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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

FINAL
DATE 10-20-05 E.A.Grant D.C.

2003-SC-0328-MR
AND
2004-SC-0506-TG

STEVIE LYN ENGLAND — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
01-CR-00068

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Steven England was convicted of complicity to murder Lisa Halvorson. The jury sentenced him to life without parole after finding the aggravating circumstance of committing the crime for profit.[1] England appeals to this Court as a matter of right.[2]

On or about July 7, 2000, England ended the life of Lisa Halvorson in her front yard. Lisa died from blunt-force trauma to the neck, and her body was bloodied and bruised from being strangled and run over by a car, among other things. England

---

[1] KRS 532.025(2)(a)(4). The aggravating factors located in KRS 532.025(2) act to enhance a convict's sentence when the conviction was for an offense that authorizes the death penalty. In this case, England was convicted of complicity to commit murder, which is a capital offense. When one is convicted of complicity she is sentenced as if she had committed the crime herself. KRS 502.020. Murder is a capital offense. KRS 507.020(2).

[2] KY CONST. § 110(2)(b).

raises fifteen claims that this Court should grant him a new trial. Discerning no reversible error, we affirm the conviction.

I. Facts

Lisa Halvorson was found dead on July 10, 2000, by her mother and her sister. She was found in the gravel portion of her driveway, and had been lying there for about three days when she was found. It was later determined that Lisa died of asphyxia. The Kentucky State Police identified Cori Poindexter, a friend of the victim, as being the last person to see Lisa alive late on the night of July 7.

The police searched the home of Lisa's boyfriend, Tyrone McCary, and collected evidence from his body. That search did not lead to any evidence that merited his arrest. The police then focused the investigation on Lisa's former husband, Pat Halvorson. Halvorson's employees were interviewed in late 2000, and Halvorson himself was questioned in February 2001. The KSP also attempted to obtain more information regarding the life insurance policy Halvorson had on Lisa. However, while the KSP was conducting this investigation, Karl Woodfork contacted the KSP and informed a detective that he had information about Lisa's murder. After meeting with Woodfork, the KSP wired him for sound and sent him to England's house with instructions to record discussions about the murder. During those taped conversations, England made statements that were sufficient to warrant further questioning.

England was brought in for questioning on March 30, 2001. During the interrogation England asked whether he should be talking and asked whether he should talk to his lawyer. His lawyer was not called, and England gave an inculpatory statement about the incident. He said that he and McCary went to Lisa's home at dusk where McCary repeatedly choked, beat, and ran over Lisa with a car. England admits

that he punched Lisa in the jaw, knocking her to the ground. But he insists that he did not participate in the murder, and that he even tried to persuade McCary to stop. When McCary disregarded his entreaty, England went to the truck to wait for McCary. England claimed that they left her alive at the end of her driveway. Incidentally, Lisa was found dead where England said they left her. England was tried separately from McCary on November 6, 2002. He was convicted of complicity to murder, and sentenced to life in prison without parole. Additional relevant facts will be discussed below.

I. Analysis

A. The statement

England asserts that the inculpatory statement he gave to the police while being interrogated should not have been admitted into evidence because his Sixth Amendment rights were violated or because his statement was a result of coercion on the part of the police. Either of his two theories would suffice to exclude this evidence. However, we find that the statement was properly admitted by the trial judge.

1. Right to counsel

England asserts that his Sixth Amendment rights were violated by the police when they continued to question him after he invoked his right to counsel. But England's Sixth Amendment right to counsel had not attached at the time England confessed to the crime because adversarial judicial proceedings had not commenced.[3] Therefore, his Sixth Amendment rights were not violated. However, even if England had claimed that it was his Fifth Amendment right to counsel that was violated, rather

[3] Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996).

than his Sixth Amendment right to counsel, he still would not prevail. This is not a pedantic distinction. Though both the Fifth and Sixth amendments contain a right to counsel, the effect of those rights is very different.

In any event, England had not unambiguously invoked his Fifth Amendment right to counsel. His confession was properly admitted at trial. Indeed, even cases cited by England do not support his contention. For instance, England cites to this Court Dean v. Commonwealth[4] wherein we held that the statement "[s]hould, should I, should I have somebody here? I don't know" insufficient to invoke his Fifth Amendment rights.[5] This was a response to the police-interrogator ensuring that Dean understood his Miranda[6] rights. In Dean the Court noted that this statement was ineffectual to invoke the right to counsel because it was not "unambiguous and unequivocal."[7] The same is true here. After being advised that he had the right to counsel, Detective John Saylor informed England that he was being questioned because of his role in the murder of Lisa. Detective Saylor told England that he knew that England was there when Lisa was killed and that England was paid money to do it. England responded that he did not know what Detective Saylor was talking about and that he did not know Lisa. Therefore, it was clear that England understood the reasons for which he was being interrogated. A little later, England responded: "I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about. I'll be honest with you. Like I said, me and Tyrone are

---

[4] 844 S.W.2d 417 (Ky. 1992).
[5] Id. at 420.
[6] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
[7] Dean, 844 S.W.2d at 420.

friends. I've never seen that woman." After further questioning England said, "I don't want to get in no trouble. I mean my lawyer. I don't know."

These are not unambiguous and unequivocal invocations of the right to counsel. The United States Supreme Court held in Davis v. United States[8] that the words "maybe I should talk to a lawyer" are insufficient to invoke the right to counsel because the statement is equivocal. And contrary to England's assertion that mentioning that he had an attorney to Detective Saylor – "my lawyer" – was sufficient to invoke the right to counsel, the mere hint that a defendant has an attorney in another matter does not constitute a request for counsel in the present issue.[9] In essence, England merely said that I guess you will have to call my lawyer and I don't know if I need my lawyer because I don't want to get into trouble. We hold that these statements do not rise to the level of impressing upon the interrogator that the suspect has requested an attorney before continuing the questioning. The statements were properly admitted at trial.

2. Coercion

Second, England also argues that his confession to the police was involuntary because he was coerced. Consequently, he argues, his conviction should be overturned because the evidence should have been excluded at trial. There are three criteria that must be present for a confession to be deemed involuntary such that it should be inadmissible as evidence. First, the police activity should be objectively coercive. Second, the defendant's free will must be overwhelmed by the coercive

[8] 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).
[9] See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989).

activity. Finally, the coercive activity must be the crucial motivating factor behind the defendant's confession.[10]

To show that his confession was coerced England argues that the police promised him that if he cooperated the death penalty would be taken off the table and that he might see his kids and sick father again. He also claims that use of a false-friend during the interrogation constituted coercion.

First, we do not agree that the statements made by the interrogators with regard to the death penalty and England's family constitute coercion. The comments about the death penalty did not tell England anything he did not already know. The police had already informed England of the reason for his being questioned, and had already played a tape of England talking with Woodfork making inculpatory responses. This would lead anyone to understand the gravity of the situation. In fact, England said that he knew Lisa's murder could be punished by the death penalty when the police informed him of this fact. And the police were not telling England anything that was illegal or untrue. The death penalty could legally have been sought upon a conviction for the murder. Therefore, we do not agree that these comments amounted to objective coercion on behalf of the police such that England's confession should have been excluded.

Second, the false-friend technique is often used to make the suspect feel more at ease so that he will not feel intimidated by the situation. This technique does not amount to coercion in most circumstances. While there are situations when using a false-friend could amount to coercion, such a situation is not present here. Sergeant

---

[10] Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 2000). See also Colorado v. Spring, 479 U.S. 564, 574, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987).

Hendley and England played on the same athletics teams in high school, which was more than twenty-five years earlier. Furthermore, there was no evidence in the record that the two had continued a friendly relationship after high school. This is not the type of relationship one would consider as inherently coercive. It is, rather, more akin to a good cop, bad cop routine. And there is nothing in the record that would show that Hendley's role in the interrogation was objectively coercive.

Additionally, England's will was never overcome by any allegedly objectively coercive actions on the part of the police. He made a reasoned determination to cooperate with the police after being presented with the evidence already compiled against him. In sum, we affirm the trial court's ruling to admit the confession because it was not coercively obtained.

B. Death penalty as an option

England asserts that the death penalty should have been taken out of the realm of potential penalties because he relied on an offer by the Commonwealth when he confessed to the crime. However, there never was an offer to England. It is true that the interrogators noted that the death penalty was an option, and it is also true that the interrogators said they had talked to the prosecutor and there was only one deal. But England puts words into the interrogators' mouths when he states that the deal was that the death penalty would not be pursued. The prosecution is not required to be absolutely honest with the suspect, and since there was no true offer upon which England could rely, we affirm the trial court's ruling that the prosecution was properly allowed to seek the death penalty in England's trial.

C. The restraining order affidavit

England further asserts that information contained in an affidavit in support of an Emergency Protective Order against his co-conspirator should have been excluded, and its admission was reversible error. England is correct insofar as he contends that this evidence is inadmissible because it does not meet any exceptions to the hearsay rule, is inherently unreliable, and violates his Sixth Amendment right "to be confronted with the witnesses against him."[11] This Court has made it abundantly clear that statements made for the purpose of obtaining a restraining order are not admissible at trial.

In both Bray v. Commonwealth[12] and Barnes v. Commonwealth[13] we said that affidavits for restraining orders were inadmissible hearsay because they were offered to prove the truth of the matter asserted – that the defendant had made a threat against the victim's life. And the facts of this case present distinctions without a difference. For example, the statement in Barnes, given by the victim, stated that the defendant had assaulted and threatened to kill her. The same is true here, except that it was against a co-conspirator of the defendant rather than the defendant himself. Lisa's statement was that McCary threatened to kill her or get someone to do it for him. Additionally, neither statement was subject to cross-examination. The distinction here is that the evidence regarding the restraining order was not against the defendant, but rather against the defendant's co-conspirator, Tyrone McCary. We see no meaningful difference in using this hearsay evidence against the defendant and in using it against a co-conspirator of the defendant. In both cases the evidence was used to establish

---

[11] U.S. CONST. amend. VI. See also Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).
[12] 68 S.W.3d 375 (Ky. 2002).
[13] 794 S.W.2d 165 (Ky. 1990).

intent by proving a threat had been made. This violates the hearsay rule regardless of whether the matter asserted was about the defendant or a co-conspirator. The Commonwealth's contention that the evidence was not against the defendant may be germane as to relevance, but not as to hearsay. As England was being prosecuted for complicity with McCary in the murder of Lisa Halvorson, and proof of McCary's intent was an element,[14] hearsay evidence that would have been error against McCary is also error against England.

Therefore, we reaffirm and extend the Barnes doctrine,[15] which is that an affidavit in support of a motion for a restraining order is not admissible at trial regardless of whether the defendant on trial is the person against whom the restraining order was sought.[16]

Of course, to overturn England's conviction, the improperly admitted evidence must have been prejudicial to his case. The Kentucky Rules of Evidence state that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party has been affected."[17] And in Crane v. Commonwealth we noted that one's substantial rights are affected when there is a "reasonable possibility that absent error the verdict would have been different."[18] We now turn to the harmless error inquiry.

If ever there were evidence that (put into the context of the particular facts of the case) failed to satisfy the "verdict would have been different" standard required

---

[14] KRS 502.020.
[15] Id.
[16] Obviously, this evidence may be admitted for other reasons provided that the hearsay and relevance rules are satisfied. For instance, it may be used under KRE 801A as a prior statement of a witness.
[17] KRE 103(a).
[18] 726 S.W.2d 302, 307 (Ky. 1987).

for reversal, it is here. Simply put, had this evidence been excluded from the jury's consideration no different result could have logically been reached. The prosecution had a taped confession with England admitting participation in this crime. This evidence is corroborated by both the circumstances of the murder and the crime scene, and is enough to deem the admission of the affidavit against England's co-conspirator harmless. But there is more. The prosecution also introduced competent evidence of a taped conversation between England and Karl Woodfork. In March 2000, Woodfork contacted the police and informed it that he had information regarding Lisa's murder. After telling the police that McCary had sought to hire him and England to murder Lisa, Woodfork agreed to record conversations with England. In those conversations, which were played for the jury, England said McCary had not paid money owed to him and considered ways to coerce McCary to pay him the money.

With this abundance of evidence, we hold that the improper admission of the affidavit was harmless, as the jury would not have returned a different verdict had the evidence been excluded.

D. Motion to sever trials

England next asserts that granting the Commonwealth's motion to sever the trials of England and McCary was reversible error. England argues that the Commonwealth failed to meet its burden for severance, and that he was prejudiced because had he and McCary been tried jointly the most England could have been convicted of was assault. This contention is based on the fact that at a joint trial the Commonwealth would not have been able to use any portions of England's confession that referred to McCary.[19] This only proves the Commonwealth's argument that it would

[19] Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

have been prejudiced had its motion to sever the trials not been granted. In fact, this is a picture-perfect case for the efficacy of severing trials. Here there are two defendants who conspired to murder. Without severance, one's confession could not have been fully used against him to avoid violating the constitutional rights of the other.

Furthermore, England made a motion to sever the trials one week before the trial was scheduled to begin on September 3, 2002, which shows that he must not have seriously objected to severance. From the foregoing, the trial judge did not abuse his discretion in granting the Commonwealth's motion to sever the trials of England and McCary.[20]

E. Right to employ a criminologist

England next claims that his conviction should be reversed because he was denied sufficient public funds to employ a criminologist. The criminologist was purportedly going to testify that the body was moved after death, that Caucasian hairs were found in Lisa's hands and panties, and that the sperm found in Lisa's vagina did not come from either England or McCary. However, this evidence, except for movement of the body, was presented at trial from other witnesses. The only facts that the criminologist was to testify to that could merit reversal is that the body was moved after death. However, upon England's motion for the Commonwealth to pay for a criminologist, the trial judge disallowed the employment of the criminologist because the cost was an unreasonable $3,500 per day. The judge stated that England could submit other names, but England failed to do this. Instead, England requested that the state

[20] See Boggs v. Commonwealth, 424 S.W.2d 806 (Ky. 1966) (holding that there should be no reversal of a judge's ruling to sever in the absence of an abuse of discretion).

pay for the purchase of a forensic pathology treatise, which was granted by the trial court. There was no reversible error.

F. Statements of the victim

England next contends that it was improper to allow Cori Poindexter to testify about statements made by Lisa during a telephone conversation she overheard between Lisa and McCary. Poindexter testified that during the conversation McCary accused Lisa of having an affair, that Lisa responded by crying and refusing to eat, and that Lisa told her that McCary had said if he could not have her, nobody would. England appeals from the admission of this evidence because it is not relevant and violates the hearsay rule.

Hearsay is a statement by a declarant, other than one made while testifying at trial or at a hearing, offered to prove the truth of the matter asserted.[21] There were three statements about which Poindexter testified. First, Poindexter testified that she overheard McCary accuse Lisa of having an affair. This statement is not hearsay. The matter asserted was that Lisa was having an affair, and it was not offered by the Commonwealth to prove the truth of it. It was ostensibly used, rather, to show the general belligerency McCary had toward Lisa at a time near to her murder. Second, Poindexter testified that Lisa cried and refused to eat in response to the conversation with McCary. This, too, is not hearsay. To be hearsay, there must be a statement. A statement is defined in KRE 801(a)(2), and it requires that the statement be intended as an assertion. Crying is not an assertion. Rather, it is a physical manifestation of an emotion or sensation. It is not a statement for hearsay purposes. However, even if crying were intended as an assertion and offered to prove the truth of

[21] KRE 801(c).

whatever was asserted – thereby implicating the hearsay rule, it would still be subject to admission into evidence as a statement of Lisa's then-existing emotional condition of mental feeling or pain.[22] Finally, Poindexter testified that Lisa told her that McCary told her that if he couldn't have her, nobody would. This is hearsay. The declarant was Lisa, and the matter asserted is that McCary said that nobody would have her if he couldn't.[23] However, this statement is admissible under the spontaneous statement exceptions to the hearsay rule, present sense impressions[24] and excited utterances.[25] The underlying premise behind these exceptions is that they are inherently reliable because they are contemporaneous with the observation, safe from defects in memory, and unlikely to result from calculated thought. Lisa's statement described what McCary said immediately after their phone conversation ended. Thus it qualifies as an exception under KRE 803(1). Furthermore, Lisa's statement was an excited utterance because McCary's statement that he would not let anybody else have her if he couldn't precipitated a startling event to Lisa, and her statement to Poindexter relating to McCary's threat was made immediately after the phone conversation while she was crying. Therefore, the trial court did not abuse its discretion,[26] and the statement was properly admitted.

---

[22] KRE 803(3).

[23] It is important to note that the matter asserted is not that nobody would have Lisa if McCary couldn't, but that McCary said those words. Lisa is the declarant, not McCary. Had the declarant been McCary, then this statement would not be hearsay because the statement was not offered to prove that Lisa would not be had by anyone but McCary. Rather, the statement was offered to prove that McCary made that threat.

[24] KRE 803(1).

[25] KRE 803(2).

[26] See Souder v. Commonwealth, 719 S.W.2d 730 (Ky. 1986) (trial court rulings regarding hearsay exceptions are entitled to deference).

Second, this evidence meets the test of relevance. The Commonwealth was charged with the burden of proving that England conspired with McCary to kill his ex-girlfriend, Lisa. The trial court allowed this statement into evidence after considering its relevance, noting that evidence that McCary threatened Lisa the day of the murder and that Lisa was scared of McCary goes to the Commonwealth's theory.

England further contends that the out of court statements should have been excluded because their probative value is substantially outweighed by the prejudicial effect.[27] We agree with the overwhelming precedent on this issue, that we should not disturb a trial court's KRE 403 ruling to admit evidence unless the trial judge has abused his discretion.[28] This deference is bestowed upon the trial judge because she is in a much better position to determine the prejudicial effect of particular evidence due to being infinitely more familiar with the case than are appellate judges. In light of the deference given to the trial court, we affirm this ruling of the trial court.

However, even if we were to conclude that the trial judge abused his discretion in admitting this evidence, such an error would be harmless in light of the remaining competent evidence. As discussed above, the Commonwealth presented two audio tapes to the jury: in one England confessed to the crime at the police station, and in the other England made inculpatory statements to Woodfork.

G. African-Americans on the jury panel

England further asserts that his conviction should be overturned because there were not a sufficient number of African-Americans on the jury panel. England does not, however, assert any wrongdoing on the part of the judicial system. His only

---

[27] KRE 403.

[28] See Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.10 (3d ed. 1993) for a more thorough discussion of federal decisions regarding FRE 403.

assertion is that the courts are required to ensure that African-Americans are represented in the jury panel, regardless of the results of the selection process, which is random. Here, the jury panel was randomly selected by computer from registered voters who also had a driver's license. This process resulted in two African-Americans being randomly selected to be on the jury panel. One of two was dismissed for cause because of a familial relationship with the defendant. The other was not dismissed for cause or peremptorily challenged, but was not seated on the jury because of the draw. Because there is not even a scintilla of evidence that African-Americans were systematically excluded from the jury panel, England is not entitled to reversal of his conviction. Simply put, one is entitled to a fair process whereby there is no systematic exclusion of qualified candidates for the jury panel; but one is not entitled to a jury composed of a certain number of persons of a given race.[29]

H. Death-qualified jury

Similarly, England argues that his conviction should be reversed because jurors who were opposed to the death penalty should have been allowed to remain on the jury. It is well-settled law in this Commonwealth that a juror may be stricken for cause if she is unable to consider the death penalty when considering the sentence upon conviction of the defendant.[30] We hold that England's constitutional rights were not violated by excusing jurors who could not consider the death penalty as a sentence upon his conviction.

I. Tape transcripts used during closing argument

---

[29] See Patterson v. Commonwealth, 555 S.W.2d 607 (Ky. App. 1977) (disproportionate number of young people on the jury panel did not establish *systematic exclusion*).
[30] E.g., Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994). See also 9 Leslie W. Abramson, Kentucky Practice § 25.49 (4th ed. 2003).

England's next assertion is that he is entitled to a new trial because the Commonwealth used enlarged, typewritten transcripts of portions of the audio tapes between England and Woodfork. The Commonwealth attempted to introduce this evidence as an exhibit during the proof phase of the trial, but the trial court sustained England's objection because it was difficult to conclude what was said on the tapes and the interpretation was properly left to the jury. However, the trial court allowed this evidence to be used during the Commonwealth's closing argument because the prosecutor's closing remarks were the Commonwealth's theory of the case rather than evidence.

This was the proper ruling by the trial court. A party has the right to present his theory of the case to the jury as long as the evidence supports such a theory.[31] Appellant cites Sanborn v. Commonwealth[32] as support for his argument that giving the jury a transcript of an unclear tape recording is reversible error. However, the issue in Sanborn was whether it was reversible error to give the jury a transcript of such a tape recording during the proof stage of trial. Here the issue is whether a transcript is improperly presented to the jury during closing argument, not as proof but as a theory of the case. But this evidence is more akin to the transcript in Norton v. Commonwealth[33] than it is to Sanborn. The Court of Appeals, in affirming Judge (now Justice) Graves' decision to admit the transcript, noted in Norton that there is a difference in a transcript offered as evidence and one offered as guidance.[34] Also, there is no allegation of particularized errors in the Commonwealth's transcript. Such was not the case in

---

[31] Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987).
[32] 754 S.W.2d 534 (1988).
[33] 890 S.W.2d 632 (Ky. App. 1995).
[34] Id. at 637.

Sanborn, where there were discrepancies even between the court reporter's transcript of the trial and the Commonwealth's transcript. We find that the trial judge did not abuse his discretion, and decline to extend Sanborn to include all instances where a transcript is presented to the jury when the tape is unclear.

J. Commonwealth's closing argument about instructions

England claims that his conviction should be reversed because he was prejudiced by the Commonwealth's improper closing argument. England argues that the Commonwealth's argument was in contradiction to the instructions given to the jury. The instructions stated that the jury could return a verdict of guilty if it believed that England killed her by "striking her, running over her with a truck, and causing her death by strangulation." During its closing the Commonwealth stated that the jury could return a verdict of guilty if it found that England engaged in one of those actions. The Commonwealth concedes that the prosecutor made the alleged statement. However, England did not make a proper objection to this statement. Pursuant to RCr 9.22, counsel must make a contemporaneous objection to any improper comment during closing argument. If counsel fails to so object, then a reviewing court will not reverse a conviction unless the comment rises to the level of palpable error, as enunciated in RCr 10.26.

The only question respecting this issue is whether there was palpable error, which exists when a reviewing court concludes that a substantial possibility exists that the result would have been different.[35] When taken as a whole, we find that the Commonwealth's closing argument was not palpable error. Had England properly

[35] E.g., Jackson v. Commonwealth, 717 S.W.2d 511 (Ky. App. 1986).

objected to the comment he may have been entitled to some form of relief, such as an admonition. However, he did not, and we do not find palpable error.

K. Notice of aggravating circumstances

Furthermore, England claims that his conviction should be reversed because he did not receive notice of the Commonwealth's evidence of aggravation, which triggered the death penalty. However, KRS 532.025 does not require written notice to the defendant of the Commonwealth's evidence. It only requires that the defendant be made known of such evidence. Here, England was certainly made known of the aggravating evidence, which was that England participated in the murder of Lisa for profit. This was dealt with at the pre-trial suppression hearing, where England claimed that he had not received notice that the Commonwealth was seeking the death penalty. However, England had such notice. For example, England received the revised notice dated August 12, 2002, of aggravating circumstances sent to both him and McCary (his co-conspirator). England's argument that it does not reference him in the body of the notice is unpersuasive, as he was mentioned in the heading and the notice was sent to his attorney. In fact, England attached the notice to his motion and argued that such notice was not contained in the indictment.

This is not a novel proposition. In Francis v. Commonwealth[36] we held that it was not necessary for the defendant to receive written notice. What was important was that the defendant be apprised of the aggravating evidence and have the ability to prepare to meet it.[37] The same is true here. It is clear that England understood that the Commonwealth was seeking the death penalty, he understood the

---

[36] 752 S.W.2d 309 (Ky. 1988).
[37] Id. at 311.

evidence upon which the Commonwealth was seeking the death penalty, and he had the opportunity to prepare to meet that evidence. In short, England had the type of notice KRS 532.025 contemplated. We decline this invitation to overturn his conviction.

L. Aggravating circumstances in the indictment

Closely akin to England's most previous argument, England asserts that because the aggravating circumstances were not included in the indictment the Commonwealth was prohibited from seeking the death penalty. However, this issue has been recently decided by this Court in Furnish v. Commonwealth,[38] a case in which three opinions were written, but all agreeing to the pertinent issue in this case: aggravating circumstances need not be included in the indictment for the Commonwealth to seek the death penalty.[39] Like in Furnish, the indictment here clearly noted that England was being charged with "Murder, A Capital Offense" for "running over and strangling Lisa Halvorson." Moreover, England was made known of the specific evidence upon which it intended to seek capital punishment. Additionally, this was not preserved for review by a pre-trial motion as required by RCr 8.18, which was also the case in Furnish.[40]

M. Recorded conversations

England further contends (apparently without the agreement of his counsel) that the trial court should not have allowed the Commonwealth to introduce the taped conversation between himself and Woodfork. He claims that this is a violation of his Fourth Amendment rights, as applied to the states by the Fourteenth Amendment, and that he is entitled to a new trial. However, use of this type of

---

[38] 95 S.W.3d 34 (Ky. 2003).
[39] Id. at 41.
[40] Id.

evidence does not violate a defendant's Fourth Amendment rights. A defendant's conversations with a police informant do not violate the defendant's constitutional rights where the informant was legally in the place where the taped conversations took place and every conversation used by the prosecution was either directly with the informant or carried on with the defendant's knowledge of his presence.[41]

N. Exculpatory evidence

England's last claim for reversal of his conviction is that he was not given exculpatory evidence by the Commonwealth. Specifically, he contends that he was not informed that the sperm found in Lisa's vagina was from her boyfriend, Shannon Jenkins, that there was a Caucasian head hair found in Lisa's panties, and that there were Caucasian head hairs in her hands. However, England was aware of the crucial parts of this information prior to trial. For instance, he was aware that the hair in Lisa's hand was probably from a cat. As to the sperm found, England argued that the sperm taken from Lisa did not match either England or McCary. Also, England was aware that Jenkins stated that he recently had sexual intercourse with Lisa. In fact, the additional test taken with Jenkins' sample was done so the prosecutor could rebut a claim that the sperm could have come from Lisa's killer.

Therefore, all the evidence England claims could have given the jury a reasonable doubt was available to England: that the hairs and sperm did not match England or McCary. The trial judge's ruling is not to be disturbed absent an abuse of discretion,[42] and we hold that it was not an abuse of discretion to deny a new trial. This is true especially in light of the competent evidence that England and McCary left Lisa

---

[41] See e.g., Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966).

[42] E.g., Anderson v. Commonwealth, 63 S.W.3d 135, 141 (Ky. 2001).

to die in the exact location in which she was found. "It is clear that in order to warrant a new trial, the defendant must make a showing of reasonable certainty that a different verdict would have been reached had the evidence been presented."[43] Had the evidence been as England wishes, the result would not have changed. He was properly convicted on the competent evidence, and we see no reason to overturn that conviction.

Lambert, C.J., and Graves, Johnstone, Keller, Scott, and Wintersheimer, JJ., concur. Cooper, J., concurs in result only.

[43] Id. (citing Carwile v. Commonwealth, 694 S.W.2d 469, 470 (1985)).

COUNSEL FOR APPELLANT:

Benjamin J. Lookofsky
P. O. Box 696
Mayfield, KY 42066

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonego
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204