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NOT TO BE PUBLISHED OPINION

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RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000846-MR

DATE 5-15-08 EJA/Griggs, D.C.

IVAN PARKER GRIGGS

APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
NO. 05-CR-01162

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Ivan Griggs appeals as a matter of right from an October 13, 2006 Judgment of the Fayette Circuit Court convicting him of murder and of tampering with physical evidence. In accord with the jury's recommendation, the court sentenced Griggs to consecutive terms of imprisonment totaling thirty-one years. Griggs contends that the trial court erred when it refused to suppress the confession he made to investigating officers and when it refused to declare a mistrial when Griggs's counsel belatedly objected to the fact that prior to making the confession Griggs had not been properly read his Miranda rights. We reject these contentions and affirm the trial court's judgment.

RELEVANT FACTS

Griggs was charged with the June 12 or 13, 2005, shooting death of Mary

Salyers at her home in Lexington. According to the Commonwealth's proof, Griggs and Salyers had a child together, Elizabeth Nicole, and since her birth in 1989 they had remained in contact in conjunction with sharing Nicole's custody. Although the extra-marital affair had ended and Griggs's marriage had survived, there was evidence tending to show that Griggs continued to be jealous of Salyers's relationships with other men.

On June 12, 2005, Nicole was to begin a month-long summer visitation with Griggs, but that evening when Griggs and his wife went to Salyers's residence to pick her up, she was not present. Earlier that day she had gone with a friend to a wedding and had not yet returned home. Griggs expressed resentment at being thus inconvenienced, and he was also angered, the Commonwealth alleged, by the presence at Salyers's residence of a male friend, with whom, Griggs believed, Salyers was romantically involved. A short time later, Nicole was delivered to the Griggses' residence to begin her visitation. Later that night, between about 11:00 pm and midnight, Griggs confronted Salyers at her residence. He fought with her and then killed her by shooting her twice in the head.

The next morning, Griggs drove Nicole to summer school, but at about 10:00 am he called his wife at work and asked her to give Nicole a ride home. Nicole and Mrs. Griggs arrived home not long thereafter and found Griggs asleep. When they tried to rouse him he was incoherent. Also, they found a container for Ambien, a prescription sleep aid, somewhere near Griggs's bed. They allowed him to sleep a while longer, but when they again tried to rouse him and his incoherence persisted, his wife called the police. At about 1:00 pm an officer dispatched an ambulance to the Griggses' home.

In the meantime, Salyers's nephew had discovered Salyers's body. He contacted emergency personnel and at about noon phoned the Griggses' residence apparently to accuse Griggs of the murder. Nicole and Mrs. Griggs learned of Salyers's death from him.

At about 2:00 pm Griggs was admitted to the emergency room at St. Joseph's Hospital in Lexington. The nurse who cared for him testified at the suppression hearing that from 2:00 until about 4:00 Griggs had slept, primarily, but that she had periodically been able to rouse him and had found him responsive and coherent albeit lethargic and not aware of where he was. He was treated for a possible Ambien overdose. At about 3:00 pm, the nurse became aware that a uniformed policeman had apparently been assigned to Griggs's room, and at about 3:30 pm Griggs was taken for a CT scan and was accompanied by two uniformed officers. At about 4:00 pm, she asked him what had happened; and he told her that he had taken perhaps "two or three" ten milligram Ambien pills, after which, he claimed, he could remember nothing. When the nurse returned to Griggs's room at about 4:15 pm, she found him being interviewed by three police detectives. She testified that the interview continued for about the next half hour, during which she was in and out of the room several times.

One of the interrogating officers, Detective Persley, also testified at the suppression hearing. He stated that he had initially been dispatched to look into a possible suicide attempt, but that en route to the hospital he was informed of Salyers's murder and of Griggs and Salyers's relationship. He met two other detectives at the hospital who were also there to investigate Griggs's possible involvement in Salyers's death. Detective Persley testified that the interview with Griggs lasted thirty to forty-five

minutes and was audio recorded. Griggs, the detective stated, had seemed lethargic, like a person just waking up in the morning. He had been oriented, however, had understood who the detectives were, and had responded appropriately and deliberately to all of their questions, including questions about the waiver of his Miranda rights. After at first claiming that he could not remember the previous night, Griggs confessed that he had returned to Salyers's residence at about 11:00 pm, had fought with her, and had killed her. He also admitted throwing away the gun, the murder weapon, along the side of the road in or near Paris, Kentucky. About fifteen minutes after the initial interview concluded, Detective Persley returned to Griggs's room to ask some follow-up questions. He again advised Griggs of his Miranda rights, and at that point Griggs requested an attorney. Approximately an hour-and-a-half or two hours later, after visits from family members, his pastor, and a suicide prevention counselor, Griggs was released from the hospital and was formally arrested.

Griggs testified at the suppression hearing and claimed that he had no recollection of talking to the emergency room nurse or of his interview with the three detectives. The first thing he remembered, he said, was Detective Persley's advising him of his Miranda rights, which he immediately invoked. He also claimed not to remember how many sleeping pills he had taken.

Griggs moved to suppress his confession on the ground that his intoxication rendered it involuntary. At the conclusion of the suppression hearing, the trial court ruled from the bench that Griggs had not been so intoxicated as to render his confession unreliable and so denied his motion. The court noted that both the nurse and the detective had found Griggs appropriately responsive and coherent. At Griggs's

trial, during Detective Persley's testimony, the Commonwealth introduced the audio recording of Griggs's interview and played it for the jury. On the recording, although Griggs's voice is weak and some of his responses are inaudible, he can be heard responding to most of the detectives' questions, and his responses are, as the nurse and the detective testified, appropriate and coherent. Griggs admits on the tape that he and Salyers argued, "scuffled," that he cut Salyers with a knife, that he brought a gun with him to her house, that "shots were fired," and that he later disposed of the gun somewhere in or near Paris, Kentucky. On appeal, Griggs renews his contention that his sleeping-pill induced lethargy rendered his confession involuntary, and he maintains that the trial court's oral findings on this issue were inadequate to support its contrary conclusion. We disagree.

ANALYSIS

I. Griggs's Confession was Voluntary.

As the parties correctly observe, our review of a suppression ruling

requires a two-step determination. . . . The factual findings by the trial court are reviewed under a clearly erroneous standard, and the application of the law to those facts is conducted under *de novo* review.

Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky. 2007) (citing Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004)). While it is true, as Griggs observes, that the preferred practice is for the trial court to enter written suppression-order findings, RCr 9.78 requires only that such findings be "enter[ed] into the record," not that they be written, and we have held that oral findings are sufficient provided that they make it possible to "discern the basis for the trial court's ruling." Coleman v. Commonwealth, 100 S.W.3d 745, 749 (Ky. 2002). That basis is apparent here.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the admission into evidence of involuntary confessions. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). A confession is involuntary “[if the defendant’s] will has been overborne and his capacity for self-determination critically impaired.” Bailey v. Commonwealth, 194 S.W.3d 296, 300 (Ky. 2006) (quoting from Schneckloth, internal quotation marks omitted). To be admissible, the confession must be “the product of an essentially free and unconstrained choice by its maker.” *Id.* at 300 (citation and internal quotation marks omitted). In assessing the voluntariness of a confession, courts must consider the totality of circumstances surrounding its making, including the characteristics of the accused and the details of the interrogation. *Id.* Coercive state action is a necessary predicate to finding a confession involuntary for constitutional purposes, but what constitutes “coercion” will vary somewhat depending on the characteristics of the accused:

[W]hen a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to the interrogating officers, a lesser quantum of coercion is necessary to call a confession into question.

Id. at 302 (citation and internal quotation marks omitted). Even if the confession is otherwise voluntary, this Court has held that voluntary intoxication can render a confession inadmissible if (but only if) “the accused was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements.” Britt v. Commonwealth, 512 S.W.2d 496, 499 (Ky. 1974) (citation and internal quotation marks omitted).

Here, Griggs does not allege that the detectives overbore his will by the use of

coercive tactics, and the record is clear that, while they certainly employed moral suasion, the detectives did not threaten Griggs, make promises, humiliate him, prolong the questioning unduly, or subject him to any sort of physical deprivation. Griggs relies, rather, upon Britt and maintains that at the time of his interrogation he was so deeply under the influence of Ambien as to be not “in his right mind” and unable to understand the meaning of his statements. The suppression hearing record, however, contains substantial evidence belying that claim. The nurse’s testimony in particular was to the effect that prior to his interview with the detectives Griggs understood her questions and responded appropriately and with comprehension. The trial court did not clearly err, therefore, when it relied on that testimony and found Griggs’s confession to have been voluntary.

II. The Police Did Not Violate Griggs’s Miranda Rights.

Griggs’s confession also implicates his right under the Fifth Amendment to the United States Constitution not to be compelled to incriminate himself. Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). To protect that right and to guard against the compulsion inherent in custodial circumstances, the United States Supreme Court established, in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the now familiar rule that a defendant’s statements during custodial interrogation will generally 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, *supra*. The Miranda warnings were adopted to ensure that any waiver of a suspect's Fifth Amendment right was voluntary. The United States Supreme Court has explained that inquiry into the voluntariness of this waiver has two distinct dimensions:

First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (citation and internal quotation marks omitted). Generally, the Miranda warnings are sufficient to inform a person of the nature of the Fifth Amendment right and the consequences of abandoning it. Colorado v. Spring, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). An officer's failure to give the Miranda warnings, however, particularly the critical warning that the person's statements can be used against him, renders the waiver involuntary because it is then insufficiently knowing. Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); Miranda v. Arizona, 384 U.S. at 471 (the warning that statements can be used in evidence against the suspect is "an absolute prerequisite to interrogation").¹

Griggs maintains that the detectives violated his Miranda right by interrogating

¹ Indeed, so deeply ingrained is this warning in our police procedures that the detective's omission in this case is both surprising and concerning. Were it not for the trial court's finding that Griggs was not yet in custody, the detective's unacceptable disregard of Miranda is likely to have resulted in a tainted and inadmissible confession.

him without first warning that anything he said could be used against him. The Commonwealth concedes, and the audio recording of Griggs's interview demonstrates, that at the outset of the interview one of the detectives (not Detective Persley) undertook to advise Griggs of his rights, "as a formality," but left out the critical "may be used against you" warning. Griggs objected to that omission neither at the suppression hearing nor at trial when the recorded interview was played for the jury. Not until the jury had retired to deliberate, in fact, did Griggs raise the issue, at which time he argued that the error was fundamental enough to support a motion for a mistrial or a motion for a new trial. The Commonwealth responded that, because Griggs was not in custody at the time of his interview, his Miranda rights had not yet attached and therefore the detective's mistake did not entitle Griggs to relief. The trial court agreed with the Commonwealth. In its adjournment notes following the second day of trial, the court recorded its ruling as follows:

The defendant moved for a mistrial raising the issue that his taped statement should not have been admitted into evidence since he was not advised that the statement could be used against him. The court finds that the defendant was not in custody at the time the statement was made and therefore no constitutional right was violated. Therefore the motion was denied.

Although on appeal Griggs has apparently overlooked this ruling, he argues in effect that the trial court's custody determination was erroneous and that the alleged Miranda violation entitles him to relief. We disagree.

A mistrial, of course,

is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. . . . The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be

removed in no other way [except by grant of a mistrial].

Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005) (citations and internal quotation marks omitted). Whether to grant a mistrial “is within the sound discretion of the trial court,” and the trial court’s ruling will not be disturbed absent an abuse of that discretion. *Id.* at 752. There was no such abuse here.

As the Commonwealth correctly observes, the Miranda warnings do not come into play until “there has been such a restriction on a person’s freedom as to render him ‘in custody.’” Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528, 128 L. Ed. 2d 293 (1994); Emerson v. Commonwealth, 230 S.W.3d 563 (Ky. 2007). When determining whether an individual was in custody,

a court must examine all of the circumstances surrounding the interrogation, but “the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”

Stansbury v. California at 322, 1529 (quoting California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)). The test, this Court has held,

is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. . . . Some of the factors that demonstrate a seizure or custody ha[s] occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.

Commonwealth v. Lucas, 195 S.W.3d 403, 405-06 (Ky. 2006) (citing United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) and Baker v. Commonwealth, 5 S.W.3d 142 (Ky. 1999)).

Other courts have held, and we agree, that the restraint giving rise to “custody” must be restraint instigated by the police, and for that reason the majority rule is that

confinement to a hospital bed does not, by itself, amount to “custody” for Miranda purposes. Wofford v. State, 952 S.W.2d 646 (Ark. 1997); DeJesus v. State, 655 A.2d 1180 (Del. 1995); State v. Tucker, 557 A.2d 270 (N.H. 1989) (collecting cases); People v. Milhollin, 751 P.2d 43 (Colo. 1988). Rather, hospital questioning, like questioning elsewhere, is not custodial unless the circumstances would lead a reasonable person to believe that were he capable of leaving the hospital, the police would not allow him to do so. Cf. Commonwealth v. Lucas, supra.

Although in this case the police apparently monitored Griggs while he was in the hospital staff’s care, we cannot say that the trial court clearly erred when it found that at the time of his questioning he was not yet in custody. Prior to that time Griggs had not been confronted by a threatening or demanding police presence, and the questioning itself was not prefaced by any indication that Griggs was not free to leave or to ask the officers to do so. The trial court did not abuse its discretion, therefore, when it denied Griggs’s belated motion for a mistrial.

III. The Evidence that Griggs was Angry and Jealous Did Not Preclude his Conviction for Murder.

The jury was instructed that it could find Griggs not guilty; guilty of first-degree manslaughter; or guilty of murder, the last if it believed that he killed Salyers “intentionally and not while acting under the influence of extreme emotional disturbance.” At the close of proof, Griggs objected to the murder instruction on the ground that the Commonwealth had failed to prove the absence of extreme emotional disturbance. On appeal, he renews that contention and maintains that the Commonwealth’s proof showed no more than that his anger was triggered on the night of the shooting by Salyers’s impoliteness and her “flaunting” of her relationship with her

male friend and that that anger led to an argument which, tragically but in the heat of passion, escalated to the point of killing. We disagree.

Under KRS 507.020(1)(a), a person is guilty of murder if he intentionally causes the death of another person,

except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance [EED].

A defendant may be found to have so acted if there is evidence that he suffered

a temporary state of mind so enraged, inflamed, or disturbed as to overcome [his] judgment, and to cause [him] to act uncontrollably from [the] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.

Greene v. Commonwealth, 197 S.W.3d 76, 81 (Ky. 2006) (quoting from McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986)). The event which triggers the explosion of violence must be sudden and uninterrupted, and the defendant's extreme emotional reaction must have a reasonable explanation or excuse "from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." KRS 507.020 (1)(a); Green v. Commonwealth, *supra*.

The Commonwealth, of course, bears the burden of proving every element of the offense, and as this Court has recently reiterated, the absence of EED becomes an element of the offense of murder whenever proof is presented that would support an EED finding. *Id.* In that event, the Commonwealth becomes obliged to disprove EED beyond a reasonable doubt. *Id.* If the evidence, considered in a light most favorable to the Commonwealth, is such that a reasonable juror could believe beyond a reasonable doubt that the defendant killed deliberately and not under the influence of EED, then

the Commonwealth meets its burden and the issue becomes a jury question. *Id.*
Reviewing courts apply the same standard. *Id.*

In this case, the Commonwealth's proof included evidence that Griggs's jealousy of Salyers and her male friend began several weeks prior to June 12, 2005. He visited Salyers's church in an apparent attempt to identify the friend, he began driving by Salyers's residence at odd times, he indicated to Nicole that he thought Salyers and the friend were lovers, and not long before the killing Nicole overheard him tell Salyers that he might burst in sometime and "kill the both of you." The evidence also showed that the killing did not erupt immediately from the alleged triggering circumstances—Nicole's absence from and the male friend's presence at Salyers's residence on June 12. Griggs, rather, went home after the alleged "insults" and had several hours to cool off. He then armed himself with both a knife and a gun; returned to Salyers's residence; apparently unplugged the phone; terrorized and injured Salyers with the knife; shot her twice in the head; and then drove well away from the crime scene and his residence to dispose of the weapons. Even assuming that jealousy of a former lover might in some case be deemed a "reasonable explanation" for an eruption of violence—a doubtful assumption—a rational juror could conclude beyond a reasonable doubt from this evidence that Griggs was not acting under the impulse of an extreme, suddenly triggered emotion, but was rather carrying out a plan that had developed over the preceding weeks and had taken final form the night of June 12. The trial court did not err, therefore, by instructing the jury that Griggs could be found guilty of murder.

CONCLUSION

Finally, Griggs also moved for a directed verdict on the charge that he tampered

with physical evidence, but he concedes on appeal that if his confession was properly admitted into evidence, as we have held it was, then his conviction on that charge must stand. As to his other alleged errors, the trial court did not err by finding that neither Griggs's sleeping-pill induced grogginess nor the incomplete Miranda warning rendered his confession inadmissible. The trial court also correctly presented the murder charge to the jury. Accordingly, we affirm the October 13, 2006, Judgment of the Fayette Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Appellate Division
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Chesnut Maxson
Assistant Attorney General
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, Kentucky 40601