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RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-17-08 Ella Capeaut, D.C.

2007-SC-000651-MR

JOSUE MARQUEZ AREVALO — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
NO. 06-CR-00677

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment convicting Appellant of intentional murder and sentencing him to forty (40) years in prison. We reject Appellant's claims of error that the jury should have been instructed on first and second-degree manslaughter, that a witness was entitled to review her prior inconsistent statement before it could be admitted, that the 911 call was improperly admitted, and that evidence of Appellant's attempt to obtain a gun three months before the crime was not admissible under KRE 404(b). As to the claim that a police officer was improperly used as an interpreter during Appellant's statement to police, we adjudge that even if it was error, it was harmless error. Hence, we affirm.

On March 14, 2006, Lexington Police responded to a call reporting a shooting at 828 Ward Drive. The 911 call came from a neighbor named Juan Villa, who did not witness the shooting but heard the gunshots. When the police arrived on the scene, they found that the deceased, Pedro Lilly, had been shot to death while seated in his car in his driveway. An autopsy revealed that Lilly had been shot four times.

At the scene, police encountered Carmella Arevalo, Lilly's paramour, repeatedly screaming, "Josue shot my Pedro" in Spanish. Subsequently, during a recorded interview with Carmella, she stated that after hearing the gunshots, she looked out her door and saw her son, Josue Arevalo, running to his car. Police questioned several other witnesses at the scene, none of whom claimed to have seen Josue or anyone else shoot Lilly. However, three of these witnesses, Juana Lopez, Eduardo Cortez, and Sixto Roblero, testified that they saw Josue running and getting into his car after the shooting, although none of them saw him with a weapon. An acquaintance of Josue, Matthew Robey, testified that in late 2005, Josue came to his house looking to obtain a gun. Robey testified that Josue said he wanted a gun because he believed his stepfather had raped him when he (Josue) was drunk and had passed out. Andrea Croom testified that Josue had asked her if she knew where he could get a gun because he "wanted to kill a Mexican." Two other witnesses, Lynn Smith and Melissa Rogers, testified that Josue had told them that he was going to kill or hurt a "fucking Mexican." Smith and Croom both stated that they

saw Josue with a gun prior to the shooting that looked like the gun the prosecution claimed was the murder weapon at trial.

In Josue's statement to police, he denied shooting Lilly and maintained that he was at his home on Race Street at the time of the shooting. A search of Josue's home after the shooting revealed a gun and ammunition. The fingerprints on the gun matched Josue's fingerprints, and the gun was determined to be the gun that fired the bullets recovered from the scene and from Lilly's body.

On May 19, 2006, Josue Arevalo was indicted for the murder of Pedro Lilly. Pursuant to a jury trial on July 23-24, 2007, Josue was found guilty of murder and sentenced to forty (40) years imprisonment. This matter of right appeal followed.

LESSER INCLUDED OFFENSES

At trial, Josue requested jury instructions on first and second-degree manslaughter, in addition to the instruction for murder submitted by the Commonwealth. The trial court denied the request, and the jury was instructed only on murder.

Josue argues that he was entitled to instructions on first and second-degree manslaughter because there was evidence from which the jury could conclude that he acted wantonly (KRS 507.040) or under extreme emotional disturbance (KRS 507.030(1)(b)) when he killed Lilly. It is the duty of the trial court to instruct the jury on every theory of the case deducible from the evidence. Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing

Manning v. Commonwealth, 23 S.W.3d 610,614 (Ky. 2000)) ; RCr 9.54(1). While that duty includes instructions on any lesser included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation. Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998) (citing Barbour v. Commonwealth, 824 S.W.2d 861, 863 (1992), overruled on other grounds by, McGinnis v. Commonwealth, 875 S.W.2d 518 (1994)). A trial court's rulings on instructions are reviewed under an abuse of discretion standard. Ratliff v. Commonwealth, 194 S.W.3d 258, 274 (Ky. 2006) (citing Johnson v. Commonwealth, 134 S.W.3d 563, 569-570 (Ky. 2004)).

Josue presented no evidence in this case, and his defense was a complete denial of any involvement in the killing of Lilly. In his statement to police, which was admitted into evidence, Josue claimed he was at his apartment on Race Street at the time of the killing. There was no evidence upon which an inference of a wanton state of mind could be based in this case. There was no evidence of anything less than an intentional state of mind. Lilly was shot four times, twice through the shoulder and twice through the chest, through a closed window while seated in his car in his driveway. While there was evidence of a possible motive, that Josue believed Lilly had raped him some months before the killing, there was no evidence of any shouting, altercation, or struggle that preceded the shooting. Further, there was abundant evidence that the killing was premeditated.

Josue relies heavily on Commonwealth v. Wolford, 4 S.W.3d 534, 539-40 (Ky. 1999), wherein this Court stated:

> We reiterate the long-standing rule that where, as here, a defendant claims an alibi, or the evidence is purely circumstantial and does not conclusively establish his state of mind at the time he killed the victim, it is appropriate to instruct on all degrees of homicide and leave it to the jury to sort out the facts and determine what inferences and conclusions to draw from the evidence.

In Wolford, we ruled that the trial court properly instructed on second-degree manslaughter because the evidence did not conclusively establish the defendant's state of mind. However, we view Wolford as distinguishable from the instant case. In Wolford, the two victims and three co-defendants had been part of an ongoing family feud. On the night of the shootings, the victims began walking toward the defendants' family property with a baseball bat and a club after gunshots had been fired toward the victims' family property. The two victims were shot to death, and at trial, the evidence as to who shot the victims and how the shooting occurred was convoluted and contradictory. Unlike the present case, there was evidence from which it could be inferred that the defendant in Wolford acted wantonly, either during an altercation with the armed victims or in wantonly shooting in the direction of the victims to scare them away or defend himself.

As stated above, in the instant case, there was no evidence that Lilly was armed or that there was any disagreement or altercation prior to the shooting. As in Ratliff, 194 S.W.3d at 275, Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997), and Foster v. Commonwealth, 827 S.W.2d 670, 677-78 (Ky.

1991), all of the evidence established that the shooting was an intentional act. Accordingly, the trial court properly refused to give a second-degree manslaughter instruction in this case.

Josue also maintains that an instruction on first-degree manslaughter was warranted in this case because there was evidence from which it could be inferred that he acted under the influence of extreme emotional disturbance (EED). KRS 507.030(1)(b). Josue points to the testimony of Matthew Robey that Josue said he wanted a gun because he believed Lilly had raped him one night after he had passed out drunk.

To be entitled to a first-degree manslaughter instruction based on EED:

> [t]here must be evidence that the defendant suffered "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky.1986). "[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted.... [I]t is wholly insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown." Foster v. Commonwealth, 827 S.W.2d 670, 678 (Ky.1991) (citations omitted). And the "extreme emotional disturbance ... [must have a] reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Spears [v. Commonwealth], 30 S.W.3d [152], 155.

Greene v. Commonwealth, 197 S.W.3d 76, 81-82 (Ky. 2006).

According to Robey's testimony, it was in December of 2005, over three months before the shooting, that Josue told him about his belief that Lilly had raped him. Thus, even if that could be a reasonable explanation for Josue's alleged EED, the event was long before the killing, and there was no evidence of ongoing EED or any more recent triggering event. Unlike Holland v. Commonwealth, 114 S.W.3d 792, 807-08 (Ky. 2003), where we allowed that the triggering event could fester for a period of time, there was no evidence in the instant case of any continuing confrontations between Josue and Lilly or even any confrontation on the night of the shooting. There was no evidence of any shouting or argument before the shooting, and in Carmella Arevalo's statement to police, she claimed to be unaware of any tension or hostility between her son and Lilly. Like the defendant in Cecil v. Commonwealth, 888 S.W.2d 669, 674 (Ky. 1994), the evidence showed that Josue acted with premeditation. Josue tried to obtain a gun to kill Lilly some three months before the shooting, and he told various witnesses that "he was going to kill a fucking Mexican." Thus, the trial court properly denied the first-degree manslaughter instruction based on EED.

OFFICER BUENO AS INTERPRETER OF STATEMENTS TO POLICE

Officer Lorenzo Bueno of the Lexington Metro Police Department was called as a witness for the Commonwealth. Officer Bueno testified about arriving at the scene of the shooting and what he saw and heard there. Bueno also acted as interpreter in the subsequent police interviews of Josue and

Carmella Arevalo, who were both Hispanic. The statements of both Josue and Carmella were played at trial.

Prior to trial, Josue moved to have one of the court interpreters used at trial translate Josue's statement, instead of relying on Officer Bueno's translation on the audiotape. Josue's trial attorney argued that because Officer Bueno was an interested party employed by the police, and was unsworn during the interview, his translation of Josue's statement should not have been played for the jury. The trial court ruled that because neither Josue nor the Commonwealth alleged any substantive errors in the translation, it would allow the audiotape of Josue's statement with Officer Bueno interpreting to be played at trial.

On appeal, Josue argues that the trial court erred in not allowing the statements of Josue and Carmella to be translated at trial by the formal court interpreters. It must be noted that Josue did not make the same objection to the playing of Carmella's statement to police, although Josue did object to the introduction of that statement on other grounds, as we shall discuss later. Hence, only the argument regarding the translation of Josue's statement was preserved for review. RCr 9.22.

KRE 604 provides, "An interpreter is subject to the provisions of these rules relating to qualifications of an expert and the administration of an oath or affirmation to make a true translation." Josue does not challenge the qualifications of Officer Bueno to testify as a Spanish-speaking expert under KRE 702. Indeed, Officer Bueno confirmed at trial that he is a native Spanish

speaker and has spoken Spanish all his life. Rather, Josue's argument stems from the fact that Officer Bueno was a police officer and was unsworn at the time he translated Josue's statement.

Regarding the fact that Officer Bueno was unsworn at the time Josue's statement was given to police, the statement of Josue to police was not presented as the in-court testimony of Josue. The statement was presented under KRE 801A(b) as an admission of a party. At the time Josue gave his statement and Officer Bueno translated the statement, no oath was required because it was not a court proceeding. At trial, Officer Bueno was under oath as a witness when he testified and authenticated the statement. KRE 603.

As to the argument that Officer Bueno was not a disinterested interpreter, we note that under KRS 30A.400(1), a person detained in police custody, who cannot communicate in English, shall be provided an interpreter prior to any interrogation or taking of a statement from that person. The statement may only be admitted against a person entitled to the services of an interpreter if the statement was made in the presence of a "qualified interpreter." KRS 30A.400(2). KRS 30A.405(1) provides:

> Any person appointed as interpreter pursuant to this chapter shall be qualified by training or experience to interpret effectively, accurately, and <u>impartially</u>, both receptively and expressively, using any necessary specialized vocabulary.

(emphasis added). However, Josue did not raise the requirements of KRS Chapter 30A or even move to suppress Josue's statement on grounds that Officer Bueno was not impartial. Rather, Josue merely requested that the

interpreters used at trial translate the statement. In our view, even if it was error to allow Officer Bueno's translation of the statement to be presented to the jury, that error was harmless because there is no assertion that any of the translation of the statement was incorrect, and the statement was not harmful to Josue's case since he denied all involvement in the shooting in the statement. RCr 9.24.

PRIOR STATEMENT OF CARMELLA AREVALO

When the Commonwealth questioned Carmella Arevalo on direct about the statement she gave to police and about her telling another witness that Josue had been at her house on the day of killing, Carmella repeatedly stated that she did not remember making such statements. Pursuant to KRE 801A(a)(1), the Commonwealth then sought to impeach the testimony of Carmella with her prior inconsistent statement to police. Josue objected to the playing of the taped statement, arguing that Carmella should have a chance to first review such statement outside the presence of the jury. The trial court overruled the objection and allowed the tape to be played.

In that statement, Carmella told police that Josue was at her house on the day of the shooting when she got home from work. She stated that when she walked in the door, Josue jumped up from the couch, grabbed at his waist and ran out the door. Carmella next remembered hearing the shots and looking out the door and seeing Josue running to his car and driving away.

Citing Brock v. Commonwealth, 947 S.W.2d 24, 31 (Ky. 1997), Josue argues that when Carmella testified that she did not remember making the

statement to police, the Commonwealth was first required to play the statement outside the presence of the jury so it could be reviewed by Carmella. We do not read Brock or our evidentiary rules as entitling the witness to review the statement before it is offered into evidence. KRE 613(a) states in pertinent part:

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

The Commonwealth made the required time, place and persons present inquiry under KRE 613, and because the statement was in the form of an audiotape recording, it was not required to first be shown to the witness. In Brock, the Court stated with regard to a recorded statement:

> Finally, any attempt to impeach or refresh the recollection of a witness with a tape recorded statement must be conducted first in chambers outside the hearing of the jury so that the jury will not be prejudiced by having heard the recording in the event it is determined to be inadmissible.

Id. at 31 (citation omitted). However, the above language relates to cases where the trial court needs to hear the recorded statement to determine its admissibility. See also Thacker v. Commonwealth, 401 S.W.2d 64 (Ky. 1966), overruled in part on other grounds by Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969). In the instant case, there was no substantive objection to the admissibility of the statement. Thus, the trial court did not need to hear the

taped statement and play it outside the presence of the jury. Hence, there was no error in admitting Carmella's statement to police.

911 CALL

During the trial, the Commonwealth called Juan Villa, the next door neighbor of Lilly and Carmella, as a witness. During his testimony, the Commonwealth offered into evidence an audiotape recording of the 911 call made by Villa immediately after the shooting. Villa tells the dispatcher that "he killed his stepfather," and describes seeing the defendant get in his car and drive away after the shooting. At trial, Villa testified that he did not actually witness the shooting, but looked out his window right after he heard the shots and saw the victim in his car and Josue driving away. The defense objected to the playing of the tape, arguing that there were other unidentified voices on the tape whose statements could not be subject to cross-examination at trial.

In listening to the audiotape of the 911 call, we note that while another female voice could be heard screaming and crying in the background, none of what she was saying was discernible. The Commonwealth maintains that the other voice on the tape was Carmella's and that anything she or Villa said on the tape would be admissible as an excited utterance under KRE 803(2).

An "excited utterance", which is an exception to the hearsay rule, is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." KRE 803(2). The 911 call by Villa was made immediately after the shooting, which would clearly qualify as a startling event. The sound of Villa's voice, as well as

the screaming and crying heard in the background, demonstrate the circumstances of chaos and excitement in which the call was made. See Soto v. Commonwealth, 139 S.W.3d 827, 860 (Ky. 2004) (stating that a 911 call by victim immediately after shooting held to be admissible). Accordingly, the trial court did not abuse its discretion in allowing the audiotape of the 911 call to be played.

PRIOR BAD ACTS

Josue argues that the trial court abused its discretion in allowing prior bad act (KRE 404(b)) testimony to be admitted regarding his solicitation of prostitutes, his use of marijuana, and the fact that a witness' wife called the police because Josue was harassing the family in attempting to obtain a gun. The arguments relative to the testimony about Josue's solicitation of prostitutes and his use of marijuana are not preserved for appellate review. RCr 9.22. There was no objection to this testimony at trial, and the arguments were not otherwise raised before the trial court.

At trial Matthew Robey testified that when Josue attempted in December 2005 to obtain a gun from him, his wife became concerned and called the police to report that Josue was harassing the family. Josue argues that this evidence was of unrelated criminal activity that served no purpose other than to portray him as a criminal.

Under KRE 404(b), "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible to prove

motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). In determining the admissibility of other crimes and bad acts evidence, the evidence is analyzed using a three-tier inquiry addressing: (1) relevance, (2) probativeness, and (3) prejudice. Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005) (citation omitted). A trial court's ruling on the admissibility of prior bad act evidence will not be overturned absent an abuse of discretion. Id.

Robey's testimony that Josue tried to get a gun from him in December of 2005 to kill his stepfather was relevant and probative of his intent and plan to kill Pedro Lilly. It also was relevant to the killer's identity in this case, since Josue denied having anything to do with the murder of Lilly. As for the testimony that Robey's wife called the police because Josue was harassing the family in trying to get a gun, we believe such evidence was admissible to show his persistence in attempting to procure a gun, and was not unduly prejudicial. No evidence was presented as to what happened after the police were called or whether Josue was ever criminally charged as a result of this call.

For the reasons stated above, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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