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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002494-MR

MARQUIS DERON HEARD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CR-00244

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, Chief Judge; TACKETT and VANMETER, Judges.

COMBS, CHIEF JUDGE. Marquis Heard appeals from the final judgment of the Fayette Circuit Court which convicted him of first-degree criminal trespass and second-degree assault. Heard argues that the trial court made several errors during his trial: the admission of hearsay testimony, the failure to give an instruction on extreme emotional distress, and the denial of his motion for a mistrial. After our review of the record, we do not agree with his allegations of error. Thus, we affirm.

The events leading to Heard's conviction occurred at the home of Sara Saunders (Saunders), the grandmother of the victim, Andreal Saunders (Angel). Heard is the father of the youngest of Angel's three children. On December 11, 2001, Heard went to the Saunders residence, where Angel was visiting, in order to speak with Angel. Aware of tensions between her granddaughter and Heard, Saunders denied him permission to enter the home. Later in the day, when Saunders left to run errands, Heard returned. When Angel refused him entry, he knocked the door off its hinges. He then assaulted Angel by hitting her in the head with the butt of a handgun; he left the premises with their child.

When Saunders returned home at about 6:00 p.m., she found her granddaughter in a hysterical state, crying and shouting incoherently. Angel's face was covered with blood; her head wounds were bleeding. Police and paramedics arrived within minutes. Angel told Officer Steve Gilbert that Heard had kicked the door down and that he hit her in the head with a gun because she would not let go of her infant child. When she did put her child down, Heard took the child. Before leaving, Heard pointed the gun at her and told her that the only reason he did not shoot her was that the gun was broken.

While police and emergency workers were still at the scene, Saunders received a telephone call from Heard. While

police attempted to trace the call, Lieutenant William McCord, a paramedic, listened to the conversation and heard the appellant threaten Saunders that he would kill Angel and himself if they reported the incident to the police. At that point, police officers took the phone from Saunders and attempted to persuade Heard to reveal where he had taken the child. Heard refused to speak to the police but agreed to talk with the paramedic. He told Lieutenant McCord that he had hit Angel with his fists -- but not with a gun. He refused to tell Lieutenant McCord what had prompted him to assault Angel nor would he reveal where he had taken the child.

Angel was taken to the emergency room of Good Samaritan Hospital. Dr. Jeff Wicker treated her bruises and the multiple cuts to her head. Angel told Dr. Wicker that the cuts were the result of being struck with a pistol.

Police eventually recovered the child with the cooperation of Heard's mother. Heard was indicted on charges of first-degree burglary, second-degree assault, and custodial interference. His trial was scheduled for September 12, 2002.

On August 29, 2002 and September 5, 2002, the Commonwealth served Angel with a subpoena commanding her to appear and to testify at Heard's trial. When she did not appear, the trial court considered granting Heard's motion for a dismissal of the charges against him but instead granted the

Commonwealth's motion for a brief continuance. A warrant was issued for Angel's arrest.

When Angel did not appear on October 9, 2002, the date of the second trial, the court allowed the Commonwealth to proceed against Heard with its circumstantial evidence of the burglary and the assault. The custodial interference count of the indictment was dismissed by agreement of the parties. The court also allowed the Commonwealth to introduce Angel's out-of-court statements implicating Heard through various witnesses. The jury found Heard guilty of first-degree criminal trespass and second-degree assault; he was sentenced to ten (10) years in prison. This appeal followed.

Heard first argues that the trial court violated his Sixth Amendment right to confront and to cross-examine his accuser by permitting the Commonwealth to introduce the out-of-court statements made by Angel on the evening of the incident through the testimony of Saunders, Officer Gilbert, and Dr. Wicker. He alleges that Angel was not "unavailable" as a witness within the context of our evidentiary rules so as to permit such hearsay evidence to be admitted. He claims that the Commonwealth acted in bad faith in failing to produce his accuser at trial. We conclude that these arguments are without merit.

There is no evidence in the record to support Heard's claim that the prosecutor failed to act reasonably in attempting to secure Angel's presence at trial. The Commonwealth had served her with two subpoenas prior to the first trial and caused an arrest warrant to be issued when she failed to appear.

Under the Kentucky Rules of Evidence (KRE), Angel's physical presence was not solely determinative as to the issue of whether the out-of-court statements could be admitted. KRE 803 provides that some types of hearsay may be admitted regardless of the availability of the declarant. Such statements –- including excited utterances (KRE 803(2)) and statements for purposes of medical treatment (KRE 803(4)) -– are those at issue in this case.

Heard argues that KRE 803 is unconstitutional as applied in criminal cases because it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. He relies on Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), for the proposition that "the Confrontation Clause restricts introduction of otherwise admissible hearsay by requiring the Commonwealth to demonstrate the unavailability of the witness." (Appellants brief, p. 10). However, as the Commonwealth correctly contends, the holding in Ohio v. Roberts has been undermined by more recent U.S. Supreme Court decisions that have analyzed admissibility of hearsay in light of the

Confrontation Clause. See, United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), and White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

In White v. Illinois, the Court dealt with testimony falling within the same exceptions to the hearsay rule which as occurred in the case before us. The White Court addressed the identical issue raised by Heard: whether the Confrontation Clause requires the prosecution to produce the declarant at trial or in the alternative to prove the declarant to be unavailable before admitting testimony under the hearsay exceptions. Emphasizing the essential reliability of the evidence on its own separate and apart from the declarant, the White Court held as follows:

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the "'integrity of the factfinding process.'" *Coy v. Iowa,* 487 U.S. 1012, 1020, 101 L.Ed.2d 857, 108 S.Ct. 2798, 2802, (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736, 96 L.Ed.2d 631, 107 S.Ct. 2658, 2662, (1987)). And as we have also noted, a statement that qualifies

> for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. [*Idaho v.*] *Wright*, 497 U.S. at 820-821, 111 L.Ed.2d 638, 110 S.Ct. 3149. . . . We therefore see no basis in *Roberts* or *Inadi* for excluding from trial, under the aegis of the Confrontation Clause, evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment.

Id. 502 U.S. at 356-357. Accordingly, we hold that the trial court did not violate Heard's right of confrontation under the Sixth Amendment by admitting the victim's out-of court statements to her grandmother and her treating physician despite her absence from the trial.

Heard also argues that the statements made to Saunders and Officer Gilbert do not properly qualify as excited utterances under KRE 803. He contends that Saunders had "a failing memory." Therefore, he challenges whether she could remember how long after coming home it was that she learned of Angel's assault. (Appellant's brief, p. 14-15.) He attacks the spontaneity of Angel's statements to Officer Gilbert, claiming that they were not made automatically and naturally but rather that they were coerced by the officer's interrogation of her. He cites Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001), for the proposition that "statements made after direct inquiry are absolutely not admissible as excited utterances." (Appellant's

brief, p. 16). Finally, he relies on Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354, ___ L.Ed.2d ___ (2004), a decision rendered after his trial, as requiring a new trial due to the allegedly erroneous admission of the statements made by Angel to the police officer which implicated Heard as her assailant.

We find no merit as to the allegation of error concerning the admission of Saunders's testimony. Although we agree that allowing Officer Gilbert to repeat the statements Angel made to him constituted a violation of Heard's Sixth Amendment rights to confrontation, we believe that under the facts of this case the admission of this evidence constituted harmless error.

KRE 803(2) defines an excited utterance as "[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." In Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998), the Kentucky Supreme Court set forth the criteria to be considered in determining whether a statement qualifies as an excited utterance:

> (i)[the] lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response

> to a question, and (viii) whether the declaration was against interest or self-serving.

Id. at 470 (quoting Souder v. Commonwealth, Ky., 719 S.W.2d 730, 733 (1986)).

Pursuant to the Jarvis criteria, we conclude that the trial court correctly allowed Saunders to repeat Angel's statements to the jury. Heard is correct that Saunders did not recall what time she left her apartment to run errands on the day in question; nor could she testify exactly how much time had elapsed between Heard's forceful entry into her home and her return. However, Saunders's testimony described Angel as hysterical, crying, incoherent, and still bleeding from the assault. The trial court determined that the victim's statements implicating Heard were sufficiently close to the time of her assault in order to qualify as excited utterances. We agree and find no error in their admission into evidence as a proper exception to the hearsay rule.

Officer Gilbert recounted that he was dispatched to Saunders's residence at 6:00 p.m. and that he arrived within three minutes. He stated that the door of the residence had been kicked in and that a woman inside the residence had been assaulted. He testified that Angel was crying and was very upset; she was holding her right arm and was bleeding about the head. Although he did not witness the assault and was unable to

establish exactly when it occurred, the trial court found that Angel's statements were made close to the time of the assault and while she was still suffering from the stress of that event.

Contrary to Heard's contentions, Young v. Commonwealth, supra, did not create an absolute ban on the introduction of excited utterances made in response to police questioning. Young holds that the characterization of a statement as an excited utterance "depends on the circumstances of each case" and that the trial court's resolution of the fact issue is entitled to great deference. 50 S.W.3d at 167. Thus, the lower court did not err under the state of the law as it existed at the time of trial when it exercised its discretion to admit this testimony.

However, the very recent ruling in Crawford, supra, clearly announces that the admission of **testimonial** statements made by an unavailable declarant violates a defendant's Sixth Amendment confrontation rights, reinforcing without any doubt the sacrosanct nature of the Confrontation Clause:

> Where **nontestimonial** hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where **testimonial evidence is at issue**, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave

> for another day any effort to spell out a comprehensive definition of "**testimonial**." Whatever else the term covers, it **applies at a minimum** to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and **to police interrogations**. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. . . . Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitutional actually prescribes: confrontation.

Id. 124 S.Ct. at 1375. (Emphases added.) The Court further explained that it was using the term *interrogation* in its "colloquial, rather than any technical legal, sense." Id. at 1365 n.4. Thus, the admission of the nontestimonial statements made by Angel to her grandmother and to her treating physician remained admissible under Crawford. But Crawford dictates that the admission of her statements to Officer Gilbert implicating Heard as her attacker should not have been admitted under any exception to the hearsay rule.

Crawford specifically refrained from addressing whether the introduction of such hearsay was subject to harmless error analysis. Id. at 1359 n.1. However, we believe that harmless error analysis is appropriate and that it poses no impediment to the Confrontation Clause as interpreted by Crawford. See, Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998). After reviewing all the evidence presented at Heard's

trial, we conclude that those portions of Officer Gilbert's testimony which offended Heard's Sixth Amendment rights were cumulative with respect to other evidence which was properly admitted. The evidence left no question concerning the identity of the perpetrator of the crime. Heard acknowledged to Lieutenant McCord that he assaulted Angel and that following the assault, he left with Angel's infant child. The only remaining discrepancy concerned the manner in which the assault occurred. Heard told the paramedic that he hit Angel with his fists; Angel told her doctor that she was hit with a pistol. The doctor's testimony established that the cuts to Angel's scalp were not consistent with lacerations caused by mere fists; rather, he testified that the wounds were caused by a blunt object. There is no reasonable doubt that the outcome would have been any different even if the trial court's evidentiary ruling as to Officer Gilbert's testimony had been in harmony with the mandate announced Crawford.

Heard also challenges the court's ruling allowing Dr. Wicker to testify to statements made by Angel under the medical treatment exception to the hearsay rule -- KRE 803(4). This rule allows admission of hearsay statements made by the declarant "for purposes of medical treatment or diagnosis and describing medical history." Heard contends that Dr. Wicker had no independent recollection of treating Angel and that the

information of the assault in the doctor's records was provided by Officer Gilbert.

The doctor acknowledged that he had only a "vague" memory of treating Angel. However, contrary to Heard's allegations, Dr. Wicker testified that the information in Angel's medical records –- recorded in his own handwriting -– had been elicited directly from his patient and not from Officer Gilbert. Therefore, we find no error in the court's ruling to allow Dr. Wicker to testify to statements made by Angel in the course of her treatment in the emergency room.

Heard next argues that the court erred in failing to grant his motion for a mistrial during the testimony of Lieutenant McCord. While talking with Heard on the phone within minutes of the assault, the officer made notes of the statements made by Heard. The court allowed Lieutenant McCord to read his notes to the jury, excluding any statements that alluded to Heard's previous encounters with the law.

During cross-examination, McCord repeated Heard's statement, "Next level, lock-up, will kill Angel." Heard's attorney asked for a mistrial on the basis that the witness's use of the term "lock-up" revealed Heard's prior criminal record to the jury. The trial court denied the motion, and no admonition or further relief was requested.

A mistrial should be granted only where manifest, "urgent or real necessity for such an action" is shown. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1995). A trial court enjoys broad discretion in deciding whether or not to grant a mistrial, and its decision will not be disturbed absent an abuse of that discretion. Bray v. Commonwealth, Ky., 68 S.W.3d 375 (2002).

It is not apparent from the record that McCord disregarded an order of the trial court. The record reveals only that McCord was instructed not to refer to the fact that Heard had been previously arrested. His use of the language at issue provides no direct reference to Heard's criminal history and merely reflects Heard's style of expression. It may be that his criminal context molded his choice of words, but Heard nonetheless adopted the words as his own. Their repetition by the officer does not amount to a violation of the court order; nor does it require a mistrial.

Heard also alleges that the statement is prejudicial because it contains a death threat –- although that argument was not the basis of his motion for a mistrial. However, Officer McCord had already testified earlier -- and without objection -- that Heard made no fewer than three threats to kill Angel during the brief telephone conversation. Thus, this last statement was cumulative with respect to Heard's threats to cause further harm

to Angel. We find no basis for a mistrial as to this allegation of error.

Heard next argues that he is entitled to reversal of his conviction based on the failure of the Commonwealth to provide him with exculpatory statements made by the victim prior to trial. His allegations in this regard are supported by an affidavit executed by Angel after Heard's conviction. In her affidavit, Angel stated that she made several attempts to explain to the prosecutor that Heard did not instigate the assault or hit her with a gun. In the alternative, Heard contends that he is entitled to a new trial based on the contents of Angel's post-trial affidavit.

Throughout the trial, the prosecuting attorney maintained that she had not obtained any statements from the victim recanting the version of the events provided at the time of the assault. The Commonwealth continues to argue that it did not fail to provide Heard with exculpatory evidence. It cites Hensley v. Commonwealth, Ky. App., 488 S.W.2d 338, 339 (1972), for the proposition that the victim's affidavit should be "regarded with distrust" and "given little weight." We agree that the trial court was not required to believe Angel's post-conviction affidavit or to afford Heard any relief based on its contents.

Heard also complains that the trial court failed to give an instruction on extreme emotional distress. The Kentucky Supreme Court has defined this mitigating element as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably." McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-469 (1986). Heard argues that the evidence established that he and Angel were at odds over the issues of custody and/or visitation of their child. He states that the fact that he left with his child after the assault is "a further indication that the child was the impetus of the events" which transpired. (Appellant's brief, p. 21.)

However, the jury found Heard guilty of the lesser crime of criminal trespass rather than burglary. Thus, it apparently accepted Heard's defense that he had gone to Saunders's residence desiring merely to talk to Angel rather than intending to engage in criminal conduct. Our review of the record reveals no evidence to support Heard's claim that the jury could reasonably have believed that he committed the assault while under the influence of an extreme emotional disturbance. The sole fact that Heard and his victim were having a dispute over parenting does not suffice as grounds or a predicate to warrant an instruction on extreme emotional disturbance. Id., at 469. We find no error in the ruling of

the trial court that the evidence did not support such an instruction.

Two arguments remain. Heard contends that he was entitled to a directed verdict of acquittal and that he was the victim of cumulative error. Our review of the evidence at trial, much of which we have recounted in this opinion, when construed most favorably to the Commonwealth, is sufficient to support Heard's convictions for criminal trespass and second-degree assault. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). As there is no error affecting Heard's rights to a fair trial, his argument as to the existence of cumulative error must also fail of its own accord.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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