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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-1023-MR

DATE 9-15-05 E.M.A. Grow, D.C.

PHILLIP L. BROWN — APPELLANT

V.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
2002-CR-101

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This appeal is from a judgment based on a jury verdict that convicted Brown of murder, first-degree burglary and first-degree robbery. He was sentenced to life in prison without the possibility of probation or parole for 25 years.

The questions presented are whether two prospective jurors should have been removed for cause; whether hearsay evidence was improperly admitted; whether evidence of bias by prosecution witnesses was erroneously excluded; and whether the defendant was denied the right to present evidence in his defense.

The victim was brutally murdered inside her home on or about the 10th, 11th, or 12th day of January, 2001. A state medical examiner testified that the cause of death was multiple blunt force and sharp force injuries sustained in an assault. Both a tire iron and knife were recovered from the scene. The victim's television was missing.

On the night of January 12, 2001, a police officer came into contact with Brown and noticed that he had some scratches on his left wrist. A couple of days later, the police photographed the two scratches and confiscated his clothes. A T-shirt belonging to Brown gave a positive chemical test indicating the presence of blood but could not be confirmed.

In a taped statement given to police on November 6, 2001, Brown denied knowing anything about the crimes perpetrated against the victim. When asked why some of his confiscated clothes had what appeared to be blood on them, he said that he had cut his wrist moving a speaker out of a car. In a second statement given to police eight days later, Brown indicated that two other individuals, Jerry and Joseph Kemp may have been involved in the crime. He later recanted this story at trial.

Brown was indicted and tried for the murder, first-degree burglary and first-degree robbery of the victim. Among other witnesses, four individuals, including Jerry and Joseph Kemp, testified against Brown. All four individuals had some type of criminal record. Brown testified in his own defense and completely denied the charges.

The jury convicted Brown of all of the offenses. He was sentenced to life in prison without the possibility of probation or parole for twenty-five years for the murder, fifteen years for the first-degree burglary and ten years for the first-degree robbery. The fifteen year sentence and the ten year sentence were ordered to run consecutively, but concurrently with the life sentence. This appeal followed.

I. Removal of Prospective Jurors

Brown argues that the trial judge erred in refusing to excuse two prospective jurors for cause. It is unnecessary to address this issue because we are reversing this case on other grounds and it is unlikely this issue will arise on retrial.

II. Double Hearsay Testimony

Brown contends that prejudicial hearsay evidence was improperly admitted. In particular, he asserts that the proper foundation was not laid for the introduction of the double hearsay testimony. We disagree.

A prosecution witness, Hughes, testified that he never had any conversation with Brown about the victim and further stated that he never made any statement to another individual, Lane, about any such conversation he had with Brown. Following the denials by Hughes, the Commonwealth elicited testimony from Lane that Hughes had told him that Brown had admitted to committing the murder. Lane also stated that Hughes had told him that Brown said if he did not believe him, he could drive by the victim's house to see that he (Brown) had left the door open.

Defense counsel only made a general objection to the testimony of Lane. The trial judge ruled that the testimony was admissible on grounds that it was impeachment of a prior witness.

Although the testimony of Lane as to what Hughes said Brown told him was double hearsay, it was admissible because each part of the combined statements conforms with an exception to the hearsay rule. KRE 805. See also, Thurman v. Commonwealth, 975 S.W.2d 888, 893 (Ky. 1998). Brown's statements were admissible as admissions of a party. KRE 801A(b)(1); Thurman, supra. Hughes could have testified to those statements because he was the person to whom the admissions were made. His statements to Lane were then admissible as prior inconsistent statements of a witness. KRE 801A(a)(1); Thurman; Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

The proper foundation was laid for the admission of Lane's testimony by asking Hughes if he had made any statements to Lane. KRE 613(a); Thurman. The fact that Hughes was never asked if he had made the particular statements to Lane is of no consequence. Hughes denied making any statements to Lane about what Brown had said to him. There was no error in the admission of the testimony.

III. Evidence of Bias of Prosecution Witnesses

Brown claims that the trial judge abused his discretion and denied him his rights of due process and confrontation by refusing to allow him to introduce evidence establishing that key prosecution witnesses had received legal assistance from the Commonwealth. We must agree.

Before trial, the Commonwealth Attorney filed a "Voluntary Compliance With Defendant's Request For Discovery" in which he detailed the assistance given to four prosecution witnesses, Jerry Kemp, Joseph Kemp, Roy Ingram and Brant Lane, in their own criminal cases. The assistance given "in exchange for information provided" ranged from helping the witnesses obtain release from jail via bond reductions or shock probation to reduction or dismissal of charges. At trial, defense counsel asked each of these witnesses during cross-examination about the assistance they had received. Each of them either equivocated or denied having any knowledge of receiving assistance from the Commonwealth.

Wanting to impeach the testimony of the four witnesses, defense counsel sought to introduce the discovery document through the testimony of an Adair circuit clerk pursuant to KRE 801A(b). The trial judge rejected the testimony on grounds that the prosecuting attorney was not a party to the action. Defense counsel was permitted to do an avowal of the circuit clerk's testimony.

A criminal defendant has a constitutionally protected right to cross-examine witnesses in order to expose a potential bias or motivation in testifying. Turner v. Commmonwealth, 153 S.W.3d 823 (Ky. 2005) *citing* Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 354 (1974). He also has a right to put in evidence any fact which might show bias on the part of a witness who has testified against him. Adcock v. Commonwealth, 702 S.W.2d 440 (Ky. 1986).

Here, Brown was denied the right to present evidence which demonstrated the potential for bias on the part of the four prosecuting witnesses. The document sought to be introduced was admissible as an admission by a party under KRE 801A(b). The prosecutor was a representative of the Commonwealth and the Commonwealth was certainly a party to this action. The document may have also been admissible under the public records exception to the hearsay rules. Considering the entire record, we are unable to conclude that the error was harmless. Consequently, this case is reversed and remanded for a new trial.

IV. Right to Present a Defense

Brown asserts that the trial judge abused his discretion and denied him his due process right to present a defense when he refused of allow him to introduce evidence of alternative perpetrators. We disagree.

The trial testimony of Jerry Kemp and others indicated that Jerry Kemp was in possession of a television very similar to the one taken from the victim. In fact, Jerry Kemp admitted that he had the television in his house; that he helped remove it when people began connecting it to the one taken from the victim's house and that he took the police to the location where he abandoned it. The police were unable to find a

television at that location. Apparently, some dairy farmers had found a similar one earlier and unknowingly disposed of it.

During Brown's case-in-chief, he presented a witness who indicated that she had a television stolen from her home and that the Kemp brothers were involved. This occurred almost a year after the crime in this case. The trial judge prohibited the testimony and admonished the jury to disregard the portion of it they heard. The witness later testified by avowal that her television was stolen from her home and that several individuals, one of whom was Joseph Kemp, had participated in the theft. She later heard that Jerry Kemp was in possession of the television and she attempted to retrieve it from him. Unable to do so, she had all the participants arrested. Jerry Kemp later returned the television and the charges were dropped.

A defendant does have a right to introduce evidence that another person committed the offense with which he is charged. Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2003). That right, however, is not unlimited. Evidence is not automatically admissible simply because it tends to show that someone else committed the offense. Beaty supra. For instance, motive evidence alone is insufficient to guarantee admissibility. Beaty. The same can be said for evidence of opportunity. Beaty.

Evidence that Jerry and Joseph Kemp were involved with or were in possession of a second stolen television nearly a year after the present crime was committed demonstrated neither motive nor opportunity in this case. Moreover, although Brown had indicated earlier in a statement to the police that the Kemps where involved in the present crime, he recanted that story entirely at trial. He still claimed that he did not commit the present offenses, but when he testified, he was no longer casting any blame

on the Kemps. Brown was not denied his right to present a defense by the exclusion of the "reverse 404(b)" evidence.

The judgment of conviction is reversed and this matter is remanded for a new trial.

All concur except Johnstone, J., who concurs in result only.

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