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RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000410-MR

11/19/09 Kelly Klaber D.C.

JASON TODD — APPELLANT

V.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
NOS. 06-CR-00081 AND 06-CR-00097

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jason Lee Todd, was convicted of murdering Valerie Monjure and assaulting Patricia "June" Brown. On appeal, Appellant complains only of the admission of out-of-court statements of Whitney Monjure, who is Valerie's daughter. Finding no error requiring reversal, Appellant's conviction is affirmed.

I. Background

The evidence at trial established that Valerie was strangled to death, and that Patricia was stabbed in the neck with a two-prong barbecue fork. At the time of the crime, Valerie was living with her friend Patricia. Patricia's daughter, Whitney, also lived with them, as did Valerie's adult daughter, Jennifer Brown.

According to Patricia's testimony, on the night of the crimes, she and Valerie fell asleep in the living room. In the early morning hours, Patricia awoke to find she was being attacked by a man whom she described as having strawberry blond hair. During her testimony, Patricia had difficulty remembering what happened and the order of the events, including when she suffered the stab wound. She first testified that when she awoke, she had a burning sensation in her neck and was covered in blood. But when she complained that she had difficulty remembering, and her memory was refreshed by an earlier statement she had given to police right after the incident, she claimed that she awoke with a plastic bag on her face and she pulled it off. According to the statement, the man with the strawberry blond hair then attacked her with an item that turned out to be a barbecue fork, implying that the stabbing occurred after she awoke. She fought the man off, taking the barbecue fork from his hand and stabbing him with it. She testified that the man then left the house.

As the attack was occurring, Jennifer Brown came into the living room. She testified that she had been awakened by a scream from the living room. When she walked into the living room, she saw a stocky white man with strawberry blond hair standing over her mother. The man looked startled, and Patricia yelled, "You were trying to kill me ..., you were trying to smother me!" Jennifer testified that the man claimed that a black man had assaulted Patricia and that he had only come into the house to assist her. He then walked out of the house and drove away in an orange or red pickup truck.

Jennifer testified that Patricia had been stabbed in the neck with the barbecue fork and that Valerie was lying on the floor. Valerie had no pulse and felt warm but clammy to the touch. She had urinated and had foam at the corners of her mouth. Patricia called 911.

Both Jennifer and Patricia identified Appellant as the man who had been in the house, both in a photo line-up and in court during their testimony.

In the course of the subsequent investigation of the crime, Appellant's name came up. Detective Beth Thompson discovered that Appellant owned a truck matching the description given by Jennifer Brown. Detective Thompson went to Appellant's house to question him. Appellant admitted that he knew Valerie Monjure and that they had "messed around," but he claimed it had been several months since he had been in her home. After asking some questions, Detective Thompson noticed two drops of blood on Appellant's shorts. She told him she "needed those shorts." She also asked to search Appellant's truck and home. Appellant consented to the search and even signed a consent form. Detective Thompson first searched his truck, but found nothing. When she returned to the house, Appellant's wife, who appeared very upset, brought out a bloody t-shirt that had been in the washing machine. Appellant was then taken into custody.

The t-shirt had two holes in it that, according to testimony from the crime lab, were consistent with being made by the barbecue fork. The blood on Appellant's shorts was found to be a mixture of his own and Patricia's. He also had a pair of puncture wounds under his left arm.

During a subsequent police interview, Appellant admitted to having been at Valerie's home the day of the crime. He had been drinking and had taken Xanax. He claimed he had sex with Valerie and then passed out on a loveseat in the living room but was awakened some time later by a commotion. He saw a "dark" man with tattoos on his stomach and arms run out the door. He tried to grab an object in the man's hand, but it slipped out of his grasp. He claimed that he then noticed a woman on the couch with blood on her and that she and another woman present were pointing at him. He left because he did not want to be blamed for the attack. During the interview, Appellant also explained that the holes in his shirt and the wounds under his arm must have come from barb wire that he had been working with earlier in the week.

Appellant's defense theory was presented through cross-examination of the prosecution's witnesses, primarily of Detective Thompson. Defense counsel elicited testimony about a man named Julian Kemeny, who had been a person of interest early in the investigation. Kemeny had a history of strange behavior, including strange diary entries about sacrificing people. He had also claimed to have been at Patricia's home the night before or possibly the night of the crimes, and that something like an affair had been going on between him and Patricia. Detective Thompson had not investigated him further, however, because he did not match the description of the other man given by Appellant, as he had no tattoos, and the women stated that there was only one man in the house. This latter point was contradicted at least once at trial by one of the officers who went to the hospital. He testified that Patricia had stated that a black male and a white male had been in the house.

The jury found Appellant guilty of murder, first-degree assault, and tampering with physical evidence. He was sentenced to twenty-eight years in prison.

Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant complains only of the admission of several hearsay statements of Whitney. Whitney, who was nineteen years old at the time of the crimes, has Down syndrome. She was in a back bedroom at the time of the attack. Appellant claims error specifically in admitting evidence that Whitney stated Appellant's name to Detective Thompson in an interview some time after the attack, and of a statement that Whitney made in front of Jennifer and Patricia Brown immediately after the crime.

Appellant now claims that all of the statements, including the mere identification of Appellant during the police interview, were admitted erroneously in violation of KRE 601(b), B.B. v. Commonwealth, 226 S.W.3d 47 (Ky. 2007), and Crawford v. Washington, 541 U.S. 36 (2004). Whether any error occurred at trial, however, depends on content and use of the statements actually admitted and any objections made. Thus, before applying the legal standards, a review of what occurred at trial with respect to the statements is necessary.

A. The Statements

Whitney made several statements to Detective Thompson during an interview several days after the attack. The interview was recorded and

transcribed. A copy of the transcript was included with Appellant's brief.[1] During the interview, Whitney stated several times, "Jason is mean." She also implied that he caused her mother to scream and to get "sick." These statements, however, were never introduced at trial, though Detective Thompson did testify that she learned of Appellant's name in the interview and subsequently investigated him.

Whitney made the statement to Jennifer and Patricia very soon after the man with strawberry blond hair left the house. Whitney walked into the living room where, unprompted, she made the statement of which Appellant now complains. According to Jennifer's testimony at trial, Whitney said, "Jason hurt me." In response to a general question about what she remembered from that night, Patricia testified in part: "I remember Whitney coming out of her room and saying Jason hurt her." Appellant argues that Patricia's testimony about the statement was less clear than Jennifer's because the word "her" is ambiguous, and that in context, it could refer either to Whitney or to her mother. In neither instance did the prosecution specifically ask the women what Whitney had said.

B. Pretrial Motion <u>In Limine</u>

Just a few days before trial, defense counsel filed a motion <u>in limine</u> to have the trial court declare Whitney's statements to Detective Thompson inadmissible. Counsel first asked that Whitney be declared incompetent as a

[1] It is not clear who made the transcript. At the top of the first page, it lists the name of Detective Thompson and Joni McCarty, an employee of the then Cabinet for Human Resources. Presumably the transcript was made either by the police or the Cabinet, and a copy was given to defense counsel in pretrial disclosures.

witness under KRE 601(b), which he argued would also render her statements to the detective inadmissible because they were testimonial in nature.

While discussing the motion, the prosecutor also mentioned the statement made in the house right after the attack. He stated that he did not intend to call Whitney as a witness and admitted that any statements she made to Detective Thompson would be inadmissible because they were "testimonial" under Crawford v. Washington, 541 U.S. 36 (2004). However, the prosecutor asserted that the statement heard by Jennifer and Patricia was an excited utterance and thus admissible.

The judge said that in "certain circumstances" a statement of an incompetent witness might still be admissible. However, the judge declined to declare Whitney incompetent without holding a competency hearing, and declined to hold a hearing because Whitney was not going to testify. He also expressed concerns about the issue having been raised so late. Defense counsel then noted that if the only statement to be introduced was the one made to Jennifer and Patricia, his position was that the statement was non-testimonial, Crawford would not apply, and thus the issue of Whitney's competency as a witness was "null."

The prosecutor stated that he thought the attorneys were in agreement that he would not to seek to admit the statements made to Detective Thompson, noting only that he would seek to introduce the fact that the name "Jason Todd" was mentioned as a way to explain why she then investigated Appellant. Defense counsel agreed that the fact that Appellant's name was mentioned was not hearsay; he objected only to the other statements from the

interview. The prosecutor agreed that these latter statements would be testimonial hearsay, implying that they were inadmissible.[2] Defense counsel then stated that it appeared that he and the prosecutor were actually in agreement, at least with regard to which statements were testimonial.

C. Objections at Trial

There was no objection to Detective Thompson's testimony that Appellant's name came up during her interview of Whitney. In fact, on cross-examination of the detective, defense counsel had her clarify that she originally got Appellant's name from Whitney, rather than from another person.

When Jennifer Brown testified that Whitney had said "Jason hurt me," defense counsel immediately objected to this statement and moved to strike it. Defense counsel stated that there had already been a ruling on the statement. Rather than arguing that the statement was an excited utterance, as he had claimed prior to trial, the prosecutor said the statement was not offered for the truth of the matter asserted and only offered it for the fact that it was said. However, he claimed that the statement was offered to show that Appellant had been at the house that night and that "something bad" had happened, which defense counsel argued meant the statement was for the truth of the matter

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[2] Appellant's brief asserts that at this point, the prosecutor "suddenly shifted position and stated that [he] considered all statements by Whitney, including the statements at the scene to the victim June and her daughter, as testimonial, except Whitney's mentioning Jason Todd's name to Det. Thompson during the interview." The prosecutor made no such assertion and did not "shift" his position. He maintained throughout the discussion that the statements made to Detective Thompson were "testimonial" (and thus he would not seek to introduce them) and that the statements made to Patricia and Jennifer were admissible as excited utterances.

asserted. The prosecutor also stated he had no problem with the jury being admonished about the statement.

The judge said that he thought the attorneys had agreed to admission of the fact that Whitney had stated Appellant's name, though a review of the pre-trial hearing shows that the agreement only went to the fact that she mentioned the name during the police interview. Rather than striking the statement, the judge admonished the jury that the witness's mention of Appellant's name was admissible but that it should disregard the rest of the statement as it was inadmissible.

When Patricia also testified, "I remember Whitney coming out of her room and saying Jason hurt her," defense counsel again objected to this statement. The prosecutor asked that the jury be admonished again, but defense counsel said that an admonition would be inadequate at that point, as the witness had just blurted out the statement and another witness had also done so, and asked for a mistrial. The judge noted that the jury was presumed to follow an admonition, but that if any other such statements were repeated on the stand, a mistrial might be necessary. The judge noted that Patricia had repeated the statement without being prompted by the prosecutor, but nevertheless instructed the prosecutor to make sure no other witnesses repeated Whitney's statement.

The judge then again instructed the jurors that the testimony just given was inadmissible and directed them to disregard the statement. The judge also informed the jurors that the law presumes that they can follow the judge's instructions. Presumably, he added this to his admonition as a way to

emphasize that the statement should be disregarded. The judge also informed the jury, based on stipulation by both sides, that Whitney had not been injured.

D. Alleged Error as to Statements Related to Whitney's Police Interview

Part of Appellant's current claim is that the trial court erred in allowing any testimony related to Detective Thompson's interview with Whitney, including the fact that Appellant's name came up. However, Appellant's counsel did not object during Detective Thompson's testimony, which would limit this Court's review even if there was an error. The reason for the lack of objection is clear from what transpired at the pre-trial conference and during the bench conferences on the objections to the other statements: defense counsel agreed that limited testimony about Appellant's name being used would be admissible. In fact, defense counsel even asked a follow-up question on cross-examination about whether this was the first time that Appellant's name had shown up in the investigation.

Appellant cannot now claim error related to testimony that his counsel agreed could be admitted and to which no objection was lodged. That defense counsel agreed to the testimony resolves Appellant's claim because it amounts to a waiver of any possible confrontation violation or hearsay error.

E. Error as to Statements Repeated by Jennifer and Patricia Brown

Appellant's claim that the repetition of Whitney's statement during the testimony of Jennifer and Patricia Brown was reversible error is more difficult. As Appellant notes, this Court has held that hearsay statements otherwise admissible under KRE 803(4), the hearsay exception for statements made for

the purpose of medical treatment or diagnosis, were inadmissible where the declarant, a three-and-a-half-year-old child, was testimonially incompetent because she "[l]ack[ed] the capacity to recollect facts," KRS 601(b)(2), and "[l]ack[ed] the capacity to understand the obligation of a witness to tell the truth," KRS 601(b)(4). See B.B., 226 S.W.3d at 51.

This, however, does not mean that all out-of-court statements by testimonially incompetent declarants are inadmissible. In B.B., this Court overruled Souder v. Commonwealth, 719 S.W.2d 730 (Ky. 1986), and Edwards v. Commonwealth, 833 S.W.2d 842 (Ky. 1992), which could be read to hold that testimonial incompetence is not a consideration at all in determining the admissibility of out-of-court statements. In place of those cases, the Court adopted Professor Lawson's view that a declarant's incompetence was a relevant consideration in determining whether to admit hearsay. Id. (citing Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.60[5], at 675 n.53 (4th ed. 2003)). The germane portion of Professor Lawson's book reads:

> The reason for the testimonial incompetence of a declarant should be important to rulings on admissibility of his or her out-of-court statements. In Souder, the declarant lacked the capacity to communicate in the courtroom (understanding questions and being able to formulate answers), a basis for testimonial incompetence that raises no questions about reliability of the hearsay. In a different situation, the declarant might be incompetent to testify for lack of capacity to accurately perceive complex events. In this latter situation, the incompetence would extend as well to the hearsay and should be an obstacle to its admission.

Lawson, supra, § 8.60[5], at 675 n.53. Thus, the out-of-court statement by Whitney would be inadmissible only if the reason for her testimonial

incompetence would undermine the rationale for reliability supporting the hearsay exception.

The best case for avoiding the hearsay prohibition for Whitney's statement would be that it was an excited utterance. See KRE 803(3) (excepting from the hearsay rule a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). "The premise for the [excited utterance] exception is that statements made under the stress of the excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate." Noel v. Commonwealth, 76 S.W.3d 923, 926 (Ky. 2002); see also Mounce v. Commonwealth, 795 S.W.2d 375, 379 (Ky. 1990) ("The theory behind the rule is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."). The question, then, would be whether the reason for finding the declarant incompetent would undermine this rationale.[3]

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[3] KRE 601(b) allows disqualification of a witness under four circumstances. The rule states:

> A person is disqualified to testify as a witness if the trial court determines that he:
>
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
>
> (2) Lacks the capacity to recollect facts;
>
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
>
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

This Court need not—and indeed cannot—answer that question in this case because the trial court did not evaluate Whitney's competency and Whitney did not testify. There was neither a hearing nor a finding by the trial court about whether Whitney was competent to testify. Without such a record, it is impossible to compare the reason for incompetency (i.e., which subsection of KRE 601(b) applies) with the hearsay exception's rationale.

Appellant argues that an appellate court can review the trial record to independently evaluate the competency of a witness, citing Kentucky v. Stincer, 482 U.S. 730 (1987), for the proposition. Stincer cites two Kentucky cases, Payne v. Commonwealth, 623 S.W.2d 867, 878 (Ky. 1981), and Hendricks v. Commonwealth, 550 S.W.2d 551, 554 (Ky. 1977), in which this Court did evaluate a witness's competency to testify. Appellant argues, as his defense counsel did at trial, that the transcript of Whitney's interview by Detective Thompson is a sufficient basis to rule on her competency under these cases.

However, the cases cited by Appellant actually involve review of the trial courts' rulings on competency, not initial decisions about competency at the appellate level. In all three cases—Stincer, Payne, and Hendricks—the competency of the witnesses in question was first evaluated by the trial court. Additionally, the witnesses actually testified directly (rather than through hearsay statements), which gave further material to evaluate their competency. Thus, unlike in this case, there was actually a competency hearing, a competency finding, and trial testimony that demonstrated the state of the witness's competency for the appellate courts to review. None of these cases

stand for the proposition that an appellate court can for the first time evaluate the competency of a witness. As this Court has noted, "An appellate court may consider a trial court's competency determination from a review of the entire record, including the evidence subsequently introduced at trial." B.B., 226 S.W.3d at 49. The key portion of this statement, however, is that the relevant review is of the "trial court's competency determination." Absent such a determination, there is nothing for a trial court to review on appeal. Original fact-finding on such an issue would be inappropriate at the appellate level.

The question is then whether the trial court erred in this case by not evaluating Whitney's testimonial competency. That Whitney's competency was raised just prior to trial is simply not a sufficient reason to decline to evaluate it. "Competency is an ongoing determination for a trial court," id., requiring the trial court to evaluate the witness's trial testimony, Stincer, 482 U.S. at 740, in addition to any testimony taken at a hearing specifically to determine testimonial competency. Testimonial competency is always at issue because the question of competency relates only to when the witness actually testifies. A witness who is incompetent months or years before trial may be properly qualified and competent at the time he or she gives testimony. Thus, "a competency hearing may [even] take place in the middle of a trial ...." Stincer, 482 U.S. at 740 n.10. Clearly, such a hearing may also be held immediately prior to trial.

Additionally, that the prosecution did not intend to call Whitney to testify did not remove the necessity of a determination of her testimonial competency, since as noted above this Court has held that such competency is a

consideration in the admissibility of hearsay statements. The question of competency as it relates to out-of-court statements relates to the time when the statements were made rather than the time of trial, thus requiring a somewhat different focus of the trial court's inquiry. Nevertheless, when a question as to a declarant's competency is raised, a trial court must evaluate that competency under the framework provided by KRE 601(b).

This Court concludes, however, that any error related to the trial court's failure to evaluate Whitney's testimonial competency was cured by the admonitions given to the jury when the out-of-court statements were repeated by Jennifer and Patricia Brown. Both times the trial court instructed the jury not to consider the substance of the statements, going so far the second time as to tell that jury that Whitney had not been injured, thus undermining the assertion in the statement. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).

Appellant, however, argues that the statement fell within the exception to the curative admonition rule for "when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant ...." Id. at 441 (citations omitted). Though the exception lays out two separate prongs, they ultimately require the same analysis, since only a devastating piece of evidence is likely to be the sort about which a jury would be able to ignore an admonition.

Having reviewed the record, this Court concludes that exception does not apply in this case because the statement was not "devastating to the defendant." Though Appellant claims that Whitney's statement "solved the case" and thus was an especially important piece of evidence for the jury, this is simply incorrect. First, the trial court's admonition undercut the factual claim in the statement by declaring that Whitney had in fact not been hurt on that night.

Moreover, while Whitney's use of Appellant's name was important to the investigation, since it led police to a man who matched the description given by Jennifer and Patricia Brown, it was not particularly essential to the prosecution's case at trial. Rather, it was Jennifer and Patricia's accurate descriptions of Appellant (including his physical appearance and the truck he drove), along with their out-of-court and in-court identification of him, and the physical evidence collected from Appellant that was essential.

If anything, this meant that the statement had a non-hearsay use at trial because it was not offered for the truth of the matter asserted, but to show simply how the Appellant's name came up in the investigation. See Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.50[4], at 651 (4th ed. 2003) ("It is important to keep in mind that there is ... a nonhearsay use of statements to prove state of mind (either for the state of mind of a declarant or of someone who heard a statement).") Additionally, other testimony (that of Detective Thompson, to which the defense had agreed) established this connection at trial and had a similar nonhearsay use.

III. Conclusion

For the forgoing reasons, the judgment of the Woodford Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J. concurs except that he would conclude that Whitney's out-of-court statement is testimonial hearsay in violation of Crawford v. Washington, 541 U.S. 36 (2004), but its admission was harmless error.

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