in this matter-of-right appeal: (1) that he was entitled to directed verdicts on the wanton-endangerment charges; (2) that a recording of the deceased victim's interview with police was erroneously admitted; and (3) that the Commonwealth was erroneously allowed to impeach its own witness with a prior recorded statement. This Court concludes that there was insufficient evidence to sustain one of the wanton-endangerment convictions and that Russell was entitled to a directed verdict of acquittal on that charge. Because the sentences for each conviction were all run concurrently, the reversal of the

wanton-endangerment conviction's one-year sentence has no effect on the total sentence. And finding no other grounds for reversal, Russell's other convictions and total sentence are affirmed.

I. Background

Edwin Russell and Amanda Jett previously dated and lived together for nearly two years. During their relationship, Russell visited Amanda's parents' home on numerous occasions. Russell also purchased a car for Amanda in his name and made the payments while they remained a couple. Amanda moved in with her parents (Richard and Sharon Jett) after the relationship ended in 2006, and she was supposed to make the payments on the car, which was eventually repossessed after she failed to do so. She also reportedly continued using Russell's personal debit card. Russell threatened Amanda with legal action to recover the amount owed on the repossessed car and the money she spent from his checking account. After Amanda complained to the county attorney about Russell's persistent calls demanding the money he believed she owed him, however, local law enforcement became involved and sent Russell a series of cease-and-desist letters. Russell ceased all contact with Amanda. His feelings of entitlement to repayment by Amanda, however, apparently remained a frequent topic of conversation with his friends and others.

In mid-November 2011, while Russell was working in his pool hall and bar in Hopkinsville, Kentucky, he overheard a man, Richard Phipps, complaining to others about his wife's attempts to take all his money. Russell interjected with his own tale of a girl from Mayfield (i.e., Amanda) who owed him money. Phipps suggested that Russell should do something to get his

money back. Russell replied that the girl was broke but that he knew her parents, Richard and Sharon, kept thousands of dollars in cash at their house under their bed, along with many weapons. According to Phipps, in the weeks that followed, Russell reportedly mentioned, without naming, the Mayfield girl's family numerous times and eventually proposed robbing them.

On February 15, 2012, Russell exchanged text messages with Phipps regarding their plan to rob the Jetts. Later that evening, Russell picked up Phipps and his cousin, James Kirby, and drove them to Mayfield. Surveillance footage confirmed that along the way, the trio stopped at several convenience stores, where they acquired pantyhose, gloves, tape, and mace. Phipps testified that Russell supplied him with a gun.

When they arrived in Mayfield, Russell drove them to the Jetts' house, where Phipps and Kirby got out of the vehicle armed with the gun and mace. According to the robbers, Russell had agreed to wait for them and be their getaway driver, but he drove away once they exited his truck.

A few minutes past midnight, February 16, nearly all the members of the Jett family, including Amanda, her 23-month-old son, and her mother, were asleep at their home. The patriarch, Richard Jett, was still awake when Phipps and Kirby knocked on the door, and he grabbed his gun before opening the door. Phipps and Kirby then invaded the home, struggled with Richard, sprayed him with mace, took his gun, and shot him in the torso.

Upon hearing the disturbance in the living room, Amanda jumped out of bed and ran to her bedroom door. She opened the door, looked down the hallway in the direction of the living room, and saw Phipps pointing a gun at

her father. As she turned to shut the door, a bullet hit the firearms case near her at the end of the hall, shattering its glass. Amanda then moved back into her bedroom, huddled with her son who had also been asleep in her bed, and called 911.

Diagonally across the hall from Amanda's room, her mother, Sharon, lay in bed, listening to the commotion outside her bedroom door. She heard Richard yell for her to grab her gun, and she complied. Phipps and Kirby then moved into Sharon's room where a shootout ensued. During the exchange, Sharon shot Phipps in the arm, while she was shot multiple times in her legs. After emptying the magazine of her own gun, Sharon lay on the mattress with her eyes open, pretending to be dead. Apparently believing her to be dead, Phipps and Kirby ignored her and searched under the bed, retrieving a metal lockbox. They took the lockbox and fled the scene without further searching the bedroom or anywhere else in the house.

After being shot, Richard escaped through the front door and went next door, where his neighbors called 911. During the break-in, a bullet also struck an exterior wall of the next-door neighbors' house without penetrating into the interior.

Emergency personnel soon arrived and transported Richard and Sharon to the hospital. Although Sharon survived her multiple gunshot wounds, Richard died of complications from his injuries a few days later.

When fleeing the scene with Kirby, Phipps dropped his gun in the grass outside the Jetts' house; according to Phipps, Russell had given him the gun to use in the robbery. Phipps and Kirby hitchhiked out of town, but police

apprehended them the following morning. When police found the gun Phipps dropped at the scene, they determined it had previously been reported by Russell as stolen during a break-in at his Todd County house weeks earlier. And once Phipps and Kirby were apprehended, they informed detectives of Russell's involvement, leading to Russell's arrest.

About an hour after leaving Phipps and Kirby at the Jetts' residence, Russell sent one of his bar employees, Brian Dossett, a text message that read, "If any one ask tell them i stayed the night with u from 7-8pm till 1am." Dossett did not see the text until the following morning, and when he asked Russell about it, Russell told him that he had driven to Mayfield and dropped Phipps off at the house but that he left when he heard shots fired. Dossett told Russell he did not want to have any involvement in the matter and refused to be an alibi witness.

Upon being taken into custody, Russell initially denied any involvement in the robbery. Eventually, he admitted driving Phipps and Kirby to the Jetts' home but claimed Phipps forced him to do so by holding him at gunpoint. He denied plotting with the men to rob the Jetts and denied giving Phipps the gun. Both Phipps and Kirby testified for the Commonwealth at Russell's trial consistent with the facts as recited above.

Russell was charged with complicity to the murder of Richard Jett, attempted murder of Sharon Jett, first-degree wanton endangerment of Amanda Jett and her son and the couple next door whose house was struck by a bullet (four counts), first-degree robbery (two counts), and first-degree burglary (two counts). He was acquitted of the two counts of complicity to first-

degree wanton endangerment related to the neighbors but was found guilty on all other counts. The jury recommended concurrent prison sentences of twenty-five years for murder, ten years for attempted murder and for each robbery and burglary conviction, and one year for each wanton-endangerment conviction. The trial judge sentenced Russell in accordance with the jury's recommendations for a total of twenty-five years' imprisonment.

He now appeals as a matter of right. See Ky. Const. § 110(2)(b).

Additional facts will be developed as needed in the discussion below.

II. Analysis

A. Russell was entitled to a directed verdict for one of the complicity-to-wanton-endangerment charges.

Russell argues that he was entitled to directed verdicts on the two charges of complicity to first-degree wanton endangerment relating to Amanda Jett and her son. This claim was partially preserved by Russell's motion for a directed verdict for the charge related to the child. But, as he concedes, he did not move for a directed verdict as to Amanda and thus requests palpable error review of that portion of his claim. See RCr 10.26.

When faced with a motion for a directed verdict, a trial court "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The court must "assume that the evidence for the Commonwealth is true, but reserv[e] to the jury questions as to the credibility and weight to be given such testimony." *Id.* It should not grant a directed verdict "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt

that the defendant is guilty.” *Id.* And on appeal, a defendant will be entitled to a directed verdict of acquittal only if the reviewing court determines “under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt.” *Id.*

A person is guilty of first-degree wanton endangerment “when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.” KRS 508.060(1). Of course, Russell was charged with and convicted of being complicit in these offenses, the actual commission of which was perpetrated by Phipps and Kirby. *See* KRS 502.020(2) (“When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he: (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result”). So we must consider the principals’ actions and surrounding circumstances in analyzing the sufficiency of the evidence of the alleged wanton endangerment.

In claiming that he was entitled to directed verdicts on the wanton-endangerment charges, Russell argues only that the evidence did not show that his actions—or again, more accurately, the actions of the principal actors, Phipps and Kirby—created a sufficient danger to Amanda and her son to constitute the offense under the statute. That is, he contends that the wanton conduct (the break-in and shooting) did not subject Amanda and her son to a

substantial danger of death or serious physical injury because they were in a different room in the house when the wanton conduct occurred. And for support, he cites *Swan v. Commonwealth*, 384 S.W.3d 77, 103–04 (Ky. 2012), in which this Court held that a co-defendant was entitled to a directed verdict on a charge of first-degree wanton endangerment where the alleged victim had been hiding in the back bedroom of a house when the wanton conduct (brandishing and firing a handgun) occurred at the front of the house.

First, it is easy to dispense with Russell’s claim as to Amanda Jett. A bullet being fired down a hallway in the direction of a person standing in a doorway at the end of that hallway undoubtedly creates a substantial danger of killing or seriously injuring that person. Therefore, Russell would not have been entitled to a directed verdict on the wanton-endangerment charge related to Amanda had he asked for it. Because the evidence was sufficient to sustain that conviction, there is no error and certainly no palpable error.

However, whether the evidence was sufficient to sustain the wanton-endangerment conviction with respect to the child is a closer question and one we answer in the negative. The circumstances surrounding the alleged endangerment to the child here are not dissimilar to those in *Swan*. As was the case in *Swan*, the alleged victim here was in the back bedroom of the house throughout the entire episode while the shooter—whose wanton acts of firing down the hallway into the gun case and shooting Sharon Jett in her bedroom served as the bases for the charge—was located on the other side of the house. Several interior walls separated them. Indeed, another bedroom and a closet were between Phipps and the child when he fired down the hallway at Amanda,

and at least two interior walls were between them when he shot Sharon. And none of the bullets—neither the one shot straight down the hallway and into the gun cabinet nor those shot at Sharon in her bedroom—were fired in the direction of the child.

Even viewing the aforementioned circumstances in the light most favorable to the Commonwealth, we simply cannot say that the child was subjected to a substantial danger of death or serious physical injury. To do so would require assuming a fantastical flight path of the bullet, with a highly unlikely combination of ricochets and passing through walls and other intermediary materials.

Simply put, the child was never in *substantial danger* from the shots fired. Of course, this Court has previously recognized the possibility that a bullet might ricochet or pass through a wall, *see Hunt v. Commonwealth*, 304 S.W.3d 15, 38 (Ky. 2009), but “th[at] danger ... is not endless,” *Swan*, 384 S.W.3d at 103. So, consistent with the limited danger of bullets ricocheting or passing through walls and the need to “draw the line somewhere,” *id.*, we conclude that the child was not subjected to a substantial danger of death or serious physical injury. The proof in this case falls on the same side of that line as the proof in *Swan*. The crime of wanton endangerment must be understood to have actual danger as its gravamen—not possible or fantastical danger.

Therefore, this Court must conclude that no reasonable jury could have found that Amanda Jett’s child was exposed to the requisite level of danger to constitute first-degree wanton endangerment. Russell was thus entitled to a directed verdict of acquittal on that charge, and his conviction and one-year

sentence on that count is reversed accordingly. This reversal has no effect on his overall sentence of twenty-five years, however, because the trial court ordered his sentences be run concurrently.

B. Admission of deceased victim's recorded interview with police violated Russell's confrontation rights but was harmless beyond a reasonable doubt.

The trial court allowed the Commonwealth to introduce, over defense objection, an audio recording of police questioning Richard Jett about the robbery and shootout that was taken on the night of the incident while he was in the hospital awaiting surgery. The court overruled Russell's hearsay objection to the recording, finding that it fell within either the "dying declaration" exception to the rule against hearsay, *see* KRE 804(b)(2),¹ or the excited-utterance exception, *see* KRE 803(2).² Russell argues that this was error and that the admission of the recording violated his rights under the Sixth Amendment's Confrontation Clause.

While the parties devote the majority of their arguments in the briefs to whether Jett's recorded statement was a dying declaration or excited utterance and thus exempt from the rule against hearsay, whether the recording satisfied one of the hearsay exceptions is immaterial because the Confrontation Clause should have barred its admission even if the hearsay rule would not. In this

¹ KRE 804(b)(2) provides that "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death" is not excluded by the hearsay rule if the declarant is unavailable to testify.

² KRE 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule irrespective of the availability of the declarant as a witness.

regard, Russell makes the mistake of arguing that because the recording does not fit under any of the hearsay exceptions, its admission violated his confrontation rights. This is incorrect because a Confrontation Clause violation occurs by the admission of a particular out-of-court statement irrespective of what the rules of evidence might say about that statement's admissibility.

The United States Supreme Court's watershed case, *Crawford v. Washington*, 541 U.S. 36 (2004), redefined the admissibility of out-of-court testimonial statements in criminal prosecutions. Since that decision, whether there has been a constitutional violation turns not on whether the statement might otherwise be allowed under the rules of evidence. *See id.* at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence"). Instead, whether the Confrontation Clause is violated turns on whether the defendant had an opportunity for cross-examination. *See id.* at 68–69. As we have previously recognized, "the Confrontation Clause of the Sixth Amendment forbids admission of all testimonial hearsay statements against a defendant at a criminal trial, unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination." *Bray v. Commonwealth*, 177 S.W.3d 741, 743 (Ky. 2005) (citing *Crawford*, 541 U.S. at 68), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). And the lynchpin in determining whether hearsay statements implicate a defendant's confrontation rights is whether the statements are "testimonial."

Although determining whether a particular out-of-court statement is testimonial or non-testimonial can often times prove difficult, that is not the case here. Even though the *Crawford* Court “le[ft] for another day any effort to spell out a comprehensive definition of ‘testimonial,’” 541 U.S. at 68, it did not hesitate to note that the term “applies at a minimum ... to police interrogations,” *id.* When the Supreme Court later narrowed that broad assertion by holding that statements made to police are non-testimonial when the primary purpose of the interrogation is to respond to an ongoing emergency, it nevertheless made clear that such statements “are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006).

With that in mind, it is clear that the primary purpose of Jett’s police interrogation, which took place hours after the shooting and robbery when he was in the relative safety of a hospital, was to acquire information about the past events and circumstances in the hopes of prosecuting the perpetrators of those crimes, rather than to enable police to meet an ongoing emergency. *Cf. Michigan v. Bryant*, 562 U.S. 344, 374–78 (2011) (holding that declarant’s dying-declaration statements to police, minutes after being shot, identifying his assailant were non-testimonial because the primary purpose of questioning was to assist police in responding to an ongoing emergency posed by the fleeing, armed assailant). Thus, we have no difficulty in concluding that the recorded statements here were testimonial hearsay. And since there was no

opportunity for cross-examination, the Sixth Amendment should have barred the recording's admission under *Crawford*.

Because admitting the recording violated Russell's rights under the Sixth Amendment's Confrontation Clause, we apply the harmless-constitutional-error standard laid out in *Chapman v. California*, 386 U.S. 18 (1967), to determine whether that violation requires reversal. Thus, the bar for finding harmless here is much higher than for non-constitutional errors. That is, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. The reviewing court must be convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* And "[t]he State bears the burden of proving that an error passes muster under this standard." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).

This Court is convinced that this is one of those rare cases in which that high burden is easily satisfied. Richard Jett's out-of-court statements related solely to his recollection of the events of the night of the robbery. Significantly, Jett never mentioned Russell or any facts remotely relevant to his alleged complicity in the robbery plot. At the time of Jett's interview, police had not yet suspected Russell of any involvement in the crime, nor were they yet aware of his connection to the Jett family vis-à-vis his prior relationship with Amanda. So it comes as no surprise that Jett's recorded statements to police have nothing to do with Russell whatsoever. Instead, in response to police questioning, Jett did no more than describe the immediate circumstances surrounding the break-in and recall the burglars' actions and his own in

defending against their intrusion. Although the recording tended to prove that the principal crimes occurred, a wealth of other properly admitted evidence did the same thing. Substantially all of the facts and circumstances mentioned by Jett on the recording were proved by other evidence, including the testimony from the principal actors, Phipps and Kirby, admitting the crimes.

In light of the large amount and nature of the other evidence proving the commission of the charged crimes, and that the recording did nothing to establish Russell's complicity in those crimes, this Court is convinced beyond a reasonable doubt that the testimonial hearsay statements did not contribute to the jury's guilty verdict. We have no doubt that Jett's recorded statements played no part in the jury's decision to find Russell guilty of being complicit in the robbery plot and the actions taken by Phipps and Kirby in furtherance of that plot. Thus, the error was harmless beyond a reasonable doubt.

C. Admission of witness's prior inconsistent statement was not reversible error.

During the direct examination of Richard Phipps, the Commonwealth was permitted to introduce a portion of Phipps's recorded statement to police, over Russell's objection. Russell argues this was error because the Commonwealth failed to establish that the prior statement was inconsistent with Phipps's testimony to allow it to be used for impeachment under KRE 801A(a)(1) and failed to lay the foundation required under KRE 613.

The Commonwealth asked Phipps several questions about whether Russell had told him and Kirby what to expect when they arrived at the Jetts' residence. While initially responding in the negative, Phipps eventually

answered: “[Russell] said [the Jetts] might not just give [the money] up or whatever.” The Commonwealth moved to introduce a portion of Phipps’s recorded interview with police where he stated that Russell had advised them that the Jetts had guns and that they might have to kill them to get the money. Defense counsel objected, arguing that Phipps had not made an inconsistent statement but had only not remembered the prior statement. The trial court found the statement was inconsistent and allowed it to be played for the jury.

After the recording was played in court, the judge called another bench conference to ascertain whether the recording was being played for impeachment purposes or to refresh the witness’s recollection. When the parties advised it was for impeachment, the judge questioned whether a proper foundation had been laid. To answer the trial court’s concerns, the Commonwealth asked Phipps whether he remembered making the statement, when he made it, and who was present when he made it. After answering those questions, Phipps testified, consistent with his recorded statements, that Russell had told him and Kirby that the Jetts were stubborn and might not easily give up the money and that they might need to shoot them.

While Russell continues to maintain that impeachment was improper because Phipps’s prior statement was not inconsistent with his trial testimony, he does not actually advance any argument specifying how Phipps’s trial testimony described above was not inconsistent with the recorded statements to police about how Russell warned them that they may need to shoot the Jetts. Instead, he merely contends that the Commonwealth never established any inconsistency because it never asked him if he made the prior statement

and did not comply with the requirements for laying a foundation in KRE 613 before playing the recording. He argues that because the procedures required to impeach a witness with a prior statement as laid out in KRE 613 were not strictly complied with, Phipps was not properly impeached. And this improper impeachment, according to Russell, requires reversal. We disagree.

Russell is correct that the Commonwealth did not lay a foundation before it introduced the recording to impeach Phipps. KRE 801A(a)(1) allows a testifying witness's prior statement to be admitted if it is inconsistent with his testimony at a trial or hearing provided the witness "is examined concerning the statement, with a foundation laid as required by KRE 613." Thus, "before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them." KRE 613. There is no dispute that the Commonwealth failed to lay such a foundation before offering Phipps's prior recorded statement.

But Russell failed to raise this to the trial court below. Instead, as noted above, the trial court itself raised this concern after the recording had been played and, as a result, the Commonwealth ultimately did satisfy the foundation-laying requirements of KRE 613, albeit belatedly so. Thus, we have difficulty surmising any error in the introduction of the recording other than perhaps a technical one in laying the proper foundation out of order.

In any event, even if we could find error in the admission of the recording, Russell has failed to demonstrate how it prejudiced him in any way.

Not only did Phipps eventually testify to the accuracy of the statements after the Commonwealth cured its failure to lay a foundation, but Kirby also testified to Russell having made those statements to him and Phipps in the lead-up to the robbery. And to be sure, because he testified for the Commonwealth against Russell, any pall cast on the credibility of Phipps's testimony by the alleged improper impeachment would have been to the Commonwealth's detriment rather than Russell's. So in that regard at least, the complained-of impeachment is more likely to have benefitted rather than prejudiced him. Thus, this Court has no trouble concluding that, whether error or not, the admission of the recorded statement was harmless and certainly does not warrant reversal.

III. Conclusion

Because the evidence was insufficient to support the conviction of first-degree wanton endangerment of Amanda Jett's son, that conviction is reversed, which does not affect Russell's total sentence because its one-year sentence was run concurrently with the longer sentences on the other convictions. The remaining convictions and total sentence of twenty-five years' imprisonment are affirmed, and this matter is remanded to the circuit court for entry of a new judgment consistent with this opinion.

All sitting. Minton, C.J.; Hughes, Keller, Noble, Wright and Venters, JJ., concur. Cunningham, J., concurs in part and dissents in part by separate opinion.

CUNNINGHAM, J., CONCURRING IN PART AND DISSENTING IN PART: I concur in the Majority opinion except for the reversal of the wanton endangerment count as to Amanda's young son. The Appellant shot a gun toward the bedroom wherein Amanda's son was sleeping. The bullet shattered the firearm case right outside the door. I believe this was sufficient evidence of a wanton endangerment conviction against the young child. Therefore, I respectfully dissent to the reversal of that count. I concur to the rest of the Majority opinion.

COUNSEL FOR APPELLANT:

Andy Beshear
Attorney General

Jeffrey Allan Cross
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Roy Alyette Durham II
Assistant Public Advocate
Department of Public Advocacy
200 Fair Oaks Lane, Suite 500
Frankfort, Kentucky 40601