IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 22, 2003
NOT TO BE PUBLISHED

FINAL
DATE 9-18-03 ELIA GRAVITT, D.C.

Supreme Court of Kentucky

2001-SC-0783-MR

CHRISTOPHER MCGORMAN, JR. — APPELLANT

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
CASE NO. 2001-CR-00110

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Christopher McGorman, was convicted in the Madison Circuit Court of Murder, First-Degree Burglary, and Defacing a Firearm. Appellant was sentenced to life, ten years, and twelve months, respectively, with each sentence to run concurrently. At the time of the crimes, Appellant was fourteen years old but was tried and convicted as an adult under the Youthful Offender Act. The primary issue at trial was Appellant's insanity. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant advances several errors on appeal, namely that: (1) the Commonwealth's expert medical witness was not qualified to give an opinion on Appellant's insanity because he did not use proper testing procedures; (2) Appellant's videotaped confession to police should have been excluded because his parents were not present, and because the jury was shown a version of the tape that was not provided to the defense during discovery; (3) a subpoena for a defense witness was

improperly quashed by the Commonwealth; (4) the jury was improperly admonished by the trial court when it reported that it was deadlocked; and (5) there was not enough evidence to submit the charge of First-Degree Burglary to the jury. We affirm the trial court's judgment of conviction for the reasons set forth below.

EXPERT WITNESS TESTIMONY

Appellant argues that the Commonwealth's expert witness, Dr. Shraberg, was not qualified to render an opinion that Appellant was criminally responsible for the crimes because he administered only the SIRS test, which was not valid for children under the age of eighteen. Further, the appellant alleges that it was error for Dr. Shraberg's wife (a school psychologist) to have administered the test to Appellant. The appellant also suggests that he was unaware of Dr. Shraberg's qualifications until trial, yet he concedes that the Commonwealth furnished him with timely notice of the expert's report. The Commonwealth responds that this alleged error is not preserved and we agree.

Appellant refers in his brief to defense counsel's request to voir dire the witness regarding his qualifications and testing procedures, but he does not cite to anywhere in the record this colloquy occurred. His only reference to the record is the cross-examination of Dr. Shraberg regarding the validity of his testing procedures. The proper place for such a challenge, however, is during a pre-trial "Daubert hearing," where the trial judge initially determines if the witness's opinion is based on scientifically valid principles and methodology, thereby rendering the opinion relevant and reliable. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); see also Sand Hill Energy, Inc. v. Ford Motor Co., Ky., 83 S.W.3d 483, 489 (2002). It is unclear to us if this expert was challenged at a pre-trial Daubert

hearing. Accordingly, Appellant has not indicated to this Court how this issue is preserved for review, and we will not search the record on appeal to make that determination. CR 76.12(4)(c)(iv); Robbins v. Robbins, Ky. App., 849 S.W.2d 571 (1993).

VIDEOTAPED CONFESSION

Appellant also finds error with the circumstances surrounding the making of his videotaped confession and with the version of the tape that was ultimately played for the jury. Appellant gave a videotaped confession to police in the presence of his attorney. He now contends that since this confession took place without his parents' knowledge or consent, it was error for the trial court to admit the confession into evidence. Appellant does not state the basis for his argument, nor does he cite to any case law on the issue. Further, Appellant concedes that this issue is not preserved for review. Nonetheless, the argument is without merit because the validity of a juvenile's confession turns upon the issue of voluntariness, and not whether or not the juvenile's parents are present. In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 1458, 18 L. Ed. 2d 527, 561 (1967). Appellant has not argued to the trial court or on appeal that his confession was not voluntary. In light of this, and of the fact that the record clearly establishes that Appellant was properly "Mirandized" in the presence of his attorney, we find that no error occurred. See Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 185 (2001).

Appellant also argues that the trial court should have excluded the videotape of the confession because not until trial did it become apparent to defense counsel that there were two versions of the tape. Specifically, Appellant insists that the two tapes were different in that: (1) one tape was in color, and one was in black and white; (2) they

were shot from different angles in the room; and (3) the tape played for the jury did not contain a statement made by Appellant where he asked his lawyer if he could tell the police what had "happened to him before." Basically, the crux of the argument is that the jury was kept from hearing Appellant's apparent reference to being molested years earlier. The Commonwealth counters that this argument is not preserved for review because defense counsel's only objection at trial to the tape was to the possibility that two separate interviews of Appellant had taken place. We agree. Indeed, our review of the record indicates that once it was established that only one interview took place (recorded by two separate cameras), defense counsel concluded that the two tapes must have been the same and the court proceeded to play the confession for the jury without objection. Therefore, once again, this issue is not properly preserved for review. We note, however, that even if this issue had been properly preserved, no error occurred because the discrepancies, if any, in the two tapes were not relevant. Further, evidence of Appellant's alleged abuse was introduced through expert testimony; therefore, any error was harmless.

SUBPOENA OF WITNESS

Appellant asserts that someone from the Commonwealth Attorney's office instructed the state police to return a subpoena on a potential defense witness without service. Appellant wished to subpoena the alleged perpetrator of the sexual abuse he had suffered years earlier. Appellant concedes that this issue is not preserved for review but indicates that he was not aware of the subpoena's return until several months after a verdict was rendered. Regardless of the circumstances surrounding the failure to serve the subpoena, in order to preserve the issue, defense counsel had the option of requesting a continuance in order to obtain the witness's presence at trial, or

providing the court with an affidavit consisting of the facts the affiant believed the witness could prove. RCr 9.04. Defense counsel chose neither of these options; therefore, this issue is unpreserved. In any event, evidence as to Appellant's abusive past was available and admitted into evidence and Appellant has not indicated how the state of the record would differ with his alleged abuser's testimony.

JURY INSTRUCTIONS

Appellant's argument seems to suggest that the trial judge's admonition to the jury, after it had reported it was deadlocked, was improper; although, Appellant admits that the instructions complied with RCr 9.57. Not only does Appellant fail to properly explain the basis for his contention or provide us with the exact charge given to the jury, he also failed to preserve this issue for review. Therefore, we will not address it further.

FIRST-DEGREE BURGLARY

Lastly, Appellant argues that the trial court erred when it submitted proof and instructions to the jury on the charge of First-Degree Burglary because there was no evidence that Appellant was armed with a deadly weapon when he entered a neighbor's home, or that the weapon stolen was in working order. Although this argument is preserved, it is without merit. Hayes v. Commonwealth, Ky., 698 S.W.2d 827 (1985), is dispositive because in that case we recognized that "one who enters a dwelling unarmed and steals guns becomes 'armed' with a deadly weapon within the meaning of KRS 511.020." Id. at 829 (quoting Daugherty v. Commonwealth, Ky., 572 S.W.2d 861, 863 (1978)). We also refused to limit this rule by requiring that the Commonwealth show that the guns stolen were in fact, "ready for use." Id. at 829-830. Appellant's reliance on Haymon v. Commonwealth, Ky., 657 S.W.2d 239 (1983), is misplaced. Haymon dealt with the phrase "use of a weapon" as it was used in KRS 533.060(1),

dealing with a defendant's parole eligibility. It merely held that the phrase, as used in that statute, was ambiguous and therefore, the defendant was entitled to the benefit of the ambiguity. Id. at 240. Accordingly, the trial court did not err in refusing to grant a directed verdict on the First-Degree Burglary charge.

For the foregoing reasons, Appellant's convictions are affirmed in all respects.

All concur.

COUNSEL FOR APPELLANT:

Andrew Martin Stephens
107 Church Street, Suite 200
Lexington, KY 40507

COUNSEL FOR APPELLEE:

A. B. Chandler, III
Attorney General
Capitol Building
Frankfort, KY 40601

Todd D. Ferguson
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204