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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0755-MR

DATE 10-1-03 ELIA Grawyth D.C.

ERIC CLARK — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
1998-CR-2424

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Clark of murder. After the jury returned its verdict, Clark pled guilty to being a second-degree persistent felony offender and was sentenced to life in prison.

Clark offers three claims of error. First, the trial judge refused to instruct on the defense of intoxication, and to include second-degree manslaughter as a lesser offense. Second, the trial judge allowed the introduction of evidence that the victim was going to seek an emergency protection order against Clark. Introduction amounted to evidence of past crimes or bad acts. Third, the trial judge improperly allowed the introduction of sympathy evidence during the guilt phase of the trial.

Clark and the victim divorced in 1997 after approximately 7 years of marriage. They reconciled in June 1998 and lived together in an apartment. The victim was an assistant store manager at the Disabled American Veterans store near their home.

Clark had been terminated from his position there in early September 1998 after he walked off the job.

The victim was found dead in the apartment by an EMT shortly after 11 p.m. on September 21, 1998. She was lying on her stomach just inside the front door and a large kitchen butcher knife was next to her. Medical testimony was that the victim died of a sharp force injury to her left upper chest that penetrated her heart.

At trial, the evidence showed that Clark was seen exiting the victim's apartment and was overheard saying that he had "killed the bitch, are you happy." After leaving the victim's apartment, Clark returned to his friend's apartment where he again acknowledged that he had killed his ex-wife. Ultimately, Clark went to his sister's house and asked her to take him to the police station because he had "done something" to the victim. He was arrested and his clothing was taken as evidence. Testing of the blood stains on the clothing indicated that the blood was consistent with that of the victim.

Clark was convicted of murder and entered a plea agreement with the Commonwealth whereby he would plead guilty to being a second-degree persistent felony offender, forego jury sentencing and agree to a life sentence. This appeal followed.

I. Intoxication

At trial, the defense introduced evidence that Clark had been drinking on the day of the crime. Evidence was introduced that showed Clark to be in control of his faculties in and around the time of the murder. There is no evidence of record where Clark is said to be acting erratically or out of the ordinary, beside the act itself.

In order to justify an instruction on intoxication there must be evidence not only that the defendant was drunk, but that he was so drunk that he did not know what he

was doing. Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 118 (1990); Meadows v. Commonwealth, Ky., 550 S.W.2d 511 (1977).

Clark cites no evidence of any behavior beyond simple drunkenness to support that such an instruction was justified. The record holds evidence of Clark taking a shower and telling his friends what he had done soon after. The trial judge did not err by refusing an instruction on intoxication and second-degree manslaughter as a lesser included offense.

II. EPO as prior crimes or bad acts

The trial judge allowed the victim's mother as well as the victim's boss to testify as to the victim's intention to get an EPO against Clark. During the trial, defense counsel objected to the admission of the mother's testimony on relevancy grounds. There was never any KRE 404(b) objection made to the trial judge.

Relief may only be granted in cases of unpreserved error when manifest injustice will result. RCr 10.26. All the circumstances may be shown which have a relation to the particular violation of the law imputed, even if, in doing so, other offenses may be brought to light. Dye v. Commonwealth, Ky., 477 S.W.2d 805 (1972): Francis v. Commonwealth, Ky., 468 S.W.2d 287, 289 (1971). Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b).

Any evidence used to swear out an EPO against Clark would have to pertain to his actions toward the victim. The intention of the victim and her mother is highly probative of Clark's intent and occurs in the immediate time preceding the murder. The

swearing out of and EPO has a probative value which outweighs any undue prejudice to the defendant and is therefore admissible under KRE 404(b) and the case law. As to the requirements of notice under KRE 404(c), that issue was definitely not preserved in the trial court. The lack of notice did not substantially affect the rights of the defendant, and is therefore not reversible error.

III. Evidence of victim in guilt phase

At trial, the victim's mother testified that the victim had graduated from high school and that the victim was shy. The prosecution brought in a photograph of the victim. The defense objected on the basis of relevancy, because identification of the victim was irrelevant.

This Court has refuted that testimony from the victim's parents regarding personal and educational activities must be excluded. There is no error in bringing to the attention of the jury that the victim was a living person, and not a mere statistic. McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 523 (1984). See also Campbell v. Commonwealth, Ky., 788 S.W.2d 260, 263 (1990). A certain amount of background information regarding the victim is relevant to understanding the nature of the crime. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 542 (1988).

The prosecution did not introduce any evidence that inflamed the passions of the jury. The evidence presented brought to life a simple outline of the victim. This evidence was completely relevant as background to the crime. No error occurred in the admission of the evidence.

Therefore, the judgment of the Jefferson Circuit Court is affirmed.

Lambert, C.J., Graves, Stumbo and Wintersheimer, JJ., concur. Keller, J., concurs in result only. Cooper, J., concurs by separate opinion and is joined by Johnstone, J.,

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CONCURRING OPINION BY JUSTICE COOPER

I concur in the result reached in this case only because the erroneous admission of evidence of the victim's intent to seek an emergency protective order (EPO) against Appellant on the day following her death was not properly preserved for review.

In Moseley v. Commonwealth, Ky., 960 S.W.2d 460 (1997), another domestic homicide case, witnesses for the prosecution were permitted to testify that the victim had related to them before her death specific acts of domestic violence perpetrated against her by the defendant. We held that, while evidence of past abuse was relevant to prove intent to kill on the subsequent occasion, KRE 404(b)(1), the testimony in question was inadmissible because it was hearsay. Id. at 461-62.

Here, both the victim's supervisor and the victim's mother testified that the victim intended to seek an EPO against Appellant on the day following her death. Of course, an EPO can only be obtained upon the filing of a petition setting forth specific acts of

alleged domestic violence or abuse committed by the perpetrator. KRS 403.730(1)(c). Neither the supervisor nor the mother testified to having personally observed Appellant commit any such acts. In fact, the supervisor testified that Appellant visited the victim at her place of employment on the afternoon of the killing and that his demeanor was not belligerent but polite and well mannered. The mother testified that she had never observed any animosity between Appellant and the victim during her visits to their home. Prior to testifying, both witnesses were cautioned by the prosecutor and, at the prosecutor's request, by the trial judge not to testify to any statements made to them by the victim. Nevertheless, their testimony that the victim intended to seek an EPO against Appellant was "indirect hearsay" that was equally as inadmissible as the hearsay admitted in Moseley.

> If the apparent purpose of offered testimony is to use an out-of-court statement to evidence the truth of facts stated therein, the hearsay objection cannot be obviated by eliciting the purport of the statements in indirect form.

Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 802 (1994) (Leibson, J., concurring) (quoting McCormick on Evidence § 240. at 593 (Cleary ed. 1972)).

In Mitchell v. Hoke, 745 F.Supp. 874, 876 (E.D.N.Y. 1990), aff'd, 930 F.2d 1 (2d Cir. 1991), a witness, Primus, in the presence of a police detective, had identified the defendant at a pretrial lineup but did not testify at trial despite the fact that he was not "unavailable." Instead, the detective testified that (1) Primus had identified "someone" at the lineup and, subsequently, (2) the defendant was arrested. Under New York law, a witness's pre-trial identification is inadmissible hearsay unless the witness cannot identify the defendant on the basis of present recollection or is otherwise unavailable. New York Crim.Proc.Law § 60.25 (McKinney 1981). Compare KRE 801A(a)(3); Owens

v. Commonwealth, Ky., 950 S.W.2d 837 (1997). To quote from Judge Weinstein's opinion:

> The prosecution attempted to avoid the hearsay rule by not asking the detective who Primus picked out of the lineup, but rather asking whether he picked someone, and who was arrested as a result. This is a distinction without a legal difference. The case provides a classic example of indirect hearsay. The act of the hearer (the detective) leads by direct inference to the precise words of the speaker (the identifying witness). Since the speaker's credibility must be evaluated to determine the probative force of this line of identification proof, the hearsay rule applies.
>
> The jury could only draw one reasonable inference from the detective's testimony: that Primus selected Mitchell. The detective in effect repeated the substance of Primus's out-of-court statement.

Mitchell, supra, at 876.

Here, the prosecutor was careful not to elicit from the supervisor and the mother that the victim had told them about prior incidents of past domestic violence perpetrated against her by Appellant. However, their testimony that the victim intended to seek an EPO against Appellant conveyed that same information by indirect hearsay. The prosecutor then used this evidence to argue during summation that there must have been something wrong with the relationship between Appellant and the victim; otherwise, the victim would not have intended to obtain an EPO against him.

Unfortunately, defense counsel did not object to the supervisor's testimony and objected to the mother's testimony only on the basis that "what the victim intended to do was irrelevant." Where the objecting party states grounds for the objection at trial, new and different grounds cannot be asserted on appeal. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 486 (1991); Miller v. Watts, Ky., 436 S.W.2d 515, 522 (1969). Nor do I find that any manifest injustice resulted from this unpreserved error. RCr 10.26. The

evidence against Appellant was absolutely overwhelming. Accordingly, I concur in the affirmance of his conviction.

Johnstone, J., joins this concurring opinion.