

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-0600-MR

DATE 5-10-07 E.A. Gray, Jr., D.C.

RICKY ALLEN BROCK

APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
CASE NO. 04-CR-162

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ricky Allen Brock was convicted of wanton murder and first degree assault. A total sentence of 35 years was imposed. This case is before the Court as a matter of right. Ky. Const. Sec. 110(2)(b).

Appellant raises several issues on appeal: 1) a handwritten prayer found in his residence was improperly admitted; 2) dismissed charges were improperly presented to the jury during the penalty phase of the trial, including a CourtNet document that went back to the jury inadvertently; 3) the trial court erred in not declaring a mistrial sua sponte after it was revealed the jury had received the CourtNet document as an exhibit; 4) the trial court's jury instructions were erroneous; and 5) the indictment failed to allege a culpable mens rea and did not charge a cognizable offense.

Finding no error on the first issue, the decision of the trial court is affirmed. None of the remaining issues were preserved and the Court can find no sound basis to review them as palpable error, except for the claim of insufficiency of the indictment.

I. Background

On July 10, 2004, Appellant stabbed Christie Saylor and Glenda Holland in their home. Saylor died at the scene while Holland escaped with severe injuries. It is disputed why Appellant was in their home. He claims to have gone there for sex, while Holland claims he was there to buy drugs. The women had ordered him to leave. At that point, Holland claims he began stabbing them. Appellant claims they began stabbing him and he stabbed them in self defense. He did have some "nicks," but no serious injuries. After Holland identified Appellant as her attacker, police located him at his father's trailer, located next door to Appellant's trailer. When police searched Appellant's residence, they found, among other things, a handwritten prayer on his couch.

Appellant was indicted and subsequently convicted of the murder of Saylor and the first-degree assault of Holland. His version of events was placed in the record through his statement to police. Holland testified at trial.

II. Analysis

A. The Note

Detective Don Perry collected evidence from the crime scene and from Appellant's residence. He collected a small sheet of paper lying on Appellant's couch that stated the following:

Please Dear Lord, move in a way that I wont (sic) have to go to jail when I go to Cort (sic) I ask it in Jesus name. And I thank you and I prase (sic) you and I love you and I need you. Aman (sic).

Appellant's trial counsel objected to the admission of the note, arguing that its author was unknown and that it could not be determined when it was written. Counsel also asserted that the note was not relevant, and that its prejudicial effect outweighed its probative value. The trial court concluded the jury could make reasonable inferences as to the authorship of the note and that conclusive authorship was not required in order for it to be admitted into evidence. It further concluded the note was relevant.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE 901(a). Thus, physical evidence is admissible if a reasonable juror could find that the matter is what it is claimed to be. Appellant argues that the note was not properly admitted because the Commonwealth failed to authenticate the note through testimony of a witness acquainted with Appellant's handwriting, someone who saw Appellant write the note or by comparison with other writings by Appellant. These are indeed examples of proper authentication under KRE 901(b), but they are by no means exhaustive.

Circumstantial evidence may be used to connect a writing to its alleged author. KRE 901(b)(4). See United States v. McGlory, 968 F.2d 309, 329-331 (3d. Cir. 1992) (writing held authenticated where no direct evidence of authorship was found and no expert comparison testimony was proffered, but prosecution established that writing was found in a trash container outside the defendant's residence, had been torn from a notebook belonging to defendant, and contained information from defendant's private telephone book), and Commonwealth v. Dixon, 149 S.W.3d 426, 428-29 (Ky. 2004) (writing held authenticated even though no direct evidence of authorship when paper

was found in a vehicle that defendant owned and in which he was the sole occupant at the time).

In this case, the note in question was found in Appellant's residence, on his couch, a short time after he admitted stabbing the victims. There is nothing else in evidence to tie the note to Appellant. The note was not compared to Appellant's handwriting. The content is, at best, ambiguous. Appellant did not acknowledge the note. There is no evidence to indicate when the note was written. There is no indication why the defendant might be going to court. Circumstantial corroboration is very thin.

Appellant also asserts that the note was both irrelevant under KRE 401 and subject to exclusion as prejudicial under KRE 403. The Commonwealth argues that these arguments are inconsistent since the application of KRE 403 presumes that the evidence in question is otherwise relevant.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. KRE 401. Appellant admitted that he stabbed the victims. The only fact to be determined was whether Appellant acted in self protection. All that is known about the note, besides its content, is that it was found on Appellant's couch. Assuming Appellant is the author, there is simply no way of knowing when this note was written and to what it is pertaining. The Commonwealth argued that the note was written *after* Appellant stabbed the victims because *that is when the note was found*. The police searched Appellant's trailer after the stabbing; therefore, *any* evidence, relevant or otherwise, was found after the stabbing. By its language, the note could have been written at any time and could be completely unrelated to the crime at hand. Specifically, it is not more or less probable that Appellant

stabbed these victims randomly as opposed to doing so in self protection based on what is written in the note; thus there is little relevance in the note.

However, upon the determination by the court that the note was relevant, it should have been excluded based on its prejudicial effect. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury...." KRE 403. Here, the prejudice lies in the inferences that are to be drawn from the note. The Commonwealth argued that Appellant came home after he stabbed the women and wrote the note immediately thereafter. The Commonwealth, in fact, used the note in closing argument to argue that if Appellant's actions were justified under the theory of self protection, he would not have written it "right after he got home." There is absolutely no evidence to support this assertion. If the note is relevant as to Appellant's claim of self protection, its prejudicial effect outweighed any amount of probativeness it had and should have been excluded under KRE 403.

Given Appellant's admission that he committed the crimes, the remaining question is whether the erroneous admission of the note was harmless error. The relevant inquiry under the harmless error doctrine is whether there is a substantial possibility that the evidence complained of contributed to the conviction. There was little evidence to support or refute that Appellant acted in self defense. The Commonwealth Attorney improperly linked the note with Appellant's claim of self defense, but the actual content of the note did not support the claim about when it was written or in any way demonstrate a lack of self defense. The admission of the note was therefore harmless error as there is no substantial possibility that it affected the verdict.

B. Sufficiency of the Indictment

Appellant also argues that the indictment in this case was not legally sufficient because the murder count did not allege a culpable mens rea. It reads, in relevant part,

THE BELL COUNTY GRAND JURY CHARGES that on or about the 10th day of July, 2004, in Bell County, Kentucky, the Defendant committed the following offenses:

COUNT 1

Murder by stabbing Christie Saylor and causing her death.

Section 12 of the Kentucky Constitution provides that the prosecution must proceed by indictment for an indictable offense. RCr 6.10 provides that an indictment is sufficient if it sets forth the names of the parties and the court and contains a plain, concise, and definite statement of the essential facts constituting the specific offense with which the defendant is charged. Under that rule, it is unnecessary “to restate all the technical requisites of the crime of which a defendant is accused, if the language of the indictment, coupled with the applicable statute, unmistakably accomplishes this end result.” Runyon v. Commonwealth, 393 S.W.2d 877, 880 (Ky. 1965). An indictment is sufficient if it fairly informs the accused of the nature of the charged crime, informs him of the specific offense with which he is charged and does not mislead him.” Thomas v. Commonwealth, 931 S.W.2d 446, 449 (Ky. 1996).

Here, the indictment was sufficient. It states that Count 1 is for murder under KRS 507.020 and that Appellant committed “(m)urder by stabbing Christie Saylor and causing her death.” While the language in the indictment lacks specificity, there is nothing insufficient about the indictment. See Brown v. Commonwealth, 555 S.W.2d 252, 257-58 (Ky. 1977) (where this Court found that an indictment charging that the defendants “murdered Bryant Victor Dudley,” was “loose, but not invalid” even though

the indictment did not specify the manner or means by which the murder was allegedly committed).

For the reasons set forth herein, the judgment and sentence of the Bell Circuit Court is affirmed.

Lambert, C.J.; Cunningham, McAnulty, Noble, Schroder and Scott, JJ., concur.
Minton, J., concurs in result only.

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