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RENDERED: MAY 24, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000356-MR

DATE 6-14-07 E.M.A. Grayson D.C.

KEVIN ROWE — APPELLANT

V.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
INDICTMENT NO. 05-CR-00116

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Kevin Allen Rowe of the murder of Tammy Hylton and the attempted murder of Robin Hylton. Rowe was sentenced to life in prison for the murder and to a concurrent twenty years for the attempted murder.

Rowe appeals as a matter of right, arguing four errors committed by the trial court: (1) denying his motion to suppress evidence seized in the search of an outbuilding located on property adjoining the property identified by street address in the search warrant, (2) refusing to allow jurors to read his prepared transcripts of the 911 call placed by Robin Hylton that interpreted inaudible portions of the call, (3) denying his motion for a continuance to allow his DNA expert time to review materials produced in the Commonwealth's expert's DNA analysis, and (4) denying his motions for mistrial prompted by the Commonwealth's alleged failure to disclose

exculpatory evidence and to disclose a tape-recording of his telephone conversation with his parents from jail.

Finding no reversible error, we affirm.

I. FACTS.

Robin and Tammy Hylton, husband and wife, were shot while riding their four-wheeler on a road in a remote area in the Eastern Kentucky mountains. According to Robin, the assailant, who was riding an all-terrain vehicle (ATV), opened fire on them with an assault rifle. Although Robin reached for his own handgun to defend himself, Tammy accidentally knocked the gun from his hand in the melee. Robin fell wounded to the ground and remained motionless as if dead. The assailant walked up to Tammy, who was lying across the four-wheeler, and delivered a single shot into her body.

After the assailant fled, Robin discovered that Tammy was dead. He called 911 on his cell phone and reported that he and his wife had been shot by a young man approximately twenty or twenty-one years old riding a Polaris ATV. While still on the phone, he exclaimed, "Oh, God, he's coming back." Robin tried to flee, but the assailant shot at him again several times and then began beating him on the head with a pistol. The two men wrestled. The assailant pressed the end of the gun barrel to the back of Robin's head and pulled the trigger. Fortunately, the gun was out of bullets. The assailant then fled on an ATV.

According to the police report, four persons who passed the scene shortly after the attacks saw the Hyltons and tried to help them. They were Ricky Rose, David Walker, Josh Anderson, and Pamela Perkins. According to his statement to police,

Anderson retrieved Robin's pistol, removed the clip, cleared the chamber, and laid it back down.

Kentucky State Police (KSP) Trooper Jason Merlo was the first law enforcement official to arrive at the scene. According to Trooper Merlo's report, he found Tammy lying dead across the four-wheeler, Robin lying wounded on the ground, and Anderson standing near Robin. According to Trooper Merlo's trial testimony, Robin told Trooper Merlo that the assailant was a thin young man—whom Robin did not know—driving a red Kawasaki ATV (in contrast to the Polaris as Robin described in the 911 call) and that the assailant had stated, "Y'all killed my brother." Trooper Merlo also interviewed Rose, Walker, Anderson, and Perkins.

Trooper Derek Sturgill arrived next at the scene. He reportedly interviewed ten to fifteen people who were already at or had come to the scene on ATVs within an hour of Robin's 911 call. Apparently, none of these persons reported seeing anything of relevance. Although Trooper Sturgill gave the names and addresses of these interviewees to primary investigator Detective Stewart "Joey" Howard, Trooper Sturgill did not make a supplemental report with details concerning the content of these interviews. And the Commonwealth provided no information concerning these interviewees to the defense in pretrial discovery.

While the investigation proceeded at the scene, according to the police report, William Younce reported that he passed Kevin Allen Rowe, who was traveling along a road down the side of the mountain leading away from the location of the scene of the crime. Younce recalled that Rowe wore a dark shirt and jeans and drove a red Kawasaki 700 ATV. He also noticed a dark box or duffle bag strapped to Rowe's ATV.

A short time later, according to the police report, Rowe appeared at the home of Phillip and A.J. Silcox offering to sell them firearms and a cell phone. Phillip Silcox testified that Rowe wanted to sell these items because Rowe wanted money to get out of town for a while. Phillip declined to buy the guns, but A.J. bought the cell phone. A.J. testified at trial that Rowe was wearing coveralls.

Rowe then appeared at the home of his girlfriend, Joanna Trump, according to her trial testimony. She testified that Rowe removed his coveralls at her house. She noticed that he had blood all over him and that his pants and underwear were soaked with blood. Trump gave him a change of clothes and patched up scratches and cuts over Rowe's arms and one of his legs. According to her, Rowe rinsed hair from a pistol at her house. Trump's mother also testified to seeing Rowe wash hair and blood from the pistol. Rowe told Joanna that he had been attacked by two men riding four wheelers and that he had fought with them, during which time his gun fell out of his pants onto the ground. Rowe told her that one attacker pulled a knife on him and that Rowe had fired a shot, which grazed one attacker's legs.

The next day, Detective Howard interviewed Robin at the hospital. Robin described the assailant as a male, nineteen to twenty years old, tall, and slim, with short dark hair, and driving a red Kawasaki 700. Robin thought the attacker's assault rifle was fully automatic and described the pistol used by the attacker as dark with brown grips. Robin was confident he would be able to identify the shooter if he saw him again.

The detective retuned to the crime scene. While there, several ATV riders drove by. Detective Howard advised them of Robin's description of the shooter and the shooter's ATV. One rider advised Detective Howard that he knew of a young man

named Rowe who matched the description of the shooter and who often rode a red Kawasaki. According to the rider, Rowe lived on Harless Creek Road. Further investigation focused on Rowe, and Robin ultimately identified Rowe from a photo lineup.

KSP obtained an arrest warrant for Rowe and a search warrant for 390 Harless Creek Road, the house where Rowe lived with his father, Kenneth Rowe. The search warrant also explicitly authorized the search for and seizure of a red Kawasaki ATV, as well as any other vehicles used by Rowe. KSP seized several guns from the Rowes' residence, although none matched the descriptions of those used in the Hylton shooting. KSP also seized ammunition that matched the types of casings retrieved from the crime scene.

During the search, KSP found an ATV in a shed on adjoining property, known as 358 Harless Creek Road. The address for the adjoining location was different from the address of the location to be searched as described in the warrant. The different address was visibly posted on the road, according to Rowe. KSP seized the ATV and took it to the KSP post.

KSP performed various tests on the ATV, finding the presence of human blood on the left brake handle. DNA testing revealed that the blood was that of Robin Hylton. Blood was also found on other parts of the ATV; and although tests could not conclusively show that either Rowe or Robin were contributors, the DNA profile was consistent with the blood being a mixture of that from Robin and from Rowe.

Appellant was arrested and indicted for Tammy's murder and the attempted murder of Robin. While in jail, Rowe called his parents. His mother asked

Rowe if he and his girlfriend, Joanna, were having problems. Both parents urged Rowe to "keep her happy" because they "needed" Joanna.

Following nine days of trial, the jury found Rowe guilty of both the murder and the attempted murder. The jury recommended a sentence of life in prison for Tammy's murder and twenty years' imprisonment for Robin's attempted murder, to be served concurrently. The trial court sentenced appellant in accordance with the jury's recommendations. This appeal followed.

II. ANALYSIS.

A. The Trial Court Properly Denied the Motion to Suppress.

Rowe contends that the trial court erred in denying his motion to suppress evidence of the ATV, including the results of the DNA tests of substances found on the ATV. He argues that KSP illegally seized the ATV because KSP found it at a different address than the address listed to be searched on the warrant.[1]

As Rowe contends, the warrant authorized police to search 390 Harless Creek Road, which was property owned by Rowe's father, Kenneth Rowe. Rowe lived with his father. The ATV was found in a shed on property at 358 Harless Creek Road, which was property owned by Kenneth Irvine. But the warrant also plainly authorized the search of "ANY AND ALL VEHICLES ON PROPERTY, AS WELL AS VEHICLE

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[1] Appellant argues that police were only authorized to search based on the "four corners" of the warrant, *citing* United States v. Laughton, 409 F.3d 744, 751 (6th Cir. 2005). But in United States v. Frazier, 423 F.3d 526, 534-35 (6th Cir. 2005), the Sixth Circuit distinguished Laughton and stated that consistent with the purpose of the exclusionary rule, information outside the warrant can be relied upon if the information was known to the officers and relayed to the magistrate authorizing the warrant. In any event, the search warrant in the instant case particularly authorized the seizure of the red Kawasaki ATV and the search of all vehicles normally used by appellant even if not located on the property at the listed address.

NORMALLY OPERATED BY KEVIN ROWE IF NOT LOCATED ON PROPERTY[.] ALSO ANY AND ALL STORAGE AND OUTBUILDINGS LOCATED ON THE PROPERTY[,]" as well as the search and seizure of a "KAWASAKI PRAIRIE ATV, RED IN COLOR[.]"

Testimony also showed that Rowe's father consented to the search of Irvine's shed. In fact, he led KSP to the ATV in the shed on Irvine's property. Even though Irvine apparently held legal title to the property where the shed was located, Irvine testified that he gave permission to Kenneth Rowe and to Kevin Rowe to use the shed for storage. So Kenneth Rowe had valid authority to consent to the search because of his relationship with the premises and his common control of the shed.[2]

Even if Rowe lacked actual authority to consent to search, there was no apparent reason for the police to think he lacked authority, making this search valid.[3] And even though KSP later discovered that the shed was located at the 358 Harless Creek Road address rather than 390 Harless Creek Road, the officer who executed the search testified to being unaware at the time that the shed was located at a different address. In light of ample testimony from several witnesses that there was no obvious marker of the line dividing Irvine's property from Kenneth Rowe's and Rowe's failure to identify any evidence showing that anyone made KSP aware of the different address

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2 *See, e.g.,* McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky. 1984) ("Consent may be given by anyone who has 'common authority over or other sufficient relationship to the premises . . . sought to be inspected.'").

3 Commonwealth v. Nourse, 177 S.W.3d 691, 696 (Ky. 2005) ("The test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched.").

and ownership of the shed at the time of the search, the trial court did not err in holding that KSP acted in good faith in searching the shed.

Because the trial court's findings are supported by substantial evidence, we find no error in its denial of Rowe's motion to suppress evidence of his ATV and any evidence retrieved from the ATV.[4]

B. The Trial Court Properly Refused to Allow the Jury to Use an "Enhanced" Transcript which "Interpreted" Inaudible Portions of Robin Hylton's 911 Call.

Rowe contends that the trial court abused its discretion when it refused to allow him to give the jury an "enhanced" transcript of Robin's 911 call. Rowe requested that the jury be allowed to "read a transcript made by the Appellant in which the inaudible parts of the call were transcribed" while it listened to the recording of the 911 call. He points out that a licensed court reporter, who was willing to testify to its accuracy, prepared the transcript. He argues that he did not ask that the transcript be admitted as an exhibit but wanted only to offer it "to prove that you could hear more than the victim speaking on the call and to support the Appellant's theory that more than one person was present at the shooting and to prove that the Appellant was not the shooter of Robin Hylton."

Rowe urges that the trial court should have utilized a procedure used in federal court in which both prosecution and defense try to produce an "official" or "stipulated" transcript and both parties are able to present its own version of disputed portions of a recording. But Rowe did not actually ask the trial court to use this

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[4] RCr 9.78.

procedure. And since he did not raise this issue before the trial court, we will not consider this issue on appeal.[5]

In any event, Rowe has failed to show us that he was entitled to provide the jury with a transcript interpreting inaudible portions of the tape. The original recording of the 911 call was played to the jury, as well as an enhanced recording presented by the defense. We have reviewed these recordings from the trial videotapes, as well as the avowal exhibit of the transcript; and we agree with the trial court that the transcript was unnecessary. As the finder of fact, the jurors were capable of listening for themselves and determining the content of the recording—such as whether Hylton referred to "Josh" rather than "gosh" in his 911 call. Rowe was not entitled to present a transcript that interpreted the recording in a manner favorable to him.

Our precedent on this subject holds that parties are not entitled to interpret inaudible portions of recordings through self-prepared, less than fully accurate transcripts.[6] To the extent that Kentucky courts have approved of parties using such transcripts to aid the jury in following a recording, it has been in situations in which the transcripts affirmatively disclose that portions of the recordings are inaudible rather than attempting to interpret such inaudible portions.[7] Rowe simply was not entitled to show

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5 Wilson v. Commonwealth, 601 S.W.2d 280, 283-84 (Ky. 1980).

6 Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988) (holding that trial court abused its discretion in admitting prosecution's self-prepared, partially inaccurate transcript of recording of alleged confession.).

7 *See* Norton v. Commonwealth, 890 S.W.2d 632, 637 (Ky.App. 1994) (holding that no error occurred in trial court's permitting jurors to read transcript of audio taped narcotics transaction as accuracy of transcript was not at issue, the transcript was not admitted as

the jury a transcript that usurped the jury's fact-finding function. As the trial court found, the jury needed no "expert listener" to interpret the content of the 911 call. The jurors were capable of resolving for themselves any disputes concerning what was said and by whom.

C. Trial Court's Denial of Continuance Was Not Error.

Rowe contends that he was denied a fair trial by the trial court's denial of his motion for a continuance to allow his expert time to obtain and review materials related to the Commonwealth's DNA testing. Specifically, Rowe's expert had requested such items as lab notes, images, and photographs used in DNA testing, as well as control data from DNA testing and quality assurance data. She requested this additional information so that she could assess whether the DNA evidence had been properly collected by the Commonwealth's experts and whether those who performed tests had used scientifically acceptable methodology to assure accuracy and reliability.

The Commonwealth had already provided at least some of these requested items; however, some items were provided to the defense expert on a CD just a few days before the scheduled trial date. And just a few days before trial, the defense expert expressed a need for missing "quality assurance data," which had not been specifically requested before, allegedly because such data is normally found in lab notes.

The trial court properly found that the defense was entitled to discovery of results and reports of scientific tests under RCr 7.24 and that the results and reports had been provided by the Commonwealth several months before trial. Under RCr 7.24,

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exhibit or used by jury in deliberations, and transcript accurately noted inaudible portions of tape rather than trying to interpret inaudible parts).

the defense was not entitled to discovery of such additional items as lab notes, images, photographs, control data, or quality assurance data used or produced in the testing. The Commonwealth's voluntary disclosure of many of these items did not create a right for Rowe to obtain and review additional items. Since Rowe had no right to obtain these additional items in discovery, he did not show "sufficient cause" to obtain a continuance on this ground.[8]

We see no abuse of discretion by the trial court in denying a continuance of the trial based on the unique facts and circumstances of this case.[9] We have identified the following factors as relevant to whether a continuance is warranted: (1) length of delay; (2) previous continuances; (3) inconvenience to litigants, witnesses, counsel, and the court; (4) whether the delay is purposeful or is caused by the accused; (5) availability of other competent counsel; (6) complexity of the case; and (7) prejudicial effect of denying the continuance.[10]

Rowe did not specify the amount of time needed for the continuance of the trial, although his expert admitted that she would not be able to review data until several weeks after the scheduled trial date. We have no specific information regarding inconveniences arising from the requested delay; but, presumably, the delay would inevitably cause some level of inconvenience to witnesses, counsel or the court since the motion for continuance arose on the eve of the scheduled trial. And even though the case must have been somewhat complex as evidenced by the length of the trial and

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8 RCr 9.04.

9 Eldred v. Commonwealth, 906 S.W.2d 694, 699 (Ky. 1994) ("The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of the case.").

10 Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991).

even though it does not appear that Rowe had engaged in a pattern of delay, we conclude that the trial court properly denied the continuance due to Rowe's failure to identify any specific prejudice he would suffer[11] other than his expert's not obtaining and reviewing materials that Rowe was not entitled to receive in discovery anyway.

Rowe's trial counsel thoroughly cross-examined the Commonwealth's DNA expert concerning her qualifications, methodology, quality control, maintenance of equipment, and use of reagents. So it appears to us that defense counsel was able effectively to cross-examine the Commonwealth's expert on the potential deficiencies in methodology raised by the defense expert to achieve the defense's goal of casting doubt on the validity of the Commonwealth's expert's opinions. We also note that Rowe cites to no evidence showing that another lab obtained different results. We find no error on this issue.

D. The Trial Court Properly Denied Rowe's Motion for Mistrial.

Rowe contends that he was entitled to a mistrial due to the Commonwealth's failure to provide discovery of (1) the identity and other information relating to the ten to fifteen persons interviewed by Trooper Sturgill and (2) a recorded telephone conversation from the jail between Rowe and his parents. Again, we conclude that the trial court did not abuse its discretion in denying a mistrial based on these assertions.

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[11] Hudson v. Commonwealth, 202 S.W.3d 17, 23 (Ky. 2006) (rejecting appellant's argument that trial court committed reversible error in denying his motion for continuance, noting that appellant failed to specifically identify how he was prejudiced by this denial).

In regard to information about the ten or fifteen individuals interviewed by Trooper Sturgill, which appellant contends to be exculpatory Brady[12] evidence, we find that our precedent indicates that no such violation meriting relief occurred in the instant case:

> As a general rule "[t]here is no general constitutional right to discovery in a criminal case and Brady did not create one. . . ." Rather, Brady concerns those cases in which the government possesses information that the defense does not and the government's failure to disclose the information deprives the defendant of a fair trial. Therefore, reversal is required only where "there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome." Moreover, Brady only applies to "the discovery, *after trial*, of information which had been known to the prosecution but *unknown to the defense*."[13]

At trial, Trooper Sturgill testified to having interviewed ten to fifteen individuals who had arrived on the scene for three to five minutes apiece. According to Trooper Sturgill, none of these people had witnessed the shooting or professed to know of any other relevant information. Nonetheless, he recorded their names and contact information in case other investigating officers saw a need to follow up with them. He gave his own contact information to these individuals in case they thought of anything else later.

Although Trooper Sturgill apparently presented this list of names to other investigating officers, he apparently never memorialized this information in a supplement to the official KSP investigative report. Nonetheless, the lead investigating officer noted in his report, which was provided in discovery at an early date, that

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[12] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that prosecution has a duty to disclose exculpatory information to the defense).

[13] Bowling v. Commonwealth, 80 S.W.3d 405, 410 (Ky. 2002) (citations omitted) (emphasis in original).

Trooper Sturgill had interviewed passers-by. So the defense was on notice that Trooper Sturgill had interviewed people, and the defense could have contacted Trooper Sturgill to find out what he had learned from those he interviewed and followed up with these individuals to obtain further information. Clearly, this information was not truly unknown to the defense, especially since defense counsel noted in his opening statement that there appeared to be thirteen to nineteen witnesses based on radio traffic. Furthermore, the defense definitely became aware of this information during trial when Trooper Sturgill testified, rather than after trial. Brady is not applicable.

There also appears to be no reasonable probability that this previously undisclosed information would have affected the outcome of the trial. Trooper Sturgill testified that these people who had happened to pass by the scene knew of no relevant information. And there is no suggestion in the record that any of these individuals had exculpatory information to impart.

As for the failure to disclose the recorded conversation in which Rowe's parents encouraged him to keep his girlfriend happy, Rowe fails to identify any prejudice resulting from the Commonwealth's failure to disclose this statement to the defense at least forty-eight hours before trial, as required by RCr 7.26. So no relief is warranted despite the violation of RCr 7.26.[14] Naturally, the effect of the keep-her-happy admonition was prejudicial to Rowe, especially in light of Joanna Trump's testimony describing Rowe's bloody clothing and his efforts to cleanse the handgun of blood and hair. Nonetheless, Rowe fails to show how he could have minimized the prejudicial effect of that statement by knowing of it beforehand. We also note that defense counsel thoroughly cross-examined Joanna Trump and her mother concerning the fact that they

[14] Beaty v. Commonwealth, 125 S.W.3d 196, 202 (Ky. 2003).

did not report the washing of hair or blood off the pistol when initially contacted by police.

Given the overwhelming evidence presented against him, which included the victim's positive identification and the Trumps' testimony concerning his washing hair and blood off the pistol, any error in not meeting the time constraints of RCr 7.26 is harmless.[15]

III. CONCLUSION.

For the foregoing reasons, we hereby affirm the circuit court's judgment.

All concur. Scott, J., not sitting.

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[15] RCr 9.24.

COUNSEL FOR APPELLANT:

Stephen W. Owens
237 Second Street, Suite One
P. O. Box 1426
Pikeville, KY 41502

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204