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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 19, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000739-MR

KIMBERLY DALTON — APPELLANT

V.

ON APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
NO. 06-CR-00005-005

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On December 15, 2005, Appellant, Kimberly Dalton, and her roommate went to a local bar (the "Wooden Nickel") in Winfield, Tennessee. She joined four others: Rocky King, Ricky King, Harold King, and Danny Bryant. The victim, Morris King (hereinafter "the victim"), was also present at the bar that evening.[1] The victim was a 65-year-old retiree who was a regular at the bar. Dalton, Rocky King, Ricky King, Harold King, and Danny Bryant (hereinafter "the group") had not known the victim before this night. The testimony at trial indicated that the group, mistakenly believing the victim to be rich, hatched a scheme to rob him. In fact, there was testimony at trial that the group openly discussed plans to rob the victim in the bar that evening. At trial, a patron from the bar testified he witnessed a conversation between Dalton and the

[1] Although they share the same last name, there is apparently no relation between the co-indictees and the victim, Morris King. The co-indictees are, however, related.

victim where it appeared she was attempting to lure him outside and rob him. Dalton's roommate also testified that Dalton told her she was going to "roll" the victim. Dalton's roommate actually called the bartender after she had left the bar that evening out of concern for the victim's safety. Towards the end of the night, members of the group attempted to persuade the victim to let them drive him home. The victim declined and went outside the bar to leave on his own.

Once outside, Ricky King got into the passenger seat of the victim's car, apparently for the purpose of securing a ride home. A bar patron went out to check on the victim and thwarted Ricky's plan to "get a ride home" with the victim. After the patron asked Ricky to get out of the victim's vehicle, Ricky got into another car with the other members of the group and drove away. However, Ricky pulled the group's car over just a few miles down the road and waited for the victim to drive by, at which point he pulled in behind the victim's car. Because Ricky was flashing his lights and honking his horn, the victim pulled over and stopped his car. Ricky and Rocky then got out of their car and approached the victim's vehicle. Rocky somehow convinced or coerced the victim to move to the passenger seat, at which point he and Ricky got into the victim's car and drove to a remote part of McCreary County, Kentucky. The other members of the group followed behind in their car.

Once there, the members of the group got out of the vehicles. However, Bryant then got into the car with the victim while the others remained outside talking. Apparently sensing danger, the victim pulled a gun and fired a

warning shot inside his car.[2] As Bryant and the victim struggled for the gun, Ricky jumped back into the car. Ricky wrestled the gun away from the victim and fired a shot through the victim's neck. Rocky then took the gun and fired several more shots. The victim died of blood loss from multiple gun shot wounds. Dalton was present during the struggle and subsequent shooting. There was also testimony at trial that she took the victim's wallet at the scene. The testimony showed that there was a one-hundred dollar bill in the victim's wallet, which was split evenly among the members of the group. It is undisputed that Dalton later disposed of the wallet and the murder weapon, although Ricky King later found and "re-disposed" of the murder weapon. An investigation of the victim's vehicle revealed substantial evidence linking the members of the group to the crime.

Procedural History

Dalton, Rocky King, Ricky King, Harold King, and Danny Bryant were all indicted for the murder and robbery of the victim, Morris King. Rocky King, Harold King, and Danny Bryant all accepted plea deals before trial. Ricky King and Dalton proceeded to trial where they were tried jointly for first-degree robbery and complicity to murder. Dalton was found guilty by a McCreary County jury of robbery in the first degree and criminal complicity to murder. She accepted a plea agreement for sentencing and was sentenced to 10 years on the robbery conviction and 25 years on the complicity to murder conviction, to run consecutively for a total of 35 years. She now appeals as a matter of right pursuant to Ky. Const. § 110(2)(b).

[2] The victim had a permit to carry a concealed weapon.

Dalton alleges several grounds of error, including: (1) that a directed verdict of acquittal should have been granted on the complicity to murder charge; (2) that it was reversible error for a detective to testify to the statements of a non-testifying co-defendant; (3) that there was improper cross-examination of Dalton amounting to reversible error; (4) that the failure to grant separate trials was reversible error; (5) that limits placed upon impeachment of the witness, Danny Bryant, violated the Confrontation Clause of the Sixth Amendment; (6) that the prosecutor improperly used the guilty pleas of Dalton's co-indictees; and (7) that the trial court abused its discretion when it overruled defense counsels' challenges for cause on two prospective jurors.

Directed Verdict

Dalton alleges that the trial court committed reversible error when it refused to grant a directed verdict on the charge of complicity to murder. This issue is preserved for review. After reviewing the evidence, we find that it would not be clearly unreasonable for a jury to find Dalton guilty of the charge.

On a motion for directed verdict, the trial court must view the evidence in a light most favorable to the Commonwealth, drawing all fair and reasonable inferences in its favor, and ask whether a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983). On appellate review, we determine whether it would be clearly unreasonable for a jury to find guilt under the evidence as a whole. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Dalton argues there was evidence presented at trial that she was involved in the robbery, but that there was no evidence to support the proposition that she *intended* the victim's death. However, Dalton misunderstands the complicity statute. The complicity statute, KRS 502.020, does not require that one intend the resulting crime. Tharp v. Commonwealth, 40 S.W.3d 356, 360 (Ky. 2000), cert. denied, 534 U.S. 928 (2001). Rather, KRS 502.020 is separated into two sections: KRS 502.020(1) requires that one have "the intention of promoting or facilitating the commission of the offense," while KRS 502.020(2) requires no such intention. Thus, a person can be found guilty of "complicity to the act" or "complicity to the result." Id.

The Official Commentary to KRS 507.020, Kentucky's murder statute, states in pertinent part:

> If a felony participant other than the defendant commits an act of killing, and if a jury should determine from all the circumstances surrounding the felony that the defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b).

Dalton was charged with and convicted of robbery in the first degree. This Court has said that the "facts proving the element of endangerment necessary to convict of first-degree robbery may be the same facts which prove the element of aggravated wantonness necessary to convict of wanton murder." Bennett v. Commonwealth, 978 S.W.2d 322, 327 (Ky. 1998). In this case, there was testimony at trial that Dalton attempted to lure the victim outside to rob him. There was also testimony that Dalton told her roommate she was going to "roll" the victim. Additionally, Dalton laid in wait in a vehicle on the side of a dark roadway with other individuals for the victim to drive past.

Finally, Dalton followed the victim's vehicle to a remote area at night in order to rob him. Dalton stood by as the others struggled with the victim and shot him. There was testimony at trial that Dalton took the victim's wallet from his body at the scene and later burned it in a stove. Moreover, she took the murder weapon and disposed of it. Here, there was more than enough evidence for the jury to reasonably believe that Dalton's participation in the robbery constituted wantonness manifesting an extreme indifference to human life. Cf. Kruse v. Commonwealth, 704 S.W.2d 192 (Ky. 1985); Meredith v. Commonwealth, 164 S.W.3d 500 (Ky. 2005). Further, it would not be clearly unreasonable for a jury to have believed that Dalton actually intended the victim's death. Dalton's statement that she intended to "roll" the victim could have been interpreted in such a way by the jury.

Because there was sufficient circumstantial evidence to submit the case to the jury, the trial court was correct in refusing to grant a directed verdict in favor of Dalton. See Benham, 816 S.W.2d at 187-88.

Testimony of the Detective

Dalton also alleges that she suffered a Crawford violation when a detective was allowed to testify about his interrogation of the non-testifying co-defendant, Ricky King. Crawford v. Washington, 541 U.S. 36 (2004). The detective was allowed to testify to certain information about his two interviews with Ricky, including testimony that Ricky changed his story several times during the interviews; that Ricky admitted to being at the Wooden Nickel that night; and that Ricky admitted to being present at the scene when the victim was killed. The detective also testified that his experience and training would

lead him to believe that Ricky was leaving out parts of his story. Dalton argues that the detective's testimony violated the Confrontation Clause of the Sixth Amendment.

Dalton claims that this issue was preserved for review, however, there was no contemporaneous objection made during the detective's testimony. Absent a contemporaneous objection, we review only for palpable error. RCr 10.26; Brooks v. Commonwealth, 217 S.W.3d 219 (Ky. 2007). "To prove palpable error, Appellant must show the probability of a different result or error so fundamental as to threaten his entitlement to due process of law." Id. at 225. On appellate review, our focus is on whether "the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." Martin v. Commonwealth, 207 S.W.3d 1, 5 (Ky. 2006).

Although Dalton characterizes the testimony of the detective as a Crawford issue, it actually lies at the intersection of Crawford and Bruton. Crawford, supra; Bruton v. United States, 391 U.S. 123 (1968). In Crawford, the United States Supreme Court held that a criminal defendant's Sixth Amendment right to confront a witness is violated where out-of-court testimonial statements are used against him. While the Court declined to define the term "testimonial," it stated that the term applies "at a minimum to . . . police interrogations." Crawford, 541 U.S. at 68. This Court has followed Crawford's lead in defining statements as testimonial where they are "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." Bray v. Commonwealth, 177 S.W.3d 741, 745 (Ky. 2005), quoting Crawford, 541

U.S. at 52. In Bruton, supra, the United States Supreme Court held that a criminal defendant's Sixth Amendment right to confront a witness is violated when a non-testifying co-defendant's inculpatory statements are admitted at trial.

However, Crawford and Bruton are not applicable to the statements testified to here because the statements do not inculpate Dalton. As such, they are not the sort of statements to which the rationales of Bruton and Crawford are applicable. Although Bruton and Crawford are not applicable to the detective's testimony, the repeated statements are still hearsay. See KRE 801. As no exception to the hearsay rule applies in this situation, it was error for the trial court to admit this testimony. See Sanborn v. Commonwealth, 754 S.W.2d 534, 541 (Ky. 1988) ("hearsay is no less hearsay because a police officer supplies the evidence . . ."). However, such error was harmless because the testimony did not inculpate Dalton. RCr 9.24. As previously stated, the statements testified to by the detective were only incriminating to the declarant, Ricky King. Accordingly, there was no manifest injustice and we will not reverse on this ground.

Improper Cross-Examination

Dalton next alleges that the Commonwealth Attorney's tactics were "improper" and prejudiced her right to a fair trial, resulting in manifest injustice. Specifically, Dalton finds fault with questions she was asked on the stand concerning the testimony of the co-indictees, Rocky King and Danny Bryant. She alleges that she was "improperly forced to comment on the

credibility" of Rocky and Bryant. This error was not preserved for review; however, Dalton requests palpable error review. RCr 10.26.

Rocky and Bryant both testified at trial and were cross-examined by defense counsel. Dalton took the stand and testified on her own behalf. Dalton's rendition of the facts substantially mirrored the testimony of Rocky and Bryant. However, the portions of Dalton's testimony that differed from Rocky's and Bryant's testimony were the parts that implicated her in the crime. The Commonwealth, on cross-examination, delved into what it described as a "self-serving limited disagreement with other witnesses." After asking Dalton a series of questions concerning discrepancies between her rendition of events and those of the co-indictees, Rocky and Bryant, the Commonwealth concluded by asking Dalton: "So, in conclusion, Ms. Dalton, everybody is lying about what you did that night?" The Commonwealth argues that its questioning tactic was designed to impeach Dalton's credibility, rather than to bolster the credibility of the other witnesses. It appears from the record that the questions asked were an attempt to impeach Dalton's testimony by showing that she testified consistently with other witnesses excepting the portions that incriminated her. We agree with the Commonwealth that the testimony was not bolstering.

Dalton cites the case of Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997) for the proposition that a prosecutor may not require a witness to characterize another witness's testimony as "lying." We stated in Moss, "A witness's opinion about the truth of the testimony of another witness is not permitted. Neither expert nor lay witnesses may testify that another witness or a defendant is lying . . . ." Id. at 583. However, in Moss, we held that such

error does not rise to the level of manifest injustice. Rather, we stated that "Appellant's failure to object and our failure to regard this as palpable error precludes relief." Id. Accordingly, we conclude that the error is not palpable. RCr 10.26.

Motion to Sever

Dalton next alleges that the trial court erred when it denied defense counsel's motion to sever her trial from the trial of her co-defendant, Ricky King. Specifically, Dalton alleges that the trials should have been separate because her defense was antagonistic to his. Dalton further argues that the detective's testimony concerning his interviews with Ricky implicated her. We disagree.

RCr 6.20 states that "[t]wo (2) or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same . . . series of acts or transactions constituting an offense or offenses." Thus, Dalton and Ricky were properly indicted together. The next question concerns whether they should have been tried together. RCr 9.16 states that trial courts shall order separate trials where "it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial . . . ." RCr 9.16. When applying this rule, however, the ultimate decision of whether to grant separate trials is within the sound discretion of the trial court. Wood v. Commonwealth, 178 S.W.3d 500, 514 (Ky. 2005). On appellate review, the denial of a motion to sever will only be reversed where "the refusal of the trial court to grant such severance is found to amount to a clear abuse of

discretion and prejudice to the defendant is positively shown." Spencer v. Commonwealth, 554 S.W.2d 355, 357 (Ky. 1977).

The only possible prejudice Dalton points to is the fact that her defense was antagonistic to her co-defendant's. However, we have never held that a trial judge *must* sever where co-defendants have antagonistic defenses. Rachel v. Commonwealth, 523 S.W.2d 395, 399 (Ky. 1975). Rather, there usually must be some other factor, coupled with the fact that the defenses were antagonistic, to result in prejudice in a joint trial. Id. As we stated in Rachel:

> That the defenses of jointly indicted persons may be, in some respects, antagonistic or that the testimony of one or both of them may directly implicate the other are only factors for the trial judge to consider in making his determination as to whether the defendants will be prejudiced by a joint trial. If upon the consideration of the case a trial judge orders a joint trial, we cannot reverse unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion. Id. at 400.

In the present case, the same evidence that was presented at the trial would have also been admissible in a separate trial against Dalton. As such, it is unclear that the possible prejudicial effect would be any different had the trials been held separately. Accordingly, we cannot say that "the likelihood of prejudice was so clearly demonstrated" to the trial judge as to render his denial of the motion to sever an abuse of discretion. We affirm on this ground.

Limitations on Impeachment of the Witness Bryant

Dalton also argues that her constitutional right to confront the witness, Danny Bryant, was violated when the trial court placed limits on his impeachment during cross-examination. In this case, Bryant was one of the three co-defendants that accepted a plea deal with the Commonwealth before

trial. Bryant was originally charged with complicity to murder and complicity to robbery, but he pled guilty to facilitation to murder and facilitation to robbery. In return, he agreed to testify for the Commonwealth. Bryant's counsel, however, requested that his sentencing be pushed back until after the trial. The Commonwealth agreed. Therefore, at the time of Dalton's trial, Bryant had not yet been sentenced.

At trial, defense counsel cross-examined Bryant, calling attention to the fact that he took lesser sentences in his plea deal than he was originally charged with. After impeaching at length on this issue, defense counsel asked: "And you haven't been sentenced yet, have you?" The Commonwealth objected to the question. The implication was that Bryant might sway his testimony in favor of the Commonwealth in exchange for a lower sentence. The court sustained the objection and directed defense counsel to stay within the bounds of the plea agreement.

The credibility of a witness may always be attacked, either by the opposing party or the party calling the witness. KRE 607. However, the Confrontation Clause does not grant criminal defendants an unfettered right to cross-examine witnesses about potential biases. The Kentucky Evidence Law Handbook, Robert G. Lawson, § 4.10[4] (4th Ed. 2003). Rather, the trial judge exercises broad discretion with respect to the admissibility of such evidence. Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997). As we have previously said, "[criminal defendants] cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway." Id. Instead, the trial court has discretion to set appropriate boundaries for such evidence,

so long as a reasonably complete picture of the witness's possible biases and motivations is developed. Id., citing United States v. Boylan, 898 F.2d 230, 254 (1st Cir. 1990).

In the present case, Dalton and her co-defendant questioned Bryant at length about his plea agreement. The cross-examination went on for nearly twenty minutes. During that time, a reasonably complete picture was drawn of Bryant's possible biases and motivations for testifying. While the safer course might have been to allow the question, the trial judge was well within his discretion and there was no error.

Evidence of the Co-Indictees' Guilty Pleas

Dalton also claims that she was prejudiced by the admission into evidence of the guilty pleas of Rocky King, Harold King, and Danny Bryant. During opening arguments, the Commonwealth's Attorney discussed each of the five individuals charged in the indictment and whether each had pled guilty. For the three that had pled guilty, the Commonwealth's Attorney recited the information concerning the charges and the sentences. During the direct testimony of Rocky King and Danny Bryant, the Commonwealth elicited testimony about their plea deals. No objections were made at trial. Dalton concedes that this issue was not preserved for review, but requests palpable error review under RCr 10.26.

There is ample authority to support this claim. See St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004). However, there is no reversible error when a defendant fails to object and such failure is part of the defendant's trial strategy. Id. In the present case, it is clear that Dalton and

her co-defendant, Ricky King, impeached the credibility of the testifying co-indictees at great length by questioning them about their plea agreements. In fact, one of Dalton's grounds of alleged error concerns the fact that she was unable to question the witness, Danny Bryant, in greater depth about his plea agreement. Moreover, her co-defendant's counsel acknowledged the guilty pleas in his opening statement, using them to preemptively impeach the co-indictees' testimony.

This case illustrates the "exception to the rule . . . [where] the defendant permits the introduction of such evidence without objection for the purpose of trial strategy[.]" Tamme v. Commonwealth, 973 S.W.2d 13, 32-33 (Ky. 1998). As we have previously stated in these circumstances, "Having employed that strategy, Appellant cannot be heard to complain after the strategy failed." Id. at 33. Thus, we find no error here.

Denial of Strikes for Cause

Dalton's final argument is that the trial court erred when it denied her request to strike two potential jurors for cause. Dalton alleges that this forced her to expend two of her peremptory strikes on these jurors (Jurors 12 and 32). We review the trial court's decision not to strike Jurors 12 and 32 for abuse of discretion. Shane v. Commonwealth, 243 S.W.3d 336, 338 (Ky. 2007).

During *voir dire*, prospective Juror 12 indicated that he had read about the case in the newspaper. He recalled that he remembered thinking the police had caught the people, but had "not really" formed an opinion as to guilt or innocence. He stated that he did not think what he read would impair his ability to be fair. Dalton's request to strike Juror 12 for cause was denied.

Prospective Juror 32 admitted during *voir dire* that her husband was a Kentucky State Police trooper. She also stated that she was friendly with Detective Correll, the lead detective in the case, and that she and her husband had socialized with him. When asked if she believed that the testimony of law enforcement officers was more credible than that of other witnesses, she responded by saying, "I don't feel that way." Dalton's request to strike Juror 32 for cause was also denied.

Dalton and her co-defendant were granted twelve peremptory strikes. Dalton and her co-defendant used their last two strikes to remove Jurors 12 and 32 from the jury. Dalton's counsel and counsel for her co-defendant filed a joint strike sheet thereafter, stating that if they had not used their peremptory strikes on Jurors 12 and 32, they would have used those strikes on Jurors 17 and 41. It is interesting to note that so many strikes for cause were granted in this case that the trial judge had to take a recess in hopes that some members of the jury pool would return in order to empanel a full jury. Two members of the jury pool did, in fact, return during the recess and a full jury was empanelled.

This case is unique because we know which jurors would have been preemptively stricken (Jurors 17 and 41) had the strikes for cause been granted. We also know that these jurors did not sit on the final jury. This case poses an exception to the rule in Shane. See King v. Commonwealth, ___ S.W.3d. ___, 2009 WL 160425 (Ky. 2009). In Shane, we found that it was error for a trial court to improperly fail to strike juror(s) for cause where the defendant had to exhaust his peremptory strikes to remove the juror(s). Id.

However, Shane may only cogently be applied where it is unknown whether a juror for whom the defendant would have used a peremptory strike *actually sat* on the jury. In this case, we *know* which jurors Dalton would have stricken. Moreover, we know that these jurors did not sit on the final jury. In Shane, we said that "the correct inquiry [on review] is not whether using a peremptory strike for a juror who should have been excused for cause had a reasonable probability of affecting the verdict (harmless error), but whether the trial court who abused its discretion by not striking that juror for reasonable cause deprived the defendant of a substantial right." Id. at 341. In this case, we cannot say that Dalton was deprived of any substantial right; she essentially received the jury she wanted and any error in the trial judge's failure to strike Jurors 12 and 32 was effectively cured. Thus, we do not need to reach a decision as to whether the trial judge's failure to strike Jurors 12 and 32 constituted an abuse of discretion. Dalton has suffered no prejudice. Accordingly, we affirm on this ground.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Jack Conway
Attorney General

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

COUNSEL FOR APPELLEE:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601