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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-1091-MR

GROVER CLIFF GABBARD — APPELLANT

V.

APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
2002-CR-0013

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Grover Cliff Gabbard, was convicted of murder by a McLean Circuit Court jury and received a sentence of life imprisonment. His appeal comes before this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant asserts the following trial errors: 1) the improper admission of hearsay testimony, 2) the improper denial of a recusal motion, 3) the improper bolstering of the Commonwealth's witnesses, and 4) a misstatement concerning parole eligibility. For the reasons stated herein, the judgment of the trial court is affirmed.

Appellant's estranged wife, Phyllis Gabbard, disappeared on January 22, 2000. Officers canvassed McLean County in search of the victim and the victim's vehicle. On February 3, 2000, Ms. Gabbard's automobile was pulled from the Green River and her body was found inside. The autopsy revealed that she had suffered two gunshot wounds to the back. Despite numerous inconsistencies in Appellant's statements to the police, no useful evidence was obtained and the investigation stalled for about two

years. At that point, two of Appellant's associates – Melvin Edmonds and Gary Hunt - made statements to the police implicating him in the murder. Hunt initially contacted police, stating that Edmonds had once revealed some sort of involvement in Ms. Gabbard's death. Edmonds later revealed that Appellant came to his home on the morning of January 22, 2000, and asked that Edmonds drive him out to the river. According to Edmonds, he drove to the guardrail where Appellant exited the car and proceeded alone to the bank of the river. Edmonds thereafter heard two gunshots. Appellant was indicted by a McLean County grand jury on May 2, 2002, on the charges of murder and persistent felony offender in the second degree.

I. HEARSAY TESTIMONY

Appellant first asserts that the trial court improperly admitted the hearsay testimony of Jennifer Raines, the victim's neighbor. Though both parties admit that the testimony at issue is clearly hearsay, the trial court permitted its introduction pursuant to KRE 803(3). Appellant argues that Raines' testimony is inadmissible because it does not fall within the requirements of the KRE 803(3) state of mind exception.

The testimony in question is as follows:

> Commonwealth: On January the 21st or 22nd . . . did Phyllis Gabbard say to you that she had done something or was going to do something that was going to make him (Appellant) upset or mad?
>
> Raines: Yes.
>
> Commonwealth: Now, tell us exactly what was said. This was after, first of all, after he (Appellant) had left, is that correct?
>
> Raines: Yes.
>
> Commonwealth: Okay.
>
> Raines: That he was going to be mad.

Commonwealth: Well, use the exact words, if you can.

Raines: Okay. Said that he was going to be, I mean, he was going to s—t when he, whenever he found out that she had filed for divorce and asked for the truck that she had before they even got together.

KRE 803(3) permits a hearsay statement to be admitted if the statement reveals the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. We have previously held that declarations of a victim's present intent to obtain a divorce and to inform a spouse of that fact are within the scope of KRE 803(3) because declarations of present intent cast light upon future intentions as opposed to past events. Crowe v. Commonwealth, 38 S.W.3d 379, 383 (Ky. 2001), citing Moseley v. Commonwealth, 960 S.W.2d 460 (Ky. 1997).

Raines' testimony does not fall within the scope of KRE 803(3) because the victim's statement does not reflect a present intention, but instead represents a commingling of belief and past action. The victim did not state that she was going to file for divorce and seek possession of the truck, but instead stated that she believed Appellant would be angry when he found out that she had already done these things. Additionally, the statement does not indicate that the victim even intended to inform Appellant of the divorce or the truck, but simply reflected her belief that he would be angry "whenever" or however he found out.

Although Raines' testimony constituted inadmissible hearsay, we have concluded that any error in this regard was cumulative and rendered harmless by the testimony of other witnesses. White v. Commonwealth, 5 S.W.3d 140, 142 (Ky. 1999);

RCr 9.24. Trooper Payne, an investigating officer, testified without objection that Appellant admitted to engaging in frequent disputes with the victim over material possessions, living arrangements, and other men, including a dispute on the night before her disappearance. Sherry Thomas, the victim's sister, testified about Appellant's rocky relationship with the victim as well as arguments that had occurred immediately before the victim's disappearance. Melvin Edmonds testified that Appellant was upset with his wife because he believed she was seeing another man. Additionally, Appellant testified as to the stormy nature of his relationship with his wife. There was no reversible error.

II. RECUSAL MOTION

For his second assignment of error, Appellant contends that he was substantially prejudiced by the trial court's failure to grant a recusal motion. The basis of the recusal motion was that the trial judge had served as prosecuting attorney against Appellant ten years previously on an unrelated charge that was being used to support a second-degree persistent felony offender (PFO) charge in the present case. Ultimately, the Commonwealth chose not to prosecute the PFO charge. We find no error.

The standard for disqualification under these circumstances is whether the trial judge has previously served as a lawyer or rendered a legal opinion in the matter in controversy. KRS 26A.015(2)(b). Appellant's prior conviction was not the matter in controversy in this case. The matter in controversy in this case was Appellant's guilt or innocence as to Ms. Gabbard's death. Because the Commonwealth chose not to prosecute the PFO charge, the conviction that was used to support it had no relevance in this case and therefore, does not fall within the "matter in controversy" requirement of

KRS 26A.015(2)(b). See also Carter v. Commonwealth, 701 S.W.2d 409, 410 (Ky. 1985). There was no error.

III. BOLSTERING CREDIBILITY

Appellant next claims that the Commonwealth improperly bolstered the credibility of Melvin Edmonds and Gary Hunt and made improper comments concerning the truthfulness of these witnesses' testimony in its closing arguments. Appellant concedes that both of these alleged errors are unpreserved for appellate review. Of course, we may address an alleged error not properly preserved for review if the alleged error is palpable and affects the substantial rights of a party. RCr 10.26. We have examined the testimony in question and conclude that the Commonwealth neither improperly bolstered the testimony of these witnesses, nor overstepped its wide boundaries in its closing statements. As we detect no error, review pursuant to RCr 10.26 is unwarranted.

IV. PAROLE ELIGIBILITY

Appellant's final allegation of error is that he was denied due process of law and fair sentencing due to a misstatement regarding parole eligibility delivered by a probation and parole officer during his testimony at the sentencing phase. The officer correctly testified that a person must serve twenty years on a life sentence in order to become eligible for parole. However, the officer misstated the parole eligibility when he testified that a person must serve forty-two years and six months of a fifty-year sentence in order to become parole eligible. See KRS 439.3401(3) (a defendant becomes eligible for parole after serving either eighty-five percent of his sentence or twenty years, whichever is less); See also Hughes v. Commonwealth, 87 S.W.3d 850, 855 (Ky. 2002). Appellant argues that this misstatement affected his substantial rights

because it left the jury with the impression that Appellant would be eligible for parole sooner if he served a life sentence than a fifty-year sentence. Appellant again concedes this error is unpreserved for appellate review and requests review pursuant to RCr 10.26.

Demonstrating palpable error affecting a substantial right is an arduous task. RCr 10.26 requires a showing of manifest injustice, which we have interpreted as "a substantial possibility . . . that the result of the trial would have been different" absent the error or, alternatively stated, an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). Turning to the present matter, we first note that misinformation provided to a jury concerning parole eligibility has required reversal in situations where the death penalty was ultimately imposed. Perdue v. Commonwealth, 916 S.W.2d 148, 163 (Ky. 1996), cert. denied, 519 U.S. 855, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996). Furthermore, we acknowledge the possibility that the jury in this matter imposed a life sentence under the impression that Appellant would be eligible for parole sooner than if it had agreed upon a fifty-year sentence.

However, we balance these concerns against the very serious probability, if not likelihood, that the jury sentenced Appellant to life due to the utterly senseless nature of the crime and the callous manner in which he disposed of his own wife's body. Moreover, we note that the information regarding parole eligibility on a life sentence was accurate, which was the sentence ultimately handed down. For these reasons, we are not convinced that a substantial possibility exists that the jury would have sentenced Appellant otherwise even if it had been correctly informed regarding parole eligibility on a fifty-year sentence. As such, reversal is not required.

For the foregoing reasons, the judgment of the McLean Circuit Court is affirmed.

Graves, Johnstone, Keller, Scott, and Wintersheimer, JJ., concur. Cooper, J., dissents by separate opinion, with Lambert, C.J., joining that dissent.

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2002-SC-1091-MR

GROVER CLIFF GABBARD — APPELLANT

V.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
02-CR-13

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE COOPER

Phyllis Gabbard was last seen alive (except by her murderer) on the morning of January 22, 2000. On February 3, 2000, her red Ford Taurus automobile was found submerged in the Green River with her dead body inside. The cause of death was two gunshot wounds inflicted before the vehicle was submerged. A witness who was working on the opposite side of the river claimed to have seen what he believed was an orange-colored object sink into the Green River at about noon on January 22, 2000. Appellant, the victim's sometimes-estranged husband, was the primary suspect. The Commonwealth advanced two possible motives for the murder at trial: (1) jealousy; and (2) anger because Phyllis had sued Appellant for divorce and sought to be awarded his only means of transportation, a Ford pickup truck.

Appellant and Phyllis married in 1996. They lived with Phyllis's two children by a prior marriage in a mobile home owned by Appellant's aunt, Ila Garrett, in Island, Kentucky. Garrett, who lived in a separate residence in the Island community, had made the down payment on the mobile home, and Appellant made the monthly lien payments until he lost his job. Appellant and Phyllis agreed to separate in August 1999. On August 26, 1999, they hired a lawyer to draft a separation agreement that would essentially allow each of them to keep the property then in their respective possessions. Specifically, Phyllis was to receive the Ford Taurus automobile and hold Appellant harmless for the remaining indebtedness on it; and Appellant was to receive the Ford pickup truck and hold Phyllis harmless for the remaining indebtedness on it. Although both parties executed the separation agreement, no action for divorce was filed at that time.

The couple reconciled several times over the next several months, a process the prosecutor described in his closing argument as a "hot and cold" relationship. During one reconciliation in November 1999, Phyllis received a tort settlement of four to five thousand dollars, which she used to pay off the remaining indebtedness on the pickup truck. Appellant and Phyllis separated again in December 1999. Appellant moved into a camper that he parked at Ila Garrett's residence in Island; Phyllis moved to a house in Sacramento, Kentucky, a few miles away. Since the mobile home was not being used, Garrett decided to sell it and signed a six-month listing contract with a realtor in Owensboro.

The jealousy motive was fostered primarily by the testimony of the victim's sister, Sherry Thomas. She testified that on January 12, 2000, she berated Phyllis for using all of her settlement money to pay off the debt on Appellant's pickup truck. An argument

ensued during which Phyllis ultimately told Thomas that she could no longer visit with Phyllis's children. Admittedly out of spite, Thomas contacted Appellant and falsely told him that Phyllis was seeing other men. Appellant related this information to his close friend, Melvin Edmonds, who also suggested jealousy as a motive at trial. Appellant testified that although he was suspicious, Phyllis assured him she was not seeing anybody else – and there was no evidence at trial that she was.

The divorce/pickup truck motive was fostered by the testimony of Jennifer Raines, who lived down the street from Phyllis in Sacramento. Raines testified over strenuous objection that while visiting Phyllis during the evening of January 21, 2000, Phyllis told her that Appellant "was going to s--t whenever he found out that she had filed for divorce and asked for the truck that she had before they ever got together." I agree with the majority opinion that Raines's testimony does not fall within any exception to the hearsay rule and, therefore, was inadmissible. Moseley v. Commonwealth, 960 S.W.2d 460 (Ky. 1997). I disagree, however, with the majority opinion's characterization of this testimony as cumulative and, therefore, harmless. A review of the six volumes of the transcribed testimony of this trial reveals that THERE WAS NO OTHER EVIDENCE THAT PHYLLIS HAD FILED FOR DIVORCE OR THAT SHE WAS ASKING TO BE AWARDED THE PICKUP TRUCK. Appellant considered the evidence so damning that his chief alibi witness, Ila Garrett, testified four times, once without solicitation, that Appellant never drove the pickup truck (implying, of course, that he would not have cared if it were awarded to Phyllis in the divorce). Appellant, though claiming that he did not have a driver's license, admitted that he drove the truck to the post office, on back roads, to Melvin Edmonds' residence, and around Island, but insisted that he would not have killed his wife over a $5,000 pickup truck.

Under cross-examination by the prosecutor, he also denied that Phyllis had ever told him that she had filed for divorce and asked for the truck in her divorce papers.

Raines also testified that Appellant called Phyllis's residence several times during Raines's visit and that she and Phyllis ultimately drove to Appellant's camper residence, where Phyllis spotted Appellant at a window and sounded her horn. They then returned to Sacramento. Shortly thereafter, Appellant appeared at Phyllis's residence with Melvin Edmonds (who remained outside in his car), and he and Phyllis discussed getting together later that night. Because Appellant had been drinking, Phyllis offered to drive. Appellant then left and Edmonds drove him back to his camper. It was after Appellant left that Phyllis supposedly told Raines that she had sued Appellant for divorce and asked for the pickup truck. Raines then departed and returned to her own home.

According to Appellant, Phyllis subsequently picked him up at the camper in the Ford Taurus, and they proceeded to the mobile home where they had formerly resided. An argument occurred there which culminated in Phyllis slamming a door so hard that the doorknob poked a hole in the wall. They then drove to Sacramento and spent the night together at Phyllis's residence. At 9:19 A.M. on January 22, Appellant and Phyllis jointly called Ila Garrett from Phyllis's residence to ask if they and the children could move back into the mobile home. Garrett responded that it was too late because she had already signed the listing contract. This evidence of a reconciliation occurring after Sherry Thomas told Appellant that Phyllis was seeing other men and less than three hours prior to the murder substantially denigrated the prosecution's jealousy theory, leaving only the pickup truck theory as a viable motive.

After learning that the mobile home was no longer available, Appellant and Phyllis again argued and Phyllis drove Appellant back to the camper, spun her tires on the gravel, and departed at a high rate of speed. Appellant claimed this argument resulted from his refusal to move out of the camper and into Phyllis's Sacramento residence. The jury could reasonably have believed, however, that during this argument, Phyllis told Appellant what she had previously told Raines, i.e., that she had filed for divorce and asked to be awarded the pickup truck – and that such was Appellant's motive for murdering her slightly more than two hours later. In fact, the prosecutor strongly suggested in closing argument that the primary motive for the murder was anger over the divorce and the pickup truck, viz:

> Now, what we have and what we have heard is simply this. We know that defendant separated with Phyllis Gabbard in August. We know that they went to his lawyer's office and signed a settlement agreement – who gets what in their separation, including he gets his truck and he pays for it. We know that they're back and forth, back and forth, hot and cold, in and out. We know that in November – sometime in November she gets a settlement in, four or five thousand dollars, and during a hot time, she pays off his truck. The truck he's going to get under that – in the agreement.
>
> . . .
>
> And what else do we know about that night? They made plans to get together. We also know that after he left of what she said about he was going to you-know-what when he finds out I'm going after that truck.
>
> . . .
>
> We have information – Sherry Thomas called him. She says hey, did you know – shouldn't have. That's something she's going to live with the rest of her life, but she did it. Did that play a role in it? I don't know. . . .
>
> But we do know that he was suspicious of her fooling around on him. We do know that he was calling. Cliff, come over here and check, there's nobody else here but me and Jennifer. We do know that was going – and we don't know what she said to him that sent him off. Going after the truck. I'm leaving you. It's done.
>
> . . .
>
> The important thing is even though Ila Garrett may not recall him ever driving the truck, he drove it. He drove it to the post office, drove it to – and drove it and drove on the back roads . . . .

"The relevant inquiry under the harmless error doctrine 'is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Jarvis v. Commonwealth, 960 S.W.2d 466, 471 (Ky. 1998) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This same "harmless error" standard was reaffirmed for constitutional errors (such as this Confrontation Clause violation) in Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless." Id. at 23-24, 87 S.Ct. at 828. Raines's testimony was neither cumulative nor harmless. Crowe v. Commonwealth, 38 S.W.3d 379, 384 (Ky. 2001). It provided the only credible motive for Appellant to have murdered his wife, and it was elicited from no other witness at this trial except Raines.

Accordingly, I respectfully dissent and would reverse and remand this case to the McLean Circuit Court for a new trial at which Raines's hearsay testimony would be excluded.

Lambert, C.J., joins this dissenting opinion.