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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 07-1124

FELISHIA MCMURRAY APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** October 1, 2008 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, [NO. CR-07-55-5] HONORABLE JODI RAINES DENNIS, JUDGE AFFIRMED

SARAH J. HEFFLEY, Judge

On the night of January 9, 2007, appellant Felishia McMurray admittedly shot and killed Nikkie Miller, who was among a group of people gathered in appellant's apartment. Though appellant claimed self-defense, the jury found her guilty of first-degree murder, and she was sentenced to fifteen years in prison. Appellant raises several issues contesting the denial of her motions to suppress evidence and the statements she gave to the police. She also contends that the trial court committed error when she was not allowed to inquire into the character and prior bad acts of the victim. We affirm.

We begin with the suppression issues that were the subject of a hearing held on June 4, 2007. Patrolman Mark Fallis of the Pine Bluff Police Department testified that on January 10, 2007, a call went out of a possible shooting with the description of a suspect vehicle. While he was proceeding to the area, Officer Fallis heard that another officer had stopped the vehicle in the parking lot of a coin laundry at the intersection of Sixth and Blake Streets.

When he arrived, he saw yet another officer chasing a black female on foot. Officer Fallis maneuvered his vehicle and pulled in front of the woman in the parking lot of a motel, which allowed the other officer to apprehend her. The woman, who was appellant, struggled to get away but was eventually taken to the ground and handcuffed. Officer Fallis perceived that she was being arrested for fleeing.

Fallis testified that he lifted appellant from the ground and began a pat-down search for weapons. As he did so, he asked appellant about the location of the gun, and she responded that she had tossed it. Another officer asked her where, and she answered that it was on the expressway between Bryant and Hutchinson Streets. Officer Fallis stated that he asked the question because he was dealing with a person who was possibly involved in a shooting but that he did not give appellant the Miranda warnings before questioning her about the gun. He testified:

> Even though I patted Felishia McMurray looking for a weapon and found no weapons, I still was interested with whether there were any weapons or a weapon over against the Town House Motel or in the parking lot or anywhere in the vicinity of where she was stopped. Such was an issue of public safety for myself and the defendant and other people in the area if the issue was a gun.

Detective William Roulhac transported appellant to the police station where he interviewed her at 11:34 p.m. Roulhac read appellant her rights and a form was filled out by appellant reflecting that she understood and waived her rights. Prior to giving a statement, she asked if she could speak with Arnold Pierce and Rolanda Shavers, who had been with appellant in the vehicle and who were also in custody. Roulhac agreed, saying that she could talk to them after he had taken care of the case and completed the necessary paperwork.

In this oral statement, appellant told Officer Roulhac that she shot Mr. Miller with a

.22 caliber revolver after he had been verbally abusive and had threatened to kill her. She could not say how many times she shot at him in the apartment, but she recalled shooting two or three more times while chasing him outside the apartment.

After giving the statement, appellant executed a written consent-to-search form authorizing a search of her apartment. Appellant was taken to the apartment, and she was present during the search. A number of .22 caliber shell casings were found in a trash can in the bedroom that were placed there by appellant when she emptied and reloaded her gun after the shooting. The officers also found a package of Newport cigarettes that held several plastic bags containing cocaine.[1]

After the search, appellant was taken back to the police department where she was once again interviewed by Detective Roulhac. After waiving her rights a second time, appellant gave a written statement that was consistent with the first in most respects. Afterwards, Detective Roulhac allowed appellant to speak with Arnold Pierce. Appellant was not able to speak with Rolanda Shavers because Ms. Shavers had been released from custody.

As her first point on appeal, appellant argues that the trial court should have granted her motion to suppress the statement she made in response to questioning about the location of the gun. Appellant argues that the statement was illegally obtained because she was in custody but had not been advised of her Miranda rights before the question was asked. Appellant further argues that, as fruits of the poisonous tree, her subsequent statements, her consent for a search, and related exhibits must also be suppressed, as tainted by the first

[1] In conjunction with murder, appellant was also charged with possession of cocaine with intent to deliver, but the trial court granted appellant's motion for a directed verdict on that charge. Appellant had also been charged with possession of oxycodone with intent to deliver, but the State nolle prossed that charge prior to trial.

statement.

In reviewing a trial court's refusal to suppress a statement, we make an independent determination based on the totality of the circumstances. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). The ruling will only be reversed if it is clearly against the preponderance of the evidence. *Id.*

As the State points out, appellant's statement about the location of the gun was not introduced into evidence at trial.[2] Normally, we would affirm since the statement was not used against her, because we do not reverse in the absence of demonstrated prejudice. *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004). However, because appellant argues that this statement corrupted the legality of other statements and evidence, it is necessary for us to address appellant's argument that the first statement was illegally obtained. We hold that it was not.

In *Marshall v. State*, 68 Ark. App. 223, 5 S.W.3d 496 (1999), we confronted a similar set of facts and recognized the "public safety" exception to the requirement for Miranda warnings, which was enunciated by the Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984). In *Marshall*, suspects involved in an aggravated robbery fled from the police, wrecked the vehicle, and then ran from the police on foot. When Marshall was apprehended, an officer asked him what he had done with the gun and if it was still on his person. Marshall replied that he had thrown the gun out of the vehicle before the crash. In *Quarles*, an armed rape suspect entered a grocery store, and when he was caught, a search of his person revealed an empty holster. Quarles was asked where the gun was, and he indicated that it was by some

[2] Appellant later admitted that the gun was concealed in a speaker box.

empty cartons.

The Court in *Quarles* held that the un-Mirandized statement need not be suppressed. The Court observed:

> The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

Id. at 657. The Court then held:

> We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment privilege against self-incrimination. We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Id. at 657-58.

On the strength of *Quarles*, we affirmed the denial of the motion to suppress in *Marshall*, stating that concerns for officer safety and the safety of the public at large justified the failure to provide Miranda warnings before asking questions about the location of an abandoned weapon. Here also, Officer Fallis was confronted with the situation involving a suspect who was believed to have committed a crime with a gun. He said he asked the question out of concern for his safety, the safety of appellant, and that of the public, because the flight and arrest of appellant occurred in a public place. These facts fall squarely within

the public safety exception, so it cannot be said that the trial court's decision was clearly erroneous. Because the "tree" was not poisonous, neither was the "fruit." *Tyron v. State*, 371 Ark. 25, ___ S.W.3d ___ (2007). Consequently, appellant's suppression argument concerning her subsequent statements, the consent for a search, and related exhibits must also fail.

In her next suppression issue, appellant contends that her second and third statements were induced by a false promise because she was not allowed to speak with her friend, Rolanda Shavers, after giving her statements, as Detective Roulhac had promised. It is true that, if a police officer makes a false promise and the suspect gives a confession because of that false promise, then the confession is not voluntarily, knowingly, and intelligently made. *Goodwin v. State*, 373 Ark. 53, ___ S.W.3d ___ (2008). We cannot say, however, that the officer made a *false* promise. Detective Roulhac did assure appellant that she could visit with Arnold Pierce and Rolanda Shavers after she spoke with him and their business was finished. Detective Roulhac did permit appellant to talk to Arnold Pierce, but appellant could not speak with Rolanda Shavers because Shavers had left the police department. There is no indication that Detective Roulhac intentionally misled appellant, and the evidence shows that he was simply not able to keep the promise as to Shavers because she was no longer at the police station. We do not believe that suppression is warranted under these circumstances, and we affirm on this point.

Appellant's last suppression issue concerns her consent for the search of her apartment. Appellant gave written consent for the search on a standardized form generated by the Pine Bluff Police Department. The form contained a blank space for the "Description or location

consented to." Appellant filled out the form herself, and Officer Roulhac testified that she wrote "2101 Sidney Street Apt. 4A." Appellant contends that her handwriting with respect to the apartment number is illegible and that it looks like "4D" instead of "4A." She also contends that the form is incomplete because it does not state that the residence was located in Pine Bluff.

Consent to conduct a search of a person's home without a warrant is a recognized exception to the presumption that searches and seizures inside a home without a warrant are unreasonable. *Hadl v. State*, 74 Ark. App. 113, 47 S.W.3d 897 (2001). Rule 11.1 of the Arkansas Rules of Criminal Procedure embodies this exception to the warrant requirement, but it does not contain any requirements concerning the means by which the consent must be given. The rule does not require the consent to be in writing, and thus far, the supreme court has not disapproved of the consent being given orally. *See Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002).

Appellant does not argue that she did not consent to the search, nor does she contend that her consent was not freely and voluntarily given. Her argument instead focuses on a perceived mis-description of the premises on the form, and the complaint that the form was incomplete. It would appear that appellant is attempting to engraft upon Rule 11.1 the requirement found in Ark. R. Crim. P. 13.2(b)(iii) that a search warrant must describe with "particularity" the premises to be searched. We note that the purpose of that requirement is to avoid the risk of the wrong property being searched or seized, *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987); *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994), and that a minor discrepancy in the physical description of the property to be searched is normally not

fatal. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Also, our courts have observed that a technical error in a search warrant is minimized when the affiant is also the executing officer. *Id.*

We do not decide whether the particularity-of-description requirement applies to a consent-to-search form, because even if it does, there was little likelihood that the wrong property would be searched. Appellant accompanied the officers to the apartment and was present during the search. The search took place in apartment 4A, and the rental agreement positively showed that apartment 4A was the one leased to appellant. The trial court's decision is not clearly against the preponderance of the evidence.

Appellant's final point is an evidentiary issue. Officer Jerry Hayes responded to the disturbance call at appellant's apartment. He was the first to arrive, and he attended to Nikkie Miller, who was unconscious but still breathing at the time. On cross-examination, appellant elicited testimony that Hayes had come into contact with Miller on previous occasions in his capacity as a police officer, and that he had once assisted in an arrest of Miller. When appellant asked why a police officer would come in contact with Miller, the State objected, arguing that Miller's character or reputation for violence was inadmissible unless a foundation was laid showing that appellant knew about Miller's prior acts. Appellant responded that the evidence was admissible under Ark. R. Evid. R. 404(a)(2) and 404(b) because she was asserting self-defense. The trial court sustained the objection, and appellant contends that the court erred in its ruling.

As an essential element of her defense, appellant had the right to introduce specific instances of the victim's violent character that were directed at her or within her knowledge.

Simpkins v. State, 48 Ark. App. 14, 889 S.W.2d 37 (1994). As a corollary to this rule, testimony of specific acts not shown to have been within the knowledge of the defendant are not directly probative of the defendant's beliefs. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983). With these rules in mind, we are not able to address this issue because the substance of the proposed testimony was not revealed. Appellant did not proffer the excluded testimony, thus we have no idea what the victim's prior acts might have been or whether appellant was aware of them. Without this information, we cannot determine the admissibility of the testimony under the aforementioned rules. The failure to proffer evidence prevents us from determining if prejudice resulted from its exclusion and precludes review of the issue on appeal. *Swinford v. State*, 85 Ark. App. 326, 154 S.W.3d 262 (2004).

Affirmed.

PITTMAN, C.J., and MARSHALL, J., agree.