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RENDERED: DECEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE Jan 11, 07 D.C.

2005-SC-000277-MR

CHERYL LYNN GABOW — APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
NO. 95-CR-0075

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Cheryl Lynn Gabow, was convicted of complicity to commit murder in the Hardin Circuit Court and was sentenced to life imprisonment without the possibility of parole for twenty-five years. She appeals this conviction as a matter of right, Ky. Const. § 110(2)(b), raising five issues for review. Finding no error, we affirm.

Background

The charges in this case arise from the murder of Fred Gabow, Appellant's husband. Following eight years of marriage, during which the couple had two children, Appellant filed for divorce. Later that year, Appellant became romantically involved with David Brangers, who subsequently moved in with Appellant. Meanwhile, Mr. Gabow began a relationship with Teresa Reeder (now Mauk).

According to Brangers' testimony, Appellant began talking about killing Mr. Gabow

shortly after she filed for divorce. Brangers was present when Appellant discussed her thoughts about killing Gabow with her then 17-year-old nephew, Joey Wolfe. Wolfe referred her to Sam McMillen, who later met with Appellant. During this meeting, Appellant asked McMillen to kill Mr. Gabow and he agreed. At a subsequent meeting, McMillen introduced Appellant to his cousin, James Cecil, whom he had recruited to participate in the crime. Appellant agreed to pay McMillen and Cecil with funds she expected to collect from Mr. Gabow's life insurance policy. The three also agreed that the murder should appear to be a robbery so as not to jeopardize the insurance funds, and should occur prior to the finalization of the divorce.

Over the next several days, the three put their plan into action. Appellant gave McMillen and Cecil money to purchase a gun, though the exact amount was disputed at trial. Appellant also drove the two to Mr. Gabow's trailer, and examined nearby roads for possible escape routes. However, as the days passed, Appellant became increasingly agitated that McMillen and Cecil had not completed their task.

The following Friday evening, Fred Gabow was sitting at the kitchen table in his trailer when he was shot in the head. His girlfriend, Teresa Mauk, was in the living room when she heard shots fired through the kitchen window and saw Mr. Gabow sink to the floor. She immediately called 911, and Mr. Gabow was transported to a Louisville hospital. He died two days later. Thereafter, Appellant confessed her involvement in the murder.

Appellant admitted that she hired McMillen and Cecil to murder Mr. Gabow, gave them money to purchase a gun, and agreed to pay them $10,000. However, she insisted that she told both of them days before the murder that she "didn't want it to happen, that she didn't want them to do anything." Still, Appellant was unable to identify any action on her part to prevent the murder or any attempt to inform Mr.

Gabow of the plot. During his own confession, Cecil denied that Appellant ever renounced the conspiracy. McMillen, on the other hand, gave inconsistent statements as to whether Appellant had attempted to cancel the plot.

Following her confession, Appellant was charged and later tried jointly with Cecil for Mr. Gabow's murder. Both were convicted and received sentences of life without the possibility of parole for twenty-five years. The conviction was affirmed by this Court in Gabow v. Commonwealth, 34 S.W.3d 63 (Ky. 2000). However, the United States District Court for the Western District of Kentucky granted Appellant's subsequent petition for writ of habeas corpus on the grounds that an unredacted, taped confession by Cecil was improperly admitted at trial. Gabow v. Deuth, 302 F. Supp.2d 687 (2004). On retrial, Appellant was again convicted of complicity to murder and received a sentence of life without the possibility of parole for twenty-five years. She now appeals that conviction as a matter of right, raising five issues for review.

Additional facts will be developed as necessary.

Testimony of Joseph Okay

Appellant first argues that trial court erred in allowing Joseph Okay, a cousin of Mr. Gabow's mother, to testify. According to Appellant, Okay was permitted to testify in violation of RCr 7.26, causing substantial prejudice. Upon review of the record, we conclude that the trial court did not abuse its discretion in permitting Okay to testify and that no reversible error occurred.

On the first day of voir dire, defense counsel moved to prohibit the testimony of Okay on two grounds: that the written statement and a transcribed interview had not been provided to defense counsel within forty-eight hours as required by RCr 7.26(1), and that Okay had not been previously identified as a potential witness as required by a

prior discovery order. At the hearing on the matter, the trial court required the Commonwealth to show cause why the document was provided only twenty-four hours prior to trial, rather than the forty-eight hours required by RCr 7.26(1). The Commonwealth's Attorney explained that it was only about a week before the trial was scheduled to begin that he learned that Okay had relevant information. Because Okay lives in Michigan, an investigator from the Attorney General's Office conducted a phone interview with Okay on February 10, transcribed the interview, and faxed it to the prosecutor the same day. On February 15, the transcribed interview was faxed to defense counsel and the trial began the following day. Concluding that the Commonwealth had established good cause for the delay in furnishing Okay's statement, the trial court permitted Okay to testify. He ultimately took the stand on February 28.

Okay's testimony primarily concerned Appellant's behavior at a family gathering following Mr. Gabow's funeral, which was held at his trailer. Okay testified that Appellant was unusually preoccupied with Mr. Gabow's belongings, even collecting and removing several items that day. Okay stated that Appellant continually discussed how she planned to spend the anticipated insurance proceeds, and described her behavior as rude and cold. The testimony, however, was limited only to information that was contained in the transcribed statement. Appellant now argues that the trial court abused its discretion by allowing Okay to testify absent sufficient notice pursuant to RCr 7.26(1).

RCr 7.26(1) states:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession

> which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

Rulings on evidentiary matters, including the determination to allow a certain witness to testify, are left to the sound discretion of the trial court. Such decisions will only be reversed on appeal upon demonstration that the trial court abused its discretion. Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky. 1998). Furthermore, when considering a violation of the "forty-eight hour rule" set forth in RCr 7.26(1), there must be actual prejudice affecting the substantial rights of the defendant caused by the delay to warrant reversal, otherwise the error is harmless. Beatty v. Commonwealth, 125 S.W.3d 196, 202 (Ky. 2003); RCr 9.24.

Having reviewed the record, we find no abuse of discretion in the trial court's decision to allow Okay's testimony. The Commonwealth provided a reasonable explanation for the delay in furnishing the statement to defense counsel. While defense counsel did not receive the document until the day before trial, the trial court noted that the violation of RCr 7.26(1) amounted only to one day. Furthermore, though the possibility of a continuance was discussed at the hearing, defense counsel never moved for such relief. Finally, because Okay was not scheduled to be called until late in the Commonwealth's case, the trial court acknowledged that defense counsel would have at least a week to review Okay's statement prior to cross-examination.

Nonetheless, Appellant argues that she was prejudiced by the Commonwealth's tardiness. According to Appellant, the delay prevented defense counsel from interviewing other persons present at the family gathering who might have been able to contradict Okay's observations. This Court has previously explained that a defendant is

prejudiced by a violation of RCr 7.26(1) if "as a result of the error, he was denied access to information which, had he possessed it, would have enabled him to contradict or impeach the witness or establish some other fact which might reasonably have altered the verdict." Hicks v. Commonwealth, 805 S.W.2d 144, 149 (Ky. 1990). Here, defense counsel never moved the court for a continuance, which would have afforded time for the further investigation which Appellant now argues was needed. Furthermore, once Okay's statement was provided to the defense, counsel still had thirteen days to prepare for cross-examination before Okay took the stand. For these reasons, we cannot conclude that the Commonwealth's tardiness denied defense counsel an opportunity to further investigate Okay's statement and, therefore, Appellant was not prejudiced.

The trial court's decision to admit Okay's testimony was based on a careful consideration of the underlying reason for the violation of the "forty-eight hour rule." Because the Commonwealth provided a legitimate explanation, we find no abuse of discretion in the trial court's conclusion that good cause was established. Furthermore, there is no indication that Appellant's substantial rights were prejudiced. There was no error.

Admission of 911 Calls

Appellant next argues that the trial court erroneously admitted tapes of Mauk's calls to 911, which she placed immediately after Mr. Gabow was shot. Defense counsel objected, on the grounds that the recording was irrelevant, overly prejudicial, and cumulative of other evidence. The trial court reviewed the tapes outside the presence of the jury and concluded that they were admissible pursuant to the excited utterance exception of the hearsay rule found at KRE 803(2). Upon review of the record, we find

no error.

The tape contained the phone call that Mauk made to 911 shortly after Mr. Gabow was shot. During the recording, a hysterical Mauk explains to the operator that Mr. Gabow was shot and bleeding profusely. She describes the noise that she heard and her discovery of the bullet hole in the window. Mauk also explains the nature and extent of Mr. Gabow's injuries to the operator, noting that he was immediately unconscious. Because Mauk remained on the line until police arrived, the recording also established the time frame between the shooting and the point at which emergency services arrived.

Determinations as to the admissibility of taped recordings lie within the sound discretion of the trial court. Johnson v. Commonwealth, 90 S.W.3d 39, 45 (Ky. 2002). Otherwise relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of undue prejudice. KRE 403. "The outcome of a KRE 403 balancing test is within the sound discretion of the trial judge, and that decision will only be overturned if there has been an abuse of discretion, i.e., if the trial judge's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Cook v. Commonwealth, 129 S.W.3d 351, 361-62 (Ky. 2004).

We find no abuse of discretion in the trial court's decision to admit the recording. The 911 recording was clearly relevant: it established the sequence of events on the evening Mr. Gabow was shot and contained a description of Mr. Gabow's injuries and the crime scene. Appellant's argument that the recording lacked relevancy because Ms. Mauk was present at trial to testify to the same facts lacks merit. Though Ms. Mauk testified as to much of the information contained on the recording, the recording provided a contemporaneous and more detailed description of a crime that occurred ten

years earlier. See Pollini v. Commonwealth, 172 S.W.3d 418, 423-24 (Ky. 2005) (where recorded 911 call was properly admitted though caller also appeared as a witness at trial, as the recording "functioned to put the sequence of events into context for the jury").

We likewise reject Appellant's assertion that the probative value of the recording was substantially outweighed by its prejudicial value. As explained above, the recording held significant probative value and cannot be considered unduly prejudicial simply because Ms. Mauk was distressed and crying during the phone call. It is well settled that the Commonwealth has the prerogative to prove its case by competent, relevant evidence of its choosing. Johnson v. Commonwealth, 105 S.W.3d 430, 439 (Ky. 2003) (quoting Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky.1998)). Though emotional, this recording provided relevant information concerning the circumstances of the crime and its immediate aftermath. See Edmonds v. Commonwealth, 906 S.W.2d 343, 346-47 (Ky. 1995).

Testimony of David Brangers

According to Appellant, the trial court erroneously admitted evidence that she had previously solicited Allen Humphries to kill Mr. Gabow. At trial, the Commonwealth sought to elicit testimony from David Brangers that Appellant had approached Humphries about killing Mr. Gabow before ultimately conspiring with McMillen and Cecil. The trial court, however, sustained defense counsel's objection to this proposed testimony, concluding that the Commonwealth had not provided sufficient notice of testimony of any prior conspiracy. Nonetheless, because the Commonwealth argued that the statements were admissible as statements by a co-conspirator in furtherance of the conspiracy, the trial court allowed limited further examination by the Commonwealth

to establish Brangers as a co-conspirator. In an attempt to elicit this admission from Brangers, the Commonwealth three times asked why he and Appellant went to Humphries' home about a year before Mr. Gabow's murder. Only moments into this further questioning, however, Brangers expressly denied conspiring with Appellant. No further reference to Humphries or any alleged prior conspiracy was permitted.

Though the trial court's ruling was ultimately favorable, Appellant nonetheless argues that the foundational questioning regarding Humphries unduly prejudiced her because it was conducted in the jury's presence. During this questioning, the Commonwealth repeatedly asked Brangers why he and Appellant made the visit to Humphries. However, Brangers was never permitted to answer this question; defense counsel successfully objected prior to any response. Appellant now argues that, even absent an express response from Brangers, the jury was given enough information from which to infer the purpose of the visit and that she was unduly prejudiced as a result.

An error is prejudicial when the substantial rights of the defendant have been adversely affected. Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969). Here, Brangers was never permitted to expressly state Appellant's purpose in visiting Humphries. Furthermore, the reference to Humphries was brief and isolated, and the jury was given no additional explanation of Humphries' identity or relationship with Appellant. Though a juror might have made an inference from this line of questioning, it is simply too speculative to conclude that the reference to Humphries, absent further details, necessarily informed the jury that Appellant had previously attempted to solicit him to kill Mr. Gabow. "No conclusion of prejudice ... can be supported by mere speculation." Kinser v. Commonwealth, 741 S.W.2d 648, 653 (Ky. 1987), habeas granted sub nom. on other grounds, Vincent v. Parke, 942 F.2d 989 (6th Cir.1991).

Motion for Mistrial

Appellant claims that the trial court erred when it denied her motion for a mistrial. She argues that the Commonwealth improperly withheld an investigative report until trial, frustrating any effective cross-examination of the report's preparer and causing her substantial prejudice. Upon review of the record, we find no error.

The "report" at issue is actually a document prepared by Dennis Spaulding, an investigator for the Attorney General. Prior to Spaulding's testimony, McMillen testified about a conversation between the Commonwealth's Attorney and him concerning a possible deal in exchange for his testimony: apparently, McMillen wanted assurances that he would be transferred to a different prison facility after providing his statement. Spaulding, who was present at this meeting, was called to rebut certain portions of McMillen's testimony concerning that conversation. On cross-examination, Spaulding acknowledged that he had referred to his notes from the meeting prior to testifying. Defense counsel approached the bench and informed the court that no report or document had been furnished. Notably, the Commonwealth's Attorney stated that he was also unaware that Spaulding had documented the conversation. At this point, Spaulding produced the document and defense counsel continued cross-examination. The trial court also informed the jury that both defense counsel and the Commonwealth's Attorney were previously unaware of this report. Following Spaulding's testimony, defense counsel moved for a mistrial, which was denied.

There are two applicable procedural rules that prevent us from finding any error in the trial court's denial of a mistrial. First, RCr 7.26(1) requires the production of documents relating to the subject matter of the witness's testimony provided that the

document (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. The record indicates that Spaulding's report was neither a "substantially verbatim statement" of the witness nor was it signed or initialed by McMillen or Spaulding. Thus, the document was not a discoverable statement within the meaning of RCr 7.26. See Hillard v. Commonwealth, 158 S.W.3d 758, 766 (Ky. 2005).

Moreover, RCr 7.24(2) specifically excludes this type of document from discovery:

> This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).

The document with which Spaulding refreshed his memory is clearly a memorialization of his mental impressions of the meeting with McMillen; it is not an official police report. In Cavender v. Miller, 984 S.W.2d 848, 849 (Ky. 1998), this Court explained that RCr 7.24 specifically exempts the notes of an investigating police officer from production. See also Hillard, 158 S.W.3d at 766.

The trial court has broad discretion in determining when a mistrial is necessary. Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000). A defendant's motion for a mistrial should only be granted where there is a "manifest necessity for such an action or an urgent or real necessity." Id. citing Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky.1985). Here, no discovery rules were violated involving Spaulding's report. Moreover, we find no indication that Appellant was otherwise prejudiced by Spaulding's testimony so as to warrant a mistrial. Defense counsel requested and was given the

document, which he reviewed before choosing to continue with cross-examination. Further, the jury was informed that defense counsel had not received the report, which prevented any possible confusion about the issue or an inference that defense counsel was ill-prepared. The motion for a mistrial was appropriately denied.

Rebuttal Testimony of Teresa Mauk

In her final allegation of error, Appellant argues that the trial court abused its discretion in allowing Mauk's rebuttal testimony. During direct examination, Appellant testified extensively about her motivation to kill Mr. Gabow. A primary reason given was that Mr. Gabow did not visit with his children enough. At a bench conference, the Commonwealth explained that it would call Mauk to rebut this portion of Appellant's testimony. Moreover, the Commonwealth sought Mauk's testimony that, on the Friday evening that Mr. Gabow was killed, the children were supposed to have been visiting their father, but that Appellant had altered this arrangement days before the murder. While defense counsel agreed that Mauk could testify as to visitation generally, he objected to testimony about a planned visit on the night Mr. Gabow was murdered. The trial court overruled the objection, concluding that Appellant's testimony about visitation had opened the door for rebuttal.

On the stand, Mauk stated that Mr. Gabow had adhered to the visitation agreement and was a very involved father. She then stated that the children were supposed to have visited on the night that Mr. Gabow was murdered, but that Appellant said that they would instead come over the following morning. Mauk then immediately clarified that she was not present when Appellant made this statement. Defense counsel objected to the testimony as hearsay; the trial court sustained the objection and admonished the jury. However, the trial court did permit Mauk to provide a non-hearsay

version of the statement: that the children were supposed to visit that evening, but that the visit never occurred. Appellant now argues that the trial court abused its discretion in permitting Mauk's rebuttal testimony.

Without specifically determining whether any error occurred, we can nonetheless conclude that any supposed error was harmless. During cross-examination of Mauk, prior to her rebuttal testimony, defense counsel asked her whether visitation normally occurred from Friday night to Sunday night, which Mauk confirmed. Defense counsel then asked if this arrangement ever changed, and whether the children ever came on Saturday morning instead of Friday night. Mauk replied that it was rare for the children to come on Saturday morning, but that it sometimes happened. Referring to the weekend that Mr. Gabow was killed, Mauk then elaborated, "I know it happened that weekend but I can't recall specifically any other weekend that occurred." Thus, prior to her rebuttal testimony, defense counsel had already elicited Mauk's testimony that the visitation arrangement had been altered on the evening of the murder.

An error in the admission or exclusion of evidence is harmless when there is no reasonable possibility, absent the error, that the verdict would have been different. Hodge v. Commonwealth, 17 S.W.3d 824, 849 (Ky. 2000). Because the jury had already heard the substance of Mauk's rebuttal testimony during cross-examination, there is little possibility that the jury was prejudiced by Mauk's subsequent statement. Reversal is not required.

Conclusion

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

All concur.

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