IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000716-MR

DATE 10-13-05 Lisa Grau HPD.C.

BRUCE DEWAYNE HALEY — APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HON. JAMES L. BOWLING, JR, JUDGE
INDICTMENT NO. 03-CR-00085

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Bruce Dewayne Haley, was convicted in the Bell Circuit Court of Capital Murder of Michael Ray Dozier, and Assault in the First Degree of Philip Gray. Haley was sentenced to twenty (20) years on the Murder Conviction, and ten (10) years on the Assault in the First Degree conviction, to run consecutively with each other. He appeals to this court as a matter of right. For the reasons set forth herein, we affirm the convictions.

FACTS

On November 11, 2002, in Bell County, Trooper Keith Baker of the Kentucky State Police was dispatched to the home of Bruce and Kathy Haley, regarding a reported feud between the Haley and Dozier families. Rhonda Dozier, the ex-wife of the decedent, Michael Dozier, who was living in his trailer at the time of his death, provided

the reason for the ongoing feud. She stated that after she and Michael divorced in July 2001, she went on a weekend trip with Bruce Haley to Gatlinburg, not knowing Haley was married. Michael Dozier found out about the trip and it became a source of "bickering" between the Dozier and Haley families. The feud resulted in various criminal charges against Rhonda and Michael Dozier, as well as Kathy Haley.

After referring Mrs. Haley to the county attorney, Trooper Baker proceeded to the residence of Michael and Rhonda Dozier in an attempt to ease the tensions between the two families. While knocking on the door at the Dozier residence at approximately 9:00 p.m., Trooper Baker heard gunshots from what he described as more than one gun, and more than one shot. He returned to his cruiser to investigate further, and shortly thereafter encountered Phillip Gray coming off an embankment near railroad tracks. Gray had been shot several times in the back and left arm, and did not tell the trooper who shot him, but did state he had been walking down the road drinking beer and had been shot, and did not indicate anyone else was with him.

A second officer arrived and also asked Gray who shot him, but he also informed the other officer that he did not want to tell, and that he would take care of it. Gray was sent to the hospital and the officers conducted a search of the area around the railroad tracks. The officers recovered a fully loaded .22 caliber pistol from Gray's back pocket. They then searched the embankment and railroad tracks where Gray had descended from. They found a .410 shotgun with an expended shell in the chamber and a .12 gauge shotgun with a live round in the chamber, as well as, a live .30/.30 cartridge, an expended casing or hull of a .30/.30 round, and 5 expended casings or hulls of .22 caliber rounds. They noted that the area overlooked the Dozier residence.

At the hospital, the doctors discovered a 4" wide by 5" long wound to Gray's left upper arm, a wound to the armpit, and a wound in the back. A blood sample revealed Gray's blood alcohol level was .243.

The following morning, sometime after 7:00 a.m., an area youth discovered the body of Michael Dozier lying in the underbrush on the embankment. He left and called the police, who arrived at 8:27 a.m. The body was removed from the scene for autopsy. A box with three .12 gauge shotgun shells was found in the victim's pocket.

Dozier's body had 3 gunshot wounds: a flesh wound to his thigh muscle, another flesh wound to the side of his kneecap, and a fatal shot to the lower front of the chest on his right side. There was a white crushed-up substance in his jean pocket which was identified as hydrocodone, an opiate similar to Loratab. Hydrocodone was found in his system and his blood alcohol level was .217.

Appellant Haley, who was immediately charged with killing Dozier, was arrested about 9:15 a.m. on an unrelated matter. He consented to a warrantless search of his home. The police collected a variety of weapons from his residence, all of which were introduced at trial, including: a Marlin Firearms Corp., Model 336SC .30/.30 caliber lever action rifle; a Savage Arms, Stephens Model 89, .22 caliber lever action rifle; a Keystone Sporting Arms, "Cricket" .22 caliber youth rifle; and a .30/.30 live Winchester round.

At trial, a KSP firearms expert testified to the variety of guns and ammunition obtained from the railroad tracks, from the Haley residence, and from Phillip Gray and the body of Michael Dozier. Specifically, the expert found: (1) the bullets removed from Michael Dozier's body were from a .22 caliber weapon and did not come from the .22

caliber guns carried by Dozier or Gray; (2) the spent .22 casings found at the crime scene were all from the same gun but not from any of the guns found at the Haley residence or at the scene; (3) none of the guns removed from the Haley residence could be positively identified as having been fired in the shooting of either victim; (4) one of the spent .30/.30 shells found at the railroad tracks had been cycled through the same gun as the live .30/.30 round found at the Haley home; and (5) neither of the .30/.30 shells could have passed through the Marlin .30/.30 caliber rifle from the Haley home.

Thus, the testimony of Gray was the only direct link to Bruce Haley's involvement in the shootings. Gray testified that he and Dozier went up to the railroad tracks with a case of beer and the two shotguns to watch Dozier's home. He said they saw someone approach on the railroad tracks toward them. Dozier yelled twice at the person, but there was no answer. Gray testified that the individual was Bruce Haley, and that Haley was the first to fire, and, in response, Dozier and Gray returned fire.

Gray was approximately three feet away from him when he shot. According to Gray, Haley put a pistol in his pants after firing the first round, and had a rifle in his other hand. When he saw the rifle, Gray ran and was shot in the back. Dozier managed to return one shot after the initial round from Haley.

Haley, however, testified that, at the time of the shooting, he was sitting drunk in his truck which was parked in his friend Rick Shepard's driveway. Shepard testified that he and Haley spent most of the day together, until about 6:00 – 7:00 p.m., and then saw him the next morning about 6:30 – 7:00 a.m. Although he could not testify as to what Haley might have done in that roughly 12-hour span, he was aware that Haley could not

move his car the following morning (after the murder) because his car was blocked by Shepherd's daughter, Jennifer. He did not see or hear Haley's vehicle leave that night.

Jennifer Shepard testified she arrived home that night a little before dark, and that she did, in fact, block Haley's truck upon returning from work, but she also said that, when she arrived, she only saw Haley's truck, not Haley himself.

The jury convicted Haley on both counts, Murder and Assault in the First Degree. They recommended sentences of twenty (20) years for Murder, and ten (10) years for Assault, with the sentences to run consecutively. Appellant now appeals his convictions.

He claims the trial court erred: (1) in admitting guns and ammunition unrelated to the crime; (2) in not granting Appellant a continuance; (3) in excluding a tape recorded message; (4) in allowing evidence regarding a prior shooting into the Dozier residence; and (5) in admitting a recording of Appellant's prior statement.

We will address each claim separately.

GUNS

After reviewing the record, we find Appellant failed to preserve this objection. Pursuant to RCr 10.26, appellate courts may review unpreserved allegations of error only when the unpreserved issues are palpable errors that affect the substantial rights of Appellant, i.e., a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996); see also Byrd v. Commonwealth, 825 S.W.2d 272, 276 (Ky. 1992).

Further, relief may be granted only upon a determination that the alleged error has resulted in manifest injustice. Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997).

Such a showing requires that "the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings." Id. at 28; United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993). Stated differently, "[e]rror rises to this level only when it is so shocking that it seriously affected the fundamental fairness and basic integrity of the proceedings conducted below." United States v. Tutiven, 40 F.3d 1, 7-8 (1st Cir. 1994). Additionally, review for a palpable error is discretionary. Olano at 732.

Here, there is neither error, nor prejudice. In a recent decision, we noted that introduction of evidence "is grounded in a logical demand that, when offering a tangible object into evidence, a party should show, as a preliminary matter, its connection to the incident involved in the litigation." R. Lawson, The Kentucky Evidence Law Handbook, § 11.00[2][a], at 840. We have upheld the admission of weapons into evidence based on eyewitness testimony that the weapon was the one used in the commission of the offense, Beason v. Commonwealth, 548 S.W.2d 835, 836-37 (Ky.1977); that it was of the same size and shape as the weapon used in the commission of the offense, Sweatt v. Commonwealth, 550 S.W.2d 520, 523 (Ky.1977); or that it was found at the scene of the offense and was capable of inflicting the type of injury sustained by the victim, Barth v. Commonwealth, 80 S.W.3d 390, 402 (Ky.2001); Grundy v. Commonwealth, 25 S.W.3d 76, 79-80 (Ky.2000)." Gerlaugh v. Commonwealth, 156 S.W.3d 747 (Ky. 2005).

Moreover, in Barth, we found "evidence could be admitted if: it was found at a time and a place furnishing reasonable ground to connect it in some way with the [incident]. The proof need not positively show the connection; but there must be proof rendering the inference reasonable or probable from its nearness in time and place or

other circumstances." 80 S.W.3d at 402 (citing Higgins v. Commonwealth, 134 S.W. 1135, 1138 (Ky. 1911). See also Grundy v. Commonwealth, 25 S.W.3d 76, 79-81 (Ky. 2000) (holding admissible a fist-sized piece of concrete found a few days after supposedly being used in an alleged assault)).

Here, a KSP firearms expert testified, in relevant part, that (1) the bullets removed from Dozier's body were from a .22 caliber weapon and (2) one of the .30/.30 spent shells found at the railroad tracks had been cycled through the same gun as the .30/.30 live round found at Haley's home. Thus, the introduction of Haley's .22 caliber weapons and his .30/.30 weapons had a "reasonable ground to connect it in some way with the [incident]." Barth, supra, 80 S.W.3d at 402. Therefore, the admission of Haley's weapons does not rise to the level of palpable error.

CONTINUANCE

In this argument, Haley contends the trial court abused its discretion in denying him a continuance on the morning of trial. He argues that Rhonda Dozier had a diary or log, and it was not provided to him until Tuesday, with the trial commencing on Thursday. He contends he needed a continuance to determine how to use this document in his examination of Rhonda Dozier. The citations to the record provided by Haley are not audible on the tapes of the trial, and the "diary" was not introduced into evidence, nor is it part of the record. Haley concedes that the substance of the document related to the feuding between the Dozier's and Haley's, but argues that a brief continuance would have been proper.

On request for a continuance, a trial court is to consider seven factors in deciding whether to grant or deny a motion for continuance. Those factors are: (1) the length of

delay; (2) previous continuances; (3) inconvenience to litigants, witnesses, counsel, and the court; (4) whether the delay is purposeful or caused by the accused; (5) availability of other competent counsel; (6) complexity of the case; and (7) whether denying the continuance will lead to identifiable prejudice. Snodgrass v. Commonwealth, 814 S.W.2d 579, 591 (Ky. 1991). "The granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge has abused that discretion, this court will not disturb the findings of the court." Williams v. Commonwealth, 644 S.W.2d 335, 337 (Ky. 1982).

Here, we do not find an abuse of discretion. Haley did not designate the time needed. This factor, considering the jury had been summoned and was waiting, must weigh in favor of denial of a continuance. As the record indicates no previous continuance, that factor is neutral. The next factor, inconvenience to all concerned, clearly weighs in favor of denial of a continuance. The remaining factors, absent the question of prejudice, are considered neutral. As to prejudice, Haley has set forth nothing to establish a prejudice. From the record before us, we cannot find an abuse of discretion. Any error in this instance however, would be considered harmless.

TAPE RECORDING

Appellant next argues the trial court erred by excluding a tape recorded message, a "tape recording of a duplicated duplicate," that was possible evidence of an alternate perpetrator. The tape purported to be a recording of a telephone message from Bill Bond, brother of Kathy Haley, ex-wife of the defendant. The substance of the message was "call Mike and his buddy and tell them I'll be at their house in about ten hours." There was no evidence introduced as to how the call was made, when it was

made, to whom, or how it was obtained. Further, no one, including the person who turned the recording over to the police, could identify who the caller was.

The Due Process Clause affords a criminal defendant the fundamental right to a fair opportunity to present a defense. Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). The exclusion of evidence violates that constitutional right when it "significantly undermine[s] fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-1268, 140 L.Ed.2d 413, (1998). A proper defense includes the right to introduce evidence that someone other than the accused committed the crime. Beaty v. Commonwealth, 125 S.W.3d 196, 207 (Ky. 2003).

> "We have been adamant that a defendant 'has the right to introduce evidence that another person committed the offense with which he is charged.' Eldred v. Commonwealth, 906 S.W.2d 694, 705 (Ky. 1994); see Harvey v. Commonwealth, 100 S.W.2d 829, 830 (Ky. 1937) ("It has been uniformly held by this court that one accused of a crime may introduce evidence tending to prove that the crime was committed by another, subject, however, to the right of the Commonwealth to rebut such evidence."); Kelly v. Commonwealth, 83 S.W.2d 489, 490 (Ky. 1935); cf. McGregor v. Hines, 995 S.W.2d 384, 388 (Ky. 1999) ("It is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense, and we reject any alternative that would imperil that right."). A trial court may only infringe upon this right when the defense theory is 'unsupported,' 'speculat[ive],' and 'far-fetched' and could thereby confuse or mislead the jury. Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997).
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> Federal courts have also specifically recognized the importance of the defendant's right to produce evidence that a third party actually committed the crime. E.g., United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir.1996)

> ("fundamental standards of relevancy require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged") (quotation omitted); United States v. Blum, 62 F.3d 63, 68 (2d Cir.1995); (reversing when trial court prevented defendant from introducing evidence that third party committed crime); United States v. Stevens, 935 F.2d 1380, 1384 (3d Cir.1991) (reversing when trial court prevented defendant from introducing evidence that third party had perpetrated another crime so similar in modus operandi to the crime with which defendant was charged as to identify third party as perpetrator); Pettijohn v. Hall, 599 F.2d 476, 480 (1st Cir.1979) ("Evidence that someone other than the defendant was identified as the criminal is not only probative but critical to the issue of the defendant's guilt.").

Beaty, 125 S.W.3d at 207-208. We noted, however, that "evidence is not automatically admissible simply because it tends to show that someone else committed the offense . . . . [For instance,] in a homicide case, a defendant is not entitled to parade before the jury every person who bore some dislike for the victim without showing that the [alleged alternate perpetrator or 'aaltperp'] at least had an opportunity to commit the murder." Id. at 208. Before evidence of an "aaltperp" can be introduced, it must be shown that this other person had both motive and opportunity to commit the crime. Id. That is not so in this case.

Here, the identity of the caller is unknown. The time and date of the call is unknown. It could be argued that the caller was Bill Bond, in which case a motive of protecting his sister, Kathy Haley, existed, but that still would not establish an opportunity. Absent both elements, motive and opportunity, evidence of an "aaltperp" is inadmissible. In this case, because there was no evidence introduced that established both elements, the tape recording was properly excluded, even had it not been "hearsay" – which it was. We find no abuse of discretion here.

PRIOR SHOOTING

Appellant next argues the trial court erred by allowing evidence regarding a prior shooting into the house of Michael and Rhonda Dozier. Ms. Dozier testified that, on October 6, 2002, she and Michael were at home in the early morning hours when someone came onto the back road and shot at their trailer. Two bullets were found in the living room door, one in their son's bed, one in the refrigerator door, and one in the bathroom wall.

Ms. Dozier then testified that, on November 10, 2002, Mr. Dozier answered the telephone at 3:00 – 3:30 a.m. and Ms. Dozier heard a person she believed to be Bruce Haley say, "Do you hear me? 4:00. Pow, pow, pow, pow."

The admissibility of evidence of uncharged crimes is governed by KRE 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) Is so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party.

In Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citing Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970)), we stated that in considering KRE 404(b) evidence, the question of whether the probative value outweighs the prejudicial effect is a task properly reserved to the sound discretion of the trial court. We further held that the standard of review of a trial court's decisions under KRE 403 is whether

the trial court abused its discretion. An abuse of discretion has been defined as a decision that was made arbitrarily, unreasonably, unfairly, or which was legally unsound. Id.; see also Daniel v. Commonwealth, 905 S.W.2d 76, 78 (Ky. 1995); Bell v. Commonwealth, 875 S.W.2d 882, 890-891 (Ky. 1994).

In Commonwealth v. Morrison, 661 S.W.2d 471 (Ky. 1983), we stated, "when dealing with evidence of a litigant's prior misconduct, when such evidence is debatably or remotely relevant, the trial court must decide whether the probative value of the evidence outweighs its inflammatory nature. If it does, the evidence is admissible. Otherwise, it is not."

Review of the facts of this case indicates that the trial court's decision to allow this evidence was legally sound. In full context, it established the reason Dozier and Gray were sitting on the railroad tracks above Dozier's home, which resulted in Dozier's murder. In fact, the prior shooting directly related to a course of conduct of the victim and Haley, thus satisfying both of the criteria set forth in KRE 404(b). Therefore, the trial court's decision was not "made arbitrarily, unreasonably, [or] unfairly." English, supra, 993 S.W.2d at 945. Accordingly, we do not find an abuse of discretion.

APPELLANT'S PRIOR STATEMENT

Lastly, Appellant argues the trial court erred in allowing the Commonwealth to play a recording of Haley's second statement to the police.

This statement was played at the close of the Commonwealth's case by recalling the lead detective in this investigation, Detective Williams. The statement was introduced because it was not consistent with the first statement Haley gave to Detective Williams. In the first statement, Haley indicated no knowledge of the crime, or

any knowledge about who may have committed the murder. He also denied having any problems with Dozier. He stated that he was drunk in his truck all night, he had partied alone, and that Dozier must have messed with someone. In the second statement, Haley implied he knew who committed the murder, someone around 25 and someone around 41 and that the crime had been committed with a .22 and .30/.30 weapon.

At trial, he admitted Dozier had obtained an Emergency Protective Order (EPO) against him, varied his previous statement to include a .44 caliber weapon as a possible murder weapon, and stated he probably had a good reason for not telling Detective Williams who the persons were that murdered Dozier.

Haley argues the previous statement was hearsay under KRE 801(c) which defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. He further argues the statement does not qualify as an exception under KRE 801A(a) (Prior statement of witnesses) or KRE 801A(b) (Admissions of parties).

The statement at issue here, regardless of its consistency with his other statements or trial testimony, is clearly admissible under KRE 801A(b)(1). Specifically, 801A(b)(1) provides that a "statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is: (1) the parties own statement . . . ." There is no dispute that this statement was, in fact, made by Haley. At trial, the Commonwealth offered Haley's statement against him. The statement was properly admitted, and therefore, there was no error.

For the reasons set forth herein, we affirm.

All concur.

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