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NOT TO BE PUBLISHED OPINION

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AS MODIFIED: JUNE 19, 2008
RENDERED: FEBRUARY 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000464-MR

ROBERT BENTON MILLER — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 04-CR-01468-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Robert Miller appeals as a matter of right from a May 25, 2006 Judgment of the Fayette Circuit Court finding him guilty of complicity to murder (KRS 507.020 and KRS 502.020), of complicity to first-degree robbery (KRS 515.020 and KRS 502.020), and of tampering with physical evidence (KRS 524.100). In accord with the jury's recommendation, Miller was sentenced to twenty, fifteen, and five-year prison terms, respectively, and was ordered to serve those terms consecutively for a total sentence of forty years. The charges against Miller stemmed from the September 15, 2004 shooting of eighteen-year-old Megan Liebengood in the parking lot of the English Manor Apartments complex on Codell Drive in Lexington. Miller and two accomplices, Michael Shepherd and Patrick Cook, were accused of accosting Liebengood as she was unloading groceries from her car and of fatally shooting her in the course of stealing her

purse. On appeal, Miller primarily contends that his complicity to murder conviction cannot stand in the face of evidence that Shepherd acted alone and beyond the robbery conspiracy when he shot and killed Liebengood. Miller also contends that the jury instructions with respect to the complicity to murder charge were flawed so as to deprive him of a unanimous verdict and that the court erred by refusing to suppress his statement to investigating police officers. We find no error in the court's suppression ruling or in its ruling that the evidence supported a finding that Miller was wantonly complicit in Liebengood's murder. We further find that under the particular circumstances of this case the jury instructions did not violate Miller's right to a unanimous verdict. Accordingly, we affirm the May 25, 2006 Judgment of the Fayette Circuit Court.

RELEVANT FACTS

Testimony by several witnesses at trial established that Miller, Shepherd, and Cook, at the time ages sixteen, sixteen, and seventeen, respectively, spent much of the afternoon and evening of September 15, 2004, drinking and/or smoking marijuana with friends outside the Ashford Place apartment where Cook lived with his cousin Elisha Epps (also sixteen), their grandmother, and Epps's parents. The Ashford Place Apartments complex is near the intersection of Woodhill Drive and Codell Drive in Lexington and is also near the English Manor complex. In April of that year Epps had given birth to Miller's child, and for a few days prior to the shooting Miller had stayed with Epps, Cook, and the baby in the Ashford Place apartment. At some point during the afternoon of September 15, Miller, Shepherd, and Cook agreed that they needed money and should "hit a lick," meaning find someone to rob. According to Cook, it was

Miller who first proposed the robbery and Miller who, later, retrieved a revolver and a holster from the apartment. Also according to Cook, Shepherd then borrowed a belt, put the holster on, placed the gun in the holster, and carried it for the rest of the evening, proudly showing it off to several people.

At approximately 10:00 pm, one of the visitors decided to go home, and Miller, Shepherd, Cook, and a fourth friend, Tim McCann, agreed to accompany her as far as one of the parking lots of the English Manor complex where a cut in the fence provided a shortcut to another neighborhood. They had not gone far when McCann encountered a girlfriend and left the group to talk to her. The remaining threesome saw their friend to the shortcut, and it was on their way back across the English Manor complex that they noticed Liebengood unloading her groceries and decided to rob her.

Cook, who was the only eyewitness to testify at trial, stated that as they sneaked up on Liebengood, Shepherd removed the revolver from the holster and held it at the ready. He then accosted Liebengood, pointed the gun at her, and ordered her to give him her money. When she responded that she had no money, Miller then found Liebengood's purse in her car and took it. Next, Shepherd ordered Liebengood to give him her keys and to get in the trunk of her car. Liebengood surrendered her keys, but when she tearfully refused to get in the trunk, Miller briefly grabbed her arm and Shepherd punched her in the face, knocking her to the ground. Cook testified that he became fearful at this point that things were getting out of hand and so he started to walk away. He believed that Miller had begun to move away, too. Before leaving, however, Cook saw Shepherd standing over Liebengood, pointing the gun down at her, and heard Shepherd ask if he "should shoot this bitch?" Cook testified that he then saw

Shepherd shoot Liebengood. After seeing two shots (there were, in fact, four), Cook ran back to his apartment, where Miller arrived shortly ahead of him and where Shepherd returned a short time later.

Elisha Epps testified that when Miller returned to their apartment he was plainly upset, and when she asked him what was wrong he replied, "Your boy Mike [Shepherd] is crazy." Miller was carrying Liebengood's purse, and he indicated that he would need to dispose of it. Epps then took the purse from him and attempted to throw it over the fence behind their apartment. The next morning, however, she discovered that the purse had snagged on the fence. Miller climbed over the fence and retrieved the purse, which they then carried to a nearby laundromat where Epps placed it in the trash. Epps also testified that when Shepherd returned to the apartment the night of the shooting, he still had the holster in his hand, was wiping it with his shirt, and repeatedly said, "I killed that white bitch."

The next day, September 16, 2004, the police arrested Shepherd and brought him to the police station for questioning. Shepherd first denied knowing anything about the murder. Then he blamed the shooting on one Josh Champagne, an acquaintance whom Shepherd later admitted naming out of animosity. Eventually, Shepherd told the police that he and Cook were the ones who tried to put Liebengood into the trunk, that she had screamed and resisted, and that it was Miller who then shot her. Shepherd also admitted that on the way back to Cook's apartment he had thrown both the gun and the keys to Liebengood's car into a dumpster.

The following day, Cook and Miller were also brought in for questioning, gave statements, and were subsequently arrested. Miller admitted being present when

Liebengood was accosted, denied any role in the robbery or shooting, and remarked that he had nothing to feel sorry about because he was not the one who "shot the bitch." On December 7, 2004, Shepherd, Miller, and Cook were indicted for murder and first-degree robbery. Miller and Shepherd were also indicted for tampering with physical evidence. Before the trial began, Cook pled guilty to the first-degree robbery charge and agreed to testify at trial. He was eventually sentenced to ten years in prison for the robbery; the murder charge was dismissed. The joint trial of Miller and Shepherd began on March 6, 2006, and lasted approximately two weeks. At trial, the Commonwealth introduced the statements Miller and Shepherd had given to the police shortly after the offense and just prior to their arrests. Both statements were redacted to eliminate any reference to the other defendant. Neither Miller nor Shepherd testified, however, or offered other evidence after the close of the Commonwealth's case. Instead, through their cross-examinations of the Commonwealth's witnesses and in their closing arguments, both defendants admitted being present during the robbery, but each pointed the finger at the other for the murder.

The jury found Shepherd guilty of intentional murder and first-degree robbery, Miller guilty of complicity to those crimes, and both guilty of tampering with physical evidence. The brunt of Miller's appeal challenges the propriety of his complicity to murder conviction. He contends that the evidence was insufficient to support findings either that he intended Liebegood's death or that he so wantonly disregarded the risk that she might be killed as to be deemed indifferent to the value of human life. He also faults the jury instructions for (1) permitting a non-unanimous complicity to murder conviction; (2) including alternative definitions of "wantonly"; and (3) failing to require a

causal nexus between his participation in the robbery and Liebengood's death. Convinced that the evidence of Miller's wantonness was sufficient and that the instructions were not flawed so as to require relief, we affirm.

ANALYSIS

I. The Evidence Supports a Finding that Miller was Wantonly Complicit in the Murder.

As the parties note, under the old felony murder doctrine, when two or more persons undertook a dangerous felony in the course of which a victim was killed, guilt for the killing could be imputed to all the participants regardless of which one actually committed it. Bennett v. Commonwealth, 978 S.W.2d 322 (Ky. 1998) (citing Tarrence v. Commonwealth, 265 S.W.2d 40 (Ky. 1953)). With the adoption of the penal code, however, Kentucky abandoned the felony murder doctrine and replaced it with the offense of wanton murder, narrowing somewhat the potential liability of participants in dangerous felonies for killings committed by a cohort. *Id.* The murder statute, KRS 507.020, now provides that

> [a] person is guilty of murder when:
>
> (a) With intent to cause the death of another person, he causes the death of such person or of a third person . . . or
>
> (b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

Under this statute,

> participation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life, thus permitting a conviction not only of the dangerous felony, but also of wanton murder.

Bennett v. Commonwealth, 978 S.W.2d at 327. In Kruse v. Commonwealth, 704 S.W.2d 192 (Ky. 1985), for example, the appellant's participation in the planning and carrying out of a robbery in which a cohort was armed with a .357 Magnum, "coupled with the use of drugs and alcohol immediately prior to the robbery," constituted sufficient evidence of aggravated wantonness and extreme indifference to human life to justify the jury's wanton murder verdict. *Id.* at 195.

There are two ways in which a non-killing participant in a dangerous felony may be convicted of wanton murder. The participant may be convicted as a principal directly under KRS 507.020(1)(b), *see* Bennett v. Commonwealth, supra, or he may be convicted pursuant to KRS 502.020 as complicit in the killing where his wanton disregard of the grave risk of death and his conduct contributing to the risk under circumstances manifesting extreme indifference to human life satisfy the complicity statute's requirement that the accomplice "act[] with the kind of culpability with respect to the result that is sufficient for the commission of the offense." KRS 502.020(2)[1]. *See* Marshall v. Commonwealth, 60 S.W.3d 513 (Ky. 2001) (citing Tharp v. Commonwealth, 40 S.W.3d 356 (Ky. 2000)).

In this case, the defendants and the Commonwealth were unanimous in rejecting

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[1]Section 2 of KRS 502.020 states in pertinent part:

> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result;

wanton murder instructions based solely on KRS 507.020 and opted instead for the complicity instruction found in section 10.14 of Cooper and Cetrulo, *Kentucky Instructions to Juries, Criminal* (2006). As to Miller, that instruction stated:

> If you do not find the Defendant, Robert Miller, guilty [of intentional murder] under Instruction No. 2, you will find the Defendant, Robert Miller, guilty of Complicity to Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about September 15, 2004 and before the finding of the Indictment herein, Michael Shepherd killed Megan Liebengood by shooting her with a firearm;
> B. That prior to the killing, the Defendant, Robert Miller, had solicited, counseled, commanded, or engaged in a conspiracy with Michael Shepherd to rob Megan Liebengood; AND
> C. That in so doing:
> (1) The Defendant, Robert Miller, intended that Megan Liebengood would be killed; OR
> (2) The Defendant, Robert Miller, was wantonly engaging in conduct which created a grave risk of death to Megan Liebengood and thereby caused the death of Megan Liebengood under circumstances manifesting an extreme indifference to human life.

It was pursuant to this instruction that the jury found Miller guilty of complicity to murder. Miller first contends that he was entitled to a directed verdict on that charge because, he maintains, the Commonwealth failed to prove either of the Part (C) alternatives, *i.e.*, either that he intended for Shepherd to kill Liebengood or that his own conduct brought about a grave risk of death, and manifested, in the circumstances, extreme indifference to human life.[2]

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[2]Although Miller couched his motion in terms of "directed verdict," he does not claim that the trial court erred by refusing to acquit him entirely, *i.e.*, not only of murder but of all lesser included offenses as well. "When the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by a case, the correct procedure is to object to the giving of instructions on those particular issues." Miller v. Commonwealth, 77 S.W.3d 566, 577 (Ky. 2002) (quoting Kimbrough

With respect to the second part of this contention, as Miller correctly notes, "only the highest levels of unjustifiable homicidal risk should render an actor eligible for a murder conviction." Brown v. Commonwealth, 975 S.W.2d 922, 924 (Ky. 1998). This Court has observed that the following circumstances set aggravatedly wanton conduct apart from conduct that would not warrant a wanton murder conviction:

> (i) homicidal risk that is exceptionally high;
> (ii) circumstances known to the actor that clearly show awareness of the magnitude of the risk; and
> (iii) minimal or non-existent social utility in the conduct.

Id. at 924.

Here, there was evidence from which a rational juror could find that Miller instigated the plan to "hit a lick;" that he supplied a loaded revolver in furtherance of the plan; that he and his cohorts had been using alcohol and/or marijuana throughout the evening leading up to the attack on Liebengood; that Miller failed to intervene or to abandon the plan even after Shepherd began attempting to force Liebengood into the trunk of her car or when he struck her; and that after the killing both Shepherd and Miller expressed contempt rather than remorse for the victim. Loaded handguns wielded in the course of a robbery undeniably pose a grave risk of death. Even juveniles, furthermore, realize that alcohol and marijuana affect one's judgment and that to combine them with guns and crime is to invite tragic results. Robbery, of course, is a detriment to the community and has no social utility whatsoever. These circumstances, very much like the circumstances found to justify a wanton murder conviction in Kruse v. Commonwealth, supra, adequately support a rational juror's conclusions that Miller

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v. Commonwealth, 550 S.W.2d 525 (Ky. 1977). Although Miller's motion was thus inartfully stated, it is clear from the transcript that the trial court understood him to be objecting only to the murder instruction and ruled accordingly.

was aware of but disregarded a grave risk that the armed robbery he was instrumental in bringing about would result in a death and that he was callously indifferent both to that potential result and to the death that did in fact occur. The trial court did not err, therefore, when it included guilty to wanton complicity to murder among the authorized verdicts.

II. The Jury Instructions Did Not Deny Miller a Unanimous Verdict.

The first part of Miller's contention is more problematic. As noted above, Part (C) of the jury instruction permitted the jury to convict Miller of complicity to murder if it found either that he intended Liebengood to be killed [by Shepherd], or that he wantonly and callously engaged in conduct creating a grave risk of Liebengood's death. We have concluded that the evidence supported Miller's conviction under the second alternative, but Miller contends that there was no evidence that he intended for Shepherd to kill Liebengood and that the trial court thus erred by including the first alternative in the instruction. As he correctly notes, under § 7 of the Kentucky Constitution, a defendant cannot be convicted of a criminal offense except by a unanimous verdict. Burnett v. Commonwealth, 31 S.W.3d 878 (Ky. 2000). This Court has explained that

> a "combination" instruction permitting a conviction of the same offense under either of two alternative theories does not deprive a defendant of his right to a unanimous verdict if *there is evidence to support a conviction under either theory.* . . . Otherwise, the verdict cannot be shown to be unanimous, and the conviction must be reversed.

Miller v. Commonwealth, 77 S.W.3d 566, 574 (Ky. 2002) (citations omitted, emphasis supplied). Miller contends that the combination instruction here violated his right to a unanimous verdict because there was no evidence to support the theory that he

intended that Liebengood be killed.

In Marshall v. Commonwealth, 60 S.W.3d 513 (Ky. 2001), this Court addressed a similar claim that the evidence did not support the jury's finding that a robbery participant had intended the murder of one of the victims and thus was himself guilty of complicity in the murder. As the Court explained,

> even if the defendant, himself, did not pull the trigger, he may still be convicted of intentional murder if he was an accomplice to an offense and intended that the victim would be killed during the course of the commission of that offense. . . . Even absent proof of an agreement to kill anyone who gets in the way of the commission of the felony, . . . intent may be inferred from the actions of a defendant or from the circumstances surrounding those actions. . . . Intent may also be inferred from knowledge. . . . However, although intent that a victim be killed may be inferred from conduct or knowledge, such intent may not be predicated on the mere intent to participate in the underlying felony. . . . And a defendant's liability for the acts of a conspirator must be determined by the defendant's own mental state, not that of the coconspirator.

60 S.W.3d at 518. In Marshall there was evidence that prior to the robbery the participants had discussed the killing and that during the robbery the appellant had joined in the physical assault on one of the victims. This evidence was sufficient, the Court ruled, to permit a rational fact finder to infer that the appellant was not a "surprised bystander" to the murder, but that he had acquiesced in and intended it.

In its brief to this Court, the Commonwealth contends that Miller's murderous intent may be inferred from his apparent acquiescence in Shepherd's escalating violence against Liebengood. Miller stood by as Shepherd demanded that Liebengood climb into the trunk, as he struck her, and as he stood over her asking if he should shoot her. By all accounts, however, these events happened rapidly and apparently to

Cook's and Miller's surprise. There was no evidence of a prior understanding among the robbers to kill anyone who interfered with the robbery or who witnessed it, nor was there evidence that Miller struck Liebengood or otherwise joined Shepherd's violent assault upon her or actively encouraged Shepherd to kill. Clearly this evidence is not as strong as the evidence permitting an inference of intent in Marshall, and the Commonwealth conceded as much in its closing argument. It told the jury that the first alternative under Part (C) of the complicity to murder instruction, the "intended that Megan Liebengood would be killed," alternative, did not really "fit" the case, and it candidly acknowledged that it had not proven that Miller intended Shepherd to kill. Indeed, the Commonwealth argued that while "Miller was not guilty of complicity to intentional murder," he was guilty of wanton complicity to murder.[3]

Generally, of course, the denial of a unanimous verdict is not subject to harmless error analysis, because, as we explained in Burnett v. Commonwealth, supra, where alternative theories have been presented to the jury the Court is not willing to assume that no juror relied on the alternate theory not supported by the evidence. In the highly unusual circumstances of this case, however, where the Commonwealth's attorney expressly conceded that the complicity to intentional murder instruction did not have adequate evidentiary support and urged conviction for wanton complicity to murder, we

[3]The jury instruction discourse between the trial court and counsel in this case occurred largely "off the record." They initially discussed the instructions one evening off the record; the judge returned the next day to present his written instructions on the record; and then he left the bench with the video recorder "on" so that the attorneys could voice their objections. A thorough discussion on the record with all counsel and the judge present following the close of proof may well have resulted in recognition of the failure of proof on the intentional complicity charge and its deletion from the jury instructions. In any event, it aids any reviewing court to have a record of the jury instruction discussion so that the judge's rationale for any given instruction can be fully understood and the evolution of the instructions fully appreciated.

are convinced, beyond a reasonable doubt, that twelve jurors found Miller guilty of complicity to wanton murder and that Miller was not denied his right to a unanimous verdict. We need not decide, therefore, whether the evidence supported the complicity to intentional murder instruction notwithstanding the Commonwealth's concession that it did not. Needless to say, if the Commonwealth intended to disavow the complicity to intentional murder theory of the case, it should not have sought an instruction on that theory. Further, as we have noted, the trial court may well have averted this issue had it included the instructions colloquy on the record. Despite these missteps, the record is clear that the Commonwealth only sought a wanton complicity conviction and that is the verdict that was returned by the unanimous jury.

III. The Complicity to Murder Instruction Correctly Included All the Elements of Complicity to Wanton Murder.

Finally with respect to the instructions, Miller contends that the complicity to murder instruction permitted the jury to convict Miller of that crime without finding any causal nexus between his conduct and the killing. This issue was not preserved and requires only brief comment. Miller bases his contention on the fact that Parts (A) and (B) of the complicity to murder instruction require findings only that Shepherd killed Liebengood and that prior to the killing Shepherd and Miller conspired to rob her. We agree with Miller that these findings, alone, are not sufficient to justify a complicity to wanton murder conviction. As the Commonwealth notes, however, Part (C) of the instruction further requires findings that Miller "was wantonly engaging in conduct which created a grave risk of death to Megan Liebengood and thereby caused the death of Megan Liebengood under circumstances manifesting an extreme indifference to human life." Contrary to Miller's contention, therefore, the instructions clearly did not permit his

complicity to murder conviction on proof less than a finding that his aggravated wantonness was a significant cause of Liebengood's death. The instructions, in this regard, were not erroneous.[4]

IV. There was Sufficient Evidence to Convict Miller of Tampering With Physical Evidence.

Miller next contends that he was improperly convicted of tampering with physical evidence. He failed to preserve this issue, but asks for palpable error review. There was no error, much less a palpable one. KRS 524.100 outlaws tampering with physical evidence in part as follows: "when, believing that an official proceeding . . . may be instituted, [a person] . . . conceals . . . physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its . . . availability in the official proceeding." As Miller notes, to amount to a violation of this statute, "[t]he concealment must be to prevent the evidence from being used in an official proceeding." Commonwealth v. Henderson, 85 S.W.3d 618 (Ky. 2002). He contends that it was Epps, and not he, who concealed Liebengood's purse with the intent proscribed in KRS 524.100. Epps's testimony (which included her recollection that when Miller showed her the purse he remarked that he needed to dispose of it and later

[4] Miller additionally claims that the trial court incorrectly instructed the jury on wantonness, *i.e.*, offering one definition for wanton complicity to murder and a conflicting definition for manslaughter in the second degree. Having reviewed the jury instructions, we find that they conform with Kentucky Instructions to Juries, Criminal pattern instructions. Moreover, when read in their entirety the instructions are not inconsistent. The wanton complicity to murder instruction included the term "wantonly" with its attendant definition but the instruction specifically provided: "The Defendant, Robert Miller, was wantonly engaging in conduct which created a grave risk of death to Megan Liebengood and thereby caused the death of Megan Liebengood under circumstances manifesting an extreme indifference to human life." In arguing inconsistency, Miller focuses solely (and improperly) on the definition of "wantonly" ignoring the remainder of the wanton complicity to murder instruction. This unpreserved issue does not constitute error.

explained that the purse probably bore his fingerprints) permitted a rational juror to infer that when he surrendered the purse to Epps, and later when he retrieved the purse from where it had become snagged on the fence and again gave it to Epps, he knew and intended that she would conceal it so as to prevent its use as evidence in an official proceeding. This evidence was sufficient to support a finding that Miller attempted to conceal the purse in order to frustrate his prosecution. We affirm, therefore, Miller's conviction and sentence for tampering with physical evidence.

V. Miller Was Not Entitled to Suppress His Statement to the Police.

a. Miller was not Deprived of his Miranda Rights.

As noted above, at trial the Commonwealth read to the jury a redacted version of the statement Miller gave to the principal investigating officer, Detective Schoonover, on the afternoon of September 17, 2004, two days after the shooting and about an hour after Miller's arrest outside Epps's and Cook's Ashford Place apartment. In his statement, Miller denied any participation in the crimes, but did admit that he was present when Liebengood was robbed and shot. He also asserted that because he had not had anything to do with shooting "the bitch," he felt no remorse for her death. The Commonwealth emphasized this last remark as evidence of Miller's callous disregard for human life. Prior to trial Miller moved to suppress his statement on the ground that it had been obtained in violation of his right, under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), to be advised prior to questioning of his constitutional right not to incriminate himself.

At the hearing on Miller's motion to suppress his statement, the two arresting officers, Detective Brotherton and Officer Cobb, both testified that they approached

Miller in the parking lot of the Ashford Place Apartments complex and that as soon as they contacted him Officer Cobb placed him in handcuffs and recited Miranda's required warnings. According to the officers, Miller indicated that he understood his rights and made no statement except to deny his identity. At the hearing, Officer Cobb recited the warnings and testified that it was his standard practice to give those warnings to every suspect he handcuffed. A few minutes after the arrest, Officer Cobb transported Miller to police headquarters where, a short time later, his interview with Detective Schoonover took place. As demonstrated by the tape of the interview, after introducing himself, Detective Schoonover asked Miller if he had been advised of his rights and Miller indicated that he had been, referring to Miranda by name. When asked to elaborate, however, Miller stated that the arresting officer had told him to "shut up, bitch," and then had told him some "off the wall shit." Detective Schoonover then undertook to readvise Miller of his rights, but omitted from the required warnings the admonition that anything Miller said could be used against him in court. Miller indicated that he understood, waived his rights, and made the limited statement described above.

Following the Commonwealth's proof at the suppression hearing, Miller's counsel advised the court that Miller desired to testify, but only if questioning would be limited to the very narrow issue of whether Officer Cobb had in fact administered the Miranda warnings at the time of Miller's arrest. The court and the Commonwealth apparently acceded to that limitation, whereupon Miller took the stand and denied that Officer Cobb had Mirandized him. On cross-examination, the Commonwealth noted that during the interview with Detective Schoonover Miller had referred specifically to his "Miranda" rights and then asked how Miller had become familiar with those rights. Miller

volunteered that he had been arrested prior to the present matter. When the Commonwealth then asked how many times he had been arrested, Miller's counsel objected on the grounds both that Miller's juvenile record was privileged and that Miller's prior experience with the Miranda warnings was irrelevant to the question of whether Officer Cobb had Mirandized him. Overruling the objection, the court explained that in its view Miller had opened the door to his prior arrests and that his experience with Miranda was one of the important circumstances bearing upon whether Detective Schoonover's deficient warning rendered Officer Cobb's alleged warning ineffective. Counsel then advised Miller not to answer any more questions, whereupon the Commonwealth moved to strike Miller's direct testimony. The trial court ultimately granted the Commonwealth's motion to strike and denied Miller's motion to suppress. It found that Officer Cobb had effectively advised Miller of his Miranda rights and, relying on Hughes v. Commonwealth, 87 S.W.3d 850 (Ky. 2002), it ruled that because Detective Schoonover had not been obliged to readvise Miller of his rights at all, his deficient warning was essentially surplusage that should be disregarded. On appeal, Miller contends that the suppression hearing was rendered fundamentally unfair when the trial court permitted irrelevant cross-examination concerning his juvenile record. He also contends that the court erred by disregarding Detective Schoonover's deficient Miranda warnings.

It is well established that generally a defendant's statements during custodial interrogation will not be admissible at trial unless prior to the statements the defendant was advised of Miranda's four basic warnings: (1) that the suspect has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3)

that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). It is likewise established that once a suspect has been given adequate warnings the police are not necessarily obliged to readvise him of Miranda rights merely because questioning has been interrupted for a time or because the questioner has changed. Hughes v. Commonwealth, 87 S.W.3d 850 (Ky. 2002). Rather, "[c]ourts look to the totality of the circumstances when deciding whether initial warnings remain effective for subsequent interrogations." State v. Treesh, 739 N.E.2d 749, 764 (Ohio 2001).

As the Commonwealth notes, in Hughes v. Commonwealth this Court rejected a bright line rule requiring that suspects be re-Mirandized whenever questioning has been interrupted or is to be continued by a different questioner. Contrary to the Commonwealth's assertion, however, and the trial court's apparent understanding, Hughes did not establish an opposite bright line either, that once effective warnings have been given the presence or absence of subsequent warnings, defective or otherwise, is simply irrelevant. The correct test, rather, as indicated above, is whether, considering the totality of the circumstances, the initial warnings remain effective for subsequent interrogations. The police, for example, could not rely on valid warnings administered in the field to shield deficient warnings subsequently administered at headquarters which were calculated either to coerce or to deceive the suspect into waiving his rights. Although we thus disagree to some extent with the trial court's reasoning, we nevertheless agree that in the circumstances of this case the warnings administered by Officer Cobb complied with Miranda and remained effective

notwithstanding Detective Schoonover's mistake.

Officer Cobb's testimony concerning both the content of the warnings he gave as well as the fact of giving them, together with Miller's unhesitating admission at the outset of his interview with Detective Schoonover that the arresting officer had Mirandized him is substantial evidence supporting the trial court's finding that Officer Cobb issued valid and complete warnings. Because (1) those warnings were given only about an hour before Miller's interrogation, (2) Detective Schoonover reminded him of those warnings, and (3) Detective Schoonover's omission was clearly an inadvertent mistake unlikely either to diminish the significance of the earlier warnings or to induce an unwitting waiver, we conclude that Officer Cobb's warnings remained effective during Miller's interview with Detective Schoonover.

Of course, as Miller correctly asserts, the fact that he was a juvenile at the time of his interrogation is one of the important circumstances to consider in assessing his waiver. That fact does not, however, alter the totality-of-the-circumstances analysis that governs review of custodial interrogations. As the Supreme Court of the United States has explained,

> [t]he totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197 (1979).

There is no suggestion in this case that the sixteen-year-old Miller was naïve, intellectually challenged, or otherwise incapable of understanding his rights. Nor is there any suggestion that Detective Schoonover improperly threatened or cajoled Miller to waive them. Miller complains that Detective Schoonover told him at one point that he would probably want to answer questions after he had heard the tape of Shepherd's and McCann's interviews, but it is not improper for the police to confront a suspect with evidence implicating him in the crime. The fact that Miller's statement amounted to little more than a denial makes it clear that he was not overreached. Indeed, Miller conceded at the suppression hearing that aside from Detective Schoonover's incomplete Miranda warning there had been no police misconduct and his statement was given voluntarily. The trial court did not err, therefore, when it denied Miller's motion to suppress his statement.

b. Miller was not Denied a Fair Suppression Hearing.

Moreover, Miller received a fair suppression hearing. It does appear, unfortunately, that the court and Miller's counsel misunderstood each other when counsel sought to limit the scope of Miller's testimony. Counsel clearly intended to limit inquiry to the single question of whether Officer Cobb had issued a Miranda warning, and she placed her client on the stand only after the trial court appeared to acquiesce in that very narrow limitation. The court later explained, however, that it understood Miller's testimony to be limited to "the Miranda issue," and ruled that the Commonwealth's questions regarding Miller's prior experience with Miranda warnings came within that limitation. Counsel's misunderstanding of the court's willingness to

limit cross-examination was, as we say, unfortunate, but we fail to perceive how Miller's rights were in any way impaired. Once the court clarified its position, Miller had the same choice about testifying he would have had had the court's position been clear from the outset. He opted not to testify, and the testimony he gave prior to that point, his mistakenly induced testimony, as it were, has been stricken and has resulted in no prejudice.

The court did not abuse its discretion, moreover, by refusing to limit cross-examination as narrowly as Miller's counsel desired. As this Court explained in Derossett v. Commonwealth, 867 S.W.2d 195 (Ky. 1993), our courts take a liberal approach to cross-examination:

> KRE 611 embodies the "wide open" rule of cross-examination by allowing questioning as to any matter *relevant* to any issue in the case, subject to judicial discretion in the control of interrogation of witnesses and production of evidence. "While the trial court may not limit cross-examination because it involves matters not covered on direct, it may limit such examination when limitations become necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack."

867 S.W.2d at 198 (quoting from Lawson, *The Kentucky Evidence Law Handbook* § 3.20(11) (3rd ed. 1993)). On the other hand, as Miller observes, this Court has recognized that trial courts should attempt to balance the right to cross-examination with the right against self-incrimination by, where appropriate, limiting cross-examination into collateral matters which might prompt an assertion of the witness's Fifth Amendment privilege. Combs v. Commonwealth, 74 S.W.3d 738 (Ky. 2002).

Under these standards, the trial court did not abuse its discretion by deeming Miller's prior experience with Miranda warnings relevant to his credibility at the

suppression hearing as well as to the effectiveness of Officer Cobb's alleged warning. Miller's credibility, in particular, was not a collateral matter which could be excluded from cross-examination. Indeed, it was a key issue at the suppression hearing, exploration of which, the trial court could reasonably believe, made delving into Miller's familiarity with Miranda both fair and necessary. Suppression hearing testimony, after all, would not expose Miller's juvenile record to the jury, and the privacy of that record could have been protected simply by excluding the public from the courtroom during his testimony. In sum, the trial court did not unfairly burden Miller's right to testify at the suppression hearing, and because Miller declined to submit to fair cross-examination, the court did not abuse its discretion by striking his direct testimony. Again, therefore, it was not error to deny Miller's motion to suppress his September 17, 2004 statement to Detective Schoonover.

VI. Miller has not Shown that His Cross-examination of Cook and McCann was Improperly Limited.

At trial, Miller sought to cross-examine both Patrick Cook and Tim McCann regarding whether they had been threatened not to testify against Shepherd. The trial court disallowed that inquiry because there was insufficient evidence linking the alleged threats to Shepherd. Foley v. Commonwealth, 942 S.W.2d 876 (Ky. 1996). Miller argues that the trial court overstated the rule that threats are not admissible unless linked to the accused and contends that the evidence in this case permitted a reasonable inference that Shepherd was behind the threats or in any event that Cook and McCann had fear-based biases in favor of Shepherd. This alleged error was not preserved by Cook's or McCann's avowal testimony. Generally, of course, an avowal is necessary to preserve this sort of error because

> [w]ithout an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial.

Bayless v. Boyer, 180 S.W.3d 439, 447 (Ky. 2005) (citation and internal quotation marks omitted). *See also* Partin v. Commonwealth, 168 S.W.3d 23 (Ky. 2005) (*citing* KRE 103(a)(2)). Here in particular that rule applies because the record otherwise suggests an absence of prejudice. Notwithstanding their alleged fears, Cook and McCann both gave testimony inculpating Shepherd. Cook, as noted above, identified Shepherd as the shooter, and McCann testified regarding Shepherd's disposal of evidence. McCann, furthermore, testified that he and Shepherd were friends, and Miller's counsel thoroughly questioned him regarding bias on that score. Absent avowal testimony indicating that Miller was prejudiced by the exclusion of "threat" evidence, therefore, this issue is not subject to review.

VII. The Trial Court Should Have Excluded And Therefore Properly Limited The Use Of Miller's Statement that "Your boy Mike is crazy."

Finally, Miller contends that the trial court erroneously excluded testimony to the effect that when Miller returned to Epps's apartment soon after the shooting, one of his first remarks was, "Your boy Mike [Shepherd] is crazy." The issue first arose prior to Cook's testimony, when counsel for Shepherd moved to exclude Cook's expected reference to the "Shep's crazy" remark. The court indicated that it did not think the remark a violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed.2d 476 (1968), but nevertheless concerned, apparently, about Shepherd's confrontation right if the remark were admitted and Miller did not testify, the court "out of an abundance of caution," instructed Cook not to testify as to Miller's statement. The issue

came up again later in the trial when Epps was asked about her interaction with Miller during the night of the shooting and she volunteered that when Miller returned to her apartment following the crime one of the first things he said was, "Your boy Mike is crazy." The Commonwealth thereupon reminded the court that Miller's statement was to have been excluded and requested that Epps be admonished to make no further reference to it. Shepherd's counsel seconded that request, and accordingly the court admonished both Epps and the parties that Miller's statement was off limits. Thus, notwithstanding the fact that the jury heard the statement, Miller was prevented from questioning Cook and Epps about it and from referring to it in his closing argument, and it is this limitation on use which is at the heart of his contention that the trial court erred by "excluding" his statement. Although we agree with Miller that the trial court's understandable Confrontation Clause concerns probably did not warrant exclusion of the remark, the remark was nevertheless excludable as hearsay and thus the trial court's ruling does not entitle Miller to relief.

We may note at the outset that generally we are obliged to affirm the trial court's correct evidentiary rulings even if incorrect reasons are offered for them. Commonwealth v. Fields, 194 S.W.3d 255 (Ky. 2006); Entwistle v. Carrier Conveyor Corporation, 284 S.W.2d 820 (Ky. 1955). Such is the case here.

Miller focuses on the trial court's reference to Bruton during the discussion prior to Cook's testimony and insists, correctly, that Bruton does not apply in this situation. In Bruton, the Supreme Court held

> that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant [Miller] is introduced [against the codefendant, Shepherd] at their joint trial, even if the jury is

> instructed to consider the confession only against the codefendant.

Richardson v. Marsh, 481 U.S. 200, 207, 107 S.Ct. 1702, 1707, 95 L. Ed. 2d 176 (1987). As Miller correctly notes, his "Shep's crazy" remark was not a confession and was not offered as proof against him. Bruton does not apply to a codefendant's extrajudicial statements offered, as here, directly against the accused. Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L. Ed. 2d 514 (1986). As the trial court was aware, however, that is not the end of the Confrontation Clause analysis.

In Davis v. Washington, ___ U.S. ___, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (2006) and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004) the Supreme Court held that under the Confrontation Clause, extrajudicial, *testimonial* statements are not admissible against an accused, regardless of their reliability and regardless of the hearsay rules, unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine him. Because Miller did not subject himself to cross-examination, if his statement were to be deemed "testimonial," it would thus be inadmissible under Davis and Crawford. This seems to have been the real crux of the trial court's concern. Under Davis, however, the Confrontation Clause is not implicated by *nontestimonial* hearsay statements, the admissibility of which is governed solely by the rules of evidence. United States v. Arnold, 486 F.3d 177 (6th Cir. 2007). It seems likely that Miller's statement here—a remark to an acquaintance outside any sort of investigative setting—was nontestimonial. We need not decide that question, however, because even if the statement was nontestimonial and thus outside the Confrontation Clause, the trial court could still properly have excluded it under the hearsay rules.

Miller contends that his "Your boy Mike is crazy" remark to Epps was admissible under KRE 803(2) as an excited utterance tending to show his state of mind: that he was surprised by the shooting and hence could not have intended it. In Thomas v. Commonwealth, 170 S.W.3d 343 (Ky. 2005), however, we noted that important among the factors to be considered in determining whether a statement was an excited utterance are the opportunity for and inducement to fabrication, the lapse of time between the main act and the declaration, the place of the declaration, and whether the declaration was self-serving. Here, Miller's self-serving statement did not occur at the scene of the shooting, but some time later after he had had an opportunity, while making his way back to Epps's apartment, to reflect on his need to shift the blame to Shepherd. The statement thus does not qualify as an excited utterance, the reliability of which would not be meaningfully tested by the adversarial process. Accordingly, use of the statement was properly limited regardless of its admissibility under the Confrontation Clause.

CONCLUSION

In sum, the trial court did not err when it refused to suppress Miller's statement to police or by ruling that the evidence was sufficient for a finding that Miller had been wantonly complicit in Shepherd's murder of Megan Liebengood. Even if the court did err by instructing the jury on the theory that Miller had been intentionally complicit in the murder, the inclusion of the unsupported theory in the jury instructions did not deny Miller his right to a unanimous verdict because in the circumstances of this case it is inconceivable that any member of the jury relied on the intentional complicity to murder instruction. Accordingly, we affirm the May 25, 2006 Judgment of the Fayette Circuit

Court.

All sitting. Lambert, C.J., Abramson, Noble, Schroder, J.J., concur.

Cunningham, Scott, Minton, J.J., concur in result only.

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Supreme Court of Kentucky

2006-SC-000464-MR

ROBERT BENTON MILLER — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 04-CR-001468-002

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION ON THE COURT'S OWN MOTION

The petition for rehearing filed by Appellant, Robert Benton Miller, is DENIED. The Opinion of the Court, rendered on February 21, 2008, is MODIFIED on its face by substitution of the attached opinion in lieu of the original opinion. Said modifications does not affect the holding.

Lambert, C.J.; Abramson, Cunningham, Minton, and Noble, JJ., concur. Scott, J., would have granted petition for rehearing. Schroder, J., not sitting.

ENTERED: June 19, 2008.

CHIEF JUSTICE