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NOT TO BE PUBLISHED OPINION

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RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000607-MR

JOHNNY HERNANDEZ — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 03-CR-01165-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Johnny Hernandez of one count of murder and two counts of first-degree wanton endangerment in the shooting death of Jimmy Allen Roberts that occurred outside a nightclub. The trial court sentenced Hernandez to twenty years in prison on the murder count, and one year on each of the wanton endangerment counts to be served consecutively for a total of twenty-two years. Thus, he appeals to this Court as a matter of right.[1]

Johnny Hernandez raises three issues on appeal. First, he argues that the trial court erred in denying his motion to suppress his confession. Second, he contends that the trial court erred in denying his motion for a new trial and request to poll the jury

[1] Ky. Const. § 110(2)(b).

before sentencing. Third, he asserts that the trial court erred in allowing highly prejudicial hearsay that did not fall under any of the exceptions to the hearsay rule.

After our review, we conclude that Hernandez was not in custody when he confessed to law enforcement that he was the shooter; therefore, the trial court did not err in denying his motion to suppress his confession. And because a juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot, we conclude that the trial court did not err in denying Hernandez's motion for a new trial. Finally, on the remaining issue, we conclude that the hearsay of which Hernandez complains was a prior inconsistent statement of a witness; therefore, the trial court did not err in allowing the admission of the statement as an exception to the hearsay rule. Thus, we affirm.

I. THE TRIAL COURT DID NOT ERR IN DENYING HERNANDEZ'S MOTION TO SUPPRESS HIS CONFESSION.

Before trial, Hernandez filed a motion to suppress statements that he had made to detectives Matthew Brotherton and Natalie Marinaro on the day of the shooting. The trial court conducted a hearing on the suppression issue. Detective Matthew Brotherton was the only witness to testify at the hearing.

A. The Suppression Hearing.

According to Detective Brotherton, he was one of the detectives assigned to investigate the homicide of Jimmy Roberts, who had been working at the nightclub that night as a bouncer. As a part of his investigation, he interviewed several witnesses to the shooting. One witness, Maurice Lawson, identified the shooter as Hernandez and

stated that he had sat at a table that night with Hernandez and his brother, Adame Hernandez.

Detective Brotherton began looking for the Hernandez brothers and went to their homes in the early morning hours soon after the shooting. Neither one had returned home immediately after the shooting. At Johnny Hernandez's home, Detective Brotherton spoke with his wife and left a pager number where he could be reached.

Hernandez, in response to his wife's message that a detective had been to his house, attempted to contact Detective Brotherton in the afternoon but did not reach him. Detective Brotherton called Hernandez back from his phone at police headquarters and tape-recorded the conversation. In that conversation, which the Commonwealth played at the suppression hearing, Detective Brotherton asked Hernandez to come down and talk to him at police headquarters. Hernandez evaded the request, and Detective Brotherton quickly changed the subject. Eventually, Detective Brotherton suggested to Hernandez again that he meet him at police headquarters to "knock out" some quick interviews and "sort it all out." This time, Hernandez agreed to meet him and reported to police headquarters later in the day.

Detective Brotherton took Hernandez to an interview room and proceeded to speak to him about what happened the night before. Detective Brotherton tape-recorded the interview, and the Commonwealth played the entire recording for the trial court at the suppression hearing.

The recording establishes that at the start of the interview, only Detective Brotherton and Hernandez were in the room; and the two spoke of general matters. But when Hernandez started discussing what had happened the night before, another

detective, Detective Marinaro, knocked on the door and entered the room. Detective Brotherton informed Hernandez that he had called Detective Marinaro and asked Hernandez if he preferred that Detective Marinaro leave the room. Hernandez stated the he did not mind if she remained. Consequently, she stayed for the remainder of the questioning.

Detective Brotherton could not recall at the suppression hearing if either of them was armed during the interview.

Eventually, Hernandez admitted to striking another male patron in the club whom he believed had stolen his brother's cell phone. The bouncers separated the two men; and, then, someone struck Hernandez in the face, causing a deep laceration above his eye. Consequently, the bouncers threw Hernandez and his brother out of the club. Hernandez further admitted that when the bouncers threw them out of the club, Adame Hernandez went to his truck and got a pistol, which he handed to Hernandez to hold while he went back to the door to confront the bouncers. Finally, Hernandez confessed that he fired shots into the air to break up the confrontation; and, then, he and his brother fled to Rockcastle County, Kentucky, where Hernandez sought medical attention for his eye.

Upon hearing Hernandez confess that he was the shooter, the detectives began pressing him on the details and challenging his version of what happened with the gun after Hernandez fired it. After a little less than an hour, the detectives asked Hernandez where his brother was. He responded that his brother was driving around. The detectives told Hernandez that they needed to talk to his brother. When Hernandez

volunteered to go get his brother, both detectives told him that they could not let him do that.

Hernandez used a phone at police headquarters to call his brother, who also agreed to come to headquarters. At this point, Hernandez remained under constant police supervision. Hernandez remained in an interview room while the detectives spoke with Hernandez's brother. After about a half an hour, the detectives returned to Hernandez's interview room and told him that he would be charged. At that point, they gave him the warnings required under Miranda v. Arizona.[2] Upon being advised of his rights by Detective Brotherton, Hernandez invoked his right to counsel, at which point Detective Brotherton concluded the interrogation.

At the conclusion of the evidence portion of the suppression hearing, the trial court heard arguments from defense counsel and the Commonwealth. The trial court found (1) that Hernandez's statement was voluntary; and (2) that given the totality of the circumstances, this was not a custodial interrogation such that the detectives were required to give Miranda warnings before speaking with Hernandez. In particular, as to the issue of custodial interrogation, the trial court found that Hernandez voluntarily presented himself to the police department and noted that Detective Brotherton did not tell him that he was not free to leave. Accordingly, the trial court denied the motion to suppress.

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[2] 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

B. Review of Trial Court's Ruling.

"In reviewing a ruling on a motion to suppress, the trial court's findings of fact are conclusive if supported by substantial evidence. This court then reviews de novo the application of the law to the facts."[3]

The prosecution may not use exculpatory or inculpatory statements "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[4] So the issue we must resolve is whether Hernandez was subject to custodial interrogation at the time he claims he was denied his Miranda rights.[5]

Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way.[6] "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."[7] In other words, courts employ a reasonable person test to determine whether an interrogation is custodial: considering the totality of the circumstances, would a reasonable person in the defendant's situation believe that he or she was at liberty to terminate the interrogation and leave?[8] But ultimately, the crux of the analysis is "simply whether there [was] a

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3 Wilson v. Commonwealth, 199 S.W.3d 175, 178 (Ky. 2006) (internal citations omitted).

4 Miranda, 384 U.S. at 444.

5 Jackson v. Commonwealth, 187 S.W.3d 300, 305 (Ky. 2006).

6 Miranda, 384 U.S. at 444.

7 Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (*quoted in* Jackson, 187 S.W.3d at 310).

8 Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (*citing* Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)).

'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[9]

Turning to the facts of this case, we agree with the trial court that Hernandez was not in custody at the time that he made incriminating statements to Detectives Brotherton and Marinaro. As conceded by the Commonwealth, however, he was in custody at the point that they informed him that he was not free to leave to get his brother. Accordingly, any statements that he made up to that point were properly admitted at his criminal trial.

In support of our conclusion, we, like the trial court, believe that the most significant factor is that Hernandez went to the police station of his own volition. And we believe that five additional factors support the trial court's conclusion that Hernandez was not in custody: (1) Hernandez freely and voluntarily contacted Detective Brotherton; (2) the tape-recorded interview reveals that the environment was not coercive; (3) Hernandez did not hesitate to answer questions; (4) the interrogation was not lengthy; and (5) the detectives did not try to intimidate Hernandez with a show of their authority. To the contrary, Hernandez casually volunteered the incriminating statements about seventeen minutes into the interview.

Under the totality of the circumstances, we do not believe that the detectives restrained Hernandez's freedom of movement of the degree associated with a formal arrest.

Hernandez argues that the detectives employed a "question-first"[10] technique in his case that was designed to get a confession that he would not have made had he

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[9] Stansbury, 511 U.S. at 322 (*quoting* California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)) (*quoted in* Wilson, 199 S.W.3d at 180).

understood his rights at the outset.[11] The "question-first" technique has been invalidated by Missouri v. Seibert.[12] In that case, a majority of the United States Supreme Court found that use of the invalid "question-first" technique during custodial interrogations necessarily casts doubt on the voluntary nature of any subsequent Miranda waivers.[13]

We need not get to Missouri v. Seibert, however, because we have affirmed the trial court's holding that Hernandez was not in custody at the time he made the incriminating statements. Because Hernandez was not in custody at the time, Miranda did not attach.[14]

II. THE TRIAL COURT DID NOT ERR IN DENYING HERNANDEZ'S MOTION FOR A NEW TRIAL AND REQUEST TO POLL THE JURY BEFORE SENTENCING.

A. The Motion for New Trial and Request to Poll Jury.

Before sentencing, Hernandez filed a motion for a new trial under RCr 10.06. In support of the motion, Hernandez stated that one of the jurors, Juror 262, had contacted defense counsel post-trial saying that the verdict entered against Hernandez was not her verdict. Hernandez requested that the trial court examine the jurors under

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10 *See* Missouri v. Seibert, 542 U.S. 600, 609, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) ("The technique of interrogating in successive, unwarned and warned phases raises a new challenge to Miranda.").

11 Callihan v. Commonwealth, 142 S.W.3d 123, 125 (Ky. 2004).

12 542 U.S. at 604 ("Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.").

13 *Id.* at 612-13 and 620-21 (Kennedy, J., concurring).

14 *See* Callihan, 142 S.W.3d at 127-28 (holding that law enforcement officers are not required to inform suspect during voluntary questioning—as opposed to custodial interrogation—of his rights and concluding that under such circumstances Missouri v. Seibert was not applicable).

RCr 10.04 to determine if the verdict was indeed unanimous. Hernandez attached an affidavit of Juror 262 in support of his motion.

The affidavit stated as follows:

1. I am juror number 262. I served on the jury which convicted Johnny Hernandez of murder and sentenced him to 20 years in prison.

2. I do not believe that Mr. Hernandez was given fair consideration while the jury deliberated his guilt or innocence.

3. It seemed to me that the jury was caught up in the first page of instructions and never considered any of the other pages.

4. It seemed to me that the jury did not consider the other offenses but quickly focused on the murder page of the instructions.

5. I do not believe that I was convinced beyond a reasonable doubt that Mr. Hernandez was guilty of the murder charge.

6. I am aware that the jury told the Court the verdict was unanimous but it was not my verdict.

7. I believe there may be another one or two jurors who feel the same way as I do.

8. I do not feel Mr. Hernandez received a fair deliberation of the charges by the jury.

After hearing arguments on Hernandez's motion, the trial court denied the motion. In so doing, the trial relied on RCr 10.04 and well-settled Kentucky law interpreting the criminal rule and holding that testimony by a juror about deliberations is not competent evidence.[15] And the court reasoned that the record reflected that: (1) both sides took the jury through the entirety of the instructions during closing arguments, including the instructions on lesser-included offenses; (2) the jury

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[15] Cape Publications, Inc. v. Braden, 39 S.W.3d 823, 826 (Ky. 2001); McQueen v. Commonwealth, 721 S.W.2d 694, 701 (Ky. 1986); Gall v. Commonwealth, 702 S.W.2d 37, 44 (Ky. 1985); Grace v. Commonwealth, 459 S.W.2d 143, 144 (Ky. 1970); Howard v. Commonwealth, 240 S.W.2d 616, 619 (Ky. 1951).

deliberated for several hours (four) before returning its verdict; (3) the jury reported that it had reached a unanimous verdict; and (4) neither the Commonwealth nor defense counsel requested that the trial court poll the jury.

B. Review of Trial Court's Ruling.

The trial court has great latitude in deciding whether to grant a new trial.[16] On appellate review, we will disturb that decision only when we conclude that the trial court abused its discretion.[17] On this issue, we conclude that the trial court properly denied Hernandez's motion for a new trial and correctly relied upon RCr 10.04 in further denying Hernandez's request to poll the jury after the trial court had accepted the verdict and the jury had been discharged.

RCr 10.04 states: "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot."

The rule is a restatement of the longstanding principle "that the testimony of jurors is not competent to explain the grounds of their decision or impeach the validity of their finding."[18] The principle prohibits jurors from testifying about what went on in the jury room during deliberations, except to establish that the verdict was made by lot.[19]

In this case, Hernandez seeks to do precisely that which RCr 10.04 prohibits. Juror 262's affidavit does not establish that the verdict was made by lot. Thus, it was not competent evidence on which to seek a new trial.

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16 Jillson v. Commonwealth, 461 S.W.2d 542, 545 (Ky. 1970).

17 *Id.*

18 Ruggles v. Commonwealth, 335 S.W.2d 344, 346 (Ky. 1960).

19 Jones v. Commonwealth, 450 S.W.2d 812, 814 (Ky. 1970) (issue involved evidence of juror's statements during deliberations as to facts not introduced into evidence; held inadmissible under RCr 10.04).

We find this case indistinguishable from two cases cited by the trial court in denying Hernandez's motion, Grace v. Commonwealth[20] and Howard v. Commonwealth.[21] In Grace, one of the juror's in Grace's criminal trial stated in an affidavit that she had not agreed to the verdict even though she nodded her head affirmatively that she concurred in the verdict when polled by the trial court.[22] Relying on RCr 10.04 and reasoning that a juror may uphold her verdict but may not impeach it, the Grace court affirmed the judgment.[23] In Howard, a juror stated in an affidavit that she did not agree with the verdict but admitted that when asked by the circuit court if the verdict was hers, she answered: "I reckon it is."[24] The Howard court relied on the predecessor to RCr 10.04 and affirmed the judgment.[25]

Hernandez contends that Grace and Howard are distinguishable because in each of those cases, the trial court polled the jury; thus, the juror had an opportunity to respond that it was not her verdict. In this case, however, Juror 262 did not have such an opportunity because neither side asked for a poll of the jury before the jury was discharged. We are not persuaded that this distinction makes any difference. In this case, the foreperson signed the verdict form, indicating that is was a unanimous verdict. Absent an allegation that the verdict was made by lot, this Court will not allow a juror's affidavit to impeach a jury verdict.

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20 459 S.W.2d at 144.

21 240 S.W.2d at 619.

22 459 s.w.2D at 144.

23 *Id.*

24 *Id.* at 619.

25 *Id.*

III. THE TRIAL COURT DID NOT ERR IN ALLOWING HEARSAY THAT WAS INCONSISTENT WITH THE DECLARANT'S TESTIMONY AT TRIAL.

A. The Hearsay at Issue.

Maurice Lawson, an acquaintance of Hernandez and witness to the shooting, testified at trial. The Commonwealth called him in its case-in-chief. During his testimony on direct and cross-examination, Lawson admitted that he had given a statement to Detective Brotherton at police headquarters in the early morning hours after the shooting. He answered several questions by defense counsel pertaining to what he had stated in that interview.

On re-direct, the Commonwealth asked Maurice Lawson the following series of questions:

Q. When Johnny came out and was holding his eye, did he say anything?

A. Nah, he didn't say nothing to me.

Q. Okay. Do you remember—did he ever ask for the gun?

A. Ah, I don't know if he did or not to be truthful. But he handed the gun to him though.

Q. Did you tell the police that you heard Johnny asking for the gun?

A. I don't remember if I did or not.

With that response, the Commonwealth concluded its examination of Maurice Lawson, and the trial court excused him as a witness.

Later in the trial, the Commonwealth called Detective Brotherton. Detective Brotherton affirmed that he interviewed Maurice Lawson at headquarters. The Commonwealth asked him if Maurice Lawson told him anything about having heard Johnny say something to Adame Hernandez about the gun, and Detective Brotherton

stated that he had. Over defense counsel's objection on the grounds of hearsay, the trial court allowed Detective Brotherton to state that "he [Maurice Lawson] believed he heard Johnny Hernandez tell Adame Hernandez to hand him the firearm."

B. Review of the Trial Court's Ruling.

Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings.[26] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[27] Applying this standard, the trial court did not abuse its discretion in allowing Detective Brotherton to answer the question.

Under KRE 801A(a)(1), a prior statement of witnesses "is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is . . . [i]nconsistent with the declarant's testimony[.]" Under KRE 613,

> [b]efore other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it.

Here, both parties had questioned Maurice Lawson in some depth about statements that he had made to Detective Brotherton at police headquarters in the early morning hours after the shooting. Having established the circumstances surrounding the statement and having inquired about what he stated, we conclude that—while the foundation was not "textbook"—the trial court was within its discretion in allowing

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[26] Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996).

[27] Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

Detective Brotherton to testify as to an inconsistent statement that Maurice Lawson made to him in that interview.

Hernandez contends that the Commonwealth should have presented the statement to Maurice Lawson and allowed him to explain it. But the statement was not written. And having reviewed the testimony, we believe that he did have an opportunity to explain his answer. He said he did not remember if he told the police or not that he heard Johnny asking for the gun.

IV. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

All sitting. All concur. Noble, J., also concurs by separate opinion in which Cunningham and Schroder, JJ., join.

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CONCURRING OPINION BY JUSTICE NOBLE

While I agree with the majority in its conclusions and application of precedent, I do have concerns over these very real interrogations in the police station as to whether they appear "voluntary" or "non-custodial" or not. Not every person who appears to be cooperating has reason to know that they are not required to do so. At times the appearance of voluntariness or freedom to leave may be illusory. Particularly, this could be true of persons from different cultures or those who have language barriers. It begins to appear that under existing law a person must actually try to leave the station and be stopped before the questioning is a "custodial" interrogation. There is a very fine line between "question first" techniques and the point at which questioning becomes custodial. A trial court must have an adequate record developed by trial counsel to support its ruling, as was the case here. Nonetheless, what a person actually knows or believes is germane to a finding that his statement was not made in a custodial setting.

Cunningham and Schroder, JJ., join this concurring opinion.