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RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6-21-07 [illegible]

2005-SC-000412-MR

ROBERT EARL GAINES APPELLANT

V.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
NO. 04-CR-00024

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

I. Introduction

On June 25, 2004, law enforcement officers located a decomposing body in a well on Ostle Loop in Livingston County, Kentucky. Through dental records, a pathologist identified the remains as Sharon Ray. Ms. Ray was 38 years old and had been missing since April 2, 2004, from the home she shared with Robert Earl Gaines. According to autopsy findings, she died of a single gunshot wound to her head.

A Livingston County Grand Jury indicted Gaines for (1) the murder of Ms. Ray, (2) possession of a handgun by a convicted felon, (3) tampering with physical evidence, and (4) abuse of a corpse. Gaines maintained his innocence for her murder. He initially denied any knowledge of her death, although he later implicated Sue Harnice in the murder and admitted to helping Harnice dispose of the body, pouring lime in the well to mask the body's decomposition, and disposing of the .22 caliber pistol used in

the shooting.

A Livingston Circuit Court jury convicted Gaines of all charges, for which the trial court sentenced him to a total of 46 years in prison. Thus, he appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Gaines raises four issues on appeal. Those issues relate to the trial and are as follows: (1) the trial court erred in allowing Larry Wilson, Ms. Ray's hair stylist, to testify to statements that Ms. Ray made to him three days before her death, including her fear that Gaines was going to kill her; (2) the trial court erred in allowing the prosecutor to ask Gaines what motive the Commonwealth's witnesses may have to lie; (3) the trial court erred when it allowed Sue Harnice to testify on rebuttal after remaining in the courtroom during the entirety of the defendant's case-in-chief and after the trial court had ordered exclusion of witnesses under KRE 615; and (4) the trial court erred in sentencing Gaines to a consecutive sentence on his misdemeanor conviction for abusing a corpse.

Because we conclude that Ms. Ray's statement that she was afraid that Gaines was going to kill her had little relevancy except toward providing a strong inference of Gaines's culpability, we must vacate the trial court's judgment and remand.

II. Gaines's testimony as to Ms. Ray's death and his actions to dispose of the body and the murder weapon and additional facts underlying the charges

Gaines testified in his own defense. He stated that on Friday, April 2, 2004, he was at his house, along with Ms. Ray, his son, and Sue Harnice. Sue Harnice was staying at his home, and Ms. Ray, who was a dental assistant, was caring for her as she had just had 18 teeth pulled, needed specialized care and was heavily medicated. Ms. Ray was also fitting a set of dentures for Harnice.

Gaines testified that he and Ms. Ray used methamphetamine every day, and the two had been up for at least three weeks straight. On the night of her death, Ms. Ray believed that she saw a light in the backyard. She put on some sort of hearing device and went outside to look for the light. While outside, she got a .22 caliber pistol from a car on the property. Ms. Ray brought the pistol in, loaded it and went back outside with Harnice. She put Harnice in a tent that was about 50 yards from the house and then came back inside. Gaines, who remained inside, noticed that she no longer had the pistol.

After coming back inside, Ms. Ray stood at the back door and looked outside. She decided to go back out, even though Gaines warned her not to. A few minutes later, Gaines heard a gunshot. He grabbed a flashlight and went outside. He saw Ms. Ray on the ground. Harnice was yelling, "I did not mean to do it. I did not know it was her." Gaines checked for a pulse and heartbeat, but Ms. Ray was dead.

Gaines testified that Harnice was ranting and raving about what to do with Ms. Ray's body.

Gaines went inside and wept.

While Gaines was inside, Harnice wrapped Ms. Ray's body in a tarp. She came inside and convinced Gaines to dispose of Ms. Ray's body. Gaines knew about the well on Ostle Loop. He put Ms. Ray's body in Harnice's car, and Harnice drove them to the well. Gaines carried the body to the well, but could not put her in. He went back to the car, and Harnice rolled the body into the well. The two drove back to Gaines's house.

Harnice stayed until Sunday. Before she left, she wrote a note that said: "Sharon, Its Sunday, had to go pay some bills, when you get back give me a call.

Thanks for all your help. Love Sue." Gaines testified that Harnice told him that it would be a good idea to leave such a note.

When asked at trial why he did not call the police immediately, Gaines answered that he was not thinking straight because he was on meth and had been up for three weeks.

A few days after disposing of Ms. Ray's body, Gaines went to Randy McDonald's house. McDonald was Gaines's cousin. According to Gaines, he told McDonald that he did something bad and needed some help. Without asking any questions, McDonald accompanied Gaines to the well, and McDonald poured two 50-pound bags of lime in the well. In doing so, however, McDonald dropped one of his gloves in the well.

Gaines disposed of the gun, which he found on the ground outside a couple of days after the shooting, by tossing it along a fence row on his farm. After Ms. Ray's body was discovered, Gaines took the police to where he had thrown the gun with the hope that they would be able to obtain Harnice's fingerprints on it.

McDonald testified at trial that when Gaines came to his house, Gaines said that he killed Ms. Ray. McDonald did not believe him, but admitted to pouring the lime in the well despite his disbelief.

Harnice testified that the last time she saw Ms. Ray was at night on Friday, April 2, 2004. Harnice was in a bedroom in Gaines's house, and Ms. Ray yelled to her that she was going for a walk, which was not unusual. Harnice never saw her again. Harnice admitted to handling a .22 caliber pistol that day when helping Ms. Ray clean the house before Ms. Ray's child came for a visit.

III. Did the trial court err in allowing Larry Wilson, Ms. Ray's hair stylist, to testify to statements that Ms. Ray made to him three days before her death, including her fear that Gaines was going to kill her?

Because we conclude that Ms. Ray's statement that she was afraid that Gaines was going to kill her had little relevancy except toward providing a strong inference of Gaines's culpability, we must vacate and remand.

A. Standard of review for evidentiary rulings

Contrary to Gaines's assertion that evidentiary rulings involve questions of law (which we review de novo), this Court reviews the trial court's evidentiary rulings for abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

B. Admissibility of testimony

Gaines contends that the majority of Larry Wilson's testimony was hearsay. Thus, it was inadmissible under KRE 802.

Wilson testified that he was Ms. Ray's hair stylist and had been for a number of years. She had an appointment with him on Tuesday, March 30, 2004, for a color and cut. He had blocked off two hours of time for her that day. The prosecutor asked Wilson if she had expressed anything to him that day. However, before the prosecutor could complete his question, defense counsel objected on the ground of hearsay.

The trial court conducted a bench conference, and inquired as to what Wilson's testimony would be. The prosecutor said that Wilson was going to say that Ms. Ray told him she was afraid of Gaines because she had to testify against him in court on some gun possession charges and assault charges that both faced due to an earlier

domestic disturbance between the two in September, 2003. Ms. Ray asked Wilson to help her get a job so that she could leave Gaines, as she believed that Gaines was going to kill her. The prosecutor argued that the statements were admissible under KRE 803(3), the then existing mental, emotional or physical condition exception to the hearsay rule. The trial court reserved ruling on the issue until it could conduct some additional research.

After the bench conference, the prosecutor asked Wilson a few additional questions. In response, Wilson testified that that day was the last time he saw Ms. Ray. After the appointment, Wilson made arrangements for Ms. Ray to interview at White & White Dentistry. Wilson knew that Ms. Ray had an interview either Wednesday or Thursday, that she had been offered the job, and was to start work the following Monday, but did not show.

The trial court conducted at least two additional bench conferences with counsel on the admissibility of Wilson's testimony, and finally decided that it would call Professor Lawson that night and advise the attorneys of its ruling the following day.

The following day, the trial court ruled that Ms. Ray's statements to Wilson were admissible under KRE 803(3). In ruling that they fell within the exception, the trial court stated that it had relied on Crowe v. Commonwealth, 38 S.W.3d 379 (Ky. 2001); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892); and Jefferson Standard Life Ins. Co. v. Hewlett, 210 S.W.2d 352 (Ky. 1948). After citing Crowe and analyzing its holding, the trial court stated that this was not a "slam dunk murder case." The trial court noted that the evidence primarily rested heavily upon someone who was involved with the defendant in taking meth (presumably referring to Randy McDonald). Having said that, the trial court found that the probative value going

toward a motive in this case outweighed any prejudicial effect and allowed the Commonwealth to recall Wilson. The trial court further noted defense counsel's continuing objection to the admission of the hearsay.

On recall, Wilson testified as follows:

> Q. Did she relate to you anything about her relationship with the defendant, Robert Gaines?
> A. Yes, sir.
> Q. And could you -- did you have a chance to observe her demeanor that day during that two hours?
> A. Yes, sir.
> Q. How did she appear -- was she calm? Was she nervous?
> A. Well, she wasn't much different than she usually is.
> Q. Okay. Alright, so her appearance --
> A. Her appearance was normal, I guess, for her.
> Q. Relate to the jury the essence of what she told you.
> A. The entire two-hour conversation?
> Q. No, just in relation to Mr. Gaines.
> A. Okay, well she talked about Bob a lot, but you're going to have to -- have to ask me a question. I mean, I can say she said a lot, but I'm afraid that his attorney is going to say well, you know –
> Q. Well, you answer the question, and if he objects, then the court can rule on it, okay?
> A. Okay.
> Q. Now, in relation to Mr. Gaines, did she talk about him and her situation?
> A. Yes, she did.
> Q. And did she relate to you whether or not this relationship was working out for the two?
> A. Well, she said there was problems.
> Q. Okay. Did she express any concern for her safety?
> A. Yes, she did.
> Q. And tell us what she said about that.
> A. She said that she was going to have to testify against Bob in a -- in court. And she said she was afraid of what he would do to her.
> Q. Okay. And did she ask your assistance in any way as far as a job?
> A. Yes, she did.
> Q. And did she relate to you that she would be moving away from Bob?
> A. Yes, she did.
> Q. And did she in any way relate that she was afraid that Mr. Gaines was going to kill her?
> A. Yes, she did.

On cross-examination, Wilson agreed that Ms. Ray and Gaines had problems a lot. Defense counsel then asked if Ms. Ray said that she was going to tell Gaines that she was going to testify against him in court. Wilson responded, "I think she did." Wilson followed up by saying that Ms. Ray told him that Gaines knew that she was going to have to testify against him. His impression was that since they were both charged with crimes as a result of the domestic disturbance call, they would both have to testify against the other in court.

Turning to the admissibility of the statements, there is no question that they are hearsay statements. The issue is whether the trial court abused its discretion in concluding that the statements were admissible under KRE 803(3):

> Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Gaines takes specific issue with Wilson's statements that Ms. Ray stated that: (1) there were problems in the relationship; (2) she was afraid that Gaines was going to kill her; (3) she was planning to testify against Gaines at their joint trial; and (4) she was going to move away from Gaines.

1. Ms. Ray's statement that she was afraid that Gaines was going to kill her

Because we believe it is dispositive of this appeal, we begin with Ms. Ray's statement that she was afraid that Gaines was going to kill her. While it is a statement of her then existing state of mind, where a victim's state of mind is not at issue, statements about a murder victim's fear of a defendant are not admissible. See Partin,

918 S.W.2d at 222. Three common circumstances where a victim's state of mind is at issue are when a defendant claims (1) self-defense, (2) accidental death, or (3) suicide. See id. Otherwise, such statements usually have "little relevancy except toward providing a strong inference of appellant's intent, actions or culpability." Shults v. Nevada, 616 P.2d 388, 394 (Nev. 1980) (quoted with approval in Partin, 918 S.W.2d at 222); see also U.S. v. Brown, 490 F.2d 758, 766 (D.C. Cir. 1973) ("The principal danger is that the jury will consider the victim's statement of fear as somehow reflecting on defendant's state of mind rather than the victim's -- i.e., as a true indication of defendant's intentions, actions, or culpability. Such inferences are highly improper and where there is a strong likelihood that they will be drawn by the jury the danger of injurious prejudice is particularly evident.").

Ms. Ray's state of mind was not at issue in this case. Gaines denied shooting Ms. Ray, much less shooting her in self-defense. He did not claim that her death was either a suicide or accidental. Thus, the trial court abused its discretion in allowing the questions and answers pertaining to Ms. Ray's concern for her safety and fear that Gaines was going to kill her.

The Commonwealth concedes that a victim's fear of a defendant is ordinarily inadmissible, but argues that in some cases, there is some probative value to the testimony. In this case, the Commonwealth argues that admission of the statement was relevant to explain why Ms. Ray would fear Gaines. Further, the Commonwealth contends that while the probative value may have been limited, so, too, was the prejudicial effect as it was one brief statement. Finally, the Commonwealth argues that even if it was error to admit the statement, there is not a substantial possibility that the result would have been any different because Gaines admitted to Randy McDonald that

he killed Ms. Ray; he admitted that he wrapped her up in a tarp and threw her in a well; and he admitted that he took steps to conceal the body and dispose of the murder weapon.

We cannot agree that the prejudicial effect of this statement was limited. We find the cases cited by the Commonwealth in support of its arguments distinguishable. In Garland v. Commonwealth, 127 S.W.3d 529, 540 (Ky. 2003), the witness was not allowed to complete her answer regarding the murder victim's fear of the defendant as it encroached upon inadmissible hearsay. And in Ernst v. Commonwealth, 160 S.W.3d 744, 753-54 (Ky. 2005), this Court held that evidence of the victim's concern over her strained relations with the defendant was admissible because the defendant had given different versions of the murder, which varied between self-defense and accident. Thus, the victim's mental state was relevant to refute the defendant's claims. Id. at 754.

In this case, however, the trial court acknowledged that there was not overwhelming evidence against Gaines on the murder charge. Accordingly, this Court cannot say that the improper introduction of highly prejudicial evidence would not have changed the result. Not surprisingly, the Commonwealth relied on Wilson's statement that Ms. Ray said she was afraid the defendant was going to kill her both in its cross-examination of Gaines and its closing argument to the jury. We vacate and remand for a new trial. Because the other claims of error with Wilson's testimony are likely to recur at trial, we will address them (slightly out of order) in this opinion. Springer v. Commonwealth, 998 S.W.2d 439, 445 (Ky. 1999). We will not, however, address the remaining claims of error as they either should not recur at trial, or are rendered moot by this opinion.

2. Ms. Ray's statement that she was planning to testify against Gaines at their joint trial

and Ms. Ray's statement that she was going to move away from Gaines

We believe that these statements are within the scope of KRE 803(3). They cast light upon future events and are relevant to prove Ms. Ray's plan to gain employment so that she could leave Gaines.

Gaines attempts to distinguish one of the cases upon which the trial court relied, Crowe v. Commonwealth, by arguing that in Crowe the murder victim's co-workers testified that the victim stated on the day of her death that she intended to tell her husband that night that she wanted a divorce. The Commonwealth's theory in Crowe was that she did tell her husband that night, and he killed her. In this case, however, Gaines argues that Wilson did not testify that Ms. Ray said anything about informing Gaines of her plan to testify against him or leave him. We conclude, however, that this is a distinction without a difference. These hearsay statements were offered to prove -- inferentially -- that Ms. Ray told Gaines of her plans to either testify against him or leave him, or both, and that such was Gaines's motive for killing her. See id. at 383.

In the end, the truth or falsity of the statements is a question for the jury. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. at 296 (the usual expression of an individual's bodily or mental feelings are often indispensable as independent, explanatory, or corroborative evidence). Gaines testified that he knew about her new job at White & White Dentistry. She had not told him that she intended to testify against him, nor did he believe that she would. He said that they both intended to plead guilty to the pending charges, and he had paid her attorney's fees just days before her death. According to Gaines, Ms. Ray had also not told him that she was going to leave him. It was then up to the jury to weigh the evidence.

3. Ms. Ray's statement that there were problems in the relationship

When considered in the context of the two statements above, which we have determined are admissible, we believe this statement goes to show Ms. Ray's then-existing mental state and her desire to leave Gaines. See Bratcher v. Commonwealth, 151 S.W.3d 332, 349 (Ky. 2004). Perhaps more importantly, however, this statement is cumulative. Gaines testified that he and Ms. Ray quarreled frequently. And defense counsel commented in his opening statement that the two had a "stormy" relationship and that Ms. Ray often left Gaines.

In accordance with our conclusion as to the hearsay statement that Ms. Ray related that she believed Gaines was going to kill her, we vacate the judgment of conviction and sentence and remand this case for a new trial.

All sitting, except Cunningham, J.

Lambert, C.J.; McAnulty, Noble, and Schroder, J.J., concur. Scott, J., dissents by separate opinion in which Minton, J., joins.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE SCOTT

Respectfully, I dissent because I do not believe the trial judge abused his discretion when he admitted Ms. Ray's statement regarding her fear that Appellant would kill her. The majority correctly holds that statements by Ms. Ray regarding problems in the relationship, her intent to testify against Appellant at an upcoming trial, and her plan to get a job and move away were admissible pursuant to KRE 803(3) since they were statements regarding her then existing state of mind and were probative in showing motive. Citing Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996), the majority distinguishes the statement regarding her fear that Appellant would kill her, however, claiming that a victim's fear of the defendant is not relevant unless the victim's state of mind is at issue.

However, I believe the victim's state of mind was at issue since Appellant claimed that a houseguest accidentally shot Ms. Ray. See id. at 223 (stating that victim's state of mind is at issue when defendant claims "self-defense, an accidental death, or suicide"). Accordingly, it was proper and fair to permit the Commonwealth to use this statement for the purpose of rebutting inferences made by Appellant that Ms. Ray's death was an accident.

In any event, a victim's fear of the defendant can be probative even in the absence of any issue regarding the victim's state of mind. Garland v. Commonwealth, 127 S.W.3d 529, 540 (Ky. 2003), overruled in part on other grounds by Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005) (finding probative value to testimony even though victim's state of mind was not at issue). In Partin, supra, this Court specifically held that

> [i]n a murder prosecution, evidence that the victim, a normal adult woman, harbored a fear of her accused killer is probative of the central inquiry. It is not unreasonable to ask in such circumstances why she would have such fear and whether it tended to render a disputed fact more or less likely.

Id. at 223. Not only was Ms. Ray's statement probative of the central inquiry, but it was additionally probative to rebut Appellant's testimony that he and Ms. Ray loved each other and that he felt no malice towards her.

In view of the entire trial, the statement at issue in this case was brief, set in context, and there were several premises upon which to base a finding of relevancy. Moreover, the trial judge specifically made a finding that the probative value of the evidence outweighed its prejudicial effect. When these circumstances are viewed in their totality, I see absolutely no abuse of discretion

on the part of the trial judge in admitting Ms. Ray's statement regarding her fear that Appellant would kill her. Accordingly, I respectfully dissent.

Minton, J., joins this dissent.