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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0348-MR
AND
2004-SC-0102-MR

DATE 3-16-06 [illegible]

ERIC JEROME GILL — APPELLANT

V.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
2002-CR-0196-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Eric Jerome Gill, was convicted in the Fayette Circuit Court of murder, tampering with physical evidence, possession of a handgun by a convicted felon, and for being a first-degree persistent felony offender. He was sentenced to life imprisonment on the murder charge, five years on the tampering charge, enhanced to twenty years by virtue of the PFO conviction, and ten years on the possession charge, enhanced to twenty years by virtue of the PFO conviction. He appeals to this Court as a matter of right. Finding no error, we affirm.

On November 16, 2001, eighteen-year-old Jodi Toll was found shot to death at the Sportsman Motel in Fayette County. Apparently, Appellant became a suspect after police interviewed Toll's boyfriend, DeShawn Miguel Miller (a.k.a. "D"), and Miller's uncle, Teddy Hawkins (a.k.a. "C"). Appellant was interviewed by police on December 3, 2001, during which he gave a detailed confession to Toll's murder. Appellant claimed

that he owed "C" and "D" money, and that "D" had ordered him to kill Toll. Appellant further stated that "D" had told him that Toll would be at the motel that night and that "D" wanted her killed because she had become pregnant by him.

Lead Detective, Natalie Marinaro, testified at trial that police investigated Appellant's story but found no evidence implicating "C" or "D." In fact, Detective Marinaro overheard a monitored phone conversation at the jail in which Appellant told someone that he had made up the entire story about the involvement of "C" and "D."

An autopsy on Toll's body revealed that she died from two gunshot wounds to the head, either of which was fatal. Toll was not pregnant, nor were any drugs or alcohol found in her system, contrary to Appellant's claim that she was "real messed up." Further, semen samples taking from Toll's body matched Appellant's DNA.

In February 2002, Appellant was indicted on the instant charges. On March 13, 2003, Appellant was tried for murder, tampering with physical evidence, and for being a first-degree persistent felony offender. A jury found him guilty of all charges. On January 14, 2004, a jury also found Appellant guilty of possession of a handgun by a convicted felon and for being a first-degree persistent felony offender. Additional facts are set forth as necessary.

I.

Appellant's first allegation of error concerns the trial court's refusal to suppress his confession on the grounds that he did not receive proper Miranda warnings and that he was intentionally misled by police.

Evidence at the suppression hearing established that Appellant was arrested in connection with Toll's murder, as well as the unrelated murder of Wilbert Adams. At the police station, Appellant was placed in an interview room, read his Miranda rights, and

he signed a waiver of rights form. There was a question raised during the hearing as to whether police told Appellant that they wanted to talk with him about a "homicide" or "homicides." Part of the tape from the interview was then played, during which Appellant noticed that the detectives had said "homicides," and he specifically asked what he was charged with.

Thereafter, Detectives Williams and Schoonover questioned Appellant for approximately forty-five minutes to an hour about the murder of Adams. After this interview, the detectives agreed to take a break to let Appellant smoke. The tape recorder was turned off and both detectives left the interview room to get a cigarette.

Sergeant Andrea Carter, who knew Appellant's family, then entered the interview room. She testified at the hearing that she told Appellant she had spoken with his father and asked Appellant if he needed anything. Sergeant Carter also told Appellant that he wasn't a bad guy but had gotten where he was because of his involvement with drugs. Sergeant Carter left the room when Detectives Williams and Schoonover returned. Sergeant Carter was adamant that she never discussed either murder with Appellant.

The detectives thereafter took Appellant outside to smoke a cigarette. Detective Williams noted that the purpose was to keep Appellant comfortable so as to maintain a good rapport. He did state, however, that they also wanted to keep Appellant unsure about what they did or did not know about the murders. After he was finished with his cigarette, Appellant was returned to the interview room where he was questioned by Detectives Schoonover and Marinaro about Toll's murder. Appellant was not readvised of his rights.

Detectives Schoonover and Marinaro told Appellant that they knew he owed money to some out of town people for drugs. The detectives told him they wanted to discuss the Toll murder and that they were not interested in the trigger man, just the person or people who ordered Toll's murder. However, Appellant asked what would happen to the trigger man and Detective Schoonover responded that, "The trigger man will have to pay his dues . . . ." Appellant thereafter confessed that "D" had ordered him to kill Toll.

At the conclusion of the suppression hearing, the trial court ruled that the initial Miranda warnings were sufficient and that the cigarette break in between the two interviews did not dissolve Appellant's waiver of rights. Further, the trial court noted that there is no requirement that a suspect be informed about the nature of the questioning before he is advised of his rights.

Kentucky has not squarely addressed whether Miranda warnings must be given prior to questioning a suspect about each crime for which he is being investigated. However, in United States ex rel. Henne v. Fike, 563 F.2d 809 (7th Cir. 1977), cert. denied, 434 U.S. 1072, 98 S. Ct. 1257, 55 L. Ed. 2d 776 (1978), the Seventh Circuit Court of Appeals held that a suspect who is advised that he is being investigated for one crime and who is given Miranda warnings need not be given the warnings a second time before he is asked about a different crime. In Fike, the defendant was arrested for driving while intoxicated. He later was asked what he knew of the whereabouts of a second man whom the police then believed to be an escapee from a county jail. Ultimately, the defendant led the police to the body of the second man, and the defendant was indicted and convicted for the man's murder. The Seventh Circuit stated, "no authority has been advanced, and we find none, holding Detective Bales

was constitutionally compelled to administer new warnings before questioning [the defendant] even assuming that he then suspected [the defendant] of having murdered Cretney." 563 F.2d at 814. See also United States v. Ferguson, 538 F. Supp. 1216 (E.D. Wis. 1982).

We find no merit in Appellant's claim that the police were required to readvise him of his Miranda rights prior to questioning him about Toll's murder. Upon arriving at the police station on the day in question, Appellant was fully advised of his constitutional rights. He indicated that he understood those rights, and he signed a written waiver expressing his intention to waive them. The interview concerning Toll's murder occurred only one hour after the initial Miranda warnings. Appellant does not claim that he had forgotten his rights or that he was unaware of them at the time he was questioned about Toll's murder. Further, at no point did he express any desire to have an attorney present or to cease the interview.

As we stated in Hughes v. Commonwealth, 87 S.W.3d 850, 854 (Ky. 2002), "The purpose of the Miranda warnings is to ensure that a suspect is aware of his constitutional rights before being interrogated." As Appellant is a persistent felony offender, he is familiar with the legal system. The error he alleges herein is not that he did not know or understand his constitutional rights. Rather, only that police failed to read him those rights prior to the Toll interview. We conclude that Appellant's rights were not violated and the failure to administer new Miranda warnings prior to the second interview did not compromise his confession.

There is likewise no merit in Appellant's argument that he was intentionally misled by police either when they failed to immediately tell him they were going to question him about the Toll murder, or when they told him they were not interested in

the triggerman in the Toll murder. At the suppression hearing, the Commonwealth introduced portions of the interview tape in which Appellant clearly recognizes that he is going to be questioned about the "homicides." Similarly, later during the Toll interview, Detective Williams told Appellant that the trigger man would have to pay his dues. While Appellant now claims that he thought the police would let him go if he confessed, there was absolutely no evidence of such presented during the hearing.

Regardless, the United States Supreme Court "has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of Miranda rights . . . ." Colorado v. Spring, 479 U.S. 564, 576, 107 S. Ct. 851, 858, 93 L. Ed. 2d 954 (1987) (citing Miranda v. Arizona, 384 U.S. 436 (1996)). This Court has also held that the use of "strategic deception" does not render a confession involuntary so long as the deception does not rise to the level of compulsion or coercion. "Of the numerous varieties of police trickery, . . . a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary." Springer v. Commonwealth, 998 S.W.2d 439, 447 (Ky. 1999) (quoting W. LaFave and J. Israel, Criminal Procedure, § 6.2(c), p. 446-48 (1984)).

Finally, Appellant's claim that Sergeant Carter spoke with him about the murders before he was Mirandized is unsupported by the record. Appellant did not testify at the suppression hearing, and Sergeant Carter unequivocally stated that she never discussed either offense with Appellant at any time before or during the interviews.

II.

Appellant contends that the trial court erred in prohibiting the hotel manager from testifying to a conversation he had with Toll on the night of her death. By avowal, the Sportsman Motel manager, Daniel Edelen, testified that on the night Toll checked into

the motel she said that she had had a fight with her boyfriend and asked Edelen if he thought someone was trying to kill her. This conversation took place after Toll had twice called Edelen to her room with complaints that her phone was not working. Toll commented that her boyfriend might have sabotaged her phone. Edelen testified, however, that Toll never indicated that she was afraid of "D," or that she thought he was going to come to the motel to hurt her. Edelen stated that he did not recall telling the police about his conversation with Toll.

Defense counsel argued at trial that Toll's statement to Edelen was admissible as either a dying declaration or to show what was going on in Toll's mind at that time. However, as the Commonwealth points out, defense counsel failed to articulate specifically that the statements fell within KRE 803(1), present sense impression, or KRE 803(3), state of mind or physical condition. Nevertheless, the trial court ruled that Edelen's testimony was inadmissible hearsay.

The present sense impression exception to the hearsay rule, KRE 803(1), describes the exception as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." For present sense impression, the statement must be made while the declarant is observing the event. See Slaven v. Commonwealth, 962 S.W.2d 845, 854 (Ky. 1997).

Toll's statement to Edelen was not a present sense impression because the statement was not made contemporaneously with an event she was describing or immediately thereafter. Fields v. Commonwealth, 12 S.W.3d 275, 279-80 (Ky. 2000); Jarvis v. Commonwealth, 960 S.W. 2d 466, 469-70 (Ky. 1998). Rather, Toll simply

asked Edelen whether he thought someone might be trying to kill her, and commented that she believed her boyfriend may have sabotaged her phone.

Whether Toll's statements fall within KRE 803(3) is a closer question. Statements relating to a declarant's present emotional state, such as fear, sorrow, excitement, fall within the "state-of-mind" exception to the hearsay rule, KRE 803(3). Ernst v. Commonwealth, 160 S.W.3d 744, 753 (Ky. 2005); Bray v. Commonwealth, 68 S.W.3d 375, 381 (Ky. 2002); Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996). However, such evidence is only admissible if the declarant's state of mind is relevant. Ernst, 160 S.W.3d at 753-54; Blair v. Commonwealth, 144 S.W.3d 801, 805 (Ky. 2004); Bray, supra; Partin, supra. Although Toll never told Edelen that she was afraid "D" was going to kill her, her comment that she believed he had sabotaged her phone did show that she had some fear of him following their fight.

Nevertheless, after reviewing the evidence presented at trial, we are of the opinion that error, if any, was harmless. RCr 9.24. The manager of the Greystone Lodge, where Toll had stayed a couple of weeks prior to her death, testified that as Toll left the lodge one evening, she gave him a card on which she had written, "If I'm not back, I've been killed by 'D' and 'C.'" Further, Gill's own testimony was that Toll repeatedly talked about dying and told him, "You wouldn't let nothing happen to me, would you?" Clearly, the jury was aware that "C" and "D" were drug dealers and that Toll had, at least on one occasion, stated that she thought they were going to kill her. Thus, we conclude that Appellant was not prejudiced by the exclusion of Edelen's testimony.

III.

Appellant argues that the trial court erred in refusing to permit Cornelius Brown,

a life-long friend of Appellant, to testify that he heard "D" confess to killing Toll. Defense counsel argued that Brown's testimony was admissible under KRE 804, as an exception to the hearsay rule because "D" was an unavailable witness whose statement was against penal interest.

During an evidentiary hearing, Brown testified that in November 2001, he had gone to "one-arm" Albert's house for the purpose of selling drugs out of the house. While there, Brown stated that "C" and "D" arrived. "D" became angry because he and "C" also sold drugs out of Albert's house and they did not want Brown cutting into their sales. Brown testified that "D" drew a gun and told him, "Get on up out of here before you end up murdered like that white b---- at the motel."

The trial court ruled that "D's" statement did not amount to a confession and further that, given Brown's relationship with Appellant and the fact that he was in jail at the time of the hearing, Brown's testimony lacked any indicia of reliability. The trial court noted that, at best, "D's" statement indicated that he knew something about Toll's murder.

For a statement to fall within the KRE 804(b)(3) hearsay exception, two requirements must be met. The first is meant to establish the necessity of the proffered testimony and the second is to establish its trustworthiness. Under the rule, the declarant, in this case "D," must be "unavailable" as a witness. All parties herein agree that "D's" whereabouts at the time of trial were unknown and he was, in fact, unavailable within the meaning of the rule. However, the second requirement is that the statement must be:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person

> in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

KRE 804(b)(3).

At common law, trustworthiness of a hearsay statement against penal interest is a prerequisite to its admissibility. Crawley v. Commonwealth, 568 S.W.2d 927 (Ky. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979). In Harrison v. Commonwealth, 858 S.W.2d 172, 175 (Ky. 1993), cert. denied, 512 U.S. 1238, 114 S. Ct. 2746, 129 L. Ed. 2d 864 (1994), this Court stated:

> The factors deemed relevant to the trustworthiness of such statement . . . are: 1) The time of the declaration and the party to whom made; 2) the existence of corroborating evidence in the case; 3) the extent to which the declaration is against the declarant's penal interest and 4) the availability of a declarant as a witness. Taylor v. Commonwealth, Ky., 821 S.W.2d 72 (1991); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

As the trial court pointed out, Brown was a life-long friend of Appellant. Further, the corroborating evidence upon which Appellant relies, i.e., the gun "D" allegedly brandished at Brown was a small caliber pistol, which was consistent with the .25-caliber murder weapon, and that "D" referred to a white female murdered at the motel, is part and parcel of Brown's own testimony.

Moreover, Appellant contends that "D's" statement tended to subject him to criminal liability since his immediate threat to Brown was linked to what he did to Toll. Generally, however, "to qualify for admission under this exception, the statement must, in a 'real and tangible way,' subject the declarant to criminal liability." Varble v. Commonwealth, 125 S.W.3d 246, 253 (Ky. 2004) (quoting United States v. Monaco, 735 F.2d 1173, 1176 (9th Cir. 1984)). It is insufficient that the statement "possibly

could" or "maybe might" have criminal repercussions. Varble, 125 S.W.3d at 253. There is no question that "D" knew Toll and knew what had happened to her. However, "D's" statement was far too ambiguous to support a conclusion that he had murdered Toll and was threatening to similarly kill Brown. Accordingly, the trial court did not err in ruling that Brown's testimony was inadmissible hearsay.

IV.

Next, Appellant takes issue with the trial court's refusal to permit his younger brother, Juan, to testify as to what Appellant told him on the night of Toll's murder. The trial court ruled that Juan's testimony was inadmissible hearsay. We agree.

The defense called Juan to testify immediately prior to Appellant. When defense counsel attempted to question Juan about what Appellant had told him, the trial court sustained the Commonwealth's hearsay objection. Defense counsel thereafter stated that if Appellant testified, the defense would recall Juan to admit the hearsay testimony as a prior consistent statement. The Commonwealth responded that a prior consistent statement would only be admissible if there was a claim of recent fabrication. The trial court then ruled that Juan's testimony was inadmissible.

Appellant argues that, although he had previously confessed, he testified at trial that he witnessed "C" and "D" enter Toll's motel room and that "D" shot Toll. Appellant contends that Juan would have testified that Appellant told him the same thing the night of the murder. Therefore, Appellant concludes that Juan's testimony as to what Appellant told him was admissible as a prior consistent statement since it was substantially the same as Appellant's trial testimony. We disagree.

Prior to the admission of a prior consistent statement, the party offering such statement must satisfy four elements:

1. The declarant must testify at trial and be subject to cross-examination;

2. There must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony;

3. The proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and

4. The prior consistent statement must be made prior to the time that the supposed motive to falsify occurred.

Robert G. Lawson, The Kentucky Evidence Law Handbook, § 8.10(3), at 578 (4th Ed. 2003); KRE 801A(a)(2).

Contrary to Appellant's assertion that this issue is preserved for review, defense counsel did not offer Juan's testimony by avowal. As a result, we cannot review what Juan would have allegedly said at trial. Nevertheless, we are of the opinion that Appellant fails to demonstrate that his prior statement to Juan, if indeed it was made, was made prior to him having a motive to falsify. If Appellant had just murdered Toll, he certainly would have had a reason to lie about what happened.

Defense counsel admitted that the sole purpose of Juan's testimony was to lend credibility to Appellant's testimony. Appellant is correct that the United States Supreme Court in Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973), held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." However, the Court further noted that the testimony in question in that case "bore persuasive assurances of trustworthiness." See also Justice v. Commonwealth, 987 S.W.2d 306 (Ky. 1998). Even had the issue been properly

preserved, such assurances simply do not exist in this case. The trial court did not err in ruling that Juan's testimony did not fall within any exception to the hearsay rule.

V.

Appellant argues that he was prejudiced by the admission of a school photograph taken of Toll when she was fourteen years old. He claims that the photograph was not an accurate depiction since Toll was eighteen at the time of her death, and only served to inflame the jury.

We question whether this issue is properly preserved. Prior to trial, the Commonwealth, defense counsel, and the trial court were reviewing photographs when defense counsel pulled out the photograph at issue and questioned its age. The Commonwealth responded that the school picture was approximately four years old. Defense counsel then noted that Toll looked like a child in the photograph.

At trial, the photograph was introduced during the testimony of Mary Ann Wiley, Toll's aunt. Wiley stated that the photograph was the last school photograph taken of Toll. Wiley further informed the jury that the photograph was four years old and that Toll was fourteen at the time it had been taken. At the end of the Commonwealth's questions, defense counsel stated, "Objections that we previously noted."

We do not find that defense counsel's pretrial comment about the photograph amounted to a proper objection. There was certainly no request made to exclude the photograph. Notwithstanding preservation, however, we do not conclude that Appellant was prejudiced. The jury was specifically informed that the photograph of Toll was not recent, and even Wiley noted that Toll's hair and facial features were different at the time of her death. There was nothing about the photograph that was "shocking, sensational, likely to provoke anger, or likely to induce undue sympathy or hostility."

Eldred v. Commonwealth, 906 S.W.2d 694, 704-05 (Ky. 1995), overruled on other grounds in Commonwealth v. Barroso, 122 S.W.3d 554, 563-64 (Ky. 2003). See also McQueen v. Commonwealth, 669 S.W.2d 519 (Ky. 1984), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205 (1984). There was no error in admitting the photograph.

VI.

Appellant's final claim of error concerns the charge of possession of a handgun by a convicted felon, which was severed from the other charges at issue herein. Following a trial in January 2004, the jury returned a verdict of guilt, and thereafter proceeded to find Appellant to be a first-degree persistent felony offender. The jury recommended an enhanced sentence of twenty years' imprisonment, and judgment was entered accordingly. Appellant now argues that the Commonwealth failed to properly prove the elements necessary for the PFO 1 charge, namely that he had completed service on his prior convictions within five years of the instant offense. KRS 532.080(3)(c). Appellant concedes that this error is not preserved, but urges review for palpable error under RCr 10.26.

The Commonwealth introduced certified copies of three Fayette Circuit Court judgments. The first showed that Appellant was convicted on November 13, 1997, of second-degree escape and was sentenced to one year imprisonment. The second judgment was Appellant's July 23, 1996 conviction for receiving or retaining a stolen vehicle. Appellant was sentenced to one year imprisonment, probated for a period of two years. The final judgment was Appellant's 2003 convictions for criminal facilitation to murder, criminal facilitation to first-degree robbery, and for being a first-degree persistent felony offender.

Appellant was convicted on the escape charge on November 13, 1997, clearly within five years of the date of the commission of offense herein. Since Appellant was sentenced to one year to serve, it is reasonable to infer that he would have served out his sentence in 1998, thus satisfying the statutory requirements. KRS 532.080(3)(c)(1). Likewise, it is reasonable to infer that since Appellant was convicted for receiving stolen property on July 23, 1996, and given a one year sentence probated for two years, Appellant would have been discharged from probation in July 1998, again well within five years of the commission of the instant offense. KRS 532.080(3)(c)(3). "A reasonable inference is sufficient to meet the requirements of the PFO statute." Martin v. Commonwealth, 13 S.W.3d 232, 235 (Ky. 2000).

Appellant is erroneous in claiming that the Commonwealth improperly used the 2003 convictions to establish his PFO status. Further, we disagree with his contention that evidence of the 2003 convictions was inadmissible and prejudicial. KRS 532.055(2)(a) provides that "[e]vidence may be offered by the Commonwealth relevant to sentencing including: [2.] The nature of prior offenses for which he was convicted[.]" While the 2003 convictions could not have been used for the purpose of determining Appellant's status as a persistent felony offender, the evidence would have been admissible during the sentencing phase, which in this case was required to be combined with the PFO phase. See Sanders v. Commonwealth, 844 S.W.2d 391 (Ky. 1992). Thus, we conclude that no error, palpable or otherwise, occurred during the PFO phase of the trial for possession of a handgun by a convicted felon.

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

All concur.

COUNSEL FOR APPELLANT:

Kathleen Kallaher Schmidt
Schmidt Law Office
P. O. Box 218
Shepherdsville, KY 40165

Linda Roberts Horsman
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204