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RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-17-08 ELLA CAPITAL D.C.

2006-SC-000361-MR

RICHARD EARL THOMAS, II — APPELLANT

V.

ON APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
NOS. 04-CR-00273 AND 05-CR-00103

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Richard Earl Thomas, II, was convicted by a Bullitt County jury of murder, theft by unlawful taking over $300.00, and third-degree burglary. In accordance with the jury's recommendation, he was sentenced to twenty (20) years for murder, five (5) years for theft, and five (5) years for burglary, to run concurrently for a total of twenty (20) years in prison. He appeals to this Court as a matter of right under Ky. Const. § 110(2)(b) and argues the circuit court erred by: (1) denying his motion to suppress self-incriminating statements; (2) denying his motion for a directed verdict; (3) admitting hearsay evidence; and (4) denying his motion for a new trial. We affirm.

Appellant stands convicted for the murder of his father, Richard Thomas. At the time of the murder, Appellant had been living with his father

and stepmother, Malissa Thomas, under what was referred to as "lockdown." This arrangement was put in place after Appellant was denied in-patient treatment for his OxyContin addiction. He was not allowed to leave the residence unless he was with a family member or his girlfriend, Amy Coble.

On Friday, September 3, 2004, Malissa Thomas left for Michigan with several family members. Appellant and his father were at home when Malissa departed. Despite repeated attempts to contact Richard, the last time Malissa spoke to her husband was at 2:00 a.m. on Saturday, when she called to tell him she had safely arrived in Michigan. Malissa became worried and asked her brother to check on Richard. However, her brother was unable to gain entry into the residence. On Monday, September 6th, Appellant called Malissa twice from Richard's cell phone to ask if she had made it home. Malissa arrived at the residence at approximately 3:00 p.m. and found Richard dead. Richard was lying on the couch with a gunshot wound to his head. The bullet causing his death had been fired from a 9mm handgun. While a shell casing was found near the body, Richard's 9mm handgun was missing from the residence. In addition, there was no evidence of forced entry into the home and the alarm system had not been activated. Malissa also found that the thermostat had been turned down to its lowest setting.

Everything in the kitchen was exactly as it had been when Malissa departed on Friday. Specifically, Malissa found a pot on the stove, in which Richard had prepared soup, and a bowl of leftover food on the kitchen table. She also found garbage bags on the table where she had left them. Finally, Malissa noted that their Dodge truck was parked in an unusual fashion in the

garage, which was not customary for Richard. Subsequently, Malissa discovered that tools were missing from the garage, and that Richard's wallet and Masonic ring were also missing from a bedroom drawer.

According to Appellant, he accompanied his father to a flea market on Saturday morning. There, Richard met a friend named Cindy. Appellant further claimed that his father gave him his cell phone and credit card before leaving the flea market. Allegedly, this was the last time Appellant saw his father alive. On Saturday evening, Appellant took his girlfriend, Amy Coble, to a Louisville restaurant. Afterwards, he spent the night at the home of his brother, Paul Thomas. Around 10:00 a.m. on Sunday, he and Amy departed for Indiana. Using Richard's credit card, Appellant rented a hotel room for the evening. He and Amy returned to the Louisville area the next day.

Contrary to Appellant's assertion that he visited a flea market with his father on Saturday, evidence showed that he was in Louisville that day between the hours of 11:30 a.m. and 4:41 p.m., pawning items at various locations. On Monday, Appellant bought OxyContin from Joshua McKinney and spent that night in a hotel room with a friend named Michael Schron. Finally, evidence showed Appellant gave inconsistent stories to others regarding his whereabouts throughout the weekend.

Investigators, believing Appellant was the last person to have seen Richard alive, wanted to interview him. When Appellant could not be found, investigators released his photograph to the news media. Upon seeing his picture on television, Appellant called his brother, Jeremy Thomas. Jeremy picked him up in Louisville and, at Appellant's request, took him to the police

station in Bullitt County. As a result of incriminating statements he made to police, Appellant was arrested and subsequently indicted on theft and burglary charges, as well as for the murder of his father.

Self-Incriminating Statements

Appellant argues the trial court erred in denying his motion to suppress certain incriminating statements he made to police. Appellant's argument has three main parts. First, citing to Commonwealth v. Lucas, 195 S.W.3d 403 (Ky. 2006), he claims he was subjected to custodial interrogation from the moment questioning began, based on the presumptively coercive nature of a police station. Second, Appellant claims there was not substantial evidence to support the trial court's ruling that he received and waived his Miranda rights. Third, he claims officers employed a question-first tactic during interrogation, as prohibited by Missouri v. Seibert, 542 U.S. 600 (2004).

On appeal of a trial court's order denying suppression, factual findings are reviewed for clear error, while conclusions of law are reviewed *de novo*. Jackson v. Commonwealth, 187 S.W.3d 300, 305 (Ky. 2006). In reviewing the denial of a motion to suppress, findings of fact are considered conclusive if they are supported by substantial evidence. RCr 9.78; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998). When factual findings are supported by substantial evidence, the next question is whether the law was properly applied to the established facts. Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004).

Appellant claims he was under custodial interrogation from the moment he arrived at the police station. "Custodial interrogation has been defined as

questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." Lucas, 195 S.W.3d at 405. Both custody and interrogation are required to trigger the constitutional right against self-incrimination. The threshold question in any case involving a possible violation of Miranda rights is whether the defendant was subject to custodial interrogation. Jackson, 187 S.W.3d at 305.

"Interrogation has been defined to include 'any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect[.]'" Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995). Appellant was indeed under interrogation once the questioning began because the officers should have known their words or actions were reasonably likely to elicit incriminating responses. However, our inquiry does not end there. We must now consider whether Appellant was in custody during the interrogation.

The initial determination of whether a person is in custody depends on the objective circumstances of the interrogation, rather than the subjective views of the parties involved. Stansbury v. California, 511 U.S. 318 (1994). The inquiry into custody must consider whether the person was under formal arrest, whether there was a restraint upon his or her freedom, and whether there was a restraint on freedom of movement to the degree normally associated with formal arrest. Lucas, 195 S.W.3d at 405. Custody determinations are fact specific and must always be made considering the totality of the circumstances. Jackson, 187 S.W.3d at 310. An interview of a

suspect by a police officer necessarily has coercive aspects to it; however, it does not create the type of risk that warrants a *per se* requirement for the issue of Miranda warnings for all station-house interrogations. Id. Rather, the pivotal requirement that triggers Miranda warnings turns on whether the environment has become so coercive as to induce a reasonable person to believe that he or she is not free to leave, or that their freedom is otherwise restrained. Id.; Lucas, 195 S.W.3d at 405. Some factors to consider in this analysis are whether there was 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." Id. at 405-06.

Appellant came to the police station on his own accord and arrived at around 1:00 a.m. on Wednesday, September 8th. He voluntarily accompanied officers to an interview room to answer questions. At that time, Appellant was neither under arrest, nor was his freedom of movement restrained. Further, Appellant never requested that he be allowed to leave. It is true that Appellant was escorted to the bathroom. However, this was in accordance with a policy that prohibits individuals from roaming about the facility unaccompanied. As such, Appellant was not in custody before he was read his Miranda rights.

Appellant further claims there was not substantial evidence to support the trial court's finding that he received and waived his Miranda rights. Specifically, he claims the officers' testimony was inconsistent and contradictory with regard to the timing of the events that transpired at the police station. Initially, Appellant was asked where he had been over the weekend. During his account, Appellant admitted to stealing items from his

father's home. Officers Patchin and Dawson testified that this occurred at approximately 2:00 or 2:30 in the morning. Prior to Appellant's admission, he was not in custody. Subsequent to that admission, the officers testified that Appellant was verbally given his Miranda rights, and that he waived them. There is some dispute as to the time this occurred; however, the waiver form listed the time as 4:22 a.m. While both Officers Patchin and Dawson testified with certainty as to the sequence of events, and that Appellant was read his Miranda rights directly after implicating himself in the burglary, neither could verify the exact times each of these events took place. Contrary to the officers' testimony, Appellant claimed he never received, much less waived, his rights. However, Appellant does recall signing various papers at the station. Under these circumstances, we cannot say the trial court abused its discretion when it found the Commonwealth had presented substantial evidence that Appellant had waived his right against self-incrimination.

Appellant next argues that officers employed an impermissible "question-first" tactic as prohibited by Seibert, 542 U.S. at 602. We agree with the Commonwealth that this issue was not preserved for appellate review, as it was not presented to the trial court for consideration. Further, Appellant has not requested palpable error review on this basis. See Dant v. Commonwealth, 258 S.W.3d 12, 21 (Ky. 2008) (holding that an appellate court will not review for palpable error unless requested and briefed by the appellant).

Directed Verdict

Appellant next argues that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence to convict him of

third-degree burglary and murder. Upon review of the record, we conclude that sufficient evidence was presented to cause a reasonable jury to find Appellant guilty of burglary and murder.

In considering a motion for a directed verdict,

> [T]he 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." Benham, 816 S.W.2d at 187, citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

We turn first to the burglary conviction. The evidence established, and Appellant essentially concedes, that he took items from his father's detached garage and pawned them. He argues, however, that no proof was offered that he entered or remained unlawfully in the detached garage so as to establish burglary. In fact, Appellant claims that he was authorized to enter the garage because he had been living at his father's house, albeit on "lockdown," and was therefore a resident.

A person is guilty of third degree burglary when, "with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." KRS 511.040(1). The official commentary to the burglary statute explains that

the requirement that one enter or remain unlawfully in a building or dwelling includes any person who enters under privilege, but who "remains on that property beyond the termination of his privilege." Official Commentary to KRS 511.020. Thus, a person who enters the victim's home as an invited guest is guilty of burglary where he kills the victim, then remains in the house to steal items. See Tribbett v. Commonwealth, 561 S.W.2d 662, 664 (Ky. 1978) ("Upon the death of the licensor, the license ceased and the privilege to be upon the premises lapsed. Therefore, when [the licensees] failed to leave, they remained unlawfully upon the premises within the meaning of the burglary statute."). Likewise, an employee authorized to enter a business after hours nonetheless exceeds the scope of that license by re-entering the business for the purpose of stealing valuable coins. See Commonwealth v. Partee, 122 S.W.3d 572, 576 (Ky. 2003) ("It is doubtful that Appellee, despite having a key and the security code, was entitled to be on the premises. His license to be there was sufficiently circumscribed to entitle the jury to believe that his third visit there on the weekend in question was without any license.").

Viewing the evidence in a light most favorable to the Commonwealth, we find it is sufficient to induce a reasonable juror to find Appellant guilty of burglary in the third-degree. The Commonwealth argued that Appellant entered the detached garage with the intent of taking items to pawn after he had killed his father. The last reported contact with Richard was at 2:00 a.m. on Saturday, September 4th. The medical examiner placed the time of death somewhere between Saturday and Sunday, but acknowledged that environmental variables, such as the low temperature in the home, could affect

this estimation. Appellant pawned his father's tools on Saturday afternoon. Based on these circumstances, a reasonable juror could conclude that Appellant killed his father sometime on Saturday morning.

The Commonwealth argues that Appellant's license and authorization to be on the property was terminated upon his father's death. See Fugate v. Commonwealth, 993 S.W.2d 931, 940 (Ky. 1999) ("[T]he privilege granted to one doing business ceases when the licensee commits acts, such as crimes, inconsistent with the business. This rationale applies to the personal dwelling as well."). Alternatively, the Commonwealth points to evidence that Appellant was not authorized to enter the detached garage, regardless of his permission to be in the residence itself. The nature of Appellant's "residency" at Richard's home is certainly a factor. Appellant was under strict rules regarding his stay there. He was not permitted to leave without an escort, and he did not have express permission to enter the detached garage. Moreover, Appellant himself told police that he had to use a credit card to pick the garage's lock, indicating his knowledge that he was unauthorized to enter that building. Considering these circumstances in a light most favorable to the Commonwealth, a reasonable juror could believe that Appellant killed his father before entering the detached garage, and that he had no authority to enter the building.

Appellant also claims that a directed verdict should have been granted on the charge of murder. The thrust of his claim is that the conviction was based solely on circumstantial evidence. Upon review of the record, we believe Appellant was not entitled to a directed verdict.

Appellant had a drug addiction so severe that he often stole items from family members and pawned them for drug money. In an effort to combat his addiction, Appellant was staying with his father and stepmother in a "lockdown" situation. Testimony showed that Appellant told inconsistent stories regarding his whereabouts on the weekend in question. Further, Appellant fled from Bullitt County in the days following the murder. It is undisputed that Appellant was in possession of his father's credit card and cell phone. Appellant's stepmother testified at trial that Richard would not have given Appellant his cell phone while she was out of town, and that Richard would have attempted to contact Appellant on Amy Coble's cell phone. Malissa further testified that Richard would not have given Appellant his credit card, considering Appellant's drug addiction and the family's overall financial problems. Finally, there was no evidence of forced entry and there was testimony that Appellant had been driving the family's Dodge truck during his pawning spree in Louisville that Saturday.

When viewing this evidence in a light most favorable to the Commonwealth, and drawing all fair and reasonable inferences from that evidence, a reasonable juror could have inferred that Appellant murdered his father. KRS 507.020(1)(a). Although the evidence presented with regard to the murder charge in this case was circumstantial, "[c]ircumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt." Bussell v. Commonwealth, 882 S.W.2d 111, 114 (Ky. 1994). As the evidence was sufficient for a reasonable juror to find Appellant guilty of murder beyond

a reasonable doubt, a directed verdict with regard to murder was not warranted.

Hearsay Evidence

Next, Appellant asserts that the trial court committed error by allowing the Commonwealth to introduce hearsay evidence, in violation of KRE 802, through the testimony of Amy Coble and Malissa Thomas. Alternatively, Appellant argues that even if the testimony was non-hearsay, it was irrelevant and inadmissible under KRE 401 and KRE 402. Finally, Appellant argues that even if relevant, the undue prejudice of the testimony substantially outweighed its probative value under KRE 403. We disagree. Appellant acknowledges that no contemporaneous objection was made and therefore, the issue is not preserved for appellate review. He requests palpable error review pursuant to RCr 10.26.

The first instance of alleged error occurred during the Commonwealth's direct examination of Appellant's girlfriend, Amy Coble:

> Q: Did Ricky make at least some contact with you after he turned himself in to the police? Did he write you some letters?
>
> A: Yes, and I believe you have copies of them.
>
> Q: And you got those letters?
>
> A: Yes. And at this time I had hired Lori Rakes and his lawyer was trying to contact me, and I was very scared and nervous because Lori had told me that his lawyer was going to try to get me to change my story which I didn't need t[o] do because mine is the truth. And so I hired Lori Rakes and I immediately gave them to her and she turned them over to the detectives.

Later in the trial, the Commonwealth recalled Malissa Thomas and asked her what she remembered about a confrontation Richard had with Appellant the week prior to his death. The following dialogue transpired:

> A: Richard caught Ricky snorting in the bathroom and he was just tired of the road Ricky was going down, and they - - he was arguing over that. He - - it was yelling and . . .
>
> Q: (INTERRUPTING) Was it a little more heated than normal?
>
> A: Yes. Because Ricky's drug use was really starting to become a problem. And Richard even made a comment to him out of anger that he didn't want to have to worry about what his son was turning into. And said that he wanted to know that he wouldn't have to worry about going to sleep and his son killing him for drugs and I got up and walked away. I went to the back bedroom and I told Richard later that he was wrong to have said that.

Turning first to Coble's testimony, we conclude that the statement is not hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). Coble's statement was not offered to prove that Appellant's lawyer had, in fact, attempted to persuade Coble to change her testimony. Rather, it was a non-responsive comment made while the Commonwealth was attempting to elicit testimony concerning Coble's contact with Appellant, both before and after his arrest. Moreover, any supposed prejudice resulting from Coble's statement was cured on cross-examination. Defense counsel established that Appellant had retained new representation prior to trial, that it was not trial counsel who had attempted to change Coble's testimony, and that Coble felt in no way threatened or coerced to alter her testimony at trial. No manifest injustice resulted from Coble's testimony and, for that reason, palpable error review is not appropriate. RCr 10.26.

We next turn to Malissa Thomas's testimony. From our review of the record, we are unable to conclusively identify the purpose of the Commonwealth's question that elicited the alleged statement made by Richard to Appellant. Nonetheless, without expressly determining that the statement was hearsay, we conclude that any supposed error was undoubtedly harmless.

"An error is reversible if the erroneously admitted evidence has a reasonable possibility of contributing to the conviction; it is harmless if there is no reasonable possibility that it contributed to the conviction." Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007). We acknowledge that this statement carries some prejudicial value because it precisely mirrors the Commonwealth's theory of the case; that is, that Appellant killed his father for drug money while he slept. However, upon review of the trial record, we believe the statement is cumulative of other properly admitted evidence. Considerable evidence was presented detailing Richard's disapproval of Appellant's drug problem, and his fear that Appellant would either hurt himself or others if he continued using drugs. Both Thomas and Coble gave testimony about the strict terms of Appellant's "lockdown," the purpose of which was to control Appellant's behavior. The testimony established Richard's worries about Appellant's health, his attempts to stop Appellant from stealing from the family home, and his fear of Appellant's erratic behavior. Having been well-informed of Richard's concern for his son, we cannot conclude that this statement unduly influenced the jury. Errors in the admission of evidence that are cumulative of properly admitted evidence are harmless. Collins v.

Commonwealth, 951 S.W.2d 569, 576 (Ky. 1997). Reversal is not required. RCr 9.24.

New Trial

Finally, Appellant contends the trial court erred in denying his motion for a new trial based upon newly discovered evidence of juror misconduct. Specifically, he asserts the trial court erred when it refused to hear testimony pertaining to events that occurred within the jury room. We find the trial court took evidence at the hearing on external influences on the jury, and that it properly refused to hear evidence concerning what occurred within the actual jury room. Thus, we conclude the trial court did not abuse its discretion.

The trial court held a hearing on Appellant's motion for a new trial, during which evidence of external influences on the jury was received. At the hearing, Ronnie Thomas (Richard's brother), Charlotte Mills (Appellant's cousin), and Steven Nallet (a witness at trial) testified in support of the motion. All of these individuals were present at Appellant's trial and claimed the foreperson was giving the thumbs up signal to Malissa Thomas, winking and nodding at her, patting her on the shoulder, inquiring how she was doing, and telling her not to worry because everything would be okay. Malissa Thomas and Shirley Madden (the jury foreperson) also testified at the hearing and denied the allegations.

The trial court heard evidence of external influences on the jury, but refused to allow evidence of any internal influence on the jury. Specifically, the trial court did not allow testimony from juror Anna Gilpin concerning her

regrets in returning a guilty verdict, nor did it allow a bailiff to testify to statements he heard the foreperson make to the jury during deliberation.

In Kentucky, it is well settled that "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." RCr 10.04. This Court has recognized "the wisdom of the long-standing rule in this Commonwealth that a jury verdict cannot be impeached through the testimony of jurors as to what occurred in the jury room, except to show that the verdict was made by lot." Hicks v. Commonwealth, 670 S.W.2d 837, 839 (Ky. 1984). Testimony from a juror regarding anything that occurred in the jury room is incompetent evidence to impeach the jury's verdict. Ruggles v. Commonwealth, 335 S.W.2d 344, 346 (Ky. 1960). Juror Gilpin's change of heart does not show the verdict was made by lot. Therefore, the trial court did not err in excluding such testimony. We further find that the same rule precluding juror testimony as to what occurred in the jury room would also preclude the bailiff from testifying as to jurors' conversations he overheard while standing outside the jury room.

In an attempt to introduce evidence of what occurred in the jury room, Appellant cites Taylor v. Commonwealth, 175 S.W.3d 68, 74 (Ky. 2005), for the premise that this Court has "not interpreted this rule as the clear-cut exclusionary rule that its text appears to suggest . . . . [T]he rule must give way to various constitutional requirements, such as due process of law." However, Appellant has failed to show why the case before us warrants deviation from the rule disallowing juror testimony to impeach the verdict.

Likewise, Appellant's reliance on Doan v. Brigano, 237 F.3d 722 (6th Cir. 2001), abrogated on other grounds as recognized by Maples v. Stegall, 340 F.3d 433 (6th Cir. 2003), is misplaced. In Doan, the Sixth Circuit declared an Ohio rule similar to our RCr 10.04 unconstitutional. Id. at 731. However, in that case the jury misconduct at issue concerned an experiment conducted by a juror in her home, the findings of which she reported to the jury in the same way an expert witness would present findings. Id. at 733. The court in Doan went on to say,

> A review of this misconduct stands in stark contrast to an examination of internal factors affecting the jury. Whether the jury understood the evidence presented at trial or the judge's instructions following the presentation of the evidence, whether a juror was pressured into arriving at a particular conclusion, and even whether jurors were intoxicated during deliberations, are all internal matters for which juror testimony may not be used to challenge a final verdict. Id. at 733.

Thus, we conclude the trial court's application of the principle that "[a] juror cannot be examined to establish a ground for a new trial, except to establish the verdict was made by lot," does not offend due process under these circumstances. RCr 10.04.

Finally, Appellant cites to Mattox v. United States, 146 U.S. 140 (1892), for the proposition that courts should consider juror testimony when it pertains to overt acts through which extraneous information is presented to the jury. In Mattox, a bailiff read a newspaper article to the jury, the content of which pertained to a case before them. 146 U.S. at 142-43. As the testimony excluded from the hearing on Appellant's motion did not pertain to an overt act like that in Mattox, we find that case distinguishable on its facts.

We are left then to decide whether the denial of Appellant's motion for a new trial was error based on the conflicting evidence of external influences on the jury. In Kentucky, the decision of whether to grant a new trial is a matter of judicial discretion. Jillson v. Commonwealth, 461 S.W.2d 542, 545 (Ky. 1970). Unless there has been an abuse of that discretion, we will not reverse. Id. The trial court properly considered conflicting evidence of external influence on the jury. Having resolved the conflicting evidence against Appellant, the lower court did not abuse its discretion in refusing to grant a new trial.

Conclusion

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed.

All sitting. All concur.

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