IMPORTANT NOTICE

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RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6-9-05 E.A. Graves D.C.

2002-SC-1079-MR

APRIL RINE — APPELLANT

V. — APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
2002-CR-0392-002

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2003-SC-0012-MR

TAMMITHA FUENTES — APPELLANT

V. — APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
2002-CR-0392-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Warren Circuit Court jury convicted April Rine of wanton murder and second-degree criminal abuse in connection with the drowning death of her three-year-old granddaughter, D. F. Rine received consecutive sentences of thirty-five years' imprisonment for the wanton murder conviction and ten years' imprisonment for the

second-degree criminal abuse conviction. Rine's co-defendant and daughter, Tammitha Fuentes, was convicted of complicity to murder and first-degree criminal abuse and received a total of thirty-five years' imprisonment. Both appeal to this Court as a matter of right. The cases have been consolidated for purposes of this opinion. Finding no error as to either Rine or Fuentes, we affirm all convictions.

Procedural and Factual Background

Following a divorce, Fuentes moved in with Rine in the fall of 2001, along with her two children, D.F. and L.F. The arrangement, however, was not harmonious. Rine did not approve of her grandchildren because of their Honduran father, and commonly referred to them as "half-breeds." Furthermore, the evidence at trial revealed that both Rine and Fuentes corporally punished D.F., often striking her with a piece of PVC pipe. Around the time that D.F. began to be toilet trained, the abuse intensified. Rine became increasingly insensitive to D.F.'s accidents and complained about her soiled bedding and clothing. As a result, Rine and Fuentes forced D.F. to sleep in a cardboard box on the kitchen floor so that she could not dirty bed linens. According to her own testimony before the grand jury, Fuentes apparently believed that this type of callous humiliation of a three-year-old child would assist in her toilet training.

On the night of April 21, 2002, Fuentes went to bed at some time between 9:30 and 11:00 p.m. Before retiring, she took two Darvocet and three to four Valium pills, narcotics for which she did not have a valid prescription. Rine's husband had already gone to bed, and Rine had gone to sleep on the couch, as was her custom. D.F. had been put to sleep in the cardboard box in the kitchen. During the night, Fuentes recalled hearing D.F. cry out, "Mommy, Mommy, help me." However, she was not certain if the cry was a dream. The drug-induced sleep also made her unable to get out

of bed. After an undetermined period of time, she was able to get out of bed and go to the bathroom.

Fuentes found D.F. laying face up in the bathtub; water had been run in it. At first, Fuentes did not realize anything was wrong with her daughter. She removed D.F. from the tub and placed her on the hallway floor to change her clothes. At this time, Fuentes realized that the child was unresponsive. Fuentes woke her mother, who began performing CPR on D.F. Fuentes then called emergency services.

The responding paramedics found no signs of life in D.F. when they arrived at Rine's home. She was pronounced dead at the hospital. An autopsy confirmed the cause of death as drowning. Sadly, the autopsy also revealed that D.F. was a chronically abused child.

Following a police investigation, a Warren County Grand Jury returned indictments against both Fuentes and Rine. Both were indicted for murder or criminal attempt to commit murder and first-degree criminal abuse. A jury trial followed, at which Fuentes and Rine were tried jointly. Rine was convicted of wanton murder and second-degree criminal abuse; Fuentes was convicted of murder by complicity and first-degree criminal abuse. This appeal followed.

Further facts will be developed as necessary later in this opinion. We turn first to those allegations of error raised by Rine.

Rine's Allegations of Error

Severance

Rine asserts that the trial court erred by denying a motion to sever the trials. Defense counsel argued that Rine would likely be prejudiced by her co-defendant's adverse defense posture. Fuentes opposed the motion, which was denied.

Joinder is proper if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." RCr 6.20. However, "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants . . . by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires." RCr 9.16.

Rine's primary contention is that the antagonistic defenses presented at trial unfairly prejudiced her. That co-defendants are asserting antagonistic defenses is a factor for the trial court to consider, though it does not alone mandate severance:

> [N]either antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice. . . . That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.

Ware v. Commonwealth, 537 S.W.2d 174, 177 (Ky. 1976). "Even if the defendants attempt to cast blame on each other, severance is not required." Gabow v. Commonwealth, 34 S.W.3d 63, 71 (Ky. 2000). Therefore, the fact that Rine and Fuentes merely attempted to implicate each other in D.F.'s abuse does not demonstrate sufficient prejudice to warrant severance.

We note that the trial court is vested with considerable discretion in ruling on motions for severance. Humphrey v. Commonwealth, 836 S.W.2d 865, 868 (Ky. 1992). Here, the trial court rendered an extremely detailed and thorough order and analysis denying the severance motion, ultimately concluding that Rine had failed to make a

positive showing that joinder would be unduly prejudicial to her. We find no indication that the trial court abused its discretion in denying Rine's motion for severance.

On appeal, Rine makes the additional argument that, even if severance was not required despite the antagonistic defenses asserted at trial, actual prejudice warranting reversal occurred as a result of joinder. Rine points mainly to the testimony of a social worker and a neighbor, which she argues would not have been admissible against her if she had been tried alone. Susan Barnett, a social worker, was called by Fuentes and testified to statements given to Barnett by Fuentes prior to the death of her daughter about the abuse that D.F. had undergone at the hands of Rine. Fuentes also called Catherine Walkup, a former neighbor and friend of Rine. Walkup testified that she knew Rine to have a bad temper, and that Rine had kept a piece of pipe in the shed for disciplinary use against Fuentes and her brother when they were children. Walkup further testified that she had seen Rine strike her children with her hand. Defense counsel for Fuentes did question Walkup regarding Rine's attitudes towards Hispanic persons, but Walkup was not permitted to respond following an objection by Rine's counsel.

At the outset, we acknowledge that Barnett's testimony contained hearsay statements. However, defense counsel for Rine made no contemporaneous objections to Barnett's testimony. With respect to Walkup's testimony, Rine alleges that it contained improper character evidence for which the Commonwealth did not provide notice pursuant to KRE 404(c). A review of the record, however, reveals that Rine's defense counsel did object to Walkup's testimony on the grounds that it contained improper character evidence, and that objection was sustained. Rine alleges in her

appeal that Walkup's testimony should have been prohibited in its entirety as having been too remote in time; this objection was never presented to the trial court for consideration.

It seems that Rine is requesting review by this Court pursuant to RCr 10.26. Upon consideration of the entire case, we do not believe that any palpable error affecting Rine's substantial rights has occurred. The portions of Barnett's testimony that are hearsay were clearly cumulative; Fuentes herself testified to essentially the same facts surrounding Rine's abuse of D.F. Furthermore, we find no error in Walkup's testimony as she was not permitted to testify as to Rine's character or attitude towards Hispanics. Her testimony with respect to Rine's temper and disciplinary tactics, though remote in time, was relevant and highly probative of a central issue in the case. Upon review of the entire record, we do not believe that a substantial possibility exists that the result would have been any different absent the errors with respect to either witness' testimony. Jackson v. Commonwealth, 717 S.W.2d 511 (Ky. App. 1986).

Evidence of Suicide Attempts

Rine asserts that the trial court erred in admitting evidence of two alleged suicide attempts. The first occurred prior to her arrest, though Rine was aware that a warrant for her arrest had been obtained, and the second occurred after her arrest, while she was in jail. The Commonwealth argues that evidence of Rine's suicide attempts is highly probative of her consciousness of guilt. Rine counters that numerous plausible explanations for her suicide attempts exist, so that any probative value is outweighed by the danger of confusion of the issues within the meaning of KRE 403.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." KRE 401. Relevancy is established by even a slight showing of probative value. Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999). A trial court's decision concerning evidentiary issues will not be disturbed on appeal absent an abuse of discretion. Brown v. Commonwealth, 983 S.W.2d 513 (Ky. 1999).

Whether evidence of attempted suicide is probative of the accused's consciousness of guilt is an issue of first impression in Kentucky. The question, however, is not complex and is easily analogized to other types of circumstantial evidence of guilt based on the accused's behavior after the crime. It has long been the rule in Kentucky that evidence of attempted flight, resisting arrest or escape from capture is probative of the accused's guilt. Commonwealth v. Howard, 287 S.W.2d 926, 927 (Ky. 1956). Likewise, giving a false name and address to an arresting officer is admissible. Adkins v. Commonwealth, 96 S.W.3d 779 (Ky. 2003). We also note that the overwhelming majority of states considering this issue have determined that evidence of attempted suicide is admissible to establish consciousness of guilt. See Dale Joseph Gilsinger, Annotation, Admissibility of Evidence Relating to Accused's Attempt to Commit Suicide, 73 A.L.R. 5th 615 (2004). ("With a single exception, courts have unanimously held that an accused's attempt to commit suicide is probative of a consciousness of guilt and is therefore admissible.")

We agree that evidence of a suicide attempt is probative of a defendant's consciousness of guilt. Though other plausible reasons for Rine's actions may exist – for example, grief over her granddaughter's death – the existence of these alternative explanations does not diminish the probative value of the evidence. Nor are we persuaded that the admission of this evidence was overly prejudicial or confusing for

the jury, as Rine asserts. Thus, the trial court did not abuse its discretion in permitting the introduction of evidence of Rine's two suicide attempts.

Impeachment of Prior Convicted Felon

Rine argues that Fuentes' defense counsel improperly impeached her defense witness by asking the witness if he was a convicted felon. In fact, at the time of trial, the witness was participating in a pretrial diversion program for a felony charge. The witness ultimately testified that he had seen Fuentes strike D.F. on one occasion. The issue for our consideration is whether a defendant participating in a pretrial diversion program is a convicted felon for purposes of impeachment.

KRE 609(a) allows "evidence that the witness has been convicted of a crime . . . if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted." Rine contends that this language clearly requires that the witness have been convicted of a felony, and that participation in the pretrial diversion program does not constitute a conviction. RCr 8.04 governs pretrial diversion programs. The Commonwealth and the defendant may enter into a pretrial diversion agreement, which suspends the prosecution for a specified period "after which it will be dismissed on the condition that the defendant not commit a crime during that period . . . ." Id. KRS 533.250(e) requires that a condition of pretrial diversion is the entry of a guilty plea or Alford plea of guilty. If the defendant subsequently fails to complete the diversion program, the agreement may be voided and the court may proceed on the defendant's guilty plea. KRS 533.256(1). If the diversion program is successfully completed, the charges are listed as "dismissed-diverted" and "shall not constitute a criminal conviction." KRS 533.258(1). Furthermore, pretrial diversion records "shall not be introduced as evidence in any court

in a civil, criminal, or other matter without the consent of the defendant." KRS 533.258(3).

Relying on Thomas v. Commonwealth, 95 S.W.3d 828 (Ky. 2003), the Commonwealth argues that a defendant is considered a convicted felon until successful completion of the diversion program. Therefore, as the defense witness here had not yet completed the program, impeachment was proper. In Thomas, the defendant had pled guilty to a drug charge and was being considered for a drug court diversion program when he was subsequently arrested for possession of a firearm. The central issue was whether the defendant's pending drug charge constituted a "prior conviction" within the meaning of KRS 527.040 (possession of a firearm by a convicted felon). This Court discussed the pretrial diversion program statute:

> [T]he entry of a guilty plea and the language of KRS 533.258(1), lead to the logical conclusion that a convicted felon status would remain from the date of Appellant's guilty plea . . . until such time, if ever, that he would successfully complete the Drug Court Diversion Program. Until such time, the conviction remains and Appellant does not qualify for the other benefits of the pretrial diversion statute.

Thomas, 95 S.W.3d at 830. We believe Thomas controls the case at bar. As in Thomas, the defense witness here had pled guilty to a felony, but had not yet completed the pretrial diversion program at the time of his testimony. Therefore, at the time of his testimony during Rine's trial, his status remained that of a convicted felon and it was not improper for the Commonwealth to impeach him.

Use of Audiotaped Statements

Rine next contends that the Commonwealth did not use the correct procedure in attempting to impeach her testimony through the use of recorded statements made by Rine to the police immediately following D.F.'s death. The tape had previously been

played in its entirety before the jury during the Commonwealth's case-in-chief. Rine concedes that the taped statements were admissible pursuant to KRE 801A as prior inconsistent statements or as statements of a party opponent. Rather, Rine finds fault with the manner in which the Commonwealth was permitted to use the statements. During cross-examination, the Commonwealth asked Rine if she remembered making certain statements to police shortly after D.F.'s death. Rine stated that she remembered speaking with the officer, but not exactly what she had said. The Commonwealth then proceeded to play the recording, pausing after every couple of statements and asking Rine to explain what she meant, or why her testimony at trial differed with certain portions of the recorded responses. Rine's legal assertion is that this method of impeachment violated KRE 801A and her right to a fair trial.

KRE 801A does not specify the procedure to be used when introducing prior statements or admissions of witnesses, except to say that a foundation must be laid before admission pursuant to KRE 613. KRE 613 requires: "Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them." Rine refers us to no other rule or case law specifying the particular manner in which one should be impeached with a prior recorded statement. The Commonwealth fulfilled the foundational requirements of KRE 613 by asking Rine if she remembered having a taped interview with police detectives at the hospital on April 22, 2002. Furthermore, Rine was given an opportunity to explain her taped statements to the jury. We find no error.

Prosecutorial Misconduct

Rine argues that the prosecutor committed misconduct by violating a prior agreement with the trial court and defense counsel to refrain from mentioning the circumstances surrounding D.F.'s sibling, L.F. During recross-examination of Rine, the Commonwealth's Attorney asked Rine if she intended to seek custody of L.F. if she were found not guilty. Defense counsel objected, and the trial court sustained the objection and admonished the jury. However, defense counsel did not request any further relief from the court. Rine now argues that the trial court should have declared a mistrial.

"If a party claims entitlement to a mistrial, he must timely ask the court to grant him such relief." West v. Commonwealth, 780 S.W. 2d 600, 602 (Ky. 1989). "[I]t is clear that a party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise, the issue may not be raised on appeal." Id. After the trial court sustained the objection, Rine's defense counsel requested no further relief. As such, we must assume that defense counsel was satisfied with the relief granted. Id. We do not find that manifest injustice resulted from this purported error; therefore, reversal on this issue is unwarranted. RCr 10.26.

Excusal of Juror for Cause

Both Rine and Fuentes raise the following issue. The Appellants argue that the trial court committed reversible error by refusing to strike for cause a juror who worked for the Cabinet for Families and Children (CFC). During voir dire, Juror W revealed that she worked at the CFC office that investigated D.F.'s death, though she did not transfer to that office until after the investigation had concluded. Juror W also stated that she was on the same team as the man who had personally investigated D.F.'s death and

assumed similar job duties, but explained that she had not discussed the case with him or anyone else. She went on to assure the trial court that she could weigh all evidence fairly and impartially, without giving greater weight to the testimony of CFC employees.

Rine and Fuentes contend that reversible error occurred when they were compelled to exercise a peremptory strike to remove Juror W, who should have properly been removed for cause. Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993). Rine's assertion, however, is without merit as the strike sheets of Rine, Fuentes, and the trial court show only Fuentes as using a peremptory challenge on Juror W. Therefore, Rine cannot claim that prejudice resulted, because she was not forced to use a peremptory challenge to remove the juror from the venire panel.

Fuentes' claim of error must also fail. The record reveals that both Rine and Fuentes each struck nine jurors, for a total of eighteen peremptory challenges. RCr 9.40 entitles jointly-tried defendants with an alternate juror to a total of thirteen peremptory challenges: eight to be used jointly pursuant to subsection (1) of the rule, an additional challenge to each defendant if tried jointly, another additional challenge to each defendant if an alternate juror was called, and one more to the defendants to share pursuant to subsection (2). See Springer v. Commonwealth, 998 S.W.2d 439, 444 (Ky. 1999). Here, the defendants each struck nine jurors, for a total of eighteen peremptory challenges. In other words, both Rine and Fuentes were granted more peremptory challenges than required by the rule. Accordingly, neither can claim that they were prejudiced by the trial court's refusal to strike Juror W for cause.

Fuentes' Allegations of Error

Amendment of the Indictment

Fuentes raises two additional issues on appeal. The first is that the Commonwealth improperly amended the indictment to conform to the proof at the close of its case-in-chief. Fuentes was initially indicted on one count of murder (KRS 507.020), one count of criminal attempt to commit murder by complicity (KRS 506.010, KRS 502.020), and one count of criminal abuse in the first degree (KRS 508.100). Count Two of the indictment initially read as follows:

> That on or about the 22nd day of April, 2002, in Warren County, Kentucky, the above-named defendant committed the crime of Criminal Attempt to Commit Murder By Complicity when with the intention of promoting or facilitating the commission of Criminal Attempt to Commit Murder First Degree, she solicited, commanded or engaged in a conspiracy with April Rine or any other unnamed persons to commit the offense or aided, counseled or attempted to aid them in the offense of an attempted murder of D---- F------, Bowling Green, Kentucky. Contrary [to] KRS 506.010[,] 507.020[,] 502.020.

After defense counsels' motions for directed verdicts were denied, the Commonwealth moved to amend count two of the indictment to charge complicity to commit murder, rather than attempted murder. Fuentes' attorney did not object to the amendment and did not request a continuance even after the trial court asked if the parties wanted to be heard on the matter. Nor did Rine's attorney object. The trial court stated that it was his understanding that no one was ever being tried for attempted murder, as all conceded that the child clearly died.

Fuentes' argument on appeal is that it was error to amend the indictment because changing the charge from complicity to commit attempted murder to complicity to commit murder charged a different offense and increased the required penalty.

Fuentes also alleges that the Commonwealth changed its theory of the case that Fuentes aided and abetted Rine in the murder, to a theory that Fuentes failed to protect her child from Rine.

We first note that this issue is not preserved by Fuentes, and we therefore may reverse only if the amendment to the indictment resulted in palpable error. RCr 10.26.

The court may permit an indictment to be amended any time before the verdict or finding if "no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." RCr 6.16. Both theories offered by the Commonwealth as to Fuentes' complicity in the murder were pursuant to KRS 502.020:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Only subsections (a) and (b) were delineated in the indictment. The jury was instructed on, and Fuentes was eventually convicted under, the theory espoused in subsection (c). This alleged change in theory did not result in Fuentes being charged with a different offense. We have held that merely altering the subsection of the statute under which a defendant is charged does not result in the charge of a different offense. Schambon v. Commonwealth, 821 S.W.2d 804, 810 (Ky. 1991). Accordingly, Fuentes was not prejudiced by the amendment to the indictment.

The amendment of the charge from complicity to commit attempted murder to complicity to commit murder does, however, result in the charge of a different offense.

It is not clear why Fuentes was initially indicted on complicity to commit attempted murder. The only additional evidence required to prove the amended offense was the death of the child, which was never in dispute. Moreover, Fuentes was, in fact, charged with murder pursuant to KRS 507.020 in addition to the complicity and abuse charges.

"[O]ur courts have consistently held that an indictment is sufficient if it fairly informs the accused of the nature of the charged offense and is not misleading." Varble v. Commonwealth, 125 S.W.3d 246, 251 (Ky. 2004). We cannot conclude that Fuentes was misled by the initial indictment, as she was at all times aware that D.F. had died and that she was being charged with murder and complicity. Therefore, we are unable to conclude that the trial court's amendment of the indictment affected Fuentes' substantial rights resulting in manifest injustice. RCr 10.26.

Sufficiency of the Evidence

Lastly, Fuentes argues that there was insufficient evidence to convict her of complicity to commit murder and first-degree criminal abuse and therefore, she was entitled to a directed verdict. We do not agree.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Sufficient evidence was presented for a reasonable jury to find Fuentes guilty of complicity to commit murder. The record reveals that on the night of D.F.'s death, Fuentes had taken numerous unprescribed narcotics before retiring to bed. As a result, she was unable to respond when she heard her child screaming for help from the bathroom. Moreover, Fuentes was aware of Rine's attitude and behavior towards D.F.

Fuentes knew her mother seriously disapproved of the child's ethnicity. Fuentes was aware of Rine's physically abusive behavior: she had observed her mother strike D.F. on one occasion, bloodying her mouth. Fuentes also was aware that her mother was using a piece of PVC pipe on D.F. as a form of physical punishment. As D.F.'s mother, Fuentes had a legal duty to protect D.F. from Rine and in failing to do so, wantonly engaged in conduct which created a grave risk of death to D.F. under circumstances manifesting an extreme indifference to human life. KRS 502.020(1)(c); KRS 507.020. Accordingly, the trial court did not err in refusing to direct a verdict of acquittal on the complicity to commit murder charge.

There was also sufficient evidence to convict Fuentes of first-degree criminal abuse. Evidence in the record revealed that Fuentes struck D.F. on the head with a ceramic spoon and with the PVC pipe at least once in the presence of others. The autopsy report revealed a litany of chronic abuse to the child: multiple marks on the fronts and backs of her legs, marks on her back, a scar on her left cheek under the eye, bruises, internal hemorrhages in the pancreas and the lining of the stomach, abrasions to the lip, a hemorrhage at the lip, bruises on the inside of her scalp, abrasions to the vaginal area, arms, and feet, and multiple remote pattern injuries consistent with being beaten with a piece of PVC pipe. D.F.'s thymus was markedly diminished, a finding often seen in chronically stressed children. The evidence also revealed that Fuentes had D.F. sleep in a cardboard box on the kitchen floor when she had toilet training accidents. Without doubt, there was sufficient evidence for a reasonable juror to find Fuentes guilty of first-degree criminal abuse. We find no error.

For the foregoing reasons, the judgments of the Warren Circuit Court are hereby affirmed.

All concur.

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