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Supreme Court of Kentucky

FINAL
DATE 8-21-08 Ella Gravitt, D.C.

2005-SC-000592-MR

STEPHANIE DENISE OLSON — APPELLANT

V. — ON APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL ISAACS, JUDGE
NO. 04-CR-000029

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Stephanie Olson, was convicted of complicity to murder by a Scott Circuit Court jury. She now appeals her conviction as a matter of right pursuant to Ky. Const. § 110(2)(b), raising twelve issues: (1) that the evidence is insufficient to support her conviction, (2) that the trial court erred in admitting testimony as to statements allegedly made by Appellant's ex-boyfriend and accomplice, (3) that the trial court erred in admitting testimony of the other accomplice's cellmate as to statements made by that accomplice, (4) that the Commonwealth improperly impeached its own witness, (5) that the trial court erred in admitting testimony as to a statement made by one of the accomplices, (6) that the Commonwealth's opening statement was improper, (7) that the trial court erred in admitting one of the accomplice's "proffer of testimony," (8) that she should have been allowed to impeach one of the witnesses with a prior misdemeanor conviction for falsely reporting an incident, (9) that the trial court erred in

admitting lack of mourning evidence, (10) that the trial court erred in admitting a police video, (11) that the trial court erred in admitting testimony as to statements made by the victim concerning the relationship between her and Appellant, and (12) that the jury instruction on complicity to murder was improper. For the reasons set forth herein, we affirm.

I. FACTS

On June 6, 2002, Appellant's mother, Diane Snellen, was found stabbed to death in her home in Georgetown, Kentucky. Appellant, her then-boyfriend David Dressman, and Timothy Crabtree were accused of the murder.

Appellant was indicted on one count of complicity to murder. The Commonwealth's theory of the case was that the three accomplices plotted to kill Snellen to collect on her life insurance policy and because Snellen disapproved of Appellant's romantic relationship with Dressman. The jury found Appellant guilty of complicity to murder, and she was sentenced to twenty-five years imprisonment. This appeal followed.

II. ANALYSIS

A. The evidence is sufficient to support Appellant's conviction for complicity to murder

At the close of the Commonwealth's case, Appellant moved for a directed verdict, arguing, as she does here, that the evidence was insufficient to support her conviction. This issue is preserved by Appellant's motion and renewed motion for directed verdict. See Hilsmeier v. Chapman, 192 S.W.3d 340, 345 (Ky. 2006) (holding that claims must be presented to the trial court in order to be preserved for appellate review). The trial

court denied the motion and allowed the case to be submitted to the jury. We find no error in the trial court's ruling.

The test for whether a trial court should direct a verdict in favor of the defendant is as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.

Here, as per the instructions, the Commonwealth was required to prove four elements beyond a reasonable doubt:

> (A) That in this county, on or about June 5, 2002, and before the finding of the indictment herein, David Dressman and/or Timothy Crabtree killed Diane Snellen by stabbing her to death; and
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> (B) That in so doing, David Dressman and/or Timothy Crabtree caused the death of Diane Snellen intentionally; and
>
> (C) That prior to that date, the defendant had solicited, aided, counseled or entered into an agreement with David Dressman and/or Timothy Crabtree, that David Dressman and/or Timothy Crabtree would kill Diane Snellen; and
>
> (D) That in soliciting, aiding, counseling, or entering into that agreement with David Dressman and/or Timothy Crabtree, it was the defendant's intention that David Dressman and/or Timothy Crabtree would kill Diane Snellen.

Upon review of the evidence presented at trial, we conclude that it was not clearly unreasonable for the jury to find Appellant guilty of complicity to murder. See id.

The Commonwealth introduced sufficient circumstantial evidence on the first two elements of the offense: that Dressman and/or Crabtree intentionally stabbed Snellen to death. See Slone v. Commonwealth, 677 S.W.2d 894, 896 (Ky. App. 1984) (a complicity conviction can be based exclusively upon circumstantial evidence). Richard Roberts, one of Crabtree's cellmates in jail, testified that Crabtree admitted that he and Dressman murdered Snellen. According to Roberts, Crabtree asked for help in killing Dressman because he was concerned that Dressman would implicate him.

Moreover, three witnesses testified that Dressman asked Crabtree how to quietly kill someone in a neighborhood,[1] and, in response, Crabtree recommended stabbing the victim in the lungs so they could not scream. As to the murder weapon, Roberts testified that Crabtree claimed he received the knife from Dressman, who at that time worked at Frisch's Big Boy. Alfred Hensley, the kitchen leader at Frisch's Big Boy, testified that a knife disappeared from the restaurant just prior to Snellen's death. Snellen was stabbed to death.

As to the third and fourth elements of complicity to murder, we believe that there was sufficient circumstantial evidence that Appellant, with the requisite mental state, solicited, aided, counseled, or entered into an agreement with Dressman and/or Crabtree to kill Snellen. See Slone, 677 S.W.2d at 896; KRS § 502.020. The evidence indicated that Appellant hated her mother; wanted her mother dead; physically fought with her mother on at least one occasion; ran away from home; and did not grieve much over her mother's death.

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[1] Kevin Butler, Mike Welch, and Richard Roberts testified about this conversation.

In addition, Georgie Barbosa, who was in jail with Appellant, testified that Appellant said that Dressman and Crabtree committed the murder. Walter Martin, with whom Appellant lived after her mother's death, testified that Appellant admitted she had been involved in the plot. According to Barbosa, Appellant said she would get $200,000, half of her mother's life insurance policy, if acquitted.

Because there was sufficient evidence upon which to submit the case to the jury, the trial court correctly refused to direct a verdict in favor of Appellant. See Benham, 816 S.W.2d at 187.

B. The trial court did not commit reversible error in admitting testimony as to statements made by David Dressman

Appellant next argues that the trial court erred in admitting certain testimony of witnesses Timothy Crabtree, Steven McCormick, Kevin Butler, Mike Welch, and Richard Roberts, as to statements allegedly made by David Dressman. Specifically, Appellant takes issue with the following testimony: (1) Crabtree testified that Dressman admitted to killing Snellen, and that, prior to the murder, Dressman asked how to kill a person in a quiet place; (2) McCormick testified that, just days after the murder, Dressman said "they" took care of "that problem," when asked whether he knew who killed Snellen; and (3) Butler, Welch, and Roberts testified that Dressman asked Crabtree how to kill a person in a quiet place. Appellant argues that these statements are inadmissible hearsay and that admitting them violated her right to confront Dressman. See U.S. Const. amend. VI; Ky. Const. § 11; Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We find no reversible error.

1. Admission of Dressman's statements did not violate the confrontation clause

We first address whether admitting the statements violated the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him". U.S. Const. amend. VI. In Crawford, the United States Supreme Court held that an out-of-court testimonial statement is inadmissible, unless the declarant is unavailable to testify *and* the defendant had a prior opportunity for cross-examination. 541 U.S. at 54, 124 S. Ct. at 1365-66. Where non-testimonial statements are at issue, states are free to use their hearsay rules.

The applicability of Crawford thus turns on whether a particular out-of-court statement is "testimonial." Although the Crawford Court did not firmly define "testimonial," it noted:

> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Crawford, 541 U.S. at 51, 124 S. Ct. at 1364 (citations omitted).

Here, Dressman made the statements at issue during casual conversations with friends and acquaintances, and thus, we conclude that Crawford is inapplicable to the present case because the statements were clearly non-testimonial. Dressman admitted killing Snellen to Crabtree at a hotel; implicated himself in the murder while walking with McCormick to a creek; and expressed his intent to kill while riding in a car with Crabtree, Butler, and Welch. Therefore, the Commonwealth's use of the statements did not violate the Confrontation Clause as the statements were non-testimonial.

2. Admission of Dressman's statements, although erroneous, was harmless error

Appellant also contends that the trial court should have excluded the statements as hearsay, not within any exception. See KRE 801. The standard of review for

admission of evidence is whether the trial court abused its discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id.

With respect to the first and second statements, we agree with Appellant that the trial court abused its discretion in admitting as declarations against penal interest: (1) the testimony of Crabtree that Dressman confessed to the murder when asked whether he had killed "that woman," and (2) the testimony of McCormick that Dressman said "they" took care of "that problem" when asked whether he knew who committed the murder. See KRE 804(b)(3) (requiring that the declarant be unavailable as a witness). However, we believe these errors were harmless. See RCr 9.24.

Unavailability of the witness at trial is a prerequisite for the declaration against interest exception. KRE 804(a) defines unavailability to include *legitimate claims of evidentiary privilege*, a witness's refusal to testify, a genuine loss of memory, death and illness or infirmity, and inability to procure the declarant's attendance at trial. The asserted basis at trial was that he could assert his Fifth Amendment rights. However, "[b]efore a declarant may be excused as unavailable based on a claim of privilege, the declarant *must appear at trial, assert the privilege, and have that assertion approved by the trial judge*." Marshall v. Commonwealth, 60 S.W.3d 513, 519 (Ky. 2001). (Emphasis added).

At issue here is whether Dressman was unavailable based on an assumed claim of privilege. He was not called as a witness. Had he been called as a witness, he presumably would have invoked his Fifth Amendment privilege against self-incrimination and refused to testify. The critical fact, however, is he was not called and did not assert

the privilege. Thus, Dressman was not unavailable as required by KRE 804(b) because he did not appear at trial, nor claim any privilege. Therefore, the trial court improperly admitted the confessions as they do not qualify as declarations against interest, and no other hearsay exception applies.

Yet, these errors are subject to harmless error analysis. Where there is "no reasonable possibility that [the testimony] affected the verdict," the error will be held to be harmless. Emerson v. Commonwealth, 230 S.W.3d 563, 570 (Ky. 2007).

Here, as to the first two statements, other evidence was presented that (1) Dressman asked Crabtree how to kill someone in a quiet place and in response Crabtree suggested stabbing them in the lungs; (2) shortly before the murder, a knife disappeared from the restaurant where Dressman worked; and (3) Crabtree admitted to Roberts that he and Dressman murdered Snellen. Moreover, none of the statements Crabtree, or McCormick, ascribed to Dressman directly implicated Olson, rather they served only to cast blame on Dressman himself or Dressman and Crabtree. Thus, there is no reasonable possibility they affected the verdict against Olson. Id.

As to the third statement, the trial court properly admitted testimony that Dressman asked Crabtree how to kill a person in a quiet place under KRE 803(3) (the hearsay exception for then existing mental, emotional, or physical condition). Statements showing state of mind are admissible under KRE 803(3) to prove a subsequent act. Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.50[3],

at 648 (4th ed. 2003). Here, the statement shows Dressman's state of mind (intention to kill) and was admissible as proof that he carried out the murder.[2]

C. The trial court properly admitted Richard Roberts's testimony as to statements made by Timothy Crabtree

Next, Appellant argues that it was error to admit certain testimony of Roberts, one of Crabtree's cellmates in jail. Roberts testified that Crabtree confessed the murder to him. Additionally, Crabtree allegedly told Roberts that Dressman had asked him how to carry out a murder. According to Roberts, Crabtree asked for help in killing Dressman because he was concerned that Dressman would implicate him. Again, the test on appellate review is whether the trial court's decision to admit the testimony was an abuse of discretion. English, 993 S.W.2d at 945. Because Roberts's testimony was properly admissible under the prior inconsistent statement exception to the hearsay rule, we find no error. See KRE 801A(a)(1).

The trial court stated that it admitted Roberts's testimony under KRE 804(b)(3), the hearsay exception for declarations against interest. In fact, his testimony was not properly admissible under that exception because the declarant, Crabtree, was not "unavailable" as a witness.[3] However, if it was admissible under another exception, then there is no error.

Indeed, Roberts's testimony was admissible under KRE 801A(a)(1), which allows admission of prior inconsistent statements of a witness provided the witness testifies at trial and is examined about the statement, subject to a proper foundation pursuant to

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[2] Appellant points out that the conversation was not to be taken seriously. However, the weight and credibility of the testimony was for the jury to decide. Gray v. Commonwealth, 203 S.W.3d 679, 692 (Ky. 2006).

[3] Crabtree testified at Appellant's trial.

KRE 613. Crabtree maintained his innocence by testifying: that he did not tell Roberts that he was involved in the murder; that he did not tell Roberts that the first stab went to Snellen's lungs; that he did not tell Roberts that Snellen made a gargling sound after she was stabbed; that he did not tell Roberts that the knife was thrown in Elkhorn Creek after the murder; and that he did not ask for Roberts's help in killing Dressman. Thus, Roberts's testimony was admissible to impeach Crabtree's testimony that he did not discuss the above matters with Roberts. See Jett v. Commonwealth, 436 S.W.2d 788, 790 (Ky. 1969) (credibility of a witness may be impeached by showing that he has made statements different from his present testimony).

D. Commonwealth properly impeached its own witness Timothy Crabtree

At trial, the Commonwealth called Crabtree and Roberts to the stand. Crabtree testified that Dressman asked him how to quietly kill someone in a neighborhood, that Dressman admitted to killing Snellen, and that he never made any statements to Roberts about his involvement in the murder. The Commonwealth subsequently impeached Crabtree, with Roberts's testimony as to these statements which he denied making.[4]

Appellant thus contends that it was improper for the trial court to allow the Commonwealth to call Crabtree as a witness. According to Appellant, the Commonwealth called Crabtree to the stand to give perjured testimony,[5] in order to impeach him with Roberts's testimony.

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[4] See supra Part C. Roberts's testimony as to statements made by Crabtree was admissible under the prior inconsistent statement exception.

[5] SCR 3.130-3.4(b) provides that a lawyer shall not "[k]knowingly or intentionally falsify evidence, [or] counsel or assist a witness to testify falsely."

Appellant urges us to adopt the federal courts' "primary purpose" test for evaluating whether a party may properly impeach his own witness. United States v. Gomez-Gallardo, 915 F.2d 553, 555-56 (9th Cir. 1990). The test prevents jurors from being exposed to otherwise inadmissible substantive evidence through the guise of impeachment. Id. at 555. Judge Posner succinctly explained the rationale as follows:

> Rule 607 of the Federal Rules of Evidence provides: "The credibility of a witness may be attacked by any party, including the party calling him." But it would be an abuse of the rule, in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence-or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize. We thus agree that "impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."

United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984) (citation omitted). We declined to adopt this primary purpose test in Thurman v. Commonwealth, 975 S.W.2d 888, 893 (Ky. 1998). Unlike the federal rules of evidence, Kentucky rules of evidence allow a prior inconsistent statement to be admissible not only for impeachment purposes, but also as substantive evidence. FRE 801(d)(1)(A); KRE 801A(a)(1); Jett, 436 S.W.2d at 792. Therefore, the concerns cited by Judge Posner are immaterial to our considerations under Kentucky rules. Our rules specifically permit the impeachment of one's own witness, thus we find no error. See KRE 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness."). When an attorney impeaches the false testimony of his own witness, it cannot be said he is knowingly or intentionally assisting in the falsification of the evidence.

E. The trial court properly admitted Kevin Butler's testimony as to a statement made by Timothy Crabtree

Prior to the murder, Crabtree spoke with Dressman at Frisch's Big Boy, where Dressman and Butler worked together. Butler testified that Crabtree said "Stephanie" drove him there. Appellant argues that this statement is inadmissible hearsay. We disagree and find that it was properly admitted as a statement made by a coconspirator.

KRE 801A(b)(5) provides that "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is ... [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The standard of review is whether there has been an abuse of discretion. English, 993 S.W.2d at 945.

Applying these principles, we find that the trial court did not abuse its discretion in admitting Butler's testimony. The Commonwealth produced sufficient evidence to show there was a conspiracy, that Crabtree was a part of that conspiracy, and that the statement was made in furtherance of the conspiracy. See Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky. 2006). The statement was clearly made *during* the conspiracy because Crabtree made it shortly before he and Dressman murdered Snellen. There was sufficient evidence that it was made *in furtherance of* that conspiracy, as Hensley testified that a knife disappeared from Frisch's Big Boy just prior to the murder, and Roberts testified that Crabtree said he got the knife from Dressman, who worked at the restaurant. Appellant's driving Dressman to get the knife was clearly in furtherance of the conspiracy. Thus, the statement was properly admitted under KRE 801A(b)(5).

F. The Commonwealth's opening statement was proper

In its opening statement, the Commonwealth told the trial court that it would call Tim Creech and Debbie DePew as witnesses to testify that Appellant admitted her involvement in the murder. According to the Commonwealth, Creech would testify that Appellant admitted to setting the plan in motion, that Appellant feared Crabtree might reveal her involvement, and that she solicited his help in killing Crabtree. DePew was supposed to testify that Appellant said she was at the murder scene with Dressman and Crabtree. Ultimately, the Commonwealth did not call either Creech or DePew to the stand. Appellant moved for a mistrial at the close of the Commonwealth's case based on its failure to present the testimony of those two witnesses. The trial court denied the motion, reasoning that Appellant could point this out to the jury in her closing statement. Appellant now argues that the trial court erred in denying her motion.

A mistrial is an extreme remedy and should be granted only for manifest necessity. Combs v. Commonwealth, 198 S.W.3d 574, 581 (Ky. 2006). The trial court is in the best position to determine the necessity of a mistrial. Gray, 203 S.W.3d at 691. We review the trial court's decision to deny Appellant's motion for mistrial for abuse of discretion. Id. at 692.

In making its opening statement, the Commonwealth may state all of the facts and circumstances which it expects in good faith to be established by the evidence. Freeman v. Commonwealth, 425 S.W.2d 575, 578 (Ky. 1967). It is improper for the Commonwealth to state facts in an opening statement which it does not reasonably expect to prove from the evidence at trial. Turner v. Commonwealth, 240 S.W.2d 80, 81 (Ky. 1951). However, the Commonwealth's failure to establish facts alleged in its opening statement may be regarded as harmless error when the evidence against the defendant is overwhelming. Kroth v. Commonwealth, 737 S.W.2d 680, 681 (Ky. 1987).

In this matter, the trial court properly exercised its discretion in denying Appellant's motion for mistrial. Appellant has failed to show any misconduct or bad faith on the part of the Commonwealth. We agree with the trial court that any prejudicial effect could have been removed or mitigated through Appellant's closing argument, by pointing out that the Commonwealth failed to produce evidence promised in its opening statement. Moreover, Appellant has not shown how she was unduly prejudiced by the Commonwealth's failure to call Creech and DePew, as the Commonwealth presented sufficient evidence to convict her. See id. at 681 (prosecutor's reference to allegedly inadmissible hearsay evidence in opening statement may be regarded as harmless error when the evidence against defendant is overwhelming). Thus, the trial court did not abuse its discretion.

G. Admission of Timothy Crabtree's proffer of testimony was harmless error

Crabtree prepared a document for the Commonwealth entitled "proffer of testimony" which detailed his version of the events surrounding the murder. At trial, the Commonwealth questioned Crabtree on direct examination about statements contained in that document and asked him to identify it. After laying the proper foundation, the Commonwealth moved to admit the document into evidence. Appellant objected to admission of the document, arguing that it could be used for impeachment only. The trial court overruled the objection and admitted it into evidence.

Appellant argues that the trial court erred by admitting this document. At issue here is part of a statement contained in the document. In the complained of statement, Dressman purportedly states to Crabtree, "I killed that woman [Snellen] and *my girlfriend [Appellant] wants me to take the blame for it*." In fact, Crabtree did not testify

about Appellant wanting Dressman to take the blame. Appellant contends that this statement, which connected her to the murder, was inadmissible hearsay.

We agree with Appellant that the trial court abused its discretion when it admitted the document, without redacting the statement at issue. The statement contained hearsay not within any exception to the rule. However, this error is subject to harmless error analysis. RCr 9.24. Substantial evidence beyond this statement, linking Appellant to the murder, was presented at trial.

The evidence showed a troubled mother-daughter relationship, wherein Appellant hated her mother, wanted her mother dead, physically fought with her mother on at least one occasion, and ran away from home. Three witnesses who lived near the victim testified that they saw Appellant's red Honda Civic, or a car that looked like it, in their neighborhood on the night of the murder.[6] In addition, there was testimony that Appellant did not grieve much over her mother's death, said that Dressman and Crabtree committed the actual murder, admitted she had been involved in the plot, and said she would get half of her mother's life insurance policy if acquitted. Thus, erroneously admitting the document was harmless, as there is no reasonable possibility that it affected the verdict. Emerson, 230 S.W.3d at 570.

H. The trial court properly excluded evidence of Richard Roberts's prior conviction for falsely reporting an incident

At trial, the Commonwealth called Roberts to testify about what he heard Crabtree say concerning the murder while they were in jail together. Appellant wanted

[6] Megan and Shawn Satterly testified that, on the night of the murder, they saw a car that looked like Appellant's red Honda Civic parked near Snellen's home. Joe Jewell, who had worked on Appellant's car on two occasions, testified that he saw her car in the neighborhood at around 10:25 p.m. to 10:35 p.m. that night.

to impeach Roberts with his prior misdemeanor conviction for falsely reporting an incident. See KRS 519.040. The trial court ruled that Appellant could ask if Roberts had been convicted of a felony, what his sentence was, if he had filed a motion for shock probation, if he had a deal with the Commonwealth, and whether he hoped to receive favorable treatment from the Commonwealth in exchange for his testimony. However, Appellant was not allowed to inquire about the specific crime. See KRE 609.

Appellant argues that the trial court erred in refusing to permit her to ask Roberts whether he had been convicted of falsely reporting an incident. Appellant first relies on her right to cross-examine Roberts concerning possible bias or interest. KRE 607; Commonwealth v. Maddox, 955 S.W.2d 718, 720 (Ky. 1997); Commonwealth v. Cox, 837 S.W.2d 898, 901 (Ky. 1992). According to Appellant, Roberts gave false information concerning the murder to the police, hoping to receive favorable treatment. When this did not work, Roberts could not change his story, otherwise he risked being charged with falsely reporting an incident. Presumably, Roberts was aware of this because he was previously convicted of the crime. Appellant additionally contends that she should have been allowed to ask Roberts about his prior conviction under KRE 608(b), as it is probative of his character for untruthfulness.

The credibility of a witness may be impeached by evidence that the witness has been convicted of a crime, but only if the crime was a felony. KRE 609(a). KRE 608(b) does not permit proof of specific instances of conduct by extrinsic evidence, but they may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness". Trial courts retain broad discretion to regulate cross-examination. Maddox, 955 S.W.2d at 721.

We find no abuse of discretion in refusing to allow Appellant to inquire about the specific crime. Pursuant to KRS 519.040, Roberts's prior conviction for falsely reporting an incident was a *misdemeanor*. As such, it was clearly inadmissible under KRE 609(a), which allows impeachment by evidence that the witness has been convicted of a crime only if the crime was a felony. Additionally, KRE 608(b) is inapplicable here, as it concerns specific instances of conduct *other than criminal convictions*. The trial court therefore properly ruled in this instance that evidence of Roberts's prior conviction for falsely reporting an incident was inadmissible. We also hold that there is no merit to Olson's KRS 611(b) claim regarding Roberts's testimony.

I. The trial court properly admitted lack of mourning evidence

Prior to trial, Appellant moved to exclude evidence that she did not grieve enough after the murder of her mother. Appellant noted that some of the witnesses anticipated to testify about her "lack of mourning" did not know her well, and that some of the testimony would not be probative, as it describes her behavior long after the murder. The trial court denied the motion and allowed the Commonwealth to present testimony about Appellant's lack of mourning.

On appeal, Appellant contends that this was error. Appellant objects to the following testimony: (1) Gale Salyer's testimony that Appellant cried very little after discovering her mother's body; (2) Detective Tom Bell's testimony that Appellant showed little emotion when he interviewed her about the murder on the day the body was discovered; (3) Coroner Stanley Hughes's testimony that he did not observe any crying, sorrow, or sadness when he interviewed her for approximately thirty minutes at the crime scene; (4) Dawn Sherman's testimony that Appellant seemed calm during a phone conversation just hours after the murder; (5) Steve McCormick's testimony that

Appellant said, three or four months after the murder, that she did not care about her mother being dead; and (6) Leslie Gilkey's testimony that, when she offered her condolences, Appellant said she "was over it." Appellant argues that the lack of mourning evidence should have been excluded as irrelevant under KRE 402 because people grieve differently, or, if relevant, excluded as unduly prejudicial, confusing, or cumulative under KRE 403.

Relevant evidence tends to make the existence of a material fact more probable or less probable than it would be without the evidence. KRE 401. Irrelevant evidence is inadmissible. KRE 402. Even if relevant, evidence may be excluded if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. Again, the standard of review is abuse of discretion. English, 993 S.W.2d at 945.

Here, evidence that Appellant was not grieving properly is probative of consciousness of guilt. See Bagwell v. State, 508 S.E.2d 385, 388-89 (Ga. 1998) (evidence that defendant wife displayed apparent indifference to victim's grave condition on night of shooting was relevant to the question of guilt, and thus was admissible). Much of this evidence came from people who knew Appellant well: Salyer lived with Appellant's ex-boyfriend, Dressman, and saw Appellant ten to fifteen times when she came to visit him; Sherman is the victim's sister and Appellant's aunt; and McCormick knew Appellant since high school. Because Appellant's lack of mourning suggests a high degree of indifference to her mother's life, it is relevant to the issues at hand.

Furthermore, there are no valid reasons for excluding this relevant evidence under the KRE 403 balancing test. The lack of mourning evidence was not unduly

prejudicial or confusing, as the witnesses briefly testified about their mere *observations*. Although the evidence was similar, it was not cumulative because each witness described Appellant's behavior *at a different point in time*. As such, there was no abuse of discretion.

J. The trial court properly admitted the document camera video

Appellant's next argues that the trial court erred in admitting a camera videotape of her encounter with Officer Glenn Sly. The police took the video when they saw Appellant's car after her mother reported her missing. Appellant contends that this video should have been edited, as certain portions of it are irrelevant, or, alternatively, substantially more prejudicial than probative.

The first part of the video shows Sly pulling over Appellant while driving with Dressman in Georgetown. Upon learning Appellant's identity, Sly admonishes her for treating her mother badly by running away. Sly then smells marijuana in the car and discusses it with Appellant and Dressman, who admit to recent drug use. However, a subsequent search of the car reveals no contraband. At the conclusion of this dialogue, Sly lets Dressman go and prepares to escort Appellant to her home. Appellant takes issue with this entire sequence of the video on relevancy grounds. See KRE 401; KRE 402. Additionally, Appellant argues that the statements about mistreating her mother and smoking marijuana were unduly prejudicial. See KRE 403.

In the second part of the video, Appellant talks with her mother and Sly at home. Snellen is worried and upset about what happened and forbids Appellant from seeing Dressman again. Appellant then argues with her mother, which causes Sly to comment on the situation. Sly points out that Appellant is disrespecting her mother, that she would be "eaten up" in a facility, and that her actions caused him to lose time he could

have instead spent with his four-year-old son. Also, Sly informs Snellen that he smelled marijuana in Appellant's car and that Appellant admitted to drug use. Although Appellant concedes that, in this portion of the video, her discussion with her mother is relevant and was properly admitted, she takes issue with all of Sly's statements on grounds of relevancy and prejudice.

We conclude that the entire video is relevant and that its probative value is not substantially outweighed by potential unfair prejudice. The statements contained in the video, including those pertaining to drug use, were relevant on the issue of motive because they illustrated a troubled mother-daughter relationship. See Ernst v. Commonwealth, 160 S.W.3d 744, 753-54 (Ky. 2005) (murder victim's state of mind was relevant to prove the increasingly strained relations between victim and defendant, tending to show a motive for murder). We see no prejudice in admitting the unedited videotape under the KRE 403 balancing test, as several witnesses testified as to the strained relationship between mother and daughter, and Appellant admitted on direct examination that she and Dressman smoked marijuana. Thus, the trial court properly exercised its discretion in admitting the videotape.

K. Admission of Nancy Lusby's testimony as to statements made by the victim was harmless error

Appellant argues that the trial court erred in admitting certain testimony of Nancy Lusby regarding statements made by Snellen. Lusby and Snellen were close friends and coworkers. They occasionally had conversations about Appellant's relationship with her mother. At trial, Lusby testified that Snellen told her that she and Appellant physically fought one year prior to the murder, that Appellant tried to go to Florida, that Appellant snuck off to see Dressman, that she had difficulty controlling Appellant, that

she made Appellant sign a contract, that Appellant wanted Dressman to move in, that Appellant wanted to move out, and that she discovered Appellant and Dressman having sex. Over Appellant's objection, the trial court admitted Snellen's statements under KRE 803(3), the present state of mind exception to the hearsay rule. According to Appellant, those statements are inadmissible hearsay not falling within KRE 803(3) or any other exception. Specifically, Appellant contends that KRE 803(3) is inapplicable here because Lusby's testimony described past acts, rather than Snellen's state of mind.

KRE 803(3) allows hearsay statements to be admitted into evidence pertaining to the declarant's "[t]hen existing mental, emotional, or physical condition." This does not include "a statement of memory or belief to prove the fact remembered or believed". Id. The inapplicability of KRE 803(3) to statements of memory or belief is best illustrated in the landmark decision of Shepard v. United States, 290 U.S. 96, 106, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933), which concluded that a statement by the victim that her husband (the accused) had poisoned her did not fall within the state of mind exception because it "faced backward ... to a past act".

As in Shepard, the hearsay statements at issue here do not qualify for the state of mind exception. They were statements of memory or belief offered to prove *past* events—that is, that at various times Appellant and her mother had a strained relationship—rather than Snellen's *present* state of mind. Moreover, we believe that this exception is inapplicable since it is Appellant's state of mind that is relevant in this matter, *not the victim's*. Thus, the trial court erred in admitting Snellen's statements, as they are hearsay not within any exception.

However, this error is subject to harmless error analysis. See RCr 9.24. Upon review of the record, it appears that there was overwhelming evidence of a troubled mother-daughter relationship, including the following: Sly's testimony that Snellen had reported her daughter missing approximately one month prior to the murder, when Appellant ran away to Atlanta with Dressman; Erasmus Rice's testimony that he once observed Appellant physically fight with her mother; Gale Salyer's and Zach Greer's testimony that Appellant said she hated her mother and wanted her mother to die;[7] and Andrew Madden's testimony that on the night before the murder, he heard Appellant say she hated her mother shortly after hanging up the telephone. The evidence presented at trial established that Appellant's volatile relationship with her mother got progressively worse leading up to the murder. As such, there is no reasonable possibility that the testimony affected the verdict. Emerson, 230 S.W.3d at 570. Thus, the error was harmless.

L. Jury instruction on complicity to murder was proper

Appellant's final argument is that the trial court denied her a unanimous verdict based on the instruction given to the jury for complicity to murder. The jury instruction at issue is as follows:

> You will find the defendant guilty of 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 June 5, 2002, and before the finding of the indictment herein, David Dressman *and/or* Timothy Crabtree killed Diane Snellen by stabbing her to death; and

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[7] According to Salyer, Appellant initially said she wished someone would kill her mother. Then later, just before the murder, Appellant said she wanted to kill her mother herself.

> (B) That in so doing, David Dressman *and/or* Timothy Crabtree caused the death of Diane Snellen intentionally; and
>
> (C) That prior to that date, the defendant had solicited, aided, counseled or entered into an agreement with David Dressman *and/or* Timothy Crabtree, that David Dressman *and/or* Timothy Crabtree would kill Diane Snellen; and
>
> (D) That in soliciting, aiding, counseling, or entering into that agreement with David Dressman *and/or* Timothy Crabtree, it was the defendant's intention that David Dressman *and/or* Timothy Crabtree would kill Diane Snellen.

Appellant contends that the jury was instructed that they could find her guilty on either of three theories, two of which she claims were unsupported by the evidence. The instruction presented to the jury allowed it to find Appellant guilty of complicity to murder if it believed that (1) Appellant solicited, aided, counseled or entered into an agreement with *Dressman* to kill her mother; (2) Appellant solicited, aided, counseled or entered into an agreement with *Crabtree* to kill her mother; or (3) Appellant solicited, aided, counseled or entered into an agreement with *Dressman and Crabtree* to kill her mother. In Appellant's view, the evidence was sufficient to support a conviction under only the third theory that all three codefendants were accomplices in the murder.

"Section 7 of the Kentucky Constitution requires a unanimous verdict reached by a jury of twelve persons in all criminal cases." Wells v. Commonwealth, 561 S.W.2d 85, 87 (Ky. 1978). The rules on unanimity relevant to Appellant's argument are as follows:

> The issue of unanimity can arise when the jury is instructed that they can find the defendant guilty on either of two theories, because some jurors may believe the defendant guilty under one theory, while others believe him guilty under another. If the evidence would support conviction under both theories, the requirement of unanimity is satisfied. However, if the evidence was sufficient to

> support a conviction under only one of two alternative theories, the requirement of unanimity is violated.

1 Cooper, Kentucky Instructions to Juries (Criminal) § 1.26 (citations omitted). Appellant concedes that this issue is unpreserved. Therefore, we review for palpable error pursuant to RCr 10.26.

We find no error, palpable or otherwise. As an initial matter, we note that the instruction given to the jury here is typical of those given throughout the Commonwealth in trials where a defendant is charged with being an accomplice to murder. The model instruction for complicity to murder is set forth in pertinent part as follows:

> You will find the Defendant 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 the finding of the indictment herein, D2 and/or D3 killed ______ (victim) by ______ (method);
>
> B. That prior to the killing, the Defendant had [solicited], [counseled], [commanded], [or] [engaged in a conspiracy with] D2 and/or D3 to rob ______ (victim);
>
> AND
>
> C. That in so doing, the Defendant intended that ______ (victim) would be killed.

Cooper, supra, § 10.14. The jury instruction tendered in the present case closely mirrors that of the model instruction, except for the absence of a codefendants' mental state element in the latter. Specifically, the "and/or" language Appellant complains of is found throughout the model instruction.

Moreover, contrary to Appellant's argument, this particular instruction allowed the jury to find her guilty under a single theory—that she was an accomplice in the murder of her mother. Aside from the fact that there was sufficient evidence to support the jury's findings under all the alternatives presented , much of the case law on unanimity

deals with instructions that erroneously include alternative mental states (i.e. intentionally or wantonly). See, e.g., Hayes v. Commonwealth, 625 S.W.2d 583, 584-85 (Ky. 1981) (jury instruction allowing the defendant to be found guilty of murder under alternative theories of either intent or wantonness denied him his right to a unanimous verdict under Section 7 of the Kentucky Constitution, where the evidence did not allow an inference that the shooting was anything but intentional); Burnett v. Commonwealth, 31 S.W.3d 878, 881-84 (Ky. 2000) (jury instruction on first-degree trafficking in a controlled substance denied the defendant his right to a unanimous verdict, where the instruction permitted the jury to find guilt on theories that were not supported by the evidence, e.g., that he possessed the cocaine with intent to manufacture it). However, we are not faced with the "alternative mental states" issue, and find no precedent holding that a defendant is deprived of his right to a unanimous verdict under these circumstances. Hence there was no error, or palpable error, in this instruction.

III. CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction.

All sitting. Lambert, C.J.; Minton, Noble and Scott, JJ., concur. Abramson, J., Cunningham, J., and Schroder, J., concur in result only.

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Supreme Court of Kentucky

2005-SC-000592-MR

STEPHANIE DENISE OLSON APPELLANT

V.

ON APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
NO. 04-CR-00029

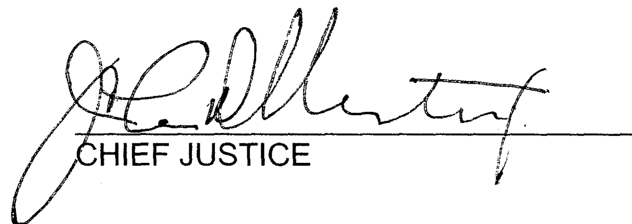
COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING MEMORANDUM OPINION OF THE COURT, RENDERED MARCH 20, 2008

The appellant's petition for rehearing is DENIED. On the Court's own motion, the Memorandum Opinion of the Court, rendered March 20, 2008, is MODIFIED on its face; and the attached opinion is substituted therefor. The modification does not affect the holding of the case.

All sitting, except Venters, J. All concur.

ENTERED: August 21, 2008.



CHIEF JUSTICE