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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 2-23-06 Ella G[illegible], D.C.

2004-SC-000143-MR

KENDRICK CHERRY APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
2001-CR-00323

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Kendrick Cherry, was convicted of murder and tampering with physical evidence by the Graves Circuit Court. Appellant was sentenced to life imprisonment for murder and five years imprisonment for tampering with physical evidence; he 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.

FACTS

On October 29, 2001, Appellant Cherry and his deceased girlfriend, the victim, were involved in a physical and verbal altercation that ended when Appellant dragged her into their home by her hair. Later that night, between 11:30 p.m. and 11:45 p.m., Randal Colley, a friend, was alone with the victim at her residence when she told him that Appellant was going to kill her when he returned. Shortly thereafter, Appellant entered the residence upset; Colley testified he saw the butt of a .25 caliber pistol in

Appellant's waistband. Colley then offered Jackson a ride which she refused. Colley left the residence thereafter.

Later that night, at approximately 1:09 a.m., on October 30, 2001, police sergeant Larry Anderson responded to a report of shots fired at Appellant's and Jackson's residence. Upon entering the residence, Sergeant Anderson found Appellant administering CPR to Jackson. When asked what happened, Appellant said she was shot in a drive-by shooting; a shot he believed came from a blue Cutlass traveling north on 15th Street. Appellant told the officer that the shot was fired when the vehicle was at the edge of the driveway. No shell casings were discovered upon a search of the area. Cherry was then taken to the police station for questioning.

While at the station, Appellant provided the police with a statement. During the questioning, he stated to several officers that it was his fault Jackson was killed. In particular, he told Detective Robert Caskey, "Mr. Caskey, I did not mean to hurt anybody. It was an accident." At no point during his conversation with the police, however, does Appellant actually state he shot Jackson; nor was this statement found on any of the recordings made of Cherry's questioning. Appellant was then arrested.

No gunshot residue was found on Appellant's hands; nor was any soot or stipple found on his clothing to indicate a close gunshot. Detective Caskey, however, explained the lack of residue by testifying that Appellant, upon hearing of the police's intention to do a gunshot residue test, began running his hands through his hair.

In jail, Appellant encountered Tyrone Wilkey, who would later testify to being threatened by Appellant two days prior with a .25 caliber pistol. While in jail, the two

men had a verbal altercation, during which Appellant told Wilkey, "You keep f---king with me, I will do you like I did that bitch."

At trial, Wilkey was called as a prosecution witness. He testified to his jailhouse "encounter" with Appellant and to the other incident he alleged occurred two days prior to the shooting, but of which Appellant states he had not heard of before. The Appellant cross-examined Wilkey, but was not permitted to show Wilkey had three felony charges pending against him; i.e., supposedly suggesting that Wilkey was hoping for preferential treatment from the Commonwealth in his own criminal matters in exchange for the testimony against the Appellant.

The trial court allowed the Appellant to present the evidence by avowal with the purpose that if it did expose a potential bias or motivation, it would be allowed before the jury. Thus, it heard arguments and testimony before deciding on the issue. Moreover, the trial judge was made aware that the prosecutor informed Wilkey long before Appellant's trial that he would not make any deals in exchange for his testimony. Appellant's avowal only specified the fact that Wilkey was facing three felony charges; no questions were asked concerning Wilkey's motivation for testifying.

The trial court even pointed this out to Appellant's counsel during the avowal but counsel chose not to ask those questions – just to rely on the existence of the pending criminal charges as sufficient proof of bias to justify their specific mention. In fact, the jury already knew (1) that Wilkey had been in jail with Appellant when the "jail house"

threat was made, and (2) just prior to the avowal, had heard that Wilkey had other pending felony charges.[1]

WILKEY'S TESTIMONY

Appellant claims the trial court committed reversible error by violating his constitutional right to fully cross-examine Tyrone Wilkey as guaranteed to him by the Confrontation Clause. We disagree.

The trial court, after the Commonwealth's objection and after conducting an in-chambers hearing as to relevancy, sustained the Commonwealth's objection to this line of questioning, holding that because the defense could not show that there had been any actual promises made to Wilkey by the Commonwealth in exchange for his testimony, the testimony was not relevant.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). "Indeed, '[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross- examination.*' " Id., (citing Davis v. Alaska, 415 U.S. 308; 94 S. Ct. 1105; 39 L. Ed. 2d 347 (1974) (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Of particular relevance here, "[w]e have recognized that the exposure of a witness[es]' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis, supra, at 316-317 (citing Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)).

---

[1] The question was asked and answered by Wilkey and then an objection was sustained, but no admonition was requested or given. The avowal followed.

It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as the Supreme Court earlier observed, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Van Arsdall, 475 U.S. at 679 (citations omitted) (emphasis in original).

"While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see, *e.g.*, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." Id. at 680.

"We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." Id. (quoting Davis v. Alaska, supra, 415 U.S., at 318, 94 S.Ct., at 1111). Appellant has not met that burden here.

Unlike in Van Arsdall, where the trial judge prevented defense counsel from asking a prosecuting witness any questions about his motivation for testifying, in this case, the trial court heard arguments and testimony before deciding on the issue. And no questions were asked during the avowal about the witness' motivations, even after proding by the judge. The trial judge was aware that the prosecutor would not make any deals in exchange for testimony. Yet, Appellant only tendered an avowal specifying Wilkey was facing three felony charges. However, the jury was already aware that Wilkey was in jail by virtue of his testimony concerning the "jailhouse encounter" and threat, was aware he had pending criminal charges and aware he was a convicted felon.

The trial judge explained the fact that Wilkey was facing charges is insufficient to show potential bias or motivation. The judge then explained that without a showing of discussions with the prosecution or police concerning favorable treatment for the pending charges or some other sort of motivation, the evidence would not be presented to the jury. Appellant here established no potential bias or motivation, so the judge properly excluded evidence of Wilkey's felony charges. This was well within the discretion afforded the trial court and respects the seperation between KRE 404(b)(1) and KRE 609(a) and (c).

Even so, a "[c]onstitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to....[a] harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might

nonetheless say that the error was harmless beyond a reasonable doubt." Van Arsdall at 684.

Thus, as the jury was already aware Wilkey was a convicted felon and in the "clutches of the law," the reasons therefore, (i.e., his three pending charges), would have added very little to his cross-examination. By this, we assume the Appellant took full use of his opportunity on avowal to show what he desired, and note again, he did not attempt to ask Wilkey questions as to why he was testifying.

The trial judge went out of his way to explain to Appellant's counsel that without a showing of discussions with the prosecution or police concerning favorable treatment for the pending charges or some other sort of motivation, the evidence would not be presented to the jury.

For the reasons set forth herein, we affirm the convictions in this matter.

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

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocacy
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, KY 40601-8204

RENDERED: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0143-MR

KENDRICK CHERRY — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
2001-CR-00323

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE COOPER

On October 30, 2001, the Graves County emergency dispatcher received a "911" call that a gunshot had been fired inside the Mayfield, Kentucky, residence shared by Louretta Suzanne Jackson and Appellant, Kendrick Cherry. When police and emergency medical technicians arrived at the residence approximately fifteen minutes later, they found Jackson lying on her back on the living room floor in front of a sofa and Appellant in the process of attempting cardiopulmonary resuscitation (CPR). Appellant told the police that he and Jackson were standing at the front door when a blue Oldsmobile Cutlass automobile pulled into his driveway and fired a shot at them, striking Jackson. Jackson died of her wound, which was later determined to have been inflicted by a .25 caliber bullet.

Detective Robert Caskey, the lead investigator, testified that police officers searched the residence and grounds with a metal detector and found no weapon or

shell casings, either inside or outside the residence. They discovered blood stains on the front door jamb but not on the floor near the sofa. They tested Appellant's hands for gunshot residue and found none. Caskey further testified that he interviewed Appellant at the police station in the presence of assistant police chief Fortner. According to Caskey, Appellant requested an opportunity to speak privately with him, and Fortner left the room. Appellant then allegedly told Caskey that "[i]t was an accident; I didn't mean to hurt anybody." However, the entire interview was recorded on audiotape, and Caskey admitted that the tape does not contain Appellant's alleged request to speak privately with him or his alleged admission. Caskey also admitted that Appellant told him that "the bullet was meant for me." Deputy Jailer James Watts testified that Appellant told him that he pointed the gun at the wall and it went off, and that he did not mean to shoot Jackson. The Commonwealth introduced evidence of other physical altercations between Appellant and Jackson, none of which involved firearms. Over Appellant's objection, Randal Colley testified that when he visited the residence earlier that night to purchase drugs, Jackson told him that Appellant "was going to kill her when he got back." Though properly preserved by contemporaneous objection, the admission of this testimony is not assigned as error on appeal. Appellant did not testify on his own behalf.

The trial court instructed the jury on tampering with physical evidence, KRS 524.100, and on all degrees of homicide, except manslaughter in the first degree (intent to kill under extreme emotional disturbance), KRS 507.030(1)(b). The jury convicted Appellant of murder, for which he was sentenced to life in prison, and of tampering with physical evidence, for which he was sentenced to five years in prison.

The only issue raised on appeal relates to the testimony of Tyrone Wilkey, who lived directly behind the house where the shooting occurred. He was fond of Jackson because the two had attended high school together. On April 11, 2002, more than five months after the shooting, Wilkey contacted Detective Caskey and executed a written statement[1] to the effect that he had seen Appellant in possession of a chrome .25 caliber pistol several weeks before the shooting, that he witnessed Appellant dragging Jackson into the house by her hair earlier on the day of the shooting, and that he heard a gunshot at the time of the murder. At trial, Wilkey testified over Appellant's objection not only that he saw Appellant with a chrome .25 caliber pistol, but also that Appellant threatened to shoot him with that weapon. The Commonwealth had not included this threat in its notice of intent to introduce evidence of "other crimes, wrongs, or acts" pursuant to KRE 404(c). The trial court overruled the objection, holding that Appellant could impeach Wilkey with his prior written statement that did not mention the threat. Wilkey further testified that on one occasion when he and Appellant were both incarcerated in the Graves County Jail, they had an altercation and Appellant stated to him: "You keep 'f'ing with me and I am going to do you like I did that bitch." This was the only direct evidence at trial tending to prove that Appellant intentionally killed Jackson.

On cross-examination, Appellant attempted to show that at the time of his testimony, Wilkey was under indictment for three separate felony offenses, one of which was scheduled for arraignment that same day. The trial court sustained the prosecutor's objection to the proffered evidence, stating that Appellant could impeach Wilkey's credibility by evidence that he was a convicted felon, but that he could not

[1] Although the statement was discussed at length at trial, it is not a part of the record on appeal.

show that there were pending charges against him unless Appellant could first prove that Wilkey had made a "deal" with the prosecutor in exchange for his testimony. The majority opinion apparently agrees, though the basis for its affirmance seems to be that "the trial judge was aware that the prosecutor would not make any deals in exchange for testimony," ante, at ___ (slip op. at 5), an assertion of prosecutorial policy that is unsupported by the record. The prosecutor stated during the in-chambers conference that he had made no deal with Wilkey, and defense counsel admitted he could not prove a deal was made, but correctly asserted that he was not required to so prove. The issue was properly preserved by avowal. KRE 103(a)(2).

The seminal case on this issue is Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In Davis, the defendant was accused of stealing a safe from a bar in Anchorage, Alaska. The safe was later discovered near the residence of the State's key witness, Richard Green. Green, a juvenile, testified that while on an errand for his mother, he encountered two men standing beside an automobile parked near his family's residence. Green identified one of the men as being the defendant, Davis, and testified that he was holding "something like a crowbar" in his hands. Id. at 310, 94 S.Ct. at 1107. Davis unsuccessfully sought to introduce evidence at trial that Green was on probation for burglary, not for the purpose of "general impeachment of Green's character as a truthful person," but to show that "Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." Id. at 311, 94 S.Ct. at 1107-08 (emphasis added). The Supreme Court held that the trial court's exclusion of this evidence denied Davis the opportunity to attack Green's credibility, thus violating Davis's right of confrontation.

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had

> counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a crucial link in the proof of petitioner's act. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, as well as of Green's possible concern that he might be a suspect in the investigation.

Id. at 317-18, 94 S.Ct. at 1111 (emphasis added) (internal citations and quotations omitted). There was no evidence that Green had a "deal" with the State in exchange for his testimony or any indication in the opinion that proof of such a "deal" was a prerequisite to the admission of the evidence of Green's probationary status. In reversing Davis's conviction for a new trial, the Supreme Court relied substantially on Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), where, as here, the defendant sought to prove that the witness had charges pending against him at the time of his testimony.

> But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, . . . that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. Nor is it material, as the Court of Appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out of his detention.

Id. at 693, 51 S.Ct. at 220 (emphasis added) (internal citations omitted).

Obviously, the existence of pending charges against a witness at the time of his testimony against a defendant is even more relevant to the issue of bias and self-interest than the fact that the witness, as in Davis, was merely on probation.

> As a general rule, pending charges are relevant to show pro-government bias on the part of the testifying witness, on the theory that the witness might tailor her testimony to please the prosecutor, in exchange for a promise of leniency on the pending charges. A colorable showing of bias can be important because, unlike evidence of prior inconsistent statements – which might indicate that the witness is lying – evidence of bias suggests why the witness might be lying.

Stephens v. Hall, 294 F.3d 210, 224 (1st Cir. 2002) (internal citations and quotations omitted). See also Jones v. Gibson, 206 F.3d 946, 956 (10th Cir. 2000) (holding it was error to preclude defendant from showing that key prosecution witness had charges pending against her: "Whether the jury would have been influenced by any possible bias of Ms. Linker is pure speculation. Nonetheless, the jury was entitled to have the benefit of a full cross-examination as to her possible bias in order to determine what weight to give her testimony."); United States v. Landerman, 109 F.3d 1053, 1063 (5th Cir. 1997); Stevens v. Bordenkircher, 746 F.2d 342, 347-48 (6th Cir. 1984). We, too, have long recognized this fundamental aspect of the right of Confrontation. Williams v. Commonwealth, 569 S.W.2d 139, 145 (Ky. 1978) ("Thus, a defendant has a right to expose the fact that a witness has criminal charges pending against him and thereby possesses a motive to lie in order to curry favorable treatment from the prosecution.").

The majority opinion's reliance on Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), is seriously misplaced. In Van Arsdall, the issue at trial was whether it was the defendant, Van Arsdall, or his codefendant, Pregent, who had stabbed the victim to death in Pregent's apartment. The trial court precluded Van Arsdall from showing that the State had dismissed a criminal charge against a witness,

Fleetwood, after Fleetwood agreed to speak with the prosecutor about the murder. Id. at 676, 106 S.Ct. at 1433-34. The Supreme Court reaffirmed Davis, see 475 U.S. at 678-79, 106 S.Ct. at 1435, and held that the trial court's error was one of constitutional magnitude: "By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." Id. at 679, 106 S.Ct. at 1435. The Court further held, however, that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis." Id. at 684, 106 S.Ct. at 1438 (referring to Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

In Van Arsdall, Fleetwood had testified only to uncontroverted facts preceding the murder and to the additional fact that when he walked across the hall and looked into Pregent's living room, he saw Van Arsdall sitting on the edge of the sofa bed next to Pregent's feet. He did not see the victim or anyone else in the room. Id. at 675, 106 S.Ct. at 1433. Van Arsdall admitted that he was in Pregent's apartment when the victim was killed. Because Fleetwood's evidence did not appear to prejudice Van Arsdall's claim that Pregent killed the victim, the Supreme Court remanded the case to the state court for a harmless error analysis, id. at 684, 106 S.Ct. at 1438, i.e., whether the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24, 87 S.Ct. at 828.

In contrast to Fleetwood's testimony in Van Arsdall, Tyrone Wilkey was the Commonwealth's best witness against Appellant. First, he testified that Appellant had previously threatened him with a weapon similar to the one the Commonwealth claims

Appellant used to kill Jackson – an accusation not contained in his previous written statement to the police. Second, he testified that Appellant made a statement to him that could reasonably be construed as an admission that Appellant intentionally killed Jackson – information also absent from Wilkey's previous statement and from the discovery materials furnished to defense counsel prior to trial. Remember, Wilkey did not offer himself as a witness until five months after the shooting. The record is silent as to whether some of the charges against him were brought prior to his written statement (or whether the altercation between Wilkey and Appellant at the jail occurred prior to the statement). Appellant's trial was not held until eighteen months later, and the charges against Wilkey remained unresolved at the time of his testimony. Further, Wilkey was scheduled for arraignment on new charges on the same day that he testified against Appellant. The jury might well have believed that Wilkey was motivated to testify against Appellant to curry favor with the authorities regarding his pending charges. Regardless, Wilkey was the Commonwealth's best witness against Appellant, and the trial court's denial of Appellant's right to show that Wilkey had reason to be biased in favor of the prosecution denied Appellant his Sixth Amendment right to Confrontation. "In our view, failure to permit cross-examination of a key government witness concerning bias, prejudice, or motive cannot be construed reasonably as harmless error." Stevens v. Bordenkircher, 746 F.2d 342, 347 (6th Cir. 1984) (emphasis in original) (granting habeas petition because trial court precluded defendant from inquiring as to witness's pending criminal charges).

Accordingly, I dissent and would reverse this case for a new trial.

Lambert, C.J.; and Roach, J., join this dissenting opinion.