

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-0602-MR

DATE 11-23-05 ELLA G. Taylor, H.D.C.

THOMAS EUGENE STEWART

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
1998-CR-00001-02

V.

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

On remand from this Court pursuant to an unpublished opinion rendered October 17, 2002, Stewart v. Commonwealth, 1999-SC-103-MR, the trial court reinstated the convictions of Appellant, Thomas Eugene Stewart, for first degree robbery and first degree burglary. Upon re-trial, a jury of the Hardin Circuit Court convicted Appellant of second degree manslaughter and fourth degree assault. For these crimes, Appellant was sentenced to a total of forty years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The crimes with which Appellant was convicted stemmed from a 1997 burglary and robbery which culminated in the assault of one victim and the murder of another.

The specific facts of this case have been carefully and sufficiently set out in this Court's previous opinion which was rendered on October 17, 2002. We will state all facts which are relevant to this opinion. In our previous opinion, we ruled, *inter alia*, that Appellant's initial arrest and detention for the crimes in this case was an unlawful violation of his Fourth Amendment rights under the United States Constitution. We stated, in pertinent part:

During the trial, Trooper Chaffins testified that, at the time he detained Appellant, he knew that a violent crime had been committed in the area and that the perpetrators were believed to be black. Further, he stated that after Appellant flagged him down, he stopped the car, and Appellant lifted his hands in the air. Appellant told him that his car had broken down up the road. At which point, Chaffins admitted he told Appellant to back towards the car and handcuffed him. These facts – which essentially boil down to the fact that Trooper Chaffins encountered an individual of the same race as the suspects – do not support a determination that Trooper Chaffins had probable cause to believe that Appellant had committed a crime at the time he took Appellant into custody. If anything, Trooper Chaffins' knowledge and observations prior to detaining Appellant support mere suspicion, which is insufficient to justify an arrest.

Stewart, supra at 29.

After Appellant was taken into custody by Trooper Chaffins, other officers arrived at the place where Appellant was being detained. Based on additional information gleaned from Appellant at the scene of the detention, the officers decided to bring Appellant down to the station for questioning. During his questioning, Appellant voluntarily waived his Miranda rights and confessed to being involved, along with two other co-defendants, in the crimes. This Court remanded the issue of whether Appellant's subsequent confession should be suppressed as tainted by his illegal detention and arrest. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). If the confession was determined not to be tainted and therefore, admissible at trial, we instructed the trial court to reinstate Appellant's convictions for

first degree robbery and first degree burglary. If the confession was determined to be tainted, the trial court was to retry Appellant for the crimes without the tainted confession.

Pursuant to this Court's instructions, an evidentiary hearing was held by the trial court on February 10, 2003. Based on its findings regarding what happened from the moment of the arrest to the moment of the taped confession, the trial court ruled that Appellant's confession was sufficiently attenuated from the illegal arrest so as to allow its admission into evidence. Based on this ruling and pursuant to this Court's instructions, Appellant's convictions for first degree robbery and first degree burglary were reinstated by the trial court. Appellant proceeded to trial on charges of murder and assault and was subsequently convicted of second degree manslaughter and fourth degree assault. We now address Appellant's assignments of error regarding the outcome of the trial court's evidentiary hearing on remand and his subsequent trial.

I. Trial Court's Determination of Sufficient Attenuation

Appellant first contends the trial court erred when it determined that Appellant's confession was sufficiently attenuated from his illegal arrest to render it admissible at trial. When reviewing determinations made pursuant to a suppression hearing, the trial court's conclusions of law are reviewed *de novo* while its findings of fact are deemed conclusive if supported by "substantial evidence." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky. App. 2000) (citing RCr 9.78 and Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998)).

Appellant does not challenge any of the trial court's findings of fact and accordingly, we accept and set forth the trial court's findings as conclusive. The trial court heard testimony from Trooper (now detective) Chaffins, Trooper Perry, Lieutenant

Lee, Sergeant Eckart and Appellant. From this testimony, the trial court determined that Chaffins did not question Appellant at all about the alleged crimes during his initial detention, but rather, Chaffins immediately called the Kentucky State Police Post ("the Post") to report Appellant's arrest (which this Court held was an illegal seizure under the Fourth Amendment). Within two to five minutes of Chaffins calling in the arrest, Lee and Perry, who were nearby in separate vehicles, arrived at the scene of Appellant's detention. Perry read Appellant his Miranda rights and then questioned Appellant regarding what he was doing at that location. Appellant admittedly lied to the officers and told them that he had run out of gas some ways up the road. When Appellant could not recall the names of his recent companions, the officers concluded that Appellant was not being forthright. Upon this determination, Lee directed Chaffins to take Appellant back to the Post, but specifically instructed him not to ask Appellant any questions about the crimes which had occurred in the area. Appellant acknowledged that he was not questioned about the alleged crimes by Chaffins or the other officers at anytime during his initial detention or transport to the Post.

Meanwhile, Eckart was involved in the investigation of the crime scene. He had been informed that another trooper had stopped a car in which co-defendant Aaron Camp was found. Camp was interviewed at the Post prior to the making of any incriminating statements by Appellant. During his interview, Camp told police that Appellant was involved in the crimes. Appellant arrived at the Post while Camp was being interviewed. He waited in a separate room with Chaffins, but was not handcuffed or questioned during this time. In fact, during this time, Chaffins and Appellant reminisced about "some football days," apparently being familiar with each other from sports activities in high school.

Once Camp implicated Appellant, Eckart decided to question Appellant about the alleged crimes. Chaffins was not in the room when Eckart questioned Appellant. Appellant was again advised of his Miranda rights prior to his questioning by Eckart and there is no contention by Appellant that he did not voluntarily waive these rights. Upon initial questioning, Appellant maintained his innocence. However, once he was confronted with Camp's statements, Appellant confessed to being involved in the crimes. Approximately four hours elapsed between the illegal arrest and Appellant's confession.

The trial court found that Chaffins was a relatively inexperienced officer at the time he arrested Appellant and was not a driving force in the investigation of the alleged crimes. The trial court also found no evidence to suggest that Chaffins had any intent to (1) perpetrate an illegal arrest, or (2) to use the illegal arrest to coerce a confession from Appellant.

Appellant now argues the trial court's findings of facts do not support its conclusion of law that his confession was sufficiently attenuated from the illegal arrest so as to allow its admission into evidence. We disagree. It is axiomatic that the Fourth Amendment prohibits statements obtained as a direct or indirect result of an illegal seizure to be admitted against the person whose rights were violated by the official conduct. Wilson v. Commonwealth, 37 S.W.3d 745, 748 (Ky. 2001) (citing various authorities). However, a major exception to this exclusionary rule "exists for information obtained from independent or causally remote sources." Id. In Wilson, we explained that "[e]vidence need not be excluded if the connection between the illegal conduct and the discovery and seizure of the evidence is highly attenuated, or when evidence has

been obtained by means 'sufficiently distinguishable' from the initial illegality so that the evidence is 'purged of the primary taint.'" Id. (citations and quotations omitted).

In this case, the evidence is more than sufficient to support the trial court's determination that Appellant's confession was obtained by means "sufficiently distinguishable" from the initial illegality. Glaring among this evidence is the fact that Appellant's co-defendant, Camp, who implicated Appellant in the crimes, was independently picked up and questioned by police. Therefore, it is a reasonable inference that Appellant would have been questioned regarding the alleged crimes regardless of whether he had been illegally arrested that night. Even further attenuating the illegal arrest from Appellant's confession is the fact that his confession was elicited not upon his illegal detention, but rather, upon being confronted with Camp's accusations.

Finally, we note that Appellant's confession was completely voluntary, a fact that is highly pertinent in light of evidence establishing absolutely no purposeful or flagrant attempt to violate Appellant's rights or to coerce a confession by means of an illegal arrest. See Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975). When the evidence is considered in its totality, we find the trial court did not err when it determined that Appellant's confession was obtained by means "sufficiently distinguishable" from the initial illegal arrest so to purge the confession of its primary taint. Wilson, supra, at 748.

II. Alleged Trial Errors

Appellant also alleges error during his re-trial. Appellant first contends the trial court erred when it granted a pre-trial motion to allow evidence regarding Appellant's alleged motive for the murder of one of the victims in this case. Specifically, the

Commonwealth gave notice that it would present testimony by one of Appellant's co-defendants stating that Appellant, who is black, told the co-defendant that he killed the victim because the victim was known to be prejudiced against blacks. Appellant contends that such testimony is irrelevant because motive does not constitute an element of any of the crimes with which he was charged. We disagree. While motive is never required to be proved in order to establish one's culpability for a crime, it is nonetheless generally considered relevant when determining such culpability. See, e.g., Davis v. Commonwealth, 147 S.W.3d 709, 722 (Ky. 2004).

Appellant further argues that even if evidence of motive is generally relevant when determining one's culpability in a criminal case, the relevancy in this case was outweighed by the danger of undue prejudice, confusion of the issues, and misleading the jury. See KRE 403. A trial court's decision not to exclude relevant evidence in light of KRE 403 is reviewed for abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). In support of his argument, Appellant contends that motive had never been an issue in the prior trial, that it was not crucial to the Commonwealth's case-in-chief since it did not have to prove Appellant actually stabbed the victim in order to convict him for the murder, and that the dubious testimony of a self-serving co-defendant should be considered insufficient to establish the contention. We find such arguments to bear primarily on the weight of the evidence and that any prejudice to Appellant was minimal in light of Appellant's pre-trial notice of the Commonwealth's intentions and Appellant's opportunity to cross-examine the source of the evidence. Accordingly, we find no abuse of discretion on this issue.

Appellant next contends the trial court erred by refusing to grant him a mistrial when Appellant's co-defendant did not testify as the Commonwealth predicted he would.

In its opening statement, the Commonwealth stated the evidence would show that Appellant stabbed the victim in the groin because Appellant believed the victim was prejudiced. At trial, the co-defendant testified that Appellant stabbed the victim in the groin because "I don't know, he's, he don't like many white people, you know, but I don't know, you know." In cases such as this, we must consider whether the prosecutor acted in good faith and whether the statement(s) operated to prejudice the defendant in any meaningful way. See Kinser v. Commonwealth, 741 S.W.2d 648, 653 (Ky. 1987); Freeman v. Commonwealth, 425 S.W.2d 575, 578 (Ky. 1967) ("Counsel has the right to direct the attention of the jury to all facts and circumstances that he in good faith believes will be allowed to develop in the evidence."). After careful review, we find no evidence to suggest that the prosecutor acted in bad faith in this case. Furthermore, the trial court admonished the jury that opening and closing statements were not evidence in the case. In light of the entire record, we find no undue prejudice caused by the misstatement.

Appellant contends error was further perpetuated, however, when the trial court, in light of the prosecutor's misstatement, refused to grant his remedial request to bar the Commonwealth from referring to the co-defendant's statement regarding Appellant not liking many white people in his closing argument. We disagree. In explaining its ruling, the trial court stated that the Commonwealth was permitted to comment on any evidence admitted at trial so long as it did not misstate the evidence or make reference to anything that was not in evidence. We find no error in this ruling and therefore, no accumulated prejudice to Appellant. See Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987) ("A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.").

Appellant argues, nonetheless, that (1) the co-defendant's statement constituted impermissible character evidence pursuant to KRE 404(a), and (2) the prosecutor's comments during closing argument regarding the co-defendant's statement did indeed misstate the evidence and mislead the jury to the extent that he was denied a fair trial. Specifically, the prosecutor stated:

I submit to you this is a crime of hate. Where Mr. Willian was stabbed is an insulting [sic] place to be stabbed. It wasn't that he was stabbed in the gut, or that he was in the legs, or the arms, or the head, or anything else, I mean, that place, those are our private parts. That was meant to degrade Mr. Willian, and the only person who we've heard who had those feelings was the defendant.

Appellant concedes that neither of these arguments was preserved for review and accordingly, we may review these claims for palpable error only. See KRE 103(a) and RCr 10.26. A review of the record fails to establish any individual or accumulated error arising from these claims which warrant reversal.

In his final argument, Appellant contends the trial court erred by improperly allowing the Commonwealth to use one of its preemptory challenges to strike a black juror. In Washington v. Commonwealth, 34 S.W.3d 376, 378-79 (Ky. 2000), we summarized the law in this area as follows:

Challenging prospective jurors on the basis of race violates the Equal Protection Clause. In [Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)], the United States Supreme Court outlined a three-step process for evaluating such claims. First, the defendant must make a prima facie showing of racial bias for the preemptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate 'clear and reasonably specific' race-neutral reasons for its use of a preemptory challenge. While the reasons need not rise to the level justifying a challenge for cause, self-serving explanations based on intuition or disclaimers of discriminatory motive are insufficient. Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination.

Id. (citations and quotations omitted).

In this case, a young black venire person voluntarily approached the bench and informed the court that he had been a foreperson of a jury the week before. The judge noted for the record that the case was a drug case where the defendant was a black male and that the trial result was ultimately favorable to the defendant. The venire person explained that he had an unpleasant experience on the jury the week before because other jurors accused him of being racist when he resisted their pressure to convict the defendant. The venire person further stated that there were three people on the venire panel who had served with him the week before; however, none of those people had made him feel uncomfortable. Later, when the parties were exercising their pre-emptory challenges, the prosecution decided to strike this potential juror. When the trial court stated that it would need to make a Batson record, the prosecutor explained that he did not want anyone on the jury who had a prior bad experience serving as a juror. The trial court accepted this reasoning and permitted the Commonwealth to peremptorily strike the juror.

Appellant's sole argument is that the explanation offered by the prosecutor in this case should not have been accepted by the judge as valid and neutral and should have been deemed a pretext for discrimination. See Gamble v. Commonwealth, 68 S.W.3d 367, 371 (Ky. 2002). "A trial court's ruling on a Batson challenge will not be disturbed unless clearly erroneous." Washington, supra, at 380. After careful review, we find nothing in the record to indicate that the prosecutor's reason was clearly invalid or an obvious pretext, and as such we find no clear error by the trial court. See Harris v. Commonwealth, 134 S.W.3d 603, 612 (Ky. 2004) ("The trial judge's decision is accorded great deference on this issue because the judge is in the best position to evaluate the credibility and demeanor of the prosecutor.")

The judgments of the Hardin Circuit Court are affirmed.

All concur.

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