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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 19, 2009
NOT TO BE PUBLISHED

FINAL
DATE 4/9/09 Kelly Klaber D.C.

Supreme Court of Kentucky

2008-SC-000117-MR

DON REED — APPELLANT

ON APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE GARY D. PAYNE, SPECIAL JUDGE
NO. 07-CR-00038

V.

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Don Reed, was convicted of the murder of Brandy Rowe, tampering with physical evidence, and abuse of a corpse. He received a sentence of life imprisonment for murder, five years imprisonment for tampering with physical evidence, and twelve months for abuse of a corpse, all to be served concurrently. Appellant appeals his convictions to this Court as a matter of right. Ky. Const. § 110.

Appellant now argues that the trial court committed several reversible errors. First, Appellant argues that RCr 7.24 and RCr 7.26 were violated when a surprise witness was permitted to testify that Appellant had once threatened the victim. Second, Appellant argues that the trial court improperly admitted testimony, during the Commonwealth's case-in-chief and on rebuttal, of prior

consistent statements made by a witness. Third, Appellant argues that the trial court erroneously denied his motions for a mistrial.

For the reasons set forth below, we affirm Appellant's conviction.

RELEVANT FACTS

On December 23, 2006, Appellant, Brandy Rowe, Paul "Spanky" Arnett, and Linda Arnett[1] were riding through a remote area of Magoffin County in Appellant's Oldsmobile Bravada. All four had been drinking alcohol for several hours. During the ride, Appellant and Rowe began to argue. When Linda and Spanky exited the car for a bathroom break, Appellant and Rowe were left alone in or near the vehicle. Shortly after leaving the car, Linda and Spanky heard a gun shot. They ran back to the vehicle where they observed Appellant with a gun next to the driver's side door. Inside the car was Rowe's body, slumped over the steering wheel with bullet holes in her neck. According to Linda and Spanky, Appellant then forced them to help him dispose of Rowe's body in a creek and set fire to the vehicle.

The next day Linda told her son, Scott Blanton, what had happened. Blanton later told the story to his brother who then told his uncle, Rondall Risner. Risner ultimately informed the authorities that he knew of a murder. On January 1, 2007, Linda was arrested and charged as an accomplice to the murder. During questioning, she told Detective Mike Goble about the murder, including Appellant's role in the killing. In exchange for immunity from prosecution, Linda agreed to testify against Appellant.

[1] Linda Arnett and Spanky Arnett are not related.

At trial, Appellant argued that Linda and Spanky murdered Rowe and were accusing him in order to protect themselves. Appellant attacked Linda's credibility by introducing evidence that she was an untruthful person, and by showing that she had been given immunity in exchange for her testimony. Appellant attacked Spanky's credibility by pointing out inconsistencies in his statements regarding Rowe's murder.

I. SURPRISE TESTIMONY OF A PRIOR THREAT

Appellant first contends that the trial court erred by allowing the Commonwealth to present testimony that, some four and a half years before the trial (and, therefore, three and half years before the murder), Appellant had voiced a threat against Brandy Rowe's life.

On the third and final day of trial, Peggy Gullett appeared at Appellant's request for the purpose of impeaching Linda's testimony. While awaiting her turn to testify, Gullett apparently mentioned to a bailiff that, a few years before Rowe's death, she had heard Appellant utter a threat against Rowe. The bailiff passed that information on to the Commonwealth's Attorney, who had not been aware of that information. The Commonwealth's Attorney immediately informed the trial judge and Appellant's counsel of his intent to call Gullett as a witness to introduce the alleged threat. Appellant objected and argued to the trial court that introduction of the statement would violate RCr 7.24 and RCr 7.26, and by its late disclosure, deprive him of due process and a fair trial. The trial court overruled the objection, but allowed Appellant's attorney the

opportunity to interview Gullett before she took the stand. Her testimony included the following:

> Prosecutor: Did you ever hear him [Appellant] threaten anybody's life?
>
> Gullett: Anybody or what? Just what, I mean, I know that you are getting at somebody. Well, the only occasion I know it happened is, was, in June of 2003, about four years ago and half years ago.
>
> Prosecutor: Ok.
>
> Gullett: Brandy Rowe had stole a bunch of checks off Don [Appellant]. $1800 worth of checks, I mean his checkbook and wrote over $1800 worth of checks. She went over the county and he had to go pick them up. He was very angry, and you know, he said he was gonna kill her, and said ah. And they let her out of jail seven or eight days. And I said, well go in and indict her. That's all I know.

Appellant now argues that the admission of Gullett's testimony unfairly surprised and prejudiced him. Appellant believes that Gullett's testimony amounted to "trial by surprise." RCr 7.24(1) requires that, upon appropriate request, the Commonwealth's Attorney must disclose to the defendant the substance of any oral incriminating statement known by the Commonwealth to have been made by the defendant to any witness. RCr 7.26 states in relevant part:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony . . . Such statement shall be made available for examination and use by the defendant.

RCr 7.24 only requires disclosure of written or oral statements made by the defendant known to the Commonwealth. Because the Commonwealth did not know about Appellant's threat prior to trial, and its existence was disclosed immediately upon discovery, RCr 7.24 was not violated. See Stone v. Commonwealth, 418 S.W.2d 646, 649 (Ky. 1967) (holding that RCr 7.24 is not violated if the Commonwealth does not have the evidence in its possession).

This case presents a completely different scenario than the one we faced in Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008). In Chestnut, the statements that were withheld in violation of RCr 7.24 were made by the defendant to a detective shortly after his arrest, and the Commonwealth knew of their existence. The Commonwealth could have, but did not, make a pretrial disclosure of the statements. Here, the existence of the Appellant's alleged threat was not known until Gullett disclosed it on the third day of trial. Once it became known, the statements were disclosed immediately to the trial court and to defense counsel. There was no violation of RCr 7.24.

RCr 7.26 was also not violated. It requires disclosure, at least 48 hours in advance of trial, of documents or recordings in the possession of the Commonwealth, which are either signed by the witness or purported to be a substantially verbatim statement of the witness. No such statement existed here. Therefore, RCr 7.26 was not violated.

With neither RCr 7.24 nor RCr 7.26 governing the situation, and the relevancy of Gullett's testimony being undoubted, the decision to admit or exclude evidence was clearly within the discretion of the trial judge. Martin v.

Commonwealth, 170 S.W.3d 374,381 (Ky. 2005) (holding that the balancing of the probative effect and the prejudicial impact of relevant evidence is left to the sound discretion of the trial court and will not be overturned unless an abuse of discretion can be discerned). We cannot conclude that trial judge abused his discretion in admitting Gullett's testimony. See Sanborn v. Commonwealth, 892 S.W.2d 542, 552 (Ky. 1994) (holding that a defendant's rights were not violated when the trial court, on short notice, allowed the admission of evidence that the defendant told an inmate he had previously killed someone). He took into account the competing interests involved and fashioned a reasonable and fair resolution. Appellant's substantial rights were not violated, and he was not denied a fair trial.

II. TESTIMONY OF PRIOR CONSISTENT STATEMENTS

Appellant next contends that several witnesses were improperly permitted to testify about Linda's prior out-of-court statements which were consistent with her trial testimony.

A. Detective Goble

Detective Goble was the first witness called to testify at trial. He did not testify about the contents of Linda's statements, and of course because she had not yet testified, he did not reference her trial testimony. On cross examination, Appellant used Detective Goble to undermine the credibility of the Commonwealth's case by recounting his grand jury testimony that Linda's statements and Spanky's statements were not consistent. Appellant also used Detective Goble's testimony to suggest that the promise of immunity given to

Linda in exchange for her testimony provided a motive for her to shift blame to Appellant. Appellant asked Detective Goble whether he believed Linda was drunk when she gave her tape-recorded statement, to which he responded that she may have been drunk. On redirect, the Commonwealth asked Detective Goble whether Linda's original accounts of the murder were consistent with the tape-recorded statement she later provided when granted immunity. Without detailing the content of her statements, Detective Goble answered that her story had remained consistent. Appellant then objected to this testimony as inadmissible evidence of prior consistent statements. The trial court overruled Appellant's objection. Appellant now argues that the admission of this evidence is reversible error.

We disagree. Goble did not present as evidence Linda's out-of-court statements, so no hearsay evidence was introduced. He simply confirmed on redirect that Linda's version of the incident remained essentially the same throughout his investigation, before and after the grant of immunity, and notwithstanding her sobriety at the time. Goble's credibility as a police detective was attacked by the suggestion that he had relied upon untruthful sources. Not the statements themselves, but the consistency of Linda's statement was therefore relevant to rebut that attack. Neither KRE 801A(a)(2), nor our decisions in Dickerson v. Commonwealth, 174 S.W.3d 451, 467 (Ky. 2005), or Smith v. Commonwealth, 920 S.W.2d 514 (Ky. 1995) is implicated, because no comparison was being drawn between in-court testimony and prior out-of-court testimony. However, even if it were, there would be no error.

Appellant interjected through Detective Goble's testimony that Linda's deal for immunity rendered her statements not credible. Proof that her statements, before and after the immunity deal, were consistent is admissible under KRE 801A(a)(2)because it rebuts the charge that the grant of immunity influenced or motivated Linda to lie.

B. Linda's Testimony

Linda testified that after Rowe's murder she first told her son, Blanton, and later told Detective Goble that Appellant shot and killed Rowe. Appellant did not object to that testimony, but he later moved to have it stricken on the grounds that it was hearsay, and not covered by KRE 801A(a)(2)as an admissible prior consistent statement. The trial court did not expressly rule on the motion, but the evidence was not stricken. Appellant contends that the trial court misconstrued his argument, believing he had alleged Linda's testimony was a "recent fabrication." Appellant argues, not that Linda's testimony was a recent fabrication, but that it was fabricated from the very beginning, and therefore the consistency of her original statements on the subject of the murder cannot be admitted. KRE 801A(a)(2)provides, in relevant part:

> A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement...and the statement is: (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

While he may not claim that Linda's testimony was a recent fabrication, there is no doubt that his trial strategy included an implied and express charge

against Linda of improper influence or motive. He clearly implied that she was influenced and motivated by the promise of immunity. The statements she made to Blanton and Detective Goble before that motivation existed, which were consistent with her trial testimony, are admissible under the rule.

C. Scott Blanton

Appellant next objects to Blanton's testimony that Linda previously told him Appellant killed Rowe. Appellant again argues that this was inadmissible prior inconsistent statement hearsay. As noted above, Appellant made a clear attempt to portray Linda's testimony as motivated by the prosecutor's offer of immunity. As such, the trial court properly admitted Blanton's testimony demonstrating the consistency of Linda's statements. Appellant also argues that Blanton was improperly called as a rebuttal witness, when he should have been called as part of the Commonwealth's case in chief. The trial court is granted a great degree of discretion in determining when rebuttal evidence will be received. RCr 9.42. Where there is no clear showing of arbitrariness or abuse of discretion, the ruling of the trial court will not be disturbed. Pilon v. Commonwealth, 544 S.W.2d 228 (Ky. 1976). We see no abuse of discretion in allowing Blanton to be called as a rebuttal witness.

III. DENIAL OF APPELLANT'S MOTIONS FOR A MISTRIAL

Appellant's final argument is that the trial court committed reversible error when it denied two motions for a mistrial.

Appellant's first request for a mistrial came after Linda testified that prior to Rowe's murder, Appellant told her he had killed someone before. Instead of

granting a mistrial, the judge admonished the jury to disregard Linda's statement and further advised that Appellant had no criminal record. Appellant concedes that he accepted the admonition and "did not preserve this issue for review."

We have consistently held that "for a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Maxie v. Commonwealth, 82 S.W.3d 860, 863-864 (Ky. 2002). Furthermore, an admonition is presumed to have cured the prejudicial effect of improper evidence. Id. Appellant has presented no argument to overcome that presumption. Therefore, any prejudicial effect of the remark that Appellant claimed to have killed someone was removed and did not result in Appellant being denied a fair and impartial trial. The refusal to declare a mistrial was not error.

Appellant's second request for a mistrial came during his daughter's testimony. She was asked if she had spoken with her father while he was in jail. Appellant objected to the question and moved for a mistrial on the grounds that it was an improper reference to prior crimes, inadmissible under KRE 404(b). It actually appears to be a reference to the fact that Appellant had been in jail awaiting trial on the instant case, which is not evidence of a prior bad act. The trial judge denied Appellant's motion for a mistrial and noted that evidence of Appellant's incarceration had been previously heard by the jury without objection. Appellant did not request an admonition to the jury. Given

that Detective Goble had testified without objection that he had reviewed some conversations Appellant had while in jail, and that the trial court had informed the jury that Appellant had no prior criminal record, it is unlikely that the jury interpreted the remark as evidence of a prior bad act. Appellant has failed to demonstrate how that fleeting reference to his pretrial incarceration on a murder charge substantially prejudiced his right to a fair and impartial trial. Furthermore, any evidentiary error of this nature could have been cured by an admonition but one was not requested. See Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005) (holding that a mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such action or an urgent or real necessity.) Here, a mistrial was clearly unwarranted and the trial court did not abuse his discretion in declining to declare one.

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

Minton, C.J., Cunningham, Noble, Schroder and Venters, JJ., concur. Abramson, J., concurs in result only. Scott, J., not sitting.

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