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RENDERED: NOVEMBER 25, 2009
NOT TO BE PUBLISHED

FINAL
DATE 12/16/09 Kelly Klaber D.C.

Supreme Court of Kentucky

2008-SC-000373-MR

DAVID EUGENE HOUCHIN — APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 07-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On May 8, 2008, Appellant, David Eugene Houchin, was found guilty by a Grayson Circuit Court jury and convicted of arson in the second-degree, fraudulent insurance acts in excess of $300, wanton endangerment in the second-degree, and of being a persistent felony offender in the first-degree.[1] For these crimes, Appellant was sentenced to twenty years' imprisonment. Appellant now appeals his conviction as a matter of right. Ky. Const. § 110(2)(b).

[1] Appellant's wife and co-defendant, Angela Houchin, was convicted of arson in the second-degree, fraudulent insurance acts in excess of $300, and wanton endangerment in the second-degree. The jury fixed her sentence at ten years' imprisonment.

I. Background

On the morning of July 25, 2006, members of the Anetta Volunteer Fire Department responded to a call that Appellant's home was on fire. When they arrived, the firefighters could not gauge how long the fire had been burning. Upon extinguishing the fire and examining the remains of Appellant's house, they found a two to three foot wide hole in the kitchen floor that had completely burned through. The firefighters thought this odd since they were taught that this formation occurs only when a fire begins at the floor. Though the Deputy State Fire Marshall concluded that the hole in the kitchen floor was caused by the direct and intentional use of a flammable agent, the Kentucky State Police later tested the surrounding wood and found no presence of accelerants.

Appellant and his wife were subsequently indicted for arson along with other related charges stemming from the fire. At their joint trial, both the Commonwealth's and Appellant's cases rested largely upon expert investigation and opinion because there were no known witnesses. Throughout the trial, the Commonwealth contended that the fire was caused intentionally while Appellant defended that the fire was purely accidental.

Robert Smith was one of two arson experts for the Commonwealth. Smith examined Appellant's home three days after the fire, in conjunction with an investigation by Allstate Insurance. Smith told the jury that in his opinion the fire started at the hole found in the middle of the house and, though he found no trace of accelerants, that it was incendiary in nature. While Smith acknowledged that he found wiring in the house exhibiting severe fire damage,

Smith concluded that this was secondary fire damage and not the source of the fire.[2]

Victor Tharp was the only defense expert. Though he did not inspect the actual fire scene, Tharp based his opinions upon the Commonwealth's photographs of the scene and Smith's report. Tharp told the jury that in his opinion the fire was not incendiary, but rather was the result of improper wiring methods in Appellant's home. In one of the photos, Tharp identified a junction box lacking the mechanical pieces necessary for the protection of its internal wiring, representing a violation of the National Electric Code. According to Tharp, this wiring method can lead to the fraying of internal wiring which, in turn, causes the wires to create a current path and overheat. Tharp concluded that the fire began near the center of the kitchen, that it would be impossible for a person to cause it, and that the fire possibly removed traces of pre-existing damage to the wiring.

Dr. Thomas Eaton was the Commonwealth's final arson expert, although he only testified during rebuttal. Dr. Eaton inspected the fire scene approximately three weeks after the fire occurred in conjunction with Allstate Insurance's investigation of Appellant's home. Dr. Eaton told the jury that in his opinion the fire started at the hole that had burned through the floor. Although Dr. Eaton acknowledged that Tharp's theory represented the probable cause of most fires and that the wiring in Appellant's home was an electrical code violation, Dr. Eaton inspected the junction box to which Tharp referred

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[2] The wiring passed through the floor from under the house and was attached to an active outlet and junction box.

and found no evidence of melted metals or loose connections in the wires. Yet, Dr. Eaton did find melted copper wiring near the fire's theorized origin, indicating higher than average temperatures at that location in the house.[3] In turn, he opined that some artificial accelerant must have been used to raise the temperature of the fire to melt the copper. Thus, his ultimate conclusion was that the house's improper wiring was not the cause of the fire but that the fire was set intentionally through the use of an accelerant.

At the conclusion of trial, the jury convicted Appellant of arson in the second-degree, fraudulent insurance acts with an aggregate value in excess of $300, wanton endangerment in the second-degree, and of being a persistent felony offender in the first-degree. On appeal, Appellant raises three principal allegations of reversible error: 1) that the Commonwealth introduced incriminating statements by a nontestifying co-defendant against him in a joint trial; 2) that the Commonwealth presented undisclosed expert testimony in rebuttal; and 3) that the Commonwealth improperly commented on his decision not to testify at trial. For the reasons that follow, we affirm Appellant's convictions.

II. Analysis

A. Introduction of Statements by Nontestifying Co-Defendant

Appellant first argues that he is entitled to a new trial because the trial court erroneously deprived him of his Sixth Amendment confrontation rights

[3] As Dr. Eaton explained to the jury, copper wiring does not ordinarily melt under the presence of fire unless that fire was burning hotter than normal. He testified that most fires burn between 1500–1700 degrees Fahrenheit, whereas copper wire melts at just less than 2000 degrees Fahrenheit.

pursuant to Bruton v. United States, 391 U.S. 123 (1968), and Crawford v. Washington, 541 U.S. 36 (2004), when it allowed the statements of his nontestifying co-defendant to be introduced against him in their joint trial. We disagree, and conclude that the trial court did not err in admitting the statements because the statements were not of such a character as to make them inadmissible under Bruton and Crawford.

Prior to trial, the Commonwealth moved the trial court to consolidate the cases against Appellant and Angela for trial. A hearing was held on the matter and Angela, through counsel, objected to the Commonwealth's motion on grounds that a joint trial would lead to inevitable Bruton violations. Appellant joined in Angela's objection and also argued that a joint trial would be to his prejudice because Angela had made certain prior incriminating statements that could also serve to inculpate him of the crimes. The trial court, however, granted the Commonwealth's motion, reasoning that any incriminating statements could be redacted at trial so as to not offend the defendants' confrontation rights under Bruton.

At trial, the Commonwealth presented the testimony of four of Angela's co-workers who had spoken with her both prior to and after the fire. When each of the co-workers was called to testify, Appellant renewed his wholesale objection to a joint trial and continued to assert that their testimony violated his Sixth Amendment right of confrontation. The trial court overruled all of Appellant's objections and the testimony proceeded.

Prior to the fire, several of the witnesses testified to hearing Angela state that her home was in a faulty condition and that she was facing financial

difficulties.[4] In particular, the co-workers testified to having heard Angela say that her house could be foreclosed upon and that she was short of money at the time. In addition, Angela allegedly told several co-workers that she thought her house contained faulty wiring such that it would not surprise her if it accidentally caught fire. After the fire occurred, Angela explained to two co-workers that the likely cause was an electrical defect in her home, noting the presence of "hot spots" in her kitchen.

1. Bruton Violation

"The Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution guarantee a defendant the right of confrontation." Murphy v. Commonwealth, 50 S.W. 3d 173, 183 (Ky. 2001). "The right of confrontation includes the right to cross-examine witnesses." Richardson v. Marsh, 481 U.S. 200, 206 (1987). For this reason, "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." Id.

In particular, under Bruton, the Confrontation Clause forbids "the use of a non-testifying co-defendant's confession that 'expressly implicate[s]' the other defendant," Shepherd v. Commonwealth, 251 S.W.3d 309, 314 (Ky. 2008) (quoting Bruton, 391 U.S. at 126), "even if the jury is instructed to consider the confession only against the codefendant," Richardson, 481 U.S. at 207. However, when a co-defendant's confession does not expressly implicate the other defendant, but rather inferentially "links" him to the crime, the

[4] We reject Appellant's contention that Angela's statements were inadmissible hearsay. They were clearly admissible as party admissions, KRE 801A(b)(1) because Angela was also a defendant in this case.

Confrontation Clause is not offended so long as the evidence itself is "properly admitted" and "the confession is redacted to eliminate all references to the defendant's existence." Shepherd, 251 S.W.3d at 314–15 (citing Richardson, 481 U.S. at 202); accord Gabow v. Commonwealth, 34 S.W.3d 63, 71 (Ky. 2000).

Turning to Appellant's arguments here, he contends that the statements Angela made to her co-workers were tantamount to confessions that she and her husband, acting together, intentionally burned their house. This assertion, however, is inapt as Angela's statements cannot be construed as incriminating confessions and, thus, the type of statements to which the dictates of Bruton apply.

While Angela's statements may have suggested a faint motive for the crimes, they did not represent a "confession." Bruton issues arise in the context of confessions. See, e.g., Bruton, 391 U.S. at 124; see also, e.g., Richardson, 481 U.S. at 203; Shepherd, 251 S.W.3d at 313; Barth v. Commonwealth, 80 S.W.3d 390, 392 (Ky. 2001). All of the statements that Angela made that Appellant now disputes were made to her co-workers and did not occur during a "post-arrest investigation." Indeed, the statements she made prior to the fire cannot be a confession as the crime had yet to be committed. And none of Angela's statements after the fire were admissions of guilt, nor were they accusatory "statements made to officials in hope of advancing [her] own cause, potentially at the expense of [Appellant], as is intuitively true in the event of a confession." Lyle v. Koehler, 720 F.2d 426, 442 (6th Cir. 1983); see also Vincent v. Parke, 942 F.2d 989, 991 (6th Cir.

1991). Accordingly, the trial court did not err in overruling Appellant's objections.

2. Crawford Violation

We now address Appellant's related argument that Angela's statements, even if not the type to which Bruton applies, constitute testimonial hearsay running afoul of Crawford. We reject Appellant's contentions here for similar reasons and conclude that the trial court did not err in admitting the statements.

Under Crawford, "the Confrontation Clause of the Sixth Amendment forbids admission of all testimonial hearsay statements against a defendant at a criminal trial, unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination." Bray v. Commonwealth, 177 S.W.3d 741, 743 (Ky. 2005) (citing Crawford, 541 U.S. at 68). Invariably, the issue that most often arises when confronted with a potential Crawford violation is determining what constitutes "testimonial" hearsay. At a minimum, the term encompasses "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," as well as statements made during "police interrogations." Crawford, 541 U.S. at 68. In general, statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. 813, 822 (2006).

Angela's hearsay statements were simply not testimonial in nature. As to the many statements she made prior to the fire occurring, "a statement . . .

made before the crime is committed . . . almost certainly is not testimonial." Bray, 177 S.W.3d at 746 (quoting United States v. Cromer, 389 F.3d 662, 673 (6th Cir. 2004)). This is usually because nothing has yet occurred "to establish or prove." Davis, 547 U.S. at 822. As to the statements Angela made after her home had burned, they were all exculpatory in nature and did not in any way inculpate Appellant such that she could be considered a witness against him. Cf. Rankins v. Commonwealth, 237 S.W.3d 128, 130 (Ky. 2007) (citing Davis, 547 U.S. at 821–22).

B. Improper Expert Testimony

Appellant makes three related arguments that the trial court committed reversible error in allowing Dr. Thomas Eaton to testify. First, Appellant argues that the failure of the Commonwealth to provide a copy of Dr. Eaton's report violated both Brady v. Maryland, 373 U.S. 83 (1963), and the trial court's discovery order. Second, Appellant argues that the testimony was based on an undisclosed factual premise, which undermined his ability to present an effective defense. And last, Appellant argues that the trial court abused its discretion in allowing the testimony in rebuttal rather than in the Commonwealth's case-in-chief. We reject Appellant's arguments here.

The record shows that, on the morning of the first day of trial, the Commonwealth mentioned the name of Dr. Thomas Eaton as a possible expert witness against Appellant. Through counsel, Appellant noted that though Dr. Eaton's name had been disclosed in related civil litigation, he did not believe that he had prepared a report of his findings.

This matter was not addressed again until the end of the Commonwealth's case-in-chief when the Commonwealth attempted to call Dr. Eaton as a witness. Through counsel, Angela immediately made a lengthy objection based on her inability to cross-examine an expert witness without adequate disclosure and notice. In particular, Angela complained that the Commonwealth had not furnished a copy of Dr. Eaton's report, effectively prohibiting discovery of his findings and possible opinions. Angela also contended that Dr. Eaton's testimony would prove cumulative because he would likely testify that there simply were no electrical problems in Appellant's home. Appellant adopted and joined the objection.

In response, the Commonwealth agreed with Angela's assessment that Dr. Eaton would testify as to the lack of any significant electrical problems in Appellant's home, but countered that the testimony should be admitted because the Commonwealth had received only recent notice of defense expert Victor Tharp's proposed testimony that the fire was due to an accidental and electrical cause. The Commonwealth, however, acknowledged that Appellant's notice was timely and complied with the trial court's discovery order. The Commonwealth went on to explain that it was not until after it had received notice of Tharp's deposition to this effect that it discovered Dr. Eaton as an additional expert witness. The Commonwealth, however, stated that no report had been prepared by Dr. Eaton. Concluding the conference, Angela replied that if the trial court chose to admit Dr. Eaton's testimony, it should be done only in rebuttal.

After hearing the arguments, the trial court denied the Commonwealth's attempt to present Dr. Eaton in its case-in-chief. The trial court, however, ruled that there was still a question as to whether Tharp would testify and that if he did, Dr. Eaton could testify in rebuttal. Before moving on, the trial court ordered Dr. Eaton to enter the courtroom and give the bases of his opinions. At Appellant's request, the trial court then allowed the defendants to interview Dr. Eaton off the record.

The following morning, Tharp testified on behalf of Appellant and explained that the cause of the fire was accidental and caused by faulty wiring. The next morning, in accordance with its prior ruling, the trial court allowed Dr. Eaton to testify in rebuttal. Appellant immediately objected and argued that it was reversible error for an expert to testify to an opinion based upon a premise not disclosed to the defendant. The trial court overruled Appellant's objections and Dr. Eaton testified that the fire was, in all likelihood, intentionally caused through the use of an accelerant.

1. Brady and Discovery Order Violations

Appellant's primary argument here is that reversal is required because the trial court allowed the Commonwealth's expert to testify without providing Appellant a copy of his report. This, Appellant contends, represents the kind of reversible error contemplated by Brady. He also contends that this violated the trial court's discovery order. Having reviewed the record, we disagree and conclude the trial court did not abuse its discretion in overruling Appellant's objections because Dr. Eaton's testimony was not of the type to which Brady applies. In addition, we conclude that because the Commonwealth did not

have a report in its possession, custody or control, the trial court's discovery order was not violated.

Under Brady, the Commonwealth must disclose exculpatory or impeaching information that is material to the guilt or innocence of a defendant. Brady, 373 U.S. at 86–88. Its failure to do so constitutes reversible error if it gave the Commonwealth "a more favorable opportunity to convict," Epperson v. Commonwealth, 809 S.W.2d 835, 840 (Ky. 1990), which renders the verdict unworthy of confidence, United States v. Bagley, 473 U.S. 667, 668 (1985). However, where the undisclosed information is merely incriminating and unfavorable rather than exculpatory or impeaching, Brady is inapplicable.

As a preliminary matter, we conclude that Dr. Eaton's testimony was, quite clearly, not exculpatory or impeaching, and thus not the type to which Brady applies. Dr. Eaton testified that he found melted copper at the scene of the fire in Appellant's home, suggesting that the fire's temperature must have been raised through the intentional use of an accelerant. Given that Appellant's primary defense to the charge of arson was that the fire was accidental, Dr. Eaton's testimony was, therefore, incriminating, not exculpatory. Appellant's reliance upon Brady here is thus inapt.

In addition, Appellant's contention that the trial court condoned a violation of its discovery order is without merit. Our discovery rules plainly require discoverable reports to be in a party's "possession, custody or control." RCr 7.24(1). Here, the record shows that Dr. Eaton did not generate a report for the Commonwealth and thus there could be nothing discoverable in its

possession, custody or control. Accordingly, the trial court did not abuse its discretion in overruling Appellant's objections to that effect.

2. New, Undisclosed Factual Premise

Appellant also argues that Dr. Eaton's rebuttal testimony contained a new, undisclosed factual premise, which undermined his ability to effectively defend himself. In particular, Appellant argues that Dr. Eaton's opinion was based on the presence of melted copper in Appellant's home, which was both incriminating and previously undisclosed. To support this argument, Appellant cites Barnett v. Commonwealth, 763 S.W.2d 119, 123 (Ky. 1988), for the proposition that an expert cannot testify in rebuttal to a new, undisclosed factual premise. We believe that there was no error in this regard. And regardless, we believe that the trial court's relief from Dr. Eaton's testimony allowed Appellant to effectively defend himself against the premise.

While Dr. Eaton's testimony was incriminating and surprising insomuch as it revealed a previously undisclosed premise—the presence of melted copper—Appellant cannot complain that this additional premise was so surprising or inherently complex as to prevent his effective defense against it, as in Barnett. Appellant concedes that he received from the Commonwealth a report prepared by Robert Smith, which noted that, in at least two places in the home, melted wiring was found, indicating a higher than expected localized temperature. In fact, Appellant admits to have developed much of his defense upon Smith's report. The general finding, therefore, was disclosed: that the physical evidence indicated higher than expected temperatures, which, in turn, indicated the temperatures were raised by the intentional use of an accelerant.

Moreover, prior to Dr. Eaton's testimony, the court, upon Appellant's objections, ordered Dr. Eaton to disclose the bases of his opinions and allowed Appellant to interview him on these grounds, off the record. While we are certainly not prepared to say that such relief is always adequate, Appellant's counsel obviously knew enough from his interview with Dr. Eaton to then object to his testimony as containing the previously undisclosed premise and to, as Appellant concedes, alert him to additional potential causes for increased localized temperatures during cross-examination (namely, increased ventilation). We also note that nothing in the record demonstrates that the Commonwealth had spoken with Dr. Eaton prior to trial or knew the substance of his proposed rebuttal testimony, which may have warranted greater relief.

3. Improper Rebuttal Testimony

Last, Appellant contends that the trial court abused its discretion in allowing the testimony of Dr. Eaton in rebuttal rather than in the Commonwealth's case-in-chief. We disagree and conclude that admission of Dr. Eaton's testimony in rebuttal did not amount to palpable error.[5]

The trial court has "broad discretion in its determination of admissibility of evidence in rebuttal under RCr 9.42." Chestnut v. Commonwealth, 250 S.W.3d 288, 297 (Ky. 2008) (citing Pilon v. Commonwealth, 544 S.W.2d 228, 231 (Ky. 1976)). Accordingly, the trial court's decision to admit evidence in rebuttal is reviewed for an abuse of discretion, Commonwealth v. King, 950

[5] We review this alleged error only for palpable error because Appellant's claim is unpreserved. RCr 10.26 (allowing relief "upon a determination that manifest injustice has resulted from the error"). Appellant did not object to the testimony as improper rebuttal evidence and concedes as much.

S.W.2d 807, 809 (Ky. 1997), and will generally not be disturbed absent a "clear showing of arbitrariness." Pilon, 544 S.W.2d at 231; accord 23A C.J.S. Criminal Law § 1663 (2009).

Although rebuttal evidence is most usual and proper where "it tends to counteract or overcome the legal effect of the evidence for the other side," Houser v. Coursey, 310 Ky. 625, 221 S.W.2d 432, 434 (1949) (quoting Reserve Loan Life Ins. Co. v. Boreing, 157 Ky. 730, 163 S.W. 1085, 1087 (1914)), a trial court has control over the use of such evidence as a part of its power to control the order of the proceedings. See RCr 9.42(e); see also Leslie W. Abramson, 9 Kentucky Practice, Criminal Practice and Procedure § 26:37 (4th ed. 2003). Indeed, for this reason, we remarked long ago that "such discretionary variations should be liberally dealt with" on review. Bennett v. Commonwealth, 150 Ky. 604, 150 S.W. 806, 808 (1912) (quoting Wigmore, Evidence § 1873).

Turning to Appellant's arguments here, we hold that the trial court's admission of Dr. Eaton's testimony in rebuttal did not rise to "manifest injustice," RCr 10.26, because the testimony was withheld until rebuttal for a "good reason," towards "the furtherance of justice." RCr 9.42(e). Here, the trial court ordered that the testimony be withheld until rebuttal so as to relieve Angela's and Appellant's objections that the substance of the testimony was undisclosed and thus prejudicial to their defense. Indeed, counsel for Angela asked the trial court to limit the testimony to rebuttal, if at all.

Consequently, the trial court prohibited the Commonwealth from presenting the evidence during its case-in-chief to give the co-defendants' an opportunity to discover the substance of Dr. Eaton's testimony. The trial court

then gave them such an opportunity, allowing them to interview Dr. Eaton before he testified. This was certainly motivated by a good reason towards the furtherance of justice. The record does not establish that the Commonwealth intentionally withheld Dr. Eaton's testimony in order to gain an undue advantage over Appellant or that it did so in bad faith, which would compel a different conclusion. See Davis v. Commonwealth, 795 S.W.2d 942, 947 (Ky. 1990); See v. Commonwealth, 746 S.W.2d 401, 403 (Ky. 1988). Therefore, we find no palpable error in this regard.

C. Prosecutorial Comments on Right to Remain Silent

Appellant's final argument is that his convictions must be reversed because the Commonwealth improperly commented upon his failure to testify at trial, thus violating his Fifth Amendment right against compelled self-incrimination. We, however, disagree and conclude that the trial court did not abuse its discretion in overruling Appellant's motion for a mistrial.

The comments that Appellant now challenges were made during the Commonwealth's closing argument. There, the prosecutor assailed an argument previously asserted by Angela's counsel, namely, that the Commonwealth had not examined every potential reason why the arson might have occurred and that the Commonwealth should have considered that a third party seeking revenge could have been the actual perpetrator. The Commonwealth countered that this was mere speculation because the only motive evidence presented to the jury went to that of the co-defendants and the potential for significant insurance proceeds. The Commonwealth then continued, stating:

> Your instructions tell you that these defendants have the right to remain silent. They do. But [co-defendant's counsel] suggests to you that the Commonwealth, the detective, the investigating officers should have assumed a revenge motive in the absence of any information from anyone.

To this comment, Angela immediately objected and moved for a mistrial, arguing that it was an improper attempt to draw attention to the co-defendants' right to remain silent. Appellant joined the motion. In reply, the Commonwealth contended that it was merely responding to the defense's closing argument and agreed that it could not comment on the co-defendants' decision not to testify. The trial court overruled the objection and denied the motion.

The Fifth Amendment of the U.S. Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In Griffin v. California, 380 U.S. 609 (1965), the U.S. Supreme Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Id. at 614; see also Spalla v. Foltz, 788 F.2d 400, 403 (6th Cir. 1986) (citing Griffin); KRE 511(a). If a reviewing court determines that a comment did improperly touch upon the defendant's decision to remain silent, its effect, being constitutional error, must be harmless beyond a reasonable doubt to avoid reversal. See Chapman v. California, 386 U.S. 18, 26 (1967).

"[T]he rule set forth in Griffin applies to indirect as well as direct comments on the failure to testify." Spalla, 788 F.2d at 403. The test for whether such a comment was improper is "[w]hether the language used was

manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Butler v. Rose, 686 F.2d 1163, 1170 (6th Cir. 1982).

Here, we find it difficult to construe the prosecutor's remarks as in any way improper because they expressly (and correctly) referenced and reiterated the trial court's previous instruction. That instruction stated:

> A Defendant is not compelled to testify and the fact that the Defendant did not testify in this case cannot be used as an inference of guilt and should not prejudice him in any way.

Appellant does not contest the clear constitutionality of such an instruction, one properly mirroring RCr 9.54(3). See generally Lakeside v. Oregon, 435 U.S. 333 (1978). For this reason, we fail to see what the prosecutor's subsequent comments added to what the jury already knew: that Appellant had a right to refuse to testify, that he exercised that right, and that such a choice could not be used as evidence of his guilt.

Yet, even if we assume that the prosecutor's comments carried an impermissible inference beyond the instructions, we believe that the statements, in context, were not manifestly intended to be, or were of such a character that the jury would naturally and necessarily take them to be, a comment upon Appellant's failure to testify. This is because "the prosecutor's reference . . . [was] a fair response to a claim made by the defendant," United States v. Robinson, 485 U.S. 25, 32, representing an "equally plausible" explanation for the statement, Lent v. Wells, 861 F.2d 972, 975 (6th Cir. 1988). See also United States v. Norwood, 555 F.3d 1061, 1067 (9th Cir. 2009); United States v. Smith, 41 F.3d 1565, 1569 (D.C. Cir. 1994).

Just prior to the Commonwealth's closing argument, counsel for Appellant's co-defendant asserted that the Commonwealth's case was deficient because it had failed to investigate the possibility of a third-party revenge motive, which, if done, may have exonerated the co-defendants. Thereafter, the Commonwealth explicitly prefaced its response to the argument as such ("But [co-defendant's counsel] suggests to you that . . ."), signaling to the jury that the comments were not "on [the prosecutor's] own initiative." Robinson, 485 U.S. at 32.

In addition, it is worth noting that the prosecutor was truthful in explaining that there was, in fact, no information supporting defense counsel's claims. The record shows that Detective Terry Scott testified at trial that, when asked, both Appellant and Angela stated that they had no enemies or ongoing grudges so as to suggest that another was responsible for the arson.

That the prosecutor phrased his isolated comment collectively—"without any information from anyone"—strengthens our conclusion that the prosecutor did not plainly intend the comment to motivate the jury to infer that Appellant's failure to testify was evidence of his guilt. We also think it significant that the prosecutor's past-tense phrasing highlighted the lack of revenge motive evidence not just at trial, but also at any point in the case prior to trial, which explained why the Commonwealth did not pursue an investigation in this regard. Cf. Robinson, 380 U.S. at 30–31. To this end, we believe that the prosecutor's comments were intended to be a legitimate rebuttal to arguments just advanced by defense counsel in closing that, in fact, ran contrary to the evidence presented. The trial court, therefore, did not err in

denying Appellant's motion for a mistrial. Cf. Hall v. Vasbinder, 563 F.3d 222, 233 (6th Cir. 2009).

III. Conclusion

For the above stated reasons, we hereby affirm Appellant's convictions.

All sitting. All concur.

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