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RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

NO. 2004-SC-000936-MR

DATE 12-13-06 EJA/Growitt/DC

MARCUS PHILLIPS

APPELLANT

V.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
INDICTMENT NO. 03-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Floyd Circuit Court jury convicted Marcus Phillips of murdering his wife and fixed punishment at life in prison. The trial court entered judgment accordingly. Phillips appeals to this Court as a matter of right.¹

Phillips contends that the judgment should be reversed because (1) the Commonwealth failed to prove criminal activity occurred in Kentucky, depriving the trial court of subject-matter jurisdiction; (2) he was convicted by an all-woman jury

¹ Ky. Const. § 110(2)(b).

impaneled after the Commonwealth purposefully struck the men from the venire, abridging his equal protection rights; (3) the Commonwealth failed to produce evidence of a dead body and an unnatural cause of death, entitling him to a directed verdict of acquittal on the murder charge; (4) the trial court allowed taped statements in evidence that contained unduly prejudicial comments from detectives; and (5) the trial court allowed evidence that impinged upon Phillips's exercise of his post-arrest right to remain silent. Finding no reversible error on any of these issues, we affirm the judgment.

I. BACKGROUND.

On June 30, 2001, Phillips walked into a police station in Hollywood, Florida, where he confessed that about a year before he had killed his wife, Patricia, and that he could no longer live with the guilt. He reported that during an argument with Patricia, he had pulled over to the side of a four-lane highway that runs through Hazard, Kentucky, drowned her in water standing beside the road, and left her body there. After verifying that Patricia was a missing person, police took Phillips into custody and called the FBI.

A few days later, FBI agents interviewed Phillips. He gave the FBI agents essentially the same statement as he had given Hollywood Police, except that he further claimed that Patricia had attacked him with a knife and pepper spray. He told them he knew she was dead when he left, he was aware that her body had not been found, and that he would be glad to assist law enforcement in looking for her remains. Law enforcement officials obtained a search warrant for Phillips's apartment, which was

located in Glendale, Indiana. They found a 2001 calendar open to the May 2001 page with the date of the 16th circled and a "0" written over the "1" of the year "2001".

After being transported back to Kentucky, Phillips gave a statement to Detective Stewart Howard of the Kentucky State Police. Again, he confessed to having killed Patricia by holding her down in water on the roadside; and he stated that this occurred somewhere along the Mountain Parkway between Prestonsburg and Campton, Kentucky. He again asserted that Patricia had pulled out a knife but stated he could not produce the knife because he had left it in a motel room somewhere. He also stated again that he would help law enforcement locate Patricia's remains, although he ultimately never did so. Searches of the Mountain Parkway and other highways in the area proved unsuccessful, and investigators were never able to pinpoint a location that matched the specifics of Phillips's description of the location.

Patricia was last seen alive on May 16, 2000. On that day, she had been in touch with her mother, Donna Newton, at her residence in Miamisburg, Ohio. Patricia and Phillips were also living in Miamisburg at that time. Patricia told her mother that she had decided to proceed with her pending divorce from Phillips but that she had agreed to drive him to his parents' home in Pikeville, Kentucky, that day. She was planning to return to Miamisburg immediately. Patricia left her children in her mother's care while she drove Phillips to Pikeville. She left her mother's residence around 2 p.m. Patricia's last contact with her mother was at 8:43 p.m. when Patricia called her mother from a pay phone saying, "I'm here." Investigators later traced that call to a pay phone at a service station on U.S. Highway 23 in Allen, Kentucky.

II. ANALYSIS.

A. Subject Matter Jurisdiction.

Phillips contends that the Commonwealth failed to prove at trial that any criminal activity occurred in Kentucky and, thus, that territorial jurisdiction was not established under KRS 500.060 (1).² Territorial jurisdiction is one aspect of subject matter jurisdiction.³ Territorial subject-matter jurisdiction is distinct from venue.⁴ And subject matter jurisdiction may be raised at any time. So Phillips's failure to raise this issue in the trial court does not preclude our review of this issue.

Phillips argues that since the Commonwealth was unable to prove a location in Kentucky matching any description of the alleged crime scene that he gave to investigators and since he professed to being confused or disoriented while making statements, any alleged criminal activity might have occurred in Indiana or Ohio. But we find that the Commonwealth's evidence was sufficient to establish territorial jurisdiction. Phillips made extra-judicial statements indicating that he killed his wife somewhere in Kentucky—between Prestonsburg and Campton in one statement. Patricia's presence in Kentucky at the time of her last known contact is corroborated by police tracing Patricia's last known phone call to Allen, Kentucky.

² KRS 500.060(1) provides, in pertinent part, that: "a person may be convicted under the law of this state of an offense committed by his own conduct or the conduct of another for which he is legally accountable when: (a) Either the conduct or the result which is an element of the offense occurs within this state[.]"

³ Robert G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY CRIMINAL LAW § 1-4(a) (1998).

⁴ Commonwealth v. Cheeks, 698 S.W.2d 832, 834-835 (Ky. 1985) (explaining that Kentucky trial courts have jurisdiction "to preside over the prosecution of offenses committed in this state" but that the proper venue or forum for trying a case is "in the county or city in which the offense was committed.") Unlike subject matter jurisdiction, venue may be waived. Commonwealth v. Hampton, 814 S.W.2d 584, 587 (Ky. 1991).

The trial court's instructions required the jury to find beyond a reasonable doubt that the murder occurred in Kentucky to convict Phillips of murder:

You will find the Defendant guilty of Murder under this instruction if, and only if, you believe from the evidence **beyond a reasonable doubt all of the following:**

- a. That in this county or another county **in the Commonwealth of Kentucky** on or about May 16, 2000[,] and before the finding of the indictment herein, he killed Patricia Phillips by holding her face under water[.]

(Emphasis added.) In returning a verdict of guilty of Murder under Instruction No. 2, the jury necessarily found beyond a reasonable doubt that Phillips killed Patricia in Kentucky. Furthermore, the evidence was sufficient to support this finding. We find no error in regard to this issue.

B. Jury of Women.

An all-woman jury tried and convicted Phillips. He contends that the jury's composition was the result of the Commonwealth's purposeful use of its peremptory strikes to remove men from the venire. Because men were excluded, Phillips argues that he was deprived of equal protection under Batson v. Kentucky⁵ and J.E.B. v. Alabama.⁶ We disagree.

We recently reiterated that claims of equal protection violations based on the prosecution's use of peremptory strikes must be evaluated by a three-prong test:

⁵ 476 U.S. 79, 86 (1986) (holding that the Equal Protection Clause of the Fourteenth Amendment is violated by prosecutors' exercising peremptory strikes against potential jurors based solely on their race or the assumption that members of their race as a group will be unable impartially to consider the government's case against a member of their race).

⁶ 511 U.S. 127, 129 (1994) (extending Batson's holding to prohibit the exercise of peremptory strikes based solely on gender).

A three-prong inquiry aids in determining whether a prosecutor's use of peremptory strikes violated the equal protection clause. Initially, discrimination must be inferred from the totality of relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a neutral explanation for challenging those jurors in the protected class. Finally, the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.⁷

Applying this test to the facts of this case, it appears that the trial court did not specifically find that the defense had made a prima facie showing of gender discrimination in the exercise of the Commonwealth's peremptory challenges. Skipping that step, the trial court seemingly assumed that a prima facie showing had been made since it required the Commonwealth to state on the record its reasons for striking male prospective jurors. After hearing the Commonwealth's reasons, the trial court found that the reasons were valid, non-gender-based reasons. The reasons offered by the Commonwealth were facially not gender-related, and Phillips did not offer any additional evidence to show that the prosecutor's reasons were merely pretextual.

"The trial court's decision is entitled to great deference."⁸ Since no "overwhelming evidence that the prosecutor's neutral explanations were pretextual"⁹

⁷ McPherson v. Commonwealth, 171 S.W.3d 1, 3 (Ky. 2005) (footnotes omitted).

⁸ *Id.*

⁹ *Id.*, distinguishing Miller-El v. Dretke, 545 U.S. 231 (2005) (which overturned trial court's finding of no Batson violation based on defense's presentation of evidence showing that prosecutor's allegedly race-neutral reasons for exercising peremptory strikes against African-Americans were merely pretextual, including (1) history of systematically excluding African-Americans from juries by using such procedures as a "jury shuffle"; (2) showing that in this death penalty case, some African-Americans clearly in favor of such penalty were subjects of peremptory strikes by prosecution while Caucasians who were more equivocal about death penalty were not subjects of peremptory strikes; (3) mischaracterization of the jurors' testimony by the prosecution and failing to respond to defend such mischaracterizations

was presented to the trial court, we find no reason to disturb the trial court's ruling on this issue. Counting the women and men in the venire as jury selection proceeded supports the correctness of the trial court's ruling.

When jury-selection began, the venire consisted of 62 persons: 39 women and 23 men. Then, the trial court excused 21 veniremembers, leaving 41 persons: 28 women and 13 men. During voir dire, the trial court excused six men and four women for cause. So before either side had used peremptory strikes, there were 24 women and seven men remaining as potential jurors. Phillips had voiced no objection in the jury selection process to that point of the trial proceeding.

According to the clerk's strike sheets, the Commonwealth struck six men and three women.¹⁰ The defense struck two men and seven women. Two veniremembers—one woman and one man—were struck by both sides. So after both sides completed their peremptory strikes, fifteen prospective jurors remained—14 women and one man. Again, Phillips made no objection. Then, in order to seat a jury of 12 members and one alternate, the trial court drew thirteen of the names. All 13 drawn were women.

Immediately after drawing names, the trial court swore the jury and then inquired if the parties had any objection to the jury panel. Defense counsel then

when defense pointed them out but instead offering new reasons; and (4) questioning prospective jurors differently on voir dire.).

¹⁰ The Commonwealth stated in its brief that it exercised five peremptory strikes against men and four against women. Having examined the jury strike sheets and the trial transcript, we find the Commonwealth's statement inaccurate—it clearly exercised six peremptory strikes against men and three against women.

objected to the composition,¹¹ stating “[i]t would appear to me that the Commonwealth has struck every man of this jury because it’s all female”; and “they have struck on the basis of gender.” The Commonwealth responded that it had struck both men and women for reasons having nothing to do with gender and added, “[w]e could have struck all men, I’m sure. We certainly did not. That’s just the way it ended up. It certainly wasn’t our intent.” The trial court then overruled the objection, excused the rejected veniremembers, and sent the jury to lunch.

Following the lunch recess, defense counsel renewed its objection. Although the trial court and counsel were uncertain whether Batson applied to gender, the court asked the Commonwealth to state on the record its reasons for exercising its peremptory strikes rejecting the male veniremembers. In summary, the Commonwealth’s stated reasons for striking the seven men included educational level, employment status, general appearance and grooming, family reputation, and area of residence. After the Commonwealth stated these reasons, the trial court asked, “anything else from either one of you?” and defense counsel replied, “[n]o, sir.” The trial court then stated that if Batson applied, even if prima facie discrimination were shown (without stating that it was shown), it was satisfied that the prosecution had offered gender-neutral reasons and, thus, overruled the objection. Later, the trial court spoke again to counsel about this issue, confirming that Batson did apply to gender. While not conducting a hearing, the court reiterated that regardless of whether there was prima facie discrimination shown, it was satisfied that the Commonwealth had offered sufficient gender-neutral reasons. Counsel did not attempt to argue further.

¹¹ Since the Commonwealth has not asserted on appeal that Phillips’s motion was untimely, we will assume that the motion was timely for the purpose of preserving this issue for appeal.

Given the limited argument offered by defense counsel, we cannot conclude that the trial court erred in overruling the objection.

We need not reach the issue of whether a prima facie showing of discrimination was made since the trial court proceeded to the prong of inquiry in asking for the Commonwealth's reasons for its peremptory strikes. And we see no merit in Phillips's argument that female jurors would be more likely than male jurors to be upset or confused by the emotional or gruesome nature of some testimony at trial. Other than pointing out the obvious numerical disparity between men and women veniremembers, which existed from the moment the venire reported for service, Phillips has not demonstrated that the Commonwealth's reasons for exercising its peremptory challenges were pretextual.

Clearly, the trial court did not abuse its discretion when it denied Phillips's Batson challenge.

C. Denial of Directed Verdict.

Phillips contends that the trial court erroneously denied his motion for a directed verdict of acquittal because the evidence was insufficient to establish the *corpus delicti* of murder in light of the fact that neither Patricia's body nor any other physical evidence of death or injury was ever found. We find that the trial court properly denied the motion for directed verdict.

Corpus delicti "means the body of the offense, the substance of the crime."¹² Obviously, the substance of the crime must be shown. To establish the substance of the crime in a murder case, "there must be proof of a death and proof that

¹² Warmke v. Commonwealth, 297 Ky. 649, 651, 180 S.W.2d 872, 873 (1944).

such death was caused by the criminal agency of the accused.”¹³ A body is not required to prove the offense. And death and criminal agency of the accused may be established by circumstantial evidence.¹⁴

As Phillips points out, an extra-judicial confession standing alone is insufficient to establish the substance of the crime of murder.¹⁵ Phillips contends that there is no other proof that Patricia is dead because her body and personal effects from the date of her disappearance were never found nor was there any physical evidence of a struggle or injury. He also argues a lack of other proof of criminal agency due to the lack of identification or autopsy of a body and lack of identification of a crime scene.

We find that sufficient evidence was presented in addition to Phillips’s extra-judicial confessions to establish both death and criminal agency. This evidence included Patricia’s leaving her children and disappearing without a trace.¹⁶ Before departing Miamisburg for Pikeville, Patricia had called her lawyer and instructed him to re-start divorce proceedings. She also arranged to have her locks in her Miamisburg apartment changed because she stated she was afraid of Phillips. After Patricia’s disappearance, Phillips was found five days later in Indiana in Patricia’s car. He had

¹³ *Id.*

¹⁴ *Id.* at 651-652.

¹⁵ RCr 9.60; *id.* at 652.

¹⁶ “Worldwide communication and travel today are so facile that a jury may properly take into account the unlikelihood that an absent person, in view of his health, habits, disposition, and personal relationships would voluntarily flee, ‘go underground,’ and remain out of touch with family and friends. The unlikelihood of such a voluntary disappearance is circumstantial evidence entitled to weight equal to that of bloodstains and concealment of evidence.” Hurley v. State, 483 A.2d 1298, 1305 (Md.App. 1984), quoting Epperly v. Commonwealth, 294 S.E.2d 882, 890 (Va. 1982). Clearly, Patricia’s disappearance without a trace was strong circumstantial evidence of her death by criminal agency given her habits, disposition, and personal relationships. Even Phillips had admitted in an extra-judicial statement that Patricia was a good mother, which would suggest that she would be unlikely to abandon her children.

her children's social security cards in his luggage. He had registered at hotels under a false name. He had unsuccessfully tried to use Patricia's debit card at a truck stop in northern Kentucky. He then gave inconsistent statements to law enforcement personnel concerning Patricia's whereabouts; and he had a calendar with the date of Patricia's disappearance circled.¹⁷ Drawing all fair and reasonable inferences in favor of the Commonwealth, the trial court properly denied Phillips's motion for a directed verdict.¹⁸

D. Detective's Comments in Videotaped Interrogation.

Five days after Patricia was last seen, the police in Aurora, Indiana, found Phillips in Patricia's car in the parking lot of a Wal-Mart while responding to employees' report that a man had been playing video games and loitering in the store for long periods. Phillips agreed to go with police to the nearby Lawrenceburg (Indiana) Justice Center, where detectives from the Miamisburg police later arrived. Detective Jeff

¹⁷ Similar circumstantial evidence supported a murder conviction despite the lack of a body or other physical evidence in Hurley, including: "(2) the appellant's own inconsistent statements concerning his wife's disappearance, *i.e.* his inability to account for his activities for several hours the night she disappeared; his persistent denial of washing his truck despite the testimony of two eyewitnesses to the contrary; his involvement in repossessing her car; and his comments to a secretary that certain rugs were seized as a result of the investigation when none were, in fact, taken by the police; (3) [victim's] relationship with appellant; (4) her character and patterns of behavior; and (5) the lack of activity on [victim's] bank accounts and credit cards and lack of contact with family members, friends[,] and governmental agencies." *Id.* at 553-554. The evidence in Hurley also included the victim's daughter hearing victim scream and seeing victim on floor of defendant's office the last time she saw victim alive. *Id.* While Patricia's mother did not hear Patricia scream or see her on the floor the last time she saw her or spoke to her, she did testify to Patricia being nervous and arranging to change her locks the last time she saw her—clearly, suggesting that Patricia feared Phillips.

¹⁸ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (stating trial court must draw all fair and reasonable inferences in favor of Commonwealth when ruling on directed verdict motion, accept Commonwealth's evidence as true but reserve questions of creditability and weight of testimony to jury, and should not give directed verdict as long as "evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty[.]").

Crumbly of the Miamisburg Police Department interviewed Phillips, and Phillips agreed to let police look in Patricia's car. The police found a chapel card from the Greater Cincinnati Airport inside the car, as well as luggage with Phillips's clothing inside. But they found no luggage for Patricia in the car.

Phillips told Detective Crumbly that he and Patricia had left Miamisburg on May 16 to go to his parents' house in Pikeville to borrow money; but Patricia decided en route that she did not want to borrow the money so they turned around and drove back to their Miamisburg apartment, where they talked for a while and decided to separate. Phillips said he last saw Patricia at 7:00 on the morning of May 17 when he left their apartment. In response to Detective Crumbly's questions, Phillips stated he was not aware that Patricia was seeking a divorce; denied using her debit card; denied recently going to the Cincinnati airport; and stated that he had had the chapel card for some time.

In a second interview the following day, Phillips told Detective Crumbly that he had lied in his statements the previous day and wanted to set things straight. Phillips stated that Patricia had decided to get away from her family so she changed her appearance and boarded a flight to Florida from the Cincinnati airport on May 17. Phillips also stated that Patricia intended to call his pager when she arrived in Florida but that he did not have his pager in his possession. He further stated that Patricia had instructed him to use the wrong PIN number with her debit card and to register at hotels under a false name to avoid detection. Part of this second interview was videotaped

Phillips contends that he was unfairly prejudiced at trial by the presentation of the partially redacted videotape of the second interview, which

contained Detective Crumbley's interrogation comments that he thought Phillips was guilty and lying and that Detective Crumbley was an expert in detecting deception. This error was preserved for review by Phillips's pretrial motion in limine in which he objected to the admission of the videotape because it contained Detective Crumbley's comments, suggestions, interrogation techniques, and theories. The trial court denied this motion but ordered the redaction of all references to polygraph tests, as well as the redaction of "dead time" in which no one spoke on tape.

Phillips argues that the presentation of this videotape was an error because it allowed Detective Crumbley "to apprise the jury that [Phillips] was lying[,] that he was guilty of murdering his wife, and that [the Detective] was an expert in lie detection." Regarding the issue of failure to redact Detective Crumbley's statements that Phillips was lying or guilty, we have previously stated that "retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect."¹⁹ We have also stated that a limiting instruction or admonition may be appropriate in this situation to advise the jury that these comments "are offered solely to provide context to the defendant's relevant responses" and not as proof that the defendant was guilty or lying.²⁰ But Phillips failed to request such an admonition so we cannot grant him relief on this basis.²¹

¹⁹ Lanham v. Commonwealth, 171 S.W.3d 14, 27 (Ky. 2005).

²⁰ *Id.* at 28.

²¹ *Id.* at 28-29.

**E. Testimony that Phillips Never Followed
Through with Offer to Help Find Body.**

Phillips contends that the trial court erred in permitting the testimony of KSP Detective Howard that Phillips had offered to help police find Patricia's remains but that Phillips ultimately did not do so. Phillips had moved at a pre-trial conference that the trial court prohibit any proof that he had offered to help find a body but did not follow through on this offer. The trial court did not rule on this motion in limine at that time, and Phillips fails to cite to any portion of the record in which the trial court made such a ruling. Furthermore, Phillips failed to make a contemporaneous objection to this testimony. Thus, it appears that this issue is not adequately preserved for review.²²

We find no palpable error in the admission of this testimony for two reasons. First, although Phillips's inaction can be construed as an exercise of his post-arrest right to remain silent, this evidence was not used by the Commonwealth to impeach Phillips, who did not testify in his own defense. And the Commonwealth did not use the evidence to argue that the jury should draw a negative inference from Phillips's exercising his right to remain silent in this manner.²³ Rather, on the whole case, we agree with the Commonwealth's position that Detective Howard's testimony

did not evolve into a comment upon the appellant's right to remain silent (nor his right to counsel), but was merely an explanation of the appellant's statements and his subsequent non-action. The Commonwealth Attorney did

²² KRE 103 provides that errors in the admission of evidence must be preserved by objection or by "motion in limine resolved by order of record[.]" It further provides that un-preserved evidentiary errors may be reviewed upon appeal if the error is "[a] palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party" and that "appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

²³ Impeachment by, or drawing negative references from, a defendant's exercise of its right to remain silent is prohibited by Doyle v. Ohio, 426 U.S. 610, 618-619 (1976).

not unduly emphasize these items, but was merely filling in a gap left in the presentation of proof.

Second, this testimony would not appear to have an unduly prejudicial effect, especially in light of a contemporaneous admonition from the trial court that no inference of guilt could be drawn from a criminal defendant's exercise of his constitutional rights to remain silent or to consult an attorney. So we cannot conclude that manifest injustice compelling relief resulted from the admission of this testimony.

III. CONCLUSION.

For the foregoing reasons, the judgment of the Floyd Circuit Court is hereby affirmed.

All concur.

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