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RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000834-MR

FINAL
DATE 5/14/09 Kelley Klaber D.C.

REGINALD MAURICE COLEMAN — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
CASE NO. 07-CR-00536

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Reginald Coleman appeals as a matter of right from a November 5, 2007 Judgment of the Fayette Circuit Court convicting him of murder and of tampering with physical evidence. Coleman was sentenced as a second-degree persistent felony offender to consecutive terms of imprisonment totaling twenty-two years. The Commonwealth alleged, and the jury found, that on July 20, 2006, Coleman shot and killed Theatrice Wortham on Hawkins Avenue in downtown Lexington. On appeal, Coleman contends that the trial court erred (1) when it refused to suppress statements Coleman made to his arresting officers; (2) when it refused to strike a potential juror for cause; (3) when it excluded evidence that the victim, Wortham, had cocaine in his system at the time of his death; and (4) when it instructed the jury on the theory of intentional murder. Finding no error except the admission of Coleman's

confession, which error in this case was harmless beyond a reasonable doubt, we affirm the trial court's Judgment.

RELEVANT FACTS

At trial, the Commonwealth presented evidence that on or about July 15 or 16, 2006, Wortham had insulted and threatened Coleman's mother. Coleman, who was protective of his mother, learned about the threat and complained about it to his friends. A few days later, on July 20, 2007, Coleman and one of his friends, Maurice Claybourne, were riding through downtown Lexington in a van they had borrowed from one of Coleman's cousins when they spotted Wortham on foot. The pair then rode to the home of a third friend, Larry Walker, and enlisted his aid to "get" Wortham. Walker testified that he anticipated violence, perhaps a beating of Wortham, and so took along a shotgun for protection. A short time later, the threesome found Wortham on Hawkins Avenue, called him over to the van, and confronted him regarding threats to Coleman's mother. According to Walker, when Waltham denied any knowledge of Mrs. Coleman, Coleman produced a handgun, leaned toward Wortham, and fired a single shot into Wortham's upper torso. The medical examiner testified that the bullet entered under Wortham's left arm and lodged in his right chest area. A witness at the scene heard the shot and, when the van drove away, observed Wortham slumped on the ground. Emergency assistance was summoned, but Wortham died as a result of internal bleeding a short time after being transported to the University of Kentucky Medical Center.

In an attempt to cover up the crime, Coleman prevailed upon another friend, Norman Alcorn, to dispose of the handgun. Approximately a week later, an anonymous tip led police investigators to Coleman and Walker, but they denied any knowledge of the shooting with the result that for a time the investigation stalled.

In February 2007, however, investigators obtained statements from Walker and Alcorn describing the shooting and the disposal of the gun. On the basis of those statements a warrant was issued for Coleman's arrest. Executing the warrant, the officers urged Coleman to confess, but when he persisted in denying any involvement in the shooting the officers handcuffed him and recited his rights under Miranda v. Arizona, 384 U.S. 436 (1966), to silence and to an attorney. During the ride to police headquarters for booking, Coleman indicated that he wished to consult an attorney, and the officers, in compliance with Miranda, thereupon ceased to question him.

At headquarters, however, as the lead detective was placing Coleman in a holding cell, he told Coleman that if he changed his mind and wanted to discuss the crime he should knock on the cell door. According to the detective's testimony at the suppression hearing, about fifteen minutes later he returned to Coleman's cell to record the booking information and brought along a photograph of Norman Alcorn, which he showed to Coleman. When Coleman indicated that he recognized Alcorn, the detective said, "Yes, I talked to Corn. I know what happened; I'm not just bluffing." He then left the cell, again urging Coleman to knock on his cell door if he wished to discuss the shooting. About

two minutes later Coleman knocked on the door, waived his Miranda rights, and gave a statement implicating himself in the crime.

Coleman moved to suppress his statement on two grounds. He complained first that the detective's recitation of the Miranda warnings, both at the time of his arrest and also just prior to his statement, failed to specify that Coleman's right to an attorney included the right to consult an attorney before and during any questioning. He also complained that the detective's confronting him with the Alcorn photo amounted to continued questioning in the face of his request for counsel and thus constituted a violation of the rule, laid down by the United States Supreme Court in Edwards v. Arizona, 451 U.S. 477 (1981), that a detainee's request for counsel forecloses further interrogation until counsel is provided unless the detainee himself reinitiates the exchange. The trial court rejected both claims, which Coleman now renews on appeal.

ANALYSIS

I. The Trial Court Erred When It Refused To Suppress Coleman's Confession, But the Error Was Harmless Beyond A Reasonable Doubt.

As the parties correctly observe, our review of a suppression ruling "requires a two-step determination. . . . The factual findings by the trial court are reviewed under a clearly erroneous standard, and the application of the law to those facts is conducted under *de novo* review." Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky. 2007) (citing Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004)). In this case, the pertinent facts are not in

dispute, and thus our review of the trial court's application of Miranda and its progeny is *de novo.*

We agree with the trial court that Coleman was adequately advised of his Miranda rights, but we are convinced that his confession should have been suppressed because the detective improperly reinitiated questioning after Coleman invoked his right to consult with an attorney. The error in this case was harmless, however, and so does not entitle Coleman to relief.

A. The Detective Adequately Advised Coleman Of His Miranda Rights.

Coleman's confession, of course, implicates his right under the Fifth Amendment to the United States Constitution not to be compelled to incriminate himself. Dickerson v. United States, 530 U.S. 428 (2000). To protect that right and to guard against the compulsion inherent in custodial circumstances, the United States Supreme Court established in Miranda, supra, the now familiar rule that a defendant's statements during custodial interrogation will generally not be admissible at trial unless prior to the statements the defendant was advised of Miranda's four basic warnings: (1) that the suspect has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Dickerson, supra. The Miranda warnings were adopted to ensure that any waiver of a suspect's Fifth Amendment right was voluntary. The Supreme Court has explained that inquiry into the voluntariness of this waiver has two distinct dimensions:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citation and internal quotation marks omitted). Generally, the Miranda warnings are sufficient to inform a person of the nature of the Fifth Amendment right and the consequences of abandoning it. Colorado v. Spring, 479 U.S. 564 (1987). An officer's failure to give the Miranda warnings, however, or his giving a misleading or incomplete version of them, renders the waiver involuntary because insufficiently knowing. Oregon v. Elstad, 470 U.S. 298 (1985); California v. Prysock, 453 U.S. 355 (1981); Miranda, 384 U.S at 471 (the warning that the individual has the right to consult a lawyer is "an absolute prerequisite to interrogation").

When Coleman had been placed under arrest, the detective advised him as follows:

> You've got the right to remain silent. Anything you say can and will be used against you in a court of law. You've got the right to have an attorney. If you can't afford an attorney, one will be appointed to you free of charge. Do you understand those rights?

Later, at headquarters, when Coleman agreed to make a statement, the detective repeated this formulation of Coleman's rights and added,

> You can stop giving your statement at any time and you can stop answering questions at any time; that's completely up to you, OK? Do you understand that?

Coleman maintains that the detective violated Miranda by interrogating him without expressly advising that he had a right to consult a lawyer prior to and during questioning.

As the parties note, the United States Supreme Court has not yet addressed this issue, and the federal Circuit Courts of Appeal have divided over it. See Martin J. McMahon, "Necessity that Miranda warnings include express reference to right to have attorney present during interrogation," 77 A.L.R.Fed. 123 (1986). In United States v. Frankson, 83 F.3d 79 (4th Cir. 1996), for example, the Fourth Circuit upheld general warnings similar to those the detective gave to Coleman and opined that they

> communicated to [the defendant] that his right to an attorney began immediately and continued forward in time without qualification. . . . *Miranda* and its progeny simply do not require that police officers provide highly particularized warnings. Such a requirement would pose an onerous burden on police officers to accurately list all possible circumstances in which *Miranda* rights might apply. Given the common sense understanding that an unqualified statement lacks qualifications, all that police officers need do is convey the general rights enumerated in *Miranda.*

Id. at 82.

The Ninth Circuit, on the other hand, in United States v. Noti,731 F.2d 610, 614 (9th Cir. 1984), noting that the Supreme Court "has repeatedly emphasized the critical importance of the right to know that counsel may be

present *during* questioning, held that "[t]he right to have counsel present during questioning is meaningful. Advisement of this right is not left to the option of the police; it is mandated by the Constitution." *Id.* at 615.

As the federal courts have observed, both views find support in Miranda, itself, and in subsequent Supreme Court opinions. Discussing the right to counsel facet of the warning, the Miranda Court concluded,

> we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. . . . [T]his warning is an absolute prerequisite to interrogation.

384 U.S. at 471. In subsequent cases, too, the Court has upheld warnings which, although deviating somewhat from Miranda's exact language, nevertheless "told [respondent] of his right to have a lawyer present prior to and during interrogation." Prysock, 453 U.S. at 361. *See also* Duckworth v. Eagan, 492 U.S. 195 (1989) and Fare v. Michael C., 442 U.S. 707 (1979).

On the other hand, the Supreme Court has emphasized that it "has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." Prysock, 453 U.S. at 359. On the contrary,

> *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent,* prerequisites to the

> admissibility of any statement made by a defendant."

Id. at 359-60 (emphasis in original) (quoting Miranda, 384 U.S. at 476). Accordingly, reviewing courts, "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" Duckworth, 492 U.S. at 203 (quoting Prysock, 453 U.S. at 361).

As noted above, in Dickerson, which reaffirmed Miranda and clarified its constitutional underpinning, the Court reiterated the required warnings as follows:

> [A] suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Dickerson, 530 U.S. at 435 (quoting Miranda, 384 U.S. at 479). We agree with the Fourth Circuit that the warnings in this case—"You've got the right to remain silent. Anything you say can and will be used against you in a court of law. You've got the right to an attorney. If you can't afford an attorney one will be appointed to you free of charge."—reasonably conveyed these rights to Coleman, and in particular adequately conveyed that his right to an attorney began immediately, prior to questioning, and thus clearly implied that the right applied during questioning as well. *Accord,* United States v. Caldwell, 954 F.2d 496 (8th Cir. 1992); United States v. Burns, 684 F.2d 1066 (2nd Cir. 1982); United States v. Adams, 484 F.2d 357 (7th Cir. 1973); United States v. Davis,

459 F.2d 167 (6th Cir. 1972). In sum, the trial court did not err by ruling that the warnings given Coleman adequately conveyed his rights under Miranda.

B. The Detective Improperly Interrogated Coleman After He Invoked His Right To Consult An Attorney, But The Admission Of Coleman's Confession Was Harmless.

In Edwards, the Supreme Court held

> that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85. The Court reiterated this latter requirement in Oregon v. Bradshaw, 462 U.S. 1039 (1983), where it stated that "before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" *Id.* at 1044 (quoting from Wyrick v. Fields, 459 U.S. 42 (1982)).

Coleman contends that the detective's confronting him with an important witness's picture, telling him that he was "not bluffing," and urging him to knock on his cell door if he changed his mind about wanting a lawyer, violated the Edwards proscription against police-initiated interrogation following his invocation of his right to consult with counsel. The trial court ruled that the

detective's acts did not amount to interrogation, and that Coleman initiated the exchange which culminated in his statement. We agree with Coleman.

Interrogation for Miranda purposes is not limited to express questioning. Rather, under Miranda, interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Coleman alleges that the detective asked him if he recognized Norman Alcorn's photograph, but even if the detective refrained from the express question, his showing the photograph, stating that he had talked to Alcorn and was not bluffing, and encouraging Coleman to revoke his request for counsel were acts the detective knew or should have known were reasonably likely to elicit the very response that occurred. There is no suggestion that the detective's acts were a necessary, normal part of Coleman's arrest or custody or were undertaken in response to Coleman's inquiries about the arrest and custody procedures. State v. Grant, 944 A.2d 947 (Conn. 2008) (collecting cases and discussing "conduct normally attendant to arrest and custody" exception). On the contrary, once Coleman had invoked his right to consult with an attorney, confronting him with adverse investigatory facts was the functional equivalent of asking for a response to those facts, and thus amounted to improper questioning. We agree with Coleman, therefore, that the detective improperly reinitiated interrogation in the face of Coleman's request

for counsel and so violated the rule laid down in Edwards. The trial court erred by ruling otherwise, and by refusing to suppress Coleman's statement.

Determining that the trial court erred is not the end of our inquiry. As the Commonwealth notes, we have previously held that Edwards violations are subject to harmless error analysis. Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998). The test for federal constitutional error "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction, . . . or, put otherwise, whether the error was harmless beyond a reasonable doubt." *Id.* at 84 (citing Chapman v. California, 386 U.S. 18 (1967)) (other citations and internal quotation marks omitted). We agree with the Commonwealth that the error here was harmless under this standard.

As noted above, in addition to Coleman's taped confession, the Commonwealth presented testimony by Coleman's friends Maurice Claybourne and Larry Walker, who knew of Coleman's anger toward Wortham, witnessed the shooting and named Coleman as the perpetrator and by Norman Alcorn, who described Coleman's asking him to dispose of the gun Coleman had used to kill Wortham. None of this testimony was undermined on cross-examination or by countervailing evidence. Given this undisputed evidence, there is no doubt whatsoever, much less a reasonable doubt, that Coleman would have been found guilty even had his confession been suppressed. Nor is there a reasonable possibility that his confession prejudiced his sentence, which was only two years greater than the legal minimum. Accordingly, although the trial

court erred when it refused to suppress Coleman's confession, the error was harmless beyond a reasonable doubt and so does not entitle Coleman to relief.

II. The Trial Court Did Not Err When It Suppressed The Fact That The Victim Had Cocaine In His Blood.

The post-mortem examination revealed that at the time of his death Wortham had cocaine in his blood. Prior to trial, the Commonwealth successfully moved to suppress that fact on the grounds that it was irrelevant and unduly prejudicial. Coleman contends that he should have been permitted to introduce the cocaine evidence through the medical examiner, notwithstanding the examiner's inability to offer testimony concerning the effect of cocaine, if any, on Wortham's behavior. The general rule, of course, is that evidence of prior bad acts is not admissible as proof of character to show action in conformity therewith, but that it may be admissible "[i]f offered for some other purpose, such as proof of motive, . . . [or] intent." KRE 404(b)(1). Coleman apparently contends that the cocaine evidence was relevant to the issue of his state of mind at the time of the killing. He argues that the presence of cocaine in Wortham's blood permitted an inference that Wortham behaved erratically and either said or did something that sparked the shooting. The jury, of course, is not permitted to speculate, and the inference Coleman urges would be speculative in the extreme. As noted, there was no proof concerning the effects of cocaine, and neither Claybourne nor Walker offered evidence that Wortham behaved confrontationally or in any way provoked the attack. Indeed, both testified that until Coleman pulled his gun and shot, the encounter with Wortham was a peaceful one. Given the complete lack of

evidence to support Coleman's drug-crazed-victim scenario, the trial court did not abuse its discretion by excluding the cocaine evidence, any marginal relevance of which was clearly outweighed by its impermissible tendency merely to paint the victim in a bad light.

III. The Trial Court Did Not Err When It Retained Juror 752.

Coleman next contends that the trial court erred when it denied his motion to strike for cause one of the venire members. During *voir dire* Juror 752 revealed that as a child she had been raped, that the mother of Wortham's child had been her elementary school classmate, and that in 1992, about fifteen years prior to Coleman's October 2007 trial, the father of her five young children had been stabbed to death. Coleman argued that this juror's own devastating experiences together with her acquaintance with Wortham's "girlfriend" made it likely that she would subconsciously side with the victim and with the Commonwealth in this case. Responding to individual *voir dire* questions, the juror acknowledged that she had at first been taken aback when she was assigned to a murder case, but stated that with the help of counseling she had long since worked through her own tragedies and that upon reflection she felt confident that she could consider the evidence fairly and impartially. She also indicated that her contact with Wortham's "girlfriend" had ceased in childhood and would not color her consideration of the evidence.

As the parties note, under RCr 9.36(1) "a prospective juror should be struck for cause if there is 'reasonable ground to believe' that the prospective juror 'cannot render a fair and impartial verdict on the evidence.'" Chatman v.

Commonwealth, 241 S.W.3d 799, 801 (Ky. 2007) (quoting the rule). Application of this standard is entrusted to the sound discretion of the trial court, the rulings of which will not be disturbed on appeal absent an abuse of that discretion or other clear error. *Id.* We are not persuaded that the trial court abused its discretion here.

Crime victims, even victims of crimes similar to those being tried, are not subject to automatic exclusion from the venire, but may be retained if the court is satisfied that the prospective juror can "objectively evaluate the evidence relating to all counts of the indictment and render a fair verdict." Bratcher v. Commonwealth, 151 S.W.3d 332, 346 (Ky. 2004) (citation and internal quotation marks omitted). Here, as the trial court observed, although Juror 752 had had experiences which could tend to create sympathy for the victim of this crime, those experiences were long enough ago to render entirely credible her confident assurances that neither her own experiences nor her childhood acquaintance with Wortham's "girlfriend" would impair her ability to reach a fair and impartial verdict. The trial court did not abuse its discretion by relying on those assurances and retaining Juror 752.

IV. Coleman Was Not Denied His Right To A Unanimous Verdict.

Finally, Coleman contends that he was denied his right to a unanimous verdict when the trial court erroneously included in the jury instructions a murder theory—intentional murder—which the evidence did not support. Coleman concedes that this issue was not properly preserved, but seeks review

for palpable error pursuant to RCr 10.26. Not only was there no palpable error, there was no error at all.

As Coleman correctly notes, under Section 7 of the Kentucky Constitution, a defendant cannot be convicted of a criminal offense except by a unanimous verdict. Burnett v. Commonwealth, 31 S.W.3d 878 (Ky. 2000). This Court has explained that

> a "combination" instruction permitting a conviction of the same offense under either of two alternative theories does not deprive a defendant of his right to a unanimous verdict if there is evidence to support a conviction under either theory. . . . Otherwise, the verdict cannot be shown to be unanimous, and the conviction must be reversed.

Miller v. Commonwealth, 77 S.W.3d 566, 574 (Ky. 2002) (citations omitted). In pertinent part, Instruction No. 3 in this case authorized the jury to find Coleman guilty of murder if it found that

> 1. He caused the death of Theatrice Wortham intentionally and not while acting under the influence of extreme emotional disturbance;
> OR
> 2. He was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Theatrice Wortham under circumstances manifesting an extreme indifference to human life.

Coleman concedes that the evidence supported a finding of wanton murder under Part 2 of the instruction, but contends that Part 1 of this combination instruction violated his right to a unanimous verdict because there was no evidence to support the theory that he intentionally killed Wortham. We disagree.

As noted above, the Commonwealth's proof included evidence that Coleman was deeply angered by Wortham's threatening and disrespectful behavior toward Coleman's mother; that Coleman, Claybourne, and Walker went looking for Wortham with the express intent of "getting" him; that Coleman and Walker came armed to the encounter, and that soon after Wortham approached their van, Coleman shot him at point blank range in the upper torso, a vital area of the body where a gunshot wound is particularly apt to be fatal. A rational juror could readily conclude from this evidence that Coleman planned the shooting and intended that it result in Wortham's death. The trial court did not err, therefore, by including in Instruction No. 3 the intentional murder alternative, Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991), and because both of the instruction's alternatives were supported by the evidence, the combination instruction did not deprive Coleman of a unanimous verdict.

CONCLUSION

In sum, the testimony of Coleman's friends overwhelmingly established that he shot and killed Theatrice Wortham under circumstances which permitted a finding that the killing was a murder. So overwhelming was their testimony that the erroneous admission of Coleman's confession, which, although preceded by adequate Miranda warnings, should have been suppressed pursuant to Edwards, supra, was harmless beyond a reasonable doubt. Coleman's conviction, moreover, was tainted neither by the retention of Juror 752 in the venire

nor by the exclusion of evidence that Wortham had cocaine in his blood. Accordingly, we hereby affirm the November 5, 2007Judgment of the Fayette Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Emily Holt Rhorer
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Heather Michelle Fryman
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601