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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0563-MR DATE 1-12-06 Ella Gravitt, D.C.

RORY K. HILL APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
03-CR-254

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the Hardin Circuit Court convicted Appellant, Rory K. Hill, of First-Degree Assault, two counts of Second-Degree Wanton Endangerment, First-Degree Trafficking in a Controlled Substance while in Possession of a Firearm (second offense), Possession of a Handgun by a Convicted Felon, and being a Second-Degree Persistent Felony Offender. For these crimes, Appellant was sentenced to a total of thirty 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 for which Appellant was convicted stemmed from a night of binge drinking and drug use. Appellant was invited to a gathering at Paula Skillman's apartment. When Appellant arrived, Ms. Skillman, her ex-husband, Carl "Pappy"

Skillman, Jeffrey Gray, and Norman Cheeseman were already at the apartment. All of the above named individuals told police different versions of the events which led to the shooting of Carl "Pappy" Skillman. The evidence suggests that all of the partygoers consumed intoxicating substances at some point during the course of the evening, including, but not limited to, alcohol, cocaine, and/or rock cocaine. Appellant indicated that he consumed up to twenty-eight beers, marijuana, and cocaine over the course of that day and night.

Appellant's testimony indicated that he was having a nice evening with the other partygoers when all of a sudden things went bad. He testified that he was a professional gambler and that he had won a large sum of money on the riverboat that day. At some point, the partygoers noticed that he had a large amount of money and cocaine on his person. Appellant testified that the partygoers attempted to rob him of his money and cocaine. When they started to approach Appellant, he grabbed a gun from the table and fired it in the air. Once the gun went off, the partygoers scattered and Appellant fled the apartment with Mr. Skillman. As Appellant and Mr. Skillman were walking down Warfield Street towards Mulberry Street, the pair started to struggle for the gun. During this struggle, Appellant testified that Mr. Skillman was shot in the stomach.

Mr. Skillman testified (along with the other partygoers to some extent) that there was no attempt to rob Appellant, but rather, Appellant just opened fire in the apartment for no apparent reason. He testified that Appellant even attempted to shoot Ms. Skillman in the back, but Mr. Skillman pleaded with Appellant not to do it. When everybody fled the apartment, Appellant told Mr. Skillman that he could run or he could get his head blown off. Mr. Skillman stated that he was not going to run away and he

was not going to let Appellant blow his head off either. Mr. Skillman then testified that Appellant raised his gun at him and that he tried to defend himself by knocking the gun away. During this altercation, Mr. Skillman was shot in the stomach.

After Appellant shot Mr. Skillman in the stomach, he encountered bystander Glendora Finley. She testified that she was driving down the street when she saw Appellant standing in the middle of the road. When she slowed down to avoid hitting Appellant, Appellant fired a shot into the passenger-side door of her vehicle. Having eluded injury, Finley immediately fled and reported the incident to Kentucky State Police. Shortly thereafter, Appellant encountered Detective Pete Chytla of the Elizabethtown Police Department. Detective Chytla observed Appellant running down the grassy part of a sidewalk on Mulberry Street. As he approached Appellant in his police cruiser, Appellant pointed his gun at Detective Chytla's car, but immediately discarded the weapon when Detective Chytla turned on the cruiser's blue lights. Appellant reportedly yelled at the detective, "They are trying to kill me. Please put me in the car!"

Appellant was subsequently tried for the First-Degree Assault of Mr. Skillman, Criminal Attempt to Commit First-Degree Assault of Glendora Finley, First-Degree Trafficking in a Controlled Substance while in Possession of a Firearm (second offense); First-Degree Wanton Endangerment of Detective Pete Chytla; Possession of a Handgun by a Convicted Felon, and of being a Second-Degree Persistent Felony Offender. The jury convicted Appellant of nearly all of the above named charges. He now appeals to this Court as a matter of right. For the reasons set forth herein, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Appellant first argues there was insufficient evidence to convict him of intentionally or wantonly assaulting Mr. Skillman. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the Commonwealth and from that portrayal, determine if it would be clearly unreasonable for the jury to find guilt. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Appellant contends the evidence was insufficient to show that he intentionally or wantonly caused serious physical injury to Mr. Skillman in violation of KRS 508.010. We disagree.

In this case, Mr. Skillman and others testified to facts which would indicate intentional and/or wanton conduct on the part of Appellant, while Appellant testified to facts which would indicate otherwise. We have repeatedly stated that "[c]redibility and weight of the evidence are matters within the exclusive province of the jury." See, e.g., Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky.1999). Thus, despite Appellant's testimony, the jury had every right to believe the testimony of Mr. Skillman and other Commonwealth witnesses. Appellant argues, however, that Mr. Skillman (and other witnesses to some extent) cannot be reasonably believed due to (1) impairment caused by drugs and alcohol the night of the shooting; (2) inconsistent statements given by Mr. Skillman and other witnesses; and (3) the existence of strong motives to fabricate. None of these reasons, either individually or taken together, are sufficient to override the jury's prerogative to make credibility determinations. See Potts v. Commonwealth, 172 S.W.3d 345, 350 (Ky. 2005) (jury has right to believe a witness's testimony even when "a witness's perception could have been impaired or circumstances indicate that a

witness may have had a motive to fabricate"). Appellant's arguments concerning Mr. Skillman's (and other's) credibility are therefore, without merit.

Next, Appellant argues there was insufficient evidence to convict him of being a Second-Degree Persistent Felony Offender. Specifically, Appellant contends the Commonwealth failed to present sufficient evidence that he "[c]ompleted service of the sentence imposed on [a] previous felony within five (5) years prior to the date of commission of the felony for which he now stands convicted." KRS 532.080(2). For the reasons set forth below, we disagree.

The evidence presented at trial demonstrated that Appellant had been convicted of three felonies in 1994. In the first felony (conviction date June 22, 1994), he was sentenced to serve six (6) years in prison. In the second and third felonies (conviction dates are September 7, 1994, and October 13, 1994, respectively), he was sentenced to serve a total of five (5) years in prison.[1] The five year sentence for the second and third felonies was ordered to begin immediately after Appellant finished serving his six year sentence for the first felony (in other words, the sentence for the latter two felonies was ordered to run consecutive to the sentence received for the first felony). Trent Van Meter, an official with the Department of Probation and Parole, testified that Appellant was discharged from prison after serving his time for the three felonies on June 29, 2001.

Appellant contends the evidence recited above is insufficient to prove that he completed service of his sentence for the latter two felonies on June 29, 2001. He reasons that if his conviction date was October 13, 1994,[2] it would have been

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[1] The sentences for these two latter convictions were ordered to be served concurrently.
[2] It is important to note that the Commonwealth could not use the first two felony convictions to support this element of KRS 532.080(2) as they had already been utilized

impossible for him to have been discharged from a five year sentence on June 29, 2001. Yet, as explained above, Appellant was not scheduled to begin serving his sentence for the latter two 1994 felony convictions until he finished serving his sentence on the first 1994 felony conviction. Appellant argues that this fact is irrelevant and that for the purposes of calculating sentence completion pursuant to KRS 532.080(2), a sentence must begin immediately after a defendant's conviction and cannot be delayed or deferred for a period of time to accommodate consecutive sentencing. We disagree.

Appellant cites to no authority whatsoever to support his rather strange interpretation of KRS 532.080(2). Further, we find no language or implications in the statute which would support his argument. See also, KRS 500.030 ("All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law."). Accordingly, the jury was permitted to infer that the serving of Appellant's October 13, 1994, felony sentence was deferred until Appellant had completed serving his June 22, 1994, felony sentence. When considered as a whole, the evidence was sufficient to support Appellant's conviction for being a Second-Degree Persistent Felony Offender.

II. DENIAL OF MOTION FOR MISTRIAL / REPLACEMENT OF JUROR

Appellant next argues the trial court erred when it refused to grant him a mistrial and/or replace a juror upon discovering that the juror had out-of-court contact with the victim, Mr. Skillman. During closing arguments in the guilt phase of the trial, juror M.M. was seen conversing with Mr. Skillman during a smoking break. The trial court conducted a hearing on the matter, receiving testimony from two women who observed

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to enhance other crimes. The Commonwealth, therefore, specifically utilized the October 13, 1994 felony conviction to support Appellant's conviction pursuant to KRS 532.080(2).

the out-of-court contact and from juror M.M. One woman testified that she heard juror M.M. state "How's it going Carl" and then observed the two men interact as she walked into the building. Juror M.M. testifiedthat he did speak with Mr. Skillman and that Mr. Skillman mentioned that he was glad that the trial was nearly over. Juror M.M. further testified that he did not respond to Mr. Skillman's comment or discuss the case, but that he simply stood outside with Mr. Skillman for approximately three to four minutes while the two men smoked. During that time, he stated that they only spoke about Mr. Skillman's difficulty in lighting his cigarette. The two men did walk back into the courthouse together and juror M.M. admitted that he held the door for Mr. Skillman as they walked into the building.

KRS 29A.310(2) provides:

> No officer, party, or witness to an action pending, or his attorney or attorneys shall, without leave of the court, converse with the jury or any member thereof upon any subject after they have been sworn.

However, in Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998), we held that interaction in violation of this rule may be deemed harmless when "the conversation between the witness and the juror was 'innocent' and matters of substance were not involved." Id. at 86. While other trial judges may have validly replaced this juror for improperly interacting with a key witness (and/or declared a mistrial), the trial judge in this case apparently found the brief encounter to be non-prejudicial to Appellant and thus, determined that no such action was required. See Id. ("The true test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial.").

It is important to note that trial judges are endowed with considerable discretion when making determinations of prejudice. Id.; see also, Gosser v. Commonwealth, 31

S.W.3d 897, 906 (Ky. 2000). In this case, the trial judge conducted a hearing on the matter and thus, was in the best position to make an intelligent determination of whether actual prejudice occurred. Without further evidence demonstrating that the trial court's determination was clearly erroneous, we are unwilling to replace our judgment for that of the trial court's. Accordingly, we find the trial court did not abuse its discretion when it determined that the misconduct in this case was not prejudicial to Appellant.

III. DENIAL OF MOTION TO SUPPRESS CUSTODIAL STATEMENTS

Next, Appellant contends that he was too impaired to have (1) voluntarily waived his Miranda rights and/or (2) voluntarily given any statements to police during his custodial interrogation. Appellant told officers that he had consumed thirteen to fourteen (13-14) beers immediately prior to the shooting and as much as twenty-eight (28) beers over the course of the entire day. In addition, he told officers that he might have smoked marijuana and snorted cocaine that day. The trial court heard testimony from the police officers and reviewed the tape containing Appellant's custodial interrogation. From this evidence, it found that Appellant, who was interviewed approximately one hour after being taken into custody, was "consistently responsive to the questions asked" by the officers and that the officers never "noted any behavior which they would describe as expected from an intoxicated person." The trial court concluded that Appellant "does not appear in any way to be manic or intoxicated to such a degree that he would not know what he was saying or be unable to give a reliable statement."

In Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974), this Court held that voluntary intoxication may cause a confession to become involuntary if the confessor is not in "sufficient possession of his faculties to give a reliable statement." Id. at 499.

Appellant argues that the sheer volume of intoxicating substances ingested by him that day, his strange behavior immediately after the shooting and during his arrest, and his behavior during the interrogation itself demonstrates that he was not in sufficient possession of his faculties to produce a voluntary confession. Specifically, Appellant notes that he was tired and mumbled during much of his interrogation, giving at least two different versions of the events that transpired that night.

"With regard to the factual findings of the trial court, 'clearly erroneous' is the standard of review for an appeal of an order denying suppression." Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001). However, whether the factual findings demonstrate voluntary behavior is a question of law to be reviewed *de novo*. See Id. (applying *de novo* review to ultimate legal question of whether there is reasonable suspicion under the Fourth Amendment). Despite Appellant's arguments to the contrary, we are not convinced that the trial court's findings of fact are clearly erroneous. Further, in light of the trial court's factual findings, we discern sufficient evidence to support its ultimate determination that Appellant's statements were voluntary in spite of his intoxication. Accordingly, the trial court did not err when it denied his motion to suppress.

IV. EVIDENTIARY ISSUES

Appellant next alleges the trial court erred when it refused to redact certain portions of his confession which referred to his involvement in drug trafficking. Specifically, Appellant contends the following exchanges should have been withheld from the jury:

Police: Did you have a stem [crack pipe] with you at all tonight?

Appellant: No, I don't smoke no d--- crack. D---. I make money at this s---, you know what I'm saying. No f------ stem, man.

. . .

Police:	Where did you get the coke at?
Appellant:	(No answer)
Police:	How much coke do you sell in a week's time roughly? You trying to get by, you trying to get by, make a living, this is how you make your living, this and gambling. Sell some coke, get some money, go hit the boats. Make a little money, lose a little money.
Appellant:	About three times a week.
Police:	When was the last time you worked?
Appellant:	2001.
Police:	Where did you work at then?
Appellant:	RGIS, inventory, inventorying stores and s---.
Police:	Okay. How much you drop on the boat on a night when you're up there?
Appellant:	S---, at least a thousand.
Police:	How often do you win?
Appellant:	Pretty much every time.
Police:	Well, you win some and you lose some, I mean you win a hand, you lose a hand.
Appellant:	I shoot craps.
Police:	Alright, well you'll win a roll and you'll lose a roll.
Appellant:	I do alright.
Police:	So you stay up every time you go?
Appellant:	No, but I do alright. I do okay.
Police:	So how you doing with the other thing?[3]
Appellant:	What other thing?

[3] Apparently, this is a reference to Appellant's involvement in drug trafficking.

Police: You doing alright with that too?

Appellant: I'm struggling. It's hard out there.

Police: Excuse me?

Appellant: I said it's hard out there, I'm struggling.

. . .

Police: Alright, you don't want to tell me where you got your coke?

Appellant: Come on man.

Police: Man, I got to ask. H--l, I wouldn't be doing my job if I didn't ask now would I? If you don't want to tell all you got to say is . . .

Appellant: I'm not going to tell you so that's all there is.

The trial court admonished the jury that it should consider the above statements only if it found Appellant to have possessed cocaine on the night of the assault and if so, only for the purpose of considering whether Appellant intended to traffic the cocaine on that night. See KRE Rule 404(b) (permitting admission of "other crimes" evidence for the purpose of showing intent). Appellant argues, however, that KRE Rule 404(b) does not justify the admission of these statements because the statements were irrelevant, not probative, and overly prejudicial. See Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994) (providing a framework for determining the admissibility of other crimes evidence pursuant to KRE Rule 404(b)). Principally, Appellant argues the statements are too prejudicial (due to their references to gambling and unemployment) and vague (with many of the statements being instigated or inferred by the interrogating officer).

The trial judge is endowed with considerable discretion when determining the admission of "other crimes" evidence pursuant to KRE Rule 404(b). See Id. Appellant's various arguments regarding the relevancy, probativeness, and prejudicial nature of the

statements referenced above are insufficient to create an inference of error by the trial court in this case. First, the statements were relevant because the purpose of the statements were to prove Appellant's intent to traffic in cocaine the night of the assault. Second, the statements were probative because they contained admissions of drug trafficking by Appellant. Third, there is no abuse of discretion in the trial court's balancing of equities in favor of admitting the evidence. Finally, we note that even if isolated portions of the statements could be construed as vague or irrelevant as they pertain to drug trafficking, these portions are necessary for the purpose of providing context and continuity to the statements. In sum, we find the trial court did not err when it admitted the above statements pursuant to KRE Rule 404(b), and even if there was error, it is harmless in light of the entire record.

Appellant last contends the trial court abused its discretion when it allowed the Commonwealth to question him on re-cross regarding matters that were outside the scope of the redirect examination. In particular, defense counsel questioned Appellant on redirect as to whether it was possible to make money and smoke crack. On re-cross, the prosecutor asked questions as to how Appellant made money (inferring to both gambling and drug trafficking). KRE Rule 611(b) states that cross-examination may be on "any matter relevant to any issue in the case." Furthermore, a trial court's discretion to regulate the scope of cross-examination is broad. Id.; Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997). It is debatable whether the questioning on re-cross was within the scope of the redirect questioning. However, even if we assume it was not, we find the trial court did not abuse its broad discretion pursuant to KRE 611(b) to permit the questioning anyway.

The judgment and sentence of the Hardin Circuit Court are affirmed.

All concur.

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