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RENDERED: FEBRUARY 19, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000361-MR
2005-SC-000373-MR

DWAYNE EARL BISHOP — APPELLANT/CROSS-APPELLEE

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 00-CR-00061

COMMONWEALTH OF KENTUCKY — APPELLEE/CROSS-APPELLANT

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING ON DIRECT APPEAL AND AFFIRMING ON CROSS-APPEAL

This is a direct appeal and a cross-appeal from a judgment in which Dwayne Earl Bishop was convicted of the murder of his estranged wife and sentenced to life imprisonment. Because Bishop moved to act as co-counsel in the case and was denied this right without a Faretta hearing, we must reverse and remand for a new trial. As no arguments were presented by the Commonwealth on their cross-appeal, we affirm as to the cross-appeal.

On August 31, 2000, Carolyn Ann Tackett Bishop, the estranged wife of Appellant, was brutally murdered. Appellant was indicted for the murder on October 26, 2000. Subsequently, Vicki Ridgway and Harolyn Howard were appointed to represent Bishop. On December 13, 2000, Bishop filed a pro se motion to disqualify Harolyn Howard from the case because she was expected

to be called as a material witness. Before the court's ruling on the motion to disqualify counsel, Bishop also filed a pro se motion "to proceed as co-counsel" on January 31, 2001. The motion requested that he be allowed to proceed as co-counsel "with limited counsel as necessary to conduct the services needed." The motion cited a conflict with his court-appointed attorney, that his court-appointed attorney would be called as a witness in the case, and that the court-appointed attorney would not file motions that Bishop felt should be filed as reasons that the court should grant his request. The pro se motion also specifically cited Wake v. Barker, 514 S.W.2d 692 (Ky. 1974), and Faretta v. California, 422 U.S. 806 (1975), as support for the motion.

On February 9, 2001, a hearing was held on the motion to proceed as co-counsel. At the hearing, the trial judge asked court-appointed counsel and the Commonwealth their positions on the motion and then denied the motion, stating:

> Now, I think I can take judicial notice that Mr. Bishop is not a practicing attorney, he has – does not have a legal license in this Commonwealth, and I – My understanding of the law is, that there is no provision for that. So, the motion to be appointed as co-counsel is OVERRULED because the law just doesn't provide for that.

The court informed Bishop that he could proceed pro se and represent himself or he could proceed with an attorney, but he could not act as co-counsel in the case. An ex parte hearing was then held on the motion to disqualify counsel, after which said motion was denied.

At the jury trial held January 17–24, 2005, Bishop was represented by Harolyn Howard and Robert Ganstine. Bishop was ultimately found guilty of murder and sentenced to life in prison. This appeal by Bishop followed.

RIGHT TO HYBRID COUNSEL

Bishop argues that it was reversible error for the trial court to deny him his right to act as co-counsel in the case. We agree.

In Wake v. Barker, 514 S.W.2d at 696, our predecessor Court held that a defendant is constitutionally entitled to "make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services . . . ." Wake has since been reaffirmed by this Court in Hill v. Commonwealth, 125 S.W.3d 221, 225 (Ky. 2004) and, most recently, in Stone v. Commonwealth, 217 S.W.3d 233, 236 (Ky. 2007).

Bishop clearly asserted his right to make a limited waiver of counsel in the present case. He was denied this right without anything approximating a Faretta hearing, as required by Hill, 125 S.W.3d at 227. At the February 9, 2001 hearing, the trial court made no inquiry into whether Bishop's requested limited waiver of counsel was voluntarily and intelligently made. The court simply summarily denied the motion because it was unaware of any legal authority for Bishop's request, notwithstanding the fact that Bishop had cited both Wake and Faretta in his pro se motion.

Because the denial of Bishop's right to hybrid representation was a structural error affecting the framework of the trial, it is not subject to

harmless error analysis and requires automatic reversal. Hill, 125 S.W.3d at 228-29. Accordingly, the judgment of the Floyd Circuit Court is reversed and the case is remanded for a new trial.

Because the remainder of issues raised by Bishop are likely to arise again on re-trial, we shall address them below.

CHAIN OF CUSTODY OF T-SHIRT

One of the pieces of evidence offered by the Commonwealth was a black t-shirt with a "Support Your Local Highwaymen" slogan on the front that was recovered in the search of Bishop's mother's house, where Bishop was residing at the time of the murder. Pursuant to the consent of Hilda Bishop, Sergeant Ronald Peppi of the Kentucky State Police ("KSP"), along with Trooper Todd Kidd, engaged in a search of the Bishop home the day after the murder. The black t-shirt which was seized was ultimately found to have Carolyn Bishop's blood and DNA on the front, as well as burrs that were indigenous to the area where her body was found.

In a pre-trial bond reduction hearing, Bishop's counsel first raised the issue of a problem with the chain of custody of the black t-shirt, although counsel did not specify at that hearing what the problem was. At trial, Bishop objected to the admission of the t-shirt on grounds of a serious break in the chain of custody because of the way it was obtained and transferred to the case officer, Detective Terry Thompson of the KSP. The trial court overruled the objection and allowed the t-shirt to be admitted into evidence.

Sergeant Peppi testified that after conducting their investigation at the scene where the victim's body was found, Detective Thompson asked him and Trooper Kidd to go to Appellant's mother's house. During the search of Hilda Bishop's house, Peppi collected the black t-shirt from the top of a dresser in Appellant's room, as well as a green knife pouch. Peppi stated that he put the t-shirt in a brown evidence collection bag, folded the top over, and placed the bag in the trunk of his cruiser. Peppi and Kidd then proceeded directly to Nelson Frazier Funeral Home, where Detective Thompson had gone. The testimony of Peppi, Kidd, Thompson and Trooper Todd Wheeler, who was assisting Thompson that day, all confirmed that Peppi handed the bag with the t-shirt over to Detective Thompson in the parking lot of the funeral home. Thompson testified that he opened the bag and looked in to see the t-shirt and then immediately placed the bag into another bag and put it in his trunk. According to Thompson, he kept the bag containing the t-shirt locked in his locker at the Post until he delivered it to Pat Hankla at the KSP Crime Lab in Frankfort. Hankla, a forensic biologist at the crime lab, testified that Thompson hand-delivered the bag with the t-shirt on September 6, and she stored it in the lab's walk-in freezer when it was not being tested.

Bishop argues that the trial court erred in allowing the t-shirt to be admitted when the chain of custody was not properly established. Bishop points to the fact that no photograph was taken of the t-shirt when it was collected from his mother's house, the original brown bag it was placed in was

not sealed, and the t-shirt was not properly listed on the KSP 41 (evidence tracking) form.

Foundation and chain of custody rulings are reviewable under an abuse of discretion standard. Penman v. Commonwealth, 194 S.W.3d 237, 245 (Ky. 2006). With items of physical evidence which are clearly identifiable and distinguishable, there is no requirement of proof of chain of custody. Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998). Although the black t-shirt at issue here was clearly identifiable and distinguishable, the blood and DNA samples taken from it, which were the incriminating portion of the evidence, were not. Thus, proof of chain of custody was required. See id.

> Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'

Id. (quoting United States v. Cardenas, 864 F.2d 1528, 1532 (10th Cir. 1989)).

Bishop seems to be arguing there was a break in the chain of custody because of some irregularities in tracking the chain of custody. In particular, the KSP 41 form completed by Detective Thompson listed the black t-shirt at the end of the form in black ink, rather than in the blue ink used to list the other items of evidence. At trial, Thompson explained that he simply forgot to initially list the black t-shirt on the form, and thus he had to list the t-shirt on the separate carbon copies of the form which had already been separated and duplicated in blue ink.

Bishop also argues that there was a problem with chain of custody because a photograph of the t-shirt was not taken at the time it was seized from Hilda Bishop's home. We note that a photograph of the t-shirt in question, which was apparently taken at the Crime Lab, was admitted into evidence. Sergeant Peppi testified that he did not take a photograph of the shirt at the residence because he had run out of film photographing the original crime scene the night before. Detective Thompson testified that he decided to have the Crime Lab photograph the t-shirt in order to preserve the integrity of the evidence on the shirt as much as possible.

As for the fact that the original brown paper collection bag was folded down at the top and not sealed, there was no evidence that the shirt was altered or tampered with as a result of the bag not being sealed. And the testimony of Sergeant Peppi and Detective Thompson was that the brown bag was put into another bag and sealed when it was transferred to Thompson.

We do not see that any of the alleged irregularities in the collection and tracking of the black t-shirt constituted a break in the chain of custody or demonstrated a reasonable probability that the t-shirt was tampered with or altered in any material respect. Like gaps in the chain of custody, irregularities in the tracking of evidence would normally go to the weight of the evidence, not to its admissibility. See id. Hence, the trial court did not abuse its discretion here in allowing the black t-shirt and the evidence taken therefrom to be admitted into evidence.

PRIOR BAD ACTS

Bishop's next assignment of error is the admission of prior bad acts in the form of evidence of previous incidents of domestic violence by Dwayne Bishop against Carolyn Bishop. Bishop takes issue with all of the rulings in favor of the Commonwealth regarding the numerous prior bad acts it intended to introduce at trial. However, the Commonwealth ultimately did not introduce evidence of all of these prior bad acts, and we will address only those acts actually introduced into evidence.

As a preliminary matter, we must look to the specific injuries Carolyn Bishop sustained on the night she was murdered and her cause of death. Dr. Greg Davis, Associate Chief Medical Examiner for the Commonwealth, conducted the autopsy of Carolyn's body. In examining the body, Dr. Davis testified to the following injuries he observed: deep stab wound to the heart; long laceration in the lip/mouth area; blunt force injury to the nasal area; bruising and contusions to both ears; deep laceration and bruising in the periorbital region resulting in two black eyes; blunt force injuries to cheeks and forehead; blunt force injury to hands and contusions on arms, hands, and fingers, all characterized as defensive wounds; scraping contusions on abdomen, chest and right shoulder; bruising on knees; numerous, superficial, clustered stab wounds to the right thigh and deep scratches in hip/thigh region. In addition, Dr. Davis noted that he recovered a bullet in her buttocks area from an old gunshot wound. Dr. Davis concluded the cause of death was multiple blunt and sharp force injuries.

Under KRE 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible, however, if "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). Case law has also established that prior bad acts are admissible under the pattern of conduct or modus operandi exception to KRE 404(b) if the facts surrounding the prior act are so strikingly similar to the charged crime as to create a reasonable probability that the acts were committed by the same person and/or were accompanied by the same mens rea. Dant v. Commonwealth, 258 S.W.3d 12, 19 (Ky. 2008) (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)). This Court has instituted a three-part test for assessing the admissibility of prior bad acts evidence under KRE 404(b), which includes examining the relevance, probativeness, and prejudice associated with the prior crime. Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994) (citing Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.25(II) (3d ed.1993)).

As for previous acts of domestic violence committed against the same victim by the defendant, this Court has held that a defendant's prior assault of his wife was admissible to prove that the defendant intentionally murdered his wife and had a motive to do so. Benjamin v. Commonwealth, 266 S.W.3d 775, 791 (Ky. 2008). In Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998), this Court held that where the evidence of domestic abuse is not too remote in

time and there is evidence linking that physical abuse to the defendant, evidence of a pattern of domestic violence by the defendant is admissible in a trial for the murder of that same victim. See also Matthews v. Commonwealth, 709 S.W.2d 414, 418 (Ky. 1985) (holding that a prior burglary charge was admissible in murder trial because it was "part of the circumstances which evidenced the domestic difficulties between the appellant and his wife").

EPOs

We first address the evidence of the multiple emergency protective orders ("EPOs") filed by Carolyn Bishop against Appellant. At trial, a Deputy Clerk from the Floyd Circuit Court testified to five EPOs that Carolyn obtained against Appellant, dating from 1991–1995, only one of which resulted in a no contact order. On hearsay grounds, the court did not allow the specific allegations in the EPOs to be admitted. It has been held that "EPOs, issued at the behest of the victim, ordering appellant to stay away from her house, in the time framework of this case, are relevant as evidence of motive or state of mind . . . ." McCarthy v. Commonwealth, 867 S.W.2d 469, 470 (Ky. 1993), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). In Barnes v. Commonwealth, 794 S.W.2d 165, 169 (Ky. 1990), we held that two incidents of domestic violence, one seven years before the defendant's murder of his wife and one four and half years before, were too remote in time to be admitted at the murder trial. This Court reasoned, "[a]cts of physical violence, remote in time, prove little with regard to intent, motive, plan or scheme; have little relevance other than establishment of a general disposition to commit

such acts; and the prejudice far outweighs any probative value in such evidence." Id.

Although all of the EPOs here, as well as many of the other acts of domestic violence we have yet to discuss, occurred more than five years before Carolyn's murder, we believe the facts in the present case to be distinguishable from Barnes. The evidence in the instant case established a long-term, ongoing pattern of life-threatening domestic violence toward Carolyn that was undeniably relevant to prove Appellant's motive and intent to kill Carolyn. They were not isolated acts of physical abuse.

Appellant testified that he and Carolyn were married in the late 1980s and that the relationship was not good from the start. Appellant admitted to regularly abusing Carolyn. Although they separated in 1996, they continued to see each other and the abuse continued. Tiffany Tackett, Carolyn's daughter, likewise testified that the relationship was always abusive. Appellant admitted to several of the specific incidents of domestic violence that we shall discuss further below. In sum, we believe that the trial court did not abuse its discretion in this case in allowing the evidence of the EPOs to be admitted.

THREATS

Bishop also claims it was error under KRE 404(b) for the trial court to admit evidence that he had on numerous occasions threatened to kill Carolyn. Several witnesses testified that they had heard Bishop threaten to kill Carolyn. Tiffany Tackett testified that in April of 2000, Appellant ran her car off the road. Immediately thereafter, Appellant came over to her car and told her that

he had mistaken her for Carolyn in the car. Appellant then told Tiffany to relay a message to Carolyn – that he was going to kill her (Carolyn) and her mother. Carolyn's sister, Mary Lou Tackett, testified that about two or three weeks before the murder, she heard Appellant repeatedly shouting at Carolyn over the phone that he was going to kill her. Mark Tackett, Carolyn's brother, also testified that he had heard Appellant threaten to kill Carolyn.

It should be noted that Bishop makes no hearsay arguments on appeal relative to the introduction of any of the prior bad acts. And it has long been a rule in this jurisdiction that threats against the victim of a crime are probative of the defendant's motive, malice and intent to commit the crime. Richie v. Commonwealth, 242 S.W.2d 1000, 1004 (Ky. 1951); Rose v. Commonwealth, 385 S.W.2d 202, 204 (Ky. 1964). Further, by Appellant's own admission, he threatened to kill Carolyn many times. When asked on direct if he could estimate how many times, Appellant responded that he could not hazard a guess, adding that "it became a way that we communicated." Accordingly, the trial court did not err in allowing in Appellant's prior threats against Carolyn's life.

BLACK EYES

The next evidence we shall examine was the testimony from several witnesses that Carolyn often had black eyes after she had been with Appellant. None of these witnesses testified that they witnessed the beating that caused the black eyes, nor was there other direct evidence linking Appellant to these

black eyes. The testimony was general in nature, with not even a specific time frame given when the black eyes were observed.

In Jarvis, 960 S.W.2d at 470, wherein the victim was observed by a witness with bruises days prior to her death, this Court held that evidence that the victim was physically abused "without any proper evidence linking that abuse to the defendant is substantially more prejudicial than it is probative." Similarly, in Smith v. Commonwealth, 904 S.W.2d 220, 224 (Ky. 1995), witnesses reported seeing the victim within six months of his death with black eyes and bruises, but no direct evidence was presented as to who had inflicted the abuse. Acknowledging that it was a difficult call, this Court adjudged that it was not an abuse of discretion to allow the evidence to be admitted. Id. In light of evidence that the beating was close in time to the fatal beating, that the appellant had the opportunity to beat the victim because they lived together, and was coupled with direct evidence that appellant had beaten the victim in the same time period, we opined that the jury could properly infer that appellant was guilty of the unwitnessed acts of abuse. Id.

In balancing the Bell factors in the case at bar, we must conclude that the prejudicial nature of the evidence outweighed its probativeness. Here, we cannot say there is any direct evidence that Appellant physically abused Carolyn during the time period she was seen with black eyes because no time period was given. Likewise, we do not know if Carolyn was seen with black eyes in the time period shortly before her murder. The witnesses testified only that they often saw Carolyn with black eyes after being with Appellant.

Although there was a pattern of ongoing physical abuse by Appellant to which Appellant readily admitted, that simply was not enough to allow the jury to infer that Appellant was the one that caused all of the black eyes.

The Commonwealth argues that the evidence that Carolyn was often seen with black eyes was admissible under the modus operandi exception to KRE 404(b) because both of her eyes were blackened at the time of her murder, and Dr. Davis testified that the injury causing her black eyes was inflicted on or near the time of death. Thus, the testimony was admissible to show that the acts were committed by the same person or with the same mens rea. This argument ignores the fact that there still must be evidence directly linking Appellant to Carolyn's recurrent black eyes.

SPECIFIC ACTS OF DOMESTIC VIOLENCE

We next address the evidence of specific instances of domestic violence perpetrated against Carolyn. This evidence was introduced through the testimony of police who responded to reports of these incidents and through emergency room physicians who treated Carolyn for her injures.

Trooper Mike Thorpe testified that he responded to a report of a domestic disturbance on December 9, 1990. When he arrived at the residence, he observed that Carolyn had been sliced with a knife and had cuts on her face, back, neck, and stomach. Appellant was arrested at the scene. We adjudge this evidence was properly admitted at trial as proof of Appellant's motive and intent, as well as modus operandi, given the similarity of injuries to the cutting

injuries Carolyn sustained when she was murdered. See Benjamin, 266 S.W.3d at 791 and English, 993 S.W.2d at 945.

Trooper Eddie Crum testified to two domestic incidents he responded to, both in 1991. When he arrived on the scene in the first incident, he observed that Carolyn's face was red and had a cut on it, as well as a handprint. Although Crum did not testify that Appellant was responsible for the injuries and Appellant was not arrested, Crum testified that Appellant was the only other person present at the scene. Given that Appellant was the only other person at the scene and the totality of other evidence of Appellant's ongoing domestic abuse of Carolyn, we cannot say it was an abuse of discretion to admit this evidence.

When Trooper Crum arrived on the scene at the second incident, he observed Carolyn with a black eye. However, Crum testified that Appellant was not at the scene and there was no evidence as to who was responsible for the black eye. Given our previous ruling on the witnessing of Carolyn with black eyes without further evidence linking Appellant to the injuries, we rule that it was an abuse of discretion to admit evidence of this incident under KRE 404(b).

We next turn to the testimony of Carolyn's emergency room treating physicians. Dr. Francisco Rivera testified that he treated Carolyn on June 30, 1994, for a jaw injury that was reported to be inflicted by Appellant. On August 6, 1995, Dr. Rivera treated Carolyn for injuries to the back of her head and her left shoulder as a result of being hit with a pool stick by Appellant. Dr.

Rivera again treated Carolyn on July 15, 1996, for a wrist injury and a large hematoma under her eye caused by a human bite. There was no testimony as to who inflicted this injury.

Dr. Rivera's testimony as to the 1994 and 1995 injuries was properly admitted as evidence of Appellant's motive and intent since there was evidence linking him to the injuries. Appellant himself admitted inflicting the injuries with the pool stick during his testimony. However, the testimony relative to the 1996 injuries was admitted in error, as there was no such evidence that Appellant was responsible for the wrist and eye injuries.

Dr. Percival Patel testified that on August 8, 1992, he treated Carolyn for a gunshot wound to her groin which she reported was inflicted by Appellant. Apparently, this was the injury that explained the bullet recovered from Carolyn's buttocks during the autopsy. During Appellant's testimony, he first admitted being responsible for the gunshot injury, then later testified that Carolyn had accidentally shot herself. Although Carolyn was not shot during her murder and the evidence of the shooting was highly prejudicial, we nevertheless adjudge that the probativeness outweighed the prejudice, and the incident was relevant to show Appellant's motive and intent to kill Carolyn. Thus, there was no abuse of discretion in its admission.

INJURY TO MARK TACKETT

The final prior bad act evidence before us is the testimony of Carolyn's brother, Mark Tackett. Tackett testified that on April 7, 1996, Appellant came to his trailer twice looking for Carolyn. The second time, he came in with a

gun, and hit Tackett in the head with it and knocked him out. Tackett testified that he filed charges against Appellant, but ultimately dropped them.

While the prosecution is not privileged to show unconnected unlawful conduct that had no bearing whatsoever upon the crime under scrutiny, all the circumstances may be shown which have a relation to the particular violation of the law imputed, even if, in doing so, other offenses may be brought to light. Francis v. Commonwealth, 468 S.W.2d 287, 289 (Ky. 1971). "E]vidence of prior threats or violence against an unrelated third-party is generally regarded as inadmissible character evidence." Davis v. Commonwealth, 147 S.W.3d 709, 722 (Ky. 2004) (citing Fugate v. Commonwealth, 202 Ky. 509, 260 S.W. 338, 341 (1924)). In this case, however, Appellant was looking for Carolyn at the time he came in the witness' trailer. Thus, we believe his violent conduct toward Mark Tackett was admissible to show his malicious intent when he was preying on Carolyn. Accordingly, it was not an abuse of discretion to allow this evidence to be admitted.

EVIDENCE OF PHYSICAL ABUSE OF VICTIM BY THIRD PARTIES

During the cross-examination of Mark Tackett, who was one of the witnesses who testified to frequently seeing Carolyn with black eyes after being with Appellant, defense counsel asked if he had ever seen Carolyn with black eyes or bruises after being with anyone else. The Commonwealth objected, and the trial court sustained the objection. Appellant argues that the trial court's ruling erroneously denied him the opportunity to present evidence that Carolyn had been abused by other people besides Appellant.

First, we have already spoken to the issue of testifying to observing injuries without evidence linking the defendant to the injuries, and the same reasoning would hold true for inferences that a third party committed the injury. Here, the defense seeks to elicit the same prejudicial inference as to third parties that it sought to exclude for Appellant. In this case, the trial court did not prohibit the defense from presenting probative evidence that another person had physically abused Carolyn for the purpose of showing that someone else may have had a motive or the intent to kill her. See Eldred v. Commonwealth, 906 S.W.2d 694, 705 (Ky. 1994), overruled on other grounds by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003). Further, the testimony which Appellant complains he was wrongfully denied the opportunity to present was not introduced by avowal as required by KRE 103(a)(2). Accordingly, there is no merit to Appellant's contention that he was denied the right to fully present a defense by the trial court's ruling.

IMPROPER BOLSTERING

The remaining issue before us relates to the testimony of Kenneth Steele, a former fellow inmate of Appellant's to whom Appellant confessed to the killing. In 2000, Steele gave a statement to Detective Thompson that Appellant had told him in jail that he murdered Carolyn. Subsequently in 2004, Steele suffered a brain injury in a car accident that impaired his memory and eyesight. At the trial in 2005, when asked if he remembered the jailhouse conversation with Appellant in 2000, Steele responded that he could only remember some of it. Steele testified that he remembered that Appellant told

him he murdered Carolyn, but he could not recall any of the specifics of the conversation. The Commonwealth then asked him about certain specific statements, and Steele replied that he could not remember. Additionally, when the Commonwealth attempted to refresh Steele's recollection by having him read the transcript, Steele indicated he could not read the statement because of his visual impairment.

The next witness called by the Commonwealth was Detective Thompson who was present when Steele gave his statement. When asked by the Commonwealth if he remembered the contents of the statement given by Steele, the defense objected on grounds of improper bolstering. The defense argued that Thompson's testimony would serve only to bolster Steele's testimony regarding Appellant's confession to him. The Commonwealth countered that it sought only to ask Thompson about those specific portions of Steele's statement that he could not remember. The trial court overruled the objection and allowed the Commonwealth to proceed with the questioning. The Commonwealth then asked Thompson about certain specific statements by Steele – that Appellant had referred to Carolyn as a "fucking whore," and had said to him, "well, the bitch won't mess with me anymore," and "Kenny, you know I done it. You knowed I done it from the start."

Appellant argues on appeal as he did below that Thompson's testimony was introduced as a prior consistent statement of Steele and, thus, constituted improper bolstering. See Smith v. Commonwealth, 920 S.W.2d 514, 516-17 (Ky. 1995). Pursuant to KRE 801A(a)(2), a prior consistent statement is

admissible only if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." See Noel v. Commonwealth, 76 S.W.3d 923, 927 (Ky. 2002). The Commonwealth maintains that the testimony of Thompson was not a prior consistent statement of Steele because Thompson did not repeat any of Steele's testimony. Rather, Thompson only testified to specific portions of Steele's statement that he was unable to remember because of his memory impairment. The Commonwealth contends that the statements were therefore admissible under KRE 801A(a)(1), the hearsay exception for prior inconsistent statements.

A statement is considered inconsistent for purposes of KRE 801A(a)(1) when the witness/declarant denies the statement or is unable to remember it. Brock v. Commonwealth, 947 S.W.2d 24, 27 (Ky. 1997); Wise v. Commonwealth, 600 S.W.2d 470 (Ky.App. 1978).

In the present case, although Thompson's testimony was consistent with Steele's general testimony that Appellant had confessed to Steele, the Commonwealth had a legitimate reason to use Thompson to bring out the specific statements of Steele which he was unable to remember. Hence, the testimony of the specific statements made by Steele was admissible as a prior inconsistent statement. Brock, 947 S.W.2d at 24; Wise, 600 S.W.2d at 470; Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969). Of course, KRE 801A(a)(1) requires that the proper foundation be laid as required by KRE 613.[1]

[1] At trial, the trial court appears to deny the prosecutor's request to lay the foundation by reading the statements to Steele (because he could not see to read).

For the reasons stated above, the judgment of the Floyd Circuit Court is reversed and the case is remanded for a new trial.

Abramson, Noble, Schroder, and Venters, JJ., concur. Cunningham, J. concurs in result only by separate opinion in which Minton, C.J., and Scott, J., join.

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COMMONWEALTH OF KENTUCKY — APPELLEE/CROSS-APPELLANT

OPINION BY JUSTICE CUNNINGHAM
CONCURRING IN RESULT ONLY

I concur in result, but disagree as to the treatment given by the majority concerning the evidence of the victim's black eyes. One does not normally acquire a black eye except through some sort of violence, be it intentional or accidental. Black eyes are evidence regularly used to support prosecution for domestic violence. Evidence that the victim was observed with black eyes after having been with Appellant is important evidence which supports a pattern of physical abuse of the victim by Appellant. Trooper Eddie Crum gave further evidence of the victim receiving physical injury at the hands of Appellant. In fairness, I would also admit the evidence by witnesses who would have testified that the victim had been observed with black eyes after having been with someone other than Appellant. This is a case about violence. Let the testimony about violence toward the victim in, and allow the jury to sort it out.

Minton, C.J.; and Scott, J., join this opinion concurring in result only.