IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 21, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000233-MR

MICHAEL JOSEPH FLICK — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 05-CR-00898

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Joseph Flick, appeals to this Court, as a matter of right, his convictions of murder, second-degree assault under extreme emotional disturbance (EED) and first-degree burglary, pursuant to Ky. Const. § 110(2)(b). A Fayette County Jury recommended life imprisonment for the murder conviction, five (5) years for the assault conviction, and ten (10) years for the burglary conviction and the trial court sentenced Appellant accordingly.

Appellant now claims two errors arose during his trial affecting his constitutional right to due process: first, he alleges that the trial court erred in denying his motion to suppress certain statements made to the police; and second, that the trial court erroneously denied his motion for a directed verdict on the murder charge given the subsequent "inconsistent verdicts."

Finding no merit to Appellant's arguments, we affirm the judgment of the Fayette Circuit Court and uphold Appellant's convictions.

I. BACKGROUND

In 2003, Randall Lambirth contacted Appellant about purchasing Appellant's optometry practice in Lexington. Appellant decided that he would sell his practice, and the two men reached an agreement. The arrangement contained a three (3) year employment contract for Appellant, which, upon its end, would complete the sale. The employment contract called for Appellant to work four (4) days a week, Wednesday through Saturday, for Lambirth.

In early 2004, the relationship between Lambirth and Appellant began to deteriorate. Appellant did not agree with how Lambirth was running the practice and regularly argued with him. Christina Wittich, Lambirth's girlfriend and Appellant's co-worker, confronted Appellant in the parking lot one afternoon, as he tried to leave for lunch with a lobby full of patients. By the summer of 2004, Appellant said he was "burned out" with work.

During this time, Appellant asked Lambirth if he could have Saturdays off because his father was ill; Lambirth acquiesced to his request. However, shortly after letting Appellant take off Saturdays, Lambirth discovered that Appellant was actually working at an optical center in a local Wal-Mart on those days. Lambirth confronted Appellant and told him he had to come back to work for him on Saturdays or he would be fired. Appellant refused to come back. On November 17, 2004,

Lambirth fired Appellant. By the end of March 2005, Appellant had filed a wrongful termination and breach of contract lawsuit against Lambirth. The two men would not see each other again until May 20, 2005.

On May 20, 2005, Appellant drove to Lambirth's house. Before exiting his vehicle, he grabbed a gun, which he had stolen from a friend. Upon entering the house, Appellant shot and killed Christina Wittich. Shortly thereafter, Lambirth returned home accompanied by his brother. He went into the house and discovered Christina lying in a pool of blood. At this point Appellant approached him with the gun. Lambirth tried to get away, but Appellant shot him in the arm. A struggle ensued between the two men, at which time Lambirth's brother, Chris, entered the house and assisted Lambirth. The two men subdued Appellant by holding him down and beating him. During the altercation, Lambirth was able to call the police.

Lambirth and Christina were taken to the University of Kentucky medical center where Christina was pronounced dead; Lambirth was treated for his wounds. Appellant was also transported to the medical center for treatment of his injuries, which consisted of various cuts and bruises, one of which required stitches. Appellant's injuries, however, were non-life threatening and he was awake and aware of what was happening while in the emergency room. He was evaluated for his level of consciousness and received the highest possible score. Appellant's x-rays, ultrasounds, and CAT scans were all normal.

Officer Ben Shirley of the Lexington Police Department accompanied Appellant from the crime scene to the hospital. Officer Shirley attempted to read Appellant his Miranda warnings while en route to the hospital but stopped because he feared that Appellant would not hear him, or would be confused because of all of the commotion in the ambulance. Once at the hospital, Officer Shirley read Appellant his Miranda warnings at approximately 8:20 p.m. Appellant was conscious and told the officer that he understood the warnings by answering, "yes." Following this, Officer Shirley proceeded to ask basic booking information questions, which Appellant had no trouble answering.

Later, Detective Brotherton arrived at the hospital to question Appellant about the events that had taken place. Brotherton did not re-Mirandize Appellant because Officer Shirley had already informed him of his rights. Appellant was able to talk with Detective Brotherton for some time and, in the process, was able to develop an elaborate kidnapping story. Appellant told Brotherton that Lambirth and his brother kidnapped him and had taken him to Lambirth's house that night. However, Detective Brotherton did not believe Appellant because he could not keep his story straight. When Detective Brotherton told Appellant that he did not believe his story, Appellant invoked his right to remain silent, which Brotherton honored, immediately ceasing the interview. Later, Appellant was transferred to Fayette County Detention Center.

The next morning, Detective Brotherton went to the detention center to talk with Appellant. A few hours earlier, Appellant had returned to the detention center from the hospital after experiencing a bad reaction to medicine he was given. Detective Brotherton testified that Appellant did not appear to be sleepy, confused, or disoriented. Appellant told Brotherton that he did not remember him or the prior conversation from the hospital. After a few questions, Appellant invoked his right to counsel. Detective Brotherton acceded to his request. Without further questioning from Brotherton, Appellant continued to briefly speak, indicating that he did not want to say anything incriminating. Eventually, Appellant again invoked his right to counsel and the interview stopped.

At trial, Appellant moved to suppress all statements made to Detective Brotherton because of alleged Miranda violations. The trial court held a suppression hearing at which written memoranda of law were submitted by both parties. On March 13, 2007, the trial court denied Appellant's motion to suppress the statements. The court made several findings of fact, to wit: 1) Officer Ben Shirley fully advised Appellant of his Miranda warnings while at the hospital; 2) Appellant indicated that he understood his rights by answering in the affirmative; 3) Appellant was fully coherent at the hospital; 4) Appellant was able to provide Officer Shirley with accurate information that constituted appropriate responses to the questions; 5) nothing in the evidence suggested that Appellant was incompetent due to mental illness; 6)

fifteen (15) hours passed between the two interviews; and 7) there was no testimony that would have demonstrated that Appellant was incoherent during the second interview.

At trial, Appellant based his defense upon the presence of Extreme Emotional Disturbance (EED). Each side presented its evidence either for or against the existence of EED. At the conclusion of the Commonwealth's case, Appellant made a motion for directed verdict arguing that a reasonable jury could not find the absence of EED. The trial court overruled the motion.

Ultimately, Appellant was convicted of murder, second-degree assault under EED and first-degree burglary. He was sentenced to life imprisonment for the murder conviction, five (5) years for the assault conviction, and ten (10) years for the burglary conviction.

II. ANALYSIS

A. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT

i. STATEMENTS AT THE HOSPITAL

Appellant claims that his statements made at the hospital to Detective Brotherton were not made voluntarily. He argues that based on the United States Supreme Court decisions in Beecher v. Alabama, 389 U.S. 35 (1967) and Mincey v. Arizona, 437 U.S. 385 (1978), his statements were involuntary because he was being treated for injuries in the hospital. We disagree.

In Beecher and Mincey, the High Court held the confessions to be inadmissible under the Due Process Clause of the 14th Amendment. They reasoned that an appraisal of the circumstances in each case compelled them to find that the Petitioners' confessions were the product of coercion, borne out of severe pain and isolation. Appellant claims that his case is factually comparable to Mincey and Beecher and therefore the trial judge erred when he denied Appellant's motion to suppress the statements. "Whether a confession was voluntarily made, and therefore, admissible in evidence, is primarily a question for the trial judge to decide, KRS 422.110 . . . it will not be disturbed unless it satisfactorily appears that the evidence supporting the decision was insufficient." Bauer v. Commonwealth, 364 S.W.2d 655, 656 (Ky. 1963).

In Mincey the defendant had been shot and was in critical condition. He was in the intensive care unit, on a respirator, and could not speak. Mincey, 437 U.S. at 396. While being questioned, the defendant lost consciousness throughout the questioning, whereupon the officer would cease, only to resume the interrogation when the defendant regained consciousness and "return[ed] relentlessly to his task." Id. at 401. The Supreme Court concluded that "[t]he statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness." Id.

In Beecher, the defendant was shot by the police and taken to the hospital. Within a few days the defendant's leg had become swollen and the pain was so great that he was receiving injections of morphine.

Beecher, 389 U.S. at 36. Soon thereafter the defendant's leg was amputated. Less than an hour after one of the morphine injections, police interviewed the defendant and prepared detailed statements for him to sign. Id. at 36-37. The Supreme Court determined that the defendant's confessions were the product of gross coercion, basing its decision on the fact that the defendant was suffering severe pain from his injuries and was under the influence of morphine when being questioned by the officers. Beecher, 389 U.S. at 37-38.

The circumstances behind the statements in Mincey and Beecher and the statements elicited from Appellant, here, are simply not comparable. In those cases the defendants were seriously injured, in extreme pain, and had substantial questions as to their mental acuity. Their injuries were far more severe than were Appellant's. When injuries are not severe, courts have been reluctant to find that the presence of injury and medical treatment invalidates the voluntariness of a statement. See Jackson v. Commonwealth, 187 S.W.3d 300 (Ky. 2006); Abela v. Martin, 380 F.3d 915 (6th Cir. 2004).

"The Due Process Clause of the Fourteenth Amendment prohibits the admission of involuntary confessions: '[if the defendant's] will has been overborne and his capacity for self-determination critically impaired, the use of [the] confession offends due process.'" Bailey v. Commonwealth, 194 S.W.3d 296, 300 (Ky. 2006); see also Schneckloth v. Bustamonte, 412 U.S. 218, 225-226 (1973). The Supreme Court has held that, "[o]nly 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) (quoting Fare v. Michael C., 442 U.S. 707 (1979)); see also Mills v. Commonwealth, 996 S.W.2d 473, 481 (Ky. 1999). A court's finding that a statement is voluntary must not be disturbed on appeal unless this finding is clearly erroneous. See Henson v. Commonwealth, 20 S.W.3d 466 (Ky. 1999).

Here, we find no error by the trial judge. Officer Shirley testified that he read Appellant his rights and that Appellant said he understood them. Moreover, as the trial court found, Appellant is an intelligent man and the injuries he sustained did not affect his ability to comprehend what was going on nor render his will "overborne" such as to "critically impair his capacity for self-determination." U.S v. LeBrun, 363 F.3d 715, 724 (8th Cir. 2004) (citing Simmons v. Bowersox, 235 F.3d 1124, 1132 (8th Cir. 2001) (cert. denied, 534 U.S. 924 (2001)). Therefore, when looking to the totality of the circumstances, we decline to hold that Appellant's statements were involuntary merely because he was receiving medical treatment for non-serious, non-life threatening injuries. There was substantial evidence presented, which would support the trial judge's ruling that the statements at the hospital were voluntary.

ii. STATEMENTS AT THE DETENTION CENTER

Likewise, Appellant claims that the statements elicited from him at the detention center were also involuntary and that the invocation of his

right to remain silent was not "scrupulously honored" as required under Michigan v. Mosley, 423 U.S. 96, 103 (1975). Appellant alleges Mosley was not followed by the police.

The pertinent facts are as follows: (1) Appellant was taken to the hospital; (2) he was read his Miranda rights and orally acknowledged them; (3) sometime during the questioning at the hospital, Appellant invoked his right to remain silent;[1] (4) Detective Brotherton immediately ceased his questioning; (5) the next morning Detective Brotherton visited Appellant at the detention center for some follow up questioning; (6) Appellant was not re-Mirandized; (7) after a few questions, Appellant invoked his right to counsel; (8) after a few non-elicited statements by Appellant the interview stopped. Appellant now claims that the invocation of his right to remain silent barred the police from initiating a subsequent interrogation on the same matter at the detention center. We disagree.

Mosley held that the admissibility of statements obtained after a person in custody has decided to remain silent depends, under Miranda, on whether his "right to cut off questioning" was "scrupulously honored." Mosley, 423 U.S. at 104. The Court looked to at a set of factors when it determined that Mosley's rights were "scrupulously honored." Those factors included: (1) Mosley was carefully advised of his rights prior to

[1] Appellant only invoked his right to remain silent; at no time, while at the hospital, did he invoke his right to counsel.

his initial interrogation, he orally acknowledge those rights, and signed a notification-of-rights form; (2) the detective conducting the interrogation immediately ceased questioning Mosley after he invoked his right to remain silent and did not resume questioning him or try to persuade him to reconsider his decision; (3) Mosley was questioned about a different crime more than two hours later at a different location by a different officer; and (4) Mosley was again given Miranda warnings prior to the second interrogation. Id. at 104-105.

In the case at hand, we are of the opinion that Appellant's rights were scrupulously honored. First, he was initially advised of his rights at the hospital, and orally acknowledged those rights.[2] Second, when Appellant informed Detective Brotherton that he no longer wanted to talk to him, Brotherton did not question Appellant further, nor did he pressure him to change his mind.[3] Third, the amount of time which lapsed between Appellant's refusal to talk at the hospital and when he was questioned at the detention center was far more than a short lapse of time.[4] Lastly, there is no evidence that Detective Brotherton had coerced Appellant into talking with him at the detention center.

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[2] He did not sign a notification form, but that is not required under Miranda.

[3] This is significant because the "right to cut off questioning centers on the defendant's ability to 'control the time at which questioning occurs, the subjects discussed, and the duration of the questioning.'" Mills, 996 S.W.2d at 483 (quoting Mosley, 423 U.S. at 103-04.).

[4] "[T]he constitutionality of a subsequent police interview depends not on its subject matter, but rather on whether the police in conducting the interview sought to undermine the suspect's resolve to remain silent." United States v. Schwensow, 151 F.3d 650, 659 (7th Cir.1998).

Furthermore, this Court has held that the factors used in the Mosley decision are neither exclusive nor exhaustive and that we approach the Mosley analysis on a case-by-case basis. Mills, 996 S.W.2d at 483. Therefore, the fact that Appellant was not given his Miranda warnings before the second interview does not amount to a deprivation of his rights or to his waiver of those Miranda rights under all the facts of this case.

Looking to the totality of the circumstances surrounding the interview at the detention center, we hold, as the Court did in Mills and Mosely, that the police "scrupulously honored" Appellant's right to cut off questioning. The trial court did not abuse its discretion in making its findings.

B. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

Appellant next claims that the trial court erred when it denied his motion for a directed verdict after the close of evidence and that the jury returned "inconsistent verdicts." We disagree.

Appellant was convicted of the murder of Christina Wittich and second-degree assault under EED for shooting Randall Lambirth. Evidence was presented indicating that Appellant suffered from mental illness and had become disturbed with his obsession over the lawsuit he

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Furthermore, "[p]olice may question a defendant after he has initially asserted his right to remain silent, provided they have not attempted to talk him out of asserting his privilege, and provided a time lapse occurs between his initial assertion of his privilege and a subsequent questioning." Matthews v. Commonwealth, 168 S.W.3d 14, 21 (Ky. 2005).

had filed against Lambirth. However, there was also conflicting evidence presented regarding Appellant's mental state tending to negate the presence of EED.

This Court no longer requires that verdicts be consistent, merely that the evidence to support such verdicts be sufficient. Commonwealth v. Harrell, 3 S.W.3d 349 (Ky. 1999). In Harrell we found, "[a] rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury . . . the better approach would be to examine the sufficiency of the evidence to support each verdict." Id. at 351. "The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318 (1979). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis in original); see also Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 282 (1966).

Pursuant to Kentucky law, the inconsistent verdicts argument is without merit; therefore, we review this claim under a sufficiency of the evidence standard. Appellant argues that because the jury found him guilty of second-degree assault under EED, they could not have found him guilty of murder. This claim lacks factual and legal support.

In reviewing insufficiency claims, this Court must ask whether it would be "clearly unreasonable" for a jury to find guilt under the evidence presented. Commonwealth v. Shuttles, 80 S.W.3d 424, 426 (2002). It is well-settled that the testimony of a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary. Id. "[T]he court – as does a jury in an ordinary case – ha[s] the right to believe the testimony adduced by one litigant in preference to that furnished by his antagonist, even though a greater number of witnesses testified in support of the rejected contention." King v. McMillian, 293 Ky. 399, 169 S.W.2d 10, 14 (1943).

The issue thus becomes whether the jury could have reasonably believed that while there was no EED when Appellant shot and killed Wittich, that event and the ones ensuing triggered EED, which was present when Appellant shot Lambirth. In fact, the jury was justified in their determinations. Each side presented evidence as to the EED issue. It was up to the jury to weigh the credibility of the witnesses. The verdict must be upheld unless it was clearly unreasonable for a jury to find guilt. Jackson, 443 U.S. at 318. To examine this, we turn to the record.

Evidence was presented by Appellant that he was extremely disturbed about the lawsuit against Lambirth. The Commonwealth presented evidence that, on the day of the crimes, Appellant was in a good mood and did not seem disturbed to the people he interacted with on that day. To find EED,

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

Greene v. Commonwealth, 197 S.W.3d 76, 81-82 (Ky. 2006). "It is not the court but a jury that must make a factual determination of . . . extreme emotional disturbance." McClellan, 715 S.W.2d at 467. The triggering event for EED may fester in the mind before surfacing, but there is a question of whether there intervened between the provocation and the crime a cooling-off period sufficient to preclude a conclusion that the provocation was adequate. See Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999); Fields v. Commonwealth, 44 S.W.3d 355, 359 (Ky. 2001).

It is undisputed that Appellant went to Lambirth's house on the day in question and killed Christina Wittich. Appellant did not argue that he did not do it; he merely argued that he did it under the duress of EED. Therefore, there was sufficient evidence to support a conviction of

murder, if the jury believed that Appellant was not acting under EED at the time of the first shooting.

In the present case, the jury was justified in coming to the conclusions they made. Two possible theories exist that would validate the jury's findings. First, the evidence presented swayed the jury to believe that Appellant was acting in his right mind at the time he shot and killed Christina Wittich, and that event caused his EED during the second offense. Or, his EED could have only been triggered by Lambirth because of their tumultuous past and therefore he was in his right mind when he killed Christina and not when he eventually saw Lambirth.

Therefore, we find no reason to overturn the trial judge's ruling denying the motion for directed verdict.

III. CONCLUSION

Accordingly, for the reasons set forth above, we hereby affirm Appellant's convictions.

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

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