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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0238-MR

JAMES SHERMAN HUGHES — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
2003-CR-0370

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Sherman Hughes, was convicted in the Fayette Circuit Court of murder and sentenced to fifty years' imprisonment. He appeals to this Court as a matter of right claiming five errors warrant reversal of his conviction: (1) admission of his statements to police without an evidentiary hearing; (2) admission of expert testimony without prior notice; (3) prosecutorial misconduct during closing arguments; (4) introduction of irrelevant victim impact evidence; and (5) denial of a directed verdict. Finding no reversible error, we affirm.

Appellant's conviction stems from a January 2003 altercation that occurred at a residence belonging to Bob West in the Eastland area of Lexington. On the evening in question, the victim, Larry Fair, arrived at West's duplex where West and Appellant had apparently been drinking. Evidently, Appellant picked up a bag of clothes and threw them at the victim's feet. An argument ensued and Appellant grabbed his shotgun and killed the victim. West told police that the victim was not armed when Appellant shot

him. West further stated that Appellant found a knife and "hacked up" the inside of his arm and then placed the knife in the victim's lifeless hand. Another eyewitness, Jean Thomas, likewise stated that the victim did not have a knife and did not attempt to hurt Appellant before he was shot. Thomas admitted that she immediately fled the residence and did not witness Appellant cut his own arm.

At trial, Appellant admitted to shooting the victim but claimed he did so in self-defense after the victim attacked him with a knife. At the close of evidence, the jury found him guilty of murder and recommended a sentence of fifty years' imprisonment. Judgment was entered accordingly and this appeal ensued. Additional facts are set forth as necessary.

I.

Appellant first claims that the trial court erred in refusing to suppress statements he made to police without first holding an evidentiary hearing pursuant to RCr 9.78. We disagree.

Officer Keith Spears testified that when he arrived at the scene Appellant was sitting at the back door of West's residence receiving medical attention. Officer Spears testified that Appellant was "a little bit shaken" and appeared to be under the influence of alcohol. Officer Spears stated that when he asked Appellant what had happened, Appellant responded, "somebody owed somebody money, and that he cut me, and I shot him."

Appellant was thereafter placed in an ambulance and transported to the hospital. Also in the ambulance with Appellant were Officer Logeran and paramedic Brian

Dawson. Dawson[1] testified at trial that he overheard Appellant tell Officer Logeran that he knew the victim was going to be at West's residence that night and that Appellant took his shotgun because he thought there would be trouble. Dawson further recounted, "Appellant stated that he put his shotgun beside the refrigerator, and as soon as the other gentleman came in, he said the other gentleman started running his mouth, so he grabbed the shotgun and pointed at him just to scare him. . . . He said it was at that time that the other gentleman cut his arm with a knife, and then he fired."

In arguing that the trial court erred in failing to hold an evidentiary hearing, Appellant relies on RCr 9.78, which provides in relevant part:

> If at any time before trial a defendant moves to suppress, or during trial makes a timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, . . . the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.

The Commonwealth contends that Appellant has not properly preserved this issue since he objected to the admission of the statements at trial rather than file a suppression motion. However, we find it to be a distinction without a difference because the rule clearly provides that a "timely objection" is sufficient.

Notwithstanding, Appellant's reliance on RCr 9.78 is misplaced. "An evidentiary hearing out of the presence of the jury and findings of fact by the trial judge are required before evidence of a custodial confession or other incriminating statement may be

[1] The parties' briefs do not indicate why Officer Logeran did not testify at trial, and instead Appellant's statements to him were introduced through Dawson. However, no argument is raised on appeal as to the manner in which the statements were admitted.

introduced into evidence before the jury." Brown v. Commonwealth, 564 S.W.2d 24, 30 (Ky. App. 1978) (emphasis added). See also Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Thus, the threshold determination must be whether Appellant was in custody at the time he made the statements to Officers Spears and Logeran. We conclude that he was not.

There is no dispute that Appellant was not advised of his Miranda rights at either the time Officer Spears spoke with him at the scene or when Officer Logeran spoke with him in the ambulance. However, the law is clear that Miranda is triggered only because of the potential of a custodial environment to "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966). To determine whether a person was in custody, for Miranda purposes, a court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293 (1994) (quoting California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) and Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)).

There is nothing in the record to support a finding that Appellant believed he was in custody or in any way restrained. Officer Spears even testified that upon first observing Appellant, he was of the opinion that administering medical treatment outweighed any need to immediately interrogate him. Further, even though Officer Logeran accompanied Appellant in the ambulance, there is absolutely no evidence to support a finding that he was in police custody or under arrest. Nor did the fact that

Appellant may have been the focus of the criminal investigation create a custodial environment. Callihan v. Commonwealth, 142 S.W.3d 123 (Ky. 2004); see also Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976) (rejecting the "focus of the investigation" test as inconsistent with Miranda).

Accordingly, only statements made during custodial interrogation are subject to suppression. See Jackson v. Commonwealth, 187 S.W.3d 300, 310 (Ky. 2006). As we conclude that Appellant was not in custody at the time of the statements in question, the trial court did not err in overruling his objection to their admission.

II.

Appellant next argues that he was prejudiced when the Commonwealth was permitted to introduce expert testimony without giving prior notice to the defense. Specifically, the Commonwealth introduced testimony to contradict Appellant's claim that he acted in self-defense when the victim attacked him with a knife.

Medical examiner Dr. Cristin Rolf testified that defensive wounds from a knife are typically inflicted on the hands when a victim reaches out to try and grab the knife, or across the front and back of the arms. Dr. Rolf stated that such wounds are usually randomly distributed throughout the victim's arms and hands. The Commonwealth then asked Dr. Rolf to view three photographs taken of Appellant's injuries in the emergency room and give her opinion of the wounds. Noting that Appellant had three almost parallel wounds on his wrist, Dr. Rolf commented, "They're not typical of defense-type wounds 'cause defense-like type wounds would be a little more, would be more random, or they might even be across the palm." Dr. Rolf opined that Appellant's injuries were more typical of self-inflicted type wounds.

The Commonwealth later called Detective Ed Jewell and Officer Albert Johnson who both testified that, based upon their experience and training as police officers, they believed Appellant's injuries were self-inflicted rather than defensive wounds.

Appellant argues that had he been given notice that the Commonwealth would present such evidence, he would have retained an expert to challenge the prosecution's expert's conclusions. Appellant claims that the expert testimony went to the heart of his defense and the "ambush" denied him the ability to prepare any type of effective cross-examination. See Binion v. Commonwealth, 891 S.W.2d 383 (Ky. 1995); Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

RCr 7.24 provides in relevant part:

> (1) Upon written request by the defense, the attorney for the Commonwealth shall disclose the . . . (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

Since Dr. Rolf admitted at trial that she had not previously viewed the photographs of Appellant's injuries, there were no results or reports, and thus the provisions of RCr 7.24 were not triggered. But see Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1988). (Commonwealth's tendering a report by a testifying expert witness that failed to include a "significant piece of . . . the expert's opinion . . ." was reversible error.) Rather, Dr. Rolf, as a medical examiner, was asked to give her expert opinion as to whether Appellant's injuries appeared to be "defensive type" wounds.[2] As

[2] At a bench conference, defense counsel challenged Dr. Rolf's ability to determine the nature of the wounds from a photograph. However, it was explained that the location of the wounds was the basis for determining whether they were, in fact, "defensive," not their type or severity. Thereafter, the trial court determined that Dr. Rolf was qualified to testify on the subject.

such, the Commonwealth was not required to disclose Dr. Rolf as an expert. See generally Lowe v. Commonwealth, 712 S.W.2d 944 (Ky. 1986).

With respect to the testimony from Detective Jewell and Officer Johnson, we do not believe that the Commonwealth sufficiently qualified either as an expert on defensive wounds. Unlike Dr. Rolf, neither had a medical degree nor training in wound classification. However, given Dr. Rolf's prior testimony, Detective Jewell and Officer Johnson's testimony was cumulative and harmless. RCr 9.24

III.

Appellant raises three separate claims of prosecutorial misconduct during closing argument. First, he argues that it was improper for the prosecutor to explain to the jury why certain taped interviews were not played during the Commonwealth's case-in-chief. However, a review of the record reveals that the prosecutor's comments were in direct response to defense counsel's reference to the fact that the Commonwealth did not introduce the interview police conducted with Appellant at the hospital, the second interview with West, and the interview with Thomas. Further, defense counsel had argued that it was odd that the Commonwealth chose to call paramedic Dawson to recount Appellant's statements to Officer Logeran rather than Logeran himself.

It is well settled that the prosecutor is granted wide latitude during closing arguments. Lynem v. Commonwealth, 565 S.W.2d 141, 144 (Ky. 1978); Dean v. Commonwealth, 844 S.W.2d 417 (Ky. 1992), cert. denied, 512 U.S. 1234, 114 S. Ct. 2737, 129 L. Ed. 2d 858 (1994). We conclude that the prosecutor was well within that latitude when he engaged in a thirty-second response to defense counsel's arguments.

Second, Appellant argues that the trial court should have granted a mistrial after the prosecutor improperly informed the jurors of their duty to convict. Specifically, the prosecutor told the jury:

> We're asking you as citizens of this community to come in, listen to the facts, and determine what's appropriate behavior in this community, and what isn't. How many times have we all sat in our dens or living rooms watched or read the news, the bad news that we all seem to get, and said, "What are they gonna do about that? You know, they've got to do something." That's what we say. Well ladies and gentlemen, the "they" is you.

In denying Appellant's motion for a mistrial on the grounds of jury nullification, the trial court ruled that the prosecutor was simply conveying to the jury its place in the criminal justice system and that it was on its shoulders to follow the law. We agree. A prosecutor can emphasize the jury's role and can call upon it to do its duty. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987), cert. denied, 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed. 2d 1036 (1989).

Finally, Appellant alleges that the prosecutor denigrated defense counsel and improperly urged the jury to base its verdict on sympathy for the victim and his family. Again, Appellant has mischaracterized the prosecutor's comments. During his closing argument, defense counsel told the jury that the testimony from the victim's daughter and sister was not relevant to what happened on the night in question, and that the Commonwealth put them on the stand solely to garner sympathy. As such, the prosecutor responded, "I'm telling you, that's part of the problem with the criminal justice system today is that people like that [pointing at defense counsel] don't want victims to even be considered in the courtroom."

Thus, while the prosecutor harshly criticized defense counsel for his characterization of the victim impact testimony, we cannot find that he improperly

"attacked" defense counsel or urged a verdict based on sympathy. As previously noted, the Commonwealth is entitled to present the human side of a victim. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997), cert. denied, 522 U.S. 986, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997).

"Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." Stopher v. Commonwealth, 57 S.W.3d 787, 805 (Ky. 2001), cert. denied, 535 U.S. 1059, 122 S. Ct. 1921, 152 L. Ed. 2d 829 (2002). Such did not occur in this case and we conclude that the Commonwealth's closing arguments were within the broad latitude allowed.

IV.

Appellant next contends that the trial court erred in permitting the introduction of irrelevant and prejudicial impact evidence from the victim's daughter and sister during the guilt phase of trial. Further, Appellant urges this Court to reconsider our decisions in 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), and Hilbert v. Commonwealth, 162 S.W.3d 921 (Ky. 2005).

As noted by Appellant, we recently addressed this precise issue in Hilbert:

> Appellant argues that the mothers' testimony had no purpose other than to arouse the jurors' emotions or to evoke sympathy for the victims. Recognizing that our holding in 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), permits at least a measure of such testimony during the guilt phase of trial, Appellant asks this Court to overrule that oft-cited decision and relegate all victim background evidence to the sentencing phase of the trial. We decline.

As Appellant notes, McQueen was decided during a time when bifurcated trials were the exception rather than the norm. Appellant contends that trial courts then were not accustomed to "discretely segregat[ing] sentencing information out of the guilt phase of the trial." Notwithstanding the changes rendered by the now-common bifurcation of trials into separate guilt and innocence phases, the lessons of McQueen are still applicable today. As stated in Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997):

> A murder victim can be identified as more than a naked statistic, and statements identifying the victims as individual human beings with personalities and activities do not unduly prejudice the defendant or inflame the jury. Just as the jury visually observes the appellant in the courtroom, the jury may receive an adequate word description of the victim as long as the victim is not glorified or enlarged.

Id. at 302-03 (citing McQueen).

As an alternative, Appellant argues that victim impact evidence should be excluded as irrelevant under the Kentucky Rules of Evidence. KRE 402 provides that "[a]ll relevant evidence is admissible." Appellant overlooks that this Court has recognized "that a certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime." Campbell v. Commonwealth, 788 S.W.2d 260, 264 (Ky. 1990), citing Sanborn v. Commonwealth, 754 S.W.2d 534, 542 (Ky. 1988) (emphasis added).

Of course, victim impact evidence does carry the potential to "inflame the jury," and a trial court must carefully balance the probative value of such evidence against prejudicial concerns. KRE 403; Clark v. Commonwealth, 833 S.W.2d 793, 797 (Ky.1991). Here, however, we find Appellant's allegations wholly without merit. The brief display of the victims' life portraits, and the reserved testimony by each of their mothers, was neither excessive nor overly emotional. We therefore find no error in the introduction of this evidence.

Hilbert, 162 S.W.3d at 926-27 (emphasis in original).

The victim's daughter testified for approximately three to four minutes, during which she showed the jury a single photograph of her with her father and briefly testified

as to how she learned of his death. The victim's sister testified for about ten minutes and spoke mainly about his battle with alcoholism. While she was very emotional, nothing in her testimony glorified the victim. Rather, the jury was simply informed about who the victim was. We find no error in the introduction of the testimony. Hilbert, id.

V.

Finally, Appellant argues that he was entitled to a directed verdict of acquittal because the Commonwealth failed to disprove beyond a reasonable doubt that he was not acting in self-defense when he shot the victim. See Estep v. Commonwealth, 64 S.W.3d 805 (Ky. 2002). Again, we disagree.

In Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991), this Court held:

> On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions of credibility and weight to be given to such testimony.

Further, "[o]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." Id.

Here, the Commonwealth presented testimony of two eyewitnesses who unequivocally stated the victim was neither armed nor the initial aggressor. West actually testified that he watched Appellant cut his own arm and then place the knife in the victim's hand. Further, the medical examiner stated that Appellant's wounds appeared to be self-inflicted rather than defensive in nature.

Viewing the evidence in the light most favorable to the Commonwealth, it is clear that it was more than sufficient to induce a reasonable juror to believe beyond a

reasonable doubt that Appellant was guilty of murder. Contrary to Appellant's argument, it was within the exclusive province of the jury to assess the credibility and veracity of the witnesses' testimony. The jury was presented with the Commonwealth's and Appellant's versions of what happened, and it concluded beyond a reasonable doubt that Appellant did not act in self-defense, but rather intentionally shot and killed the victim. The trial court did not err in refusing to grant a directed verdict.

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

All concur.

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