RENDERED: October 12, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002614-MR

WILLIAM JOSEPH THOMPSON — APPELLANT

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 98-CR-00080

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: William Joseph Thompson brings this appeal from a October 5, 2000, judgment of the Washington Circuit Court. We affirm.

On October 24, 1998, Thompson returned home from an all night fishing and drinking expedition. Thompson's live-in girlfriend, Beverly Gaines, (Gaines) was waiting for him. At some point thereafter, it appears an altercation ensued. Thompson testified he passed out after being struck by Gaines. He ended up with a gash above one eye, scratches on his neck and chest, bruised elbows, and a bite mark on his arm; Gaines ended

up dead. Injuries to her body were consistent with a physical struggle. Thompson testified he called "911" after regaining consciousness.

Thompson was indicted for Gaines' murder by the Washington County grand jury November 5, 1998. Kentucky Revised Statutes (KRS) 507.020. On September 1, 2000, Thompson was convicted of second degree manslaughter, KRS 507.040, by a jury, and sentenced to ten years in the penitentiary. The trial court entered its final judgment on October 5, 2000. This appeal followed.

Thompson's first assignment of error is that the circuit court improperly allowed a "partially inaudible" tape recording of his 911 call to be played to the jury. It is well established that it is within the discretion of the trial court to determine whether partially inaudible tape recordings must be excluded. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988). The circuit court reviewed the tape and determined it would be helpful to the jury. As such, we perceive no abuse of discretion in allowing a partially inaudible 911 tape to be played to the jury.

Thompson next asserts the circuit court erred by permitting jurors to view a transcript of the 911 call prepared by the Commonwealth while listening to the tape recording. In support of his argument, Thompson cites Sanborn. Thompson maintains Sanborn held that presenting to the jury any transcript prepared by the Commonwealth is *per se* prejudicial. In Sanborn, the defendant was tried for first degree murder. After his

arrest, he made a tape recorded statement to police and the commonwealth attorney. Parts of the tape were inaudible. At trial, the prosecutor was allowed to furnish the jury a written transcript of the tape. The defense objected to some twenty-five specific errors in the transcript, but no changes were made therein. Instead, the questionable parts of the transcript were "highlighted" by a yellow marker. We understand Sanborn to hold that the circuit court abused its discretion in permitting the Commonwealth's highlighted version of the inaudible portions of the tape to be presented to the jury. In the case *sub judice*, the following exchanges took place among defense attorney Mrs. Whitaker, prosecutor Mr. Metcalf, and the court concerning the 911 tape and transcript:

> MRS. WHITAKER: ...THERE ARE A COUPLE OF THE PORTIONS OF THE TAPE JUDGE THAT ARE INAUDIBLE. OKAY. THROUGH ONE WAY OR THE OTHER. THERE'S A SIREN GOING OFF AT ONE POINT BUT I DON'T THINK THAT REALLY TAKES UP ANY OF THE WORDS THAT WERE SAID BUT THERE ARE, I MEAN, THERE'S PORTIONS IN THE TRANSCRIPT PROVIDED BY THE COMMONWEALTH THAT DO SAY INAUDIBLE.
>
> . . . .
>
> THE COURT: I'LL PROBABLY LISTEN. WHAT PARTS TO (SIC) YOU OBJECT TO?
>
> MRS. WHITAKER: THERE'S A COUPLE OF PARTS IN THERE, I'D HAVE TO GET A COPY OF IT.
>
> THE COURT: IF YOU'LL STATE, TELL US ON THE TRANSCRIPT WHAT YOU OBJECT TO THEN I'LL, BUT I'M MORE THAN LIKELY GOING TO ALLOW ALL OF IT.
>
> . . . .
>
> MRS. WHITAKER: ...KNOWING THAT THE COURT OVERRULED THAT . . . - - AND IS GOING

TO GIVE THE TRANSCRIPT, I DID REQUEST ONE THING BE ADDED, SUBJECT TO THAT.

THE COURT: WHAT ARE YOU ASKING?

MR. METCALF: WE'RE (SIC) EDITED THAT.

THE COURT: ALRIGHT. ALRIGHT. GO AHEAD AND PASS IT AMONG THE JURY AND SOON AS THE TAPE IS OVER TAKE THEM UP.

. . . .

From the above, it appears that, in at least some instances, the transcripts simply used the word "inaudible" for indistinct portions of the tape. It likewise appears Thompson had some input into the drafting of the transcript. Thus, we cannot say the transcript was the "Commonwealth's version." As such, we view Sanborn as inapplicable to the case at hand.

Thompson also cites Norton v. Commonwealth, Ky. App., 890 S.W.2d 632 (1994). Thompson maintains Norton holds a transcript is improper if it is merely one party's interpretation of the recording. In Norton, the defendant was tried for drug trafficking. Part of the evidence was a tape made by an undercover officer wearing a "wire." Portions of the tape were indistinct. The lower court allowed a transcript prepared by the Commonwealth to be handed out to the jury while the tape was being played. The transcripts were taken up after the tape finished. Indistinct portions of the tape were noted in the transcript as "inaudible." The defendant neither argued specific inaccuracies nor offered an alternative transcript. The Norton Court thus held that Commonwealth prepared transcripts may be permitted when no attempt is made to "provide the prosecutor's or anyone else's version or interpretation of the inaudible or

indistinct portions." Id. at 637. We thus interpret the Norton Court as holding there is no universal prohibition on the use of Commonwealth-prepared transcripts with tape recordings.

In the present case, Thompson does not cite us to specific inaccuracies in the transcript. It is clear from the record that certain indistinct portions of the tape were marked in the transcript as "inaudible" and Thompson had input into the transcript. No alternative transcript was offered Thompson. As such, we find Norton to be applicable in this case. The indistinct portions of the tape were marked in the transcript as "inaudible," no specific inaccuracies were argued, nor was any alternative transcript offered by the defense. As such, we perceive no abuse of discretion on the part of the circuit court in allowing the jurors to view a transcript during a playing of the 911 recording.

Thompson's next contention is that the circuit court erred in denying Thompson's motion to strike a juror for cause. Specifically, Thompson complains one of the jurors had been represented by the assistant commonwealth attorney in a civil matter. In support of his contention, Thompson relies on Riddle v. Commonwealth, Ky. App., 864 S.W.2d 308 (1993). Thompson argues that this Court in Riddle held that prospective jurors who had attorney/client relationships with commonwealth's attorneys were *per se* biased as a result of the attorney/client relationship. Thompson believes this is particularly true when a prospective juror evinces a willingness to again engage the services of the commonwealth attorney in a legal matter. We

disagree. This Court in Riddle said specifically that a prior attorney/client relationship does not disqualify prospective jurors automatically. Id. at 310. In Riddle, there was inadequate opportunity to develop bias in the prospective jurors. In the instant case, the record shows Thompson's counsel questioned this prospective juror more than once as to whether the juror could be impartial. The prospective juror at all times answered affirmatively. Additionally, the prospective juror informed Thompson's counsel her representation by the commonwealth attorney had taken place "years ago." "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause," (citation omitted). Pennington v. Commonwealth, Ky., 316 S.W.2d 221, 224 (1958). Based upon the above facts, we believe Thompson's counsel had ample opportunity to develop bias or prejudice. As such, we are of the opinion the circuit court did not abuse its discretion in denying Thompson's motion to strike the potential juror for cause.

Thompson's next assignment of error is that the circuit court allowed two lay witnesses to testify as to body fluid evidence.

First, Thompson complains that an investigating officer testified that, in his opinion, stains on Gaines' underwear and sweat pants were urine. Lay witness testimony in the form of opinion is appropriate where the opinion is rationally based on the witness' perception, and helpful to a clear understanding of a fact in issue. Ky. R. Evid. (KRE) 701; Crowe v. Commonwealth, Ky. 38 S.W.3d 379 (2001). The officer observed stains on Gaines'

clothing as it was being removed at autopsy. He opined the stains were urine. This testimony presumably helped determine Gaines' position at the time of her death. We believe this testimony to be rationally based on the officer's perceptions and helpful in determining a fact in issue. Moreover, Thompson does not indicate how he was harmed by the testimony. Thus, we perceive no abuse of discretion by the circuit court in allowing the testimony.

Second, Thompson complains another Springfield police officer testified that blood spatter patterns at the scene were indicative of a struggle. Thompson acknowledges this assignment of error was not properly preserved for review. As such, he urges us to review his contention as palpable error. Ky. R. Crim. P. (RCr) 10.26. KRE 103(e). If a substantial possibility exists that the outcome of a case would not have been different, the error complained of will be held non-prejudicial. Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986).

In the present case, there is evidence that Thompson suffered a laceration to the head, a bite to the arm, and scratches and bruises on his body. There was evidence Gaines suffered defensive wounds, in addition to her fatal strangulation injury. Thus, we believe there was ample evidence of a struggle independent of the blood spatter testimony. We do not believe the outcome would have been different absent the officer's testimony. As such, we are of the opinion the testimony of the officer to blood spatter evidence does not rise to the level of palpable error under RCr 10.26.

Thompson maintains the circuit court committed reversible error in allowing autopsy photographs taken by a police officer to be entered into evidence. While admitting the photographs might have been error, we are not convinced such offended a substantial right of Thompson. KRE 103(a). We observe that of the two photos in issue, one was later offered to help determine whether injury to Gaines' mouth might have been caused by paramedics. We are bolstered in our opinion in that two other photos taken at autopsy were entered through the coroner. As no substantial right of Thompson was affected, we believe the circuit court did not commit reversible error in allowing the photos to be entered as evidence.

For the foregoing reasons, the judgment of the Washington Circuit court is affirmed.

ALL CONCUR.

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