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NOT TO BE PUBLISHED OPINION

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RENDERED: NOVEMBER 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000562-MR

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

JOHN SIZEMORE — APPELLANT

V.

ON APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
NO. 07-CR-00104-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, John Sizemore, was found guilty by a Clay Circuit Court jury of complicity to murder. Appellant was sentenced to thirty (30) years imprisonment. He now appeals his conviction as a matter of right. Ky. Const. § 110(2)(b).

I. Background

In the summer of 2007, Gerald Sizemore was living in Clay County, Kentucky, and married to his second wife, Bobbie Cheryl Clarkson.[1] At approximately 9:45 p.m. on the evening of August 19, 2007, the couple's son, Dillon, called to tell his father that he was on his way home from Cincinnati. Yet, when Dillon arrived home at about 11:00 p.m., Gerald was not there. One of Gerald's other children, April, arrived home at

[1] There is no evidence that Gerald and Appellant were closely related.

about 12:00 a.m. and when their father was still not home, the two began to worry. Dillon and April placed some phone calls and drove around looking for Gerald, all without success.

Shortly after returning home at about 2:00 a.m., Dillon and April heard what sounded like a car crash.[2] Standing close to the door, the two saw Gerald enter the front yard so badly beaten and covered with blood that he was nearly unrecognizable. When he reached the house, April began to render aid and asked Gerald who had done this to him. He responded, "Starr's boyfriend,"[3] and then added that it was April's boyfriend, Gary Becknell. When Gerald's wife, Cheryl, entered the room, Gerald exclaimed, "It's that goddamn bunch you fool with."[4] Though Gerald did not want anyone to call the police or EMS, April called 911 after finding a wound under his shirt.

Gerald was taken by ambulance to the Manchester hospital before being airlifted to the University of Kentucky hospital in Lexington. Surgery, however, was unsuccessful and Gerald was declared brain dead. Life support was discontinued and Gerald died. The cause of death was determined to be blunt impacts to the head resulting in a six-

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[2] Gerald's car was later found to have hit a light pole.

[3] Gerald repeated the statement approximately thirty minutes later when police arrived on the scene, though it appeared nonsensical. Starr would later testify that she did not have a boyfriend and that her husband, Mark Kidd, was working in Virginia at the time.

[4] April testified at trial that Gerald's comment was directed at Cheryl.

inch brain laceration and significant hemorrhage.[5] There were several bruises and abrasions on his face and both sides of his body, indicating that he had been dragged on the ground at some point. He had two broken ribs and injuries to his extremities consistent with defensive wounds.

The Manchester City Police Department immediately began investigating Gerald's whereabouts on the night of August 19th, but developed no leads. However, after asking for tips on a local T.V. station, the investigating officer, Marion Spurlock, received an anonymous phone call informing him that the caller had last seen Gerald's car in Appellant's driveway. Acting on this information, Spurlock and other officers went to Appellant's home to further investigate. They first visited the home of Appellant's brother, Eugene Sizemore, which was located next to Appellant's. Eugene and Appellant's nephew, Michael Sizemore, both indicated that there had been a fight at Appellant's home. The officers then proceeded to Appellant's home and noticed broken glass on the driveway, blood on the porch, and a bleach bottle in the yard.[6]

Appellant answered the door and invited the officers inside. He consented to a search of his home, several items were seized, and the

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[5] In spite of the injury, the medical examiner believed that Gerald could have had lucid intervals for a few hours, but that he could also suffer from erratic behavior.

[6] The officers testified that they could smell the odor of bleach in the driveway and later testimony would reveal that chlorine bleach can be used to degrade DNA and prevent analysis.

officers noticed that Appellant had bruising around his eyes and various scratch marks. He agreed to accompany the officers to the police station and make a statement. Therein, Appellant stated that he had known Gerald all of his life, but had not seen him in several years. Appellant admitted that he was an alcoholic and had been drinking prior to Gerald coming to his house on the night of the 19th. Appellant stated that Gerald came to his home already bleeding and stated that he had been involved in an altercation. Appellant stated that Gerald was drinking and snorting Xanax pills.[7] Ten to fifteen minutes later, however, Gerald "went crazy", started calling Appellant the name "Cheryl", and began hitting and attacking Appellant. Appellant claimed that he managed to push Gerald out of the door before locking him out. Gerald then allegedly got into his car and drove away. Appellant stated that he had been hurt in the altercation and that there was blood all over him. By the end of the interview, however, Appellant stated that he was not really sure what had happened because he was intoxicated.

The next morning, police obtained an arrest warrant for Appellant and a search warrant for his home. More items were seized, including glass ashtrays (one of which appeared to have been recently washed) and a twenty-pound barbell. After his arrest, Appellant was interviewed again. He recounted that Gerald had arrived at his home sometime after midnight, already bleeding. Gerald immediately began drinking and ingesting pills. The two talked and, at some point thereafter, Gerald

[7] At the hospital, Gerald's blood alcohol level was 0.12.

became agitated, called him the name "Cheryl," and attacked Appellant. In this statement, however, Appellant added that he was afraid no one could come to his defense and so he defended himself by grabbing anything he could get a hold of and began to strike Gerald, "splitting his brains out." When asked what he used, Appellant stated that it was an ashtray or a barbell. He managed to shove Gerald out of the front door, but did not recall going out of the house with Gerald. Appellant claimed that he did not know of any attempts to clean blood from the scene.

After interviews with Eugene and Michael, the police still believed that Appellant was not disclosing all that he knew. Appellant thereafter gave a third and final recorded statement. In this lengthier interview, Appellant disclosed that he was suffering from liver cancer and had just gotten out of prison in Minnesota (at some point prior to or during 2007). His version of events was largely consistent with prior interviews, but differed in some significant respects. Notably, Appellant added that when Gerald attacked him, Appellant called out for help from Eugene and Michael. Eugene unsuccessfully tried to remove Gerald from Appellant before Michael and another individual, Nathan McDaniel, came to his aid. Appellant stated that Michael and Nathan beat Gerald both inside and outside of the house with some objects and "stomped the shit" out of Gerald's body for "don't know how long" as he lay in the driveway and over Appellant's pleas for them to stop. Appellant admitted that he struck Gerald with a glass ashtray during the altercation and stated that

Michael later used bleach to clean blood from the scene in the early morning light.

Appellant, Eugene, Michael, and Nathan were indicted by a Clay County Grand Jury for murder and complicity to murder, but Appellant's trial was severed from the co-defendants'. At trial, Appellant's three police interviews were played for the jury. Other evidence included the testimony of Roderick Steadman, who shared a cell with Appellant while both were incarcerated in Lexington, Kentucky prior to trial (in March of 2008), wherein he claimed that Appellant confessed to the crimes. Appellant only presented one witness in his defense, his sister. At the conclusion of trial, Appellant was found guilty of complicity to murder and was sentenced in accordance with the jury's recommendation, thirty (30) years imprisonment.

On appeal, Appellant raises four principal allegations of error in his underlying trial: 1) that references to his prior imprisonment constituted impermissible character evidence; 2) that the trial court failed to exclude a prosecution witness; 3) that the evidence did not reasonably support the murder instructions; and 4) that the prosecutor for the Commonwealth engaged in misconduct. For the reasons that follow, we affirm Appellant's conviction.

II. Analysis

A. References to Prior Imprisonment

Appellant first argues that this Court should reverse his conviction because the trial court improperly admitted references to past

imprisonment, representing impermissible character evidence pursuant to KRE 404(b). He challenges the admission of such references revealed at trial through both the testimony of Roderick Steadman as well as a statement Appellant made in his second police interview. We review each separately.

1. Steadman's Testimony

Prior to trial, Appellant contended that the testimony of Roderick Steadman would possibly reveal that Appellant was incarcerated in March of 2008 in a federal prison in Lexington, Kentucky. The Commonwealth countered that such references were necessary to provide context to Appellant's confession and that omission of the references could mislead the jury. We agree and do not believe that the trial court erred.

At trial, the Commonwealth presented the testimony of Roderick Steadman. Steadman testified that Appellant confessed to the crime while the two were "in a special housing unit," sharing the same "cell" in a Lexington, Kentucky prison. Appellant allegedly told Steadman that he and Gerald were at his trailer snorting Xanax and drinking whiskey when Gerald began calling Appellant "Cheryl." Appellant stated that he and Cheryl had an ongoing drug and physical relationship and that Gerald began accusing him of "messing around with his wife." A fight broke out and Appellant held Gerald down as Eugene and Michael beat him. They eventually killed Gerald with a lamp (or some similar object) and Appellant claimed that blood had gotten on nearly everything. The

group then put Gerald in his car, drove him off their property, and put him behind the wheel somewhere else to make it appear as though Gerald was in a car wreck. In closing argument, the Commonwealth referenced (albeit mistakenly, discussed *infra*) Steadman's testimony and Appellant's imprisonment at the time of the confession, though never identifying the underlying offense.

As Appellant argues, it is generally true that KRE 404(b) prohibits the use of evidence of crimes other than those charged "to prove that an accused is a person of criminal disposition," Drumm v. Commonwealth, 783 S.W.2d 380, 381 (Ky. 1990).[8] Yet, it is also true that such evidence may be admissible where the evidence is "so inextricably intertwined *with other evidence essential to the case* that separation of the two could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2) (emphasis added). Moreover, it is well-established that evidence of other crimes may be admitted "[i]f offered for some other purpose." KRE 404(b)(1).

Here, the Commonwealth rightly argued that exclusion of the confession's context – within prison, to a fellow cell mate – could potentially thwart a complete presentation of essential evidence to the case, as well as mislead the jury. Indeed, the surrounding circumstances were critical to a proper understanding of the confession as well as Steadman's veracity. Moreover, the fact of Appellant's

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[8] Drumm has been superseded in part due to the adoption of KRE 803(4). See Garrett v. Commonwealth, 48 S.W.3d 6, 10-11 (Ky. 2001).

imprisonment with Steadman was in no way offered to show his propensity to commit the charged crime. Accordingly, we do not think the brief and isolated references to Appellant's imprisonment with Steadman within the context of his purported confession amounted to error. Cf. Major, 177 S.W.3d at 708 ("[T]he evidence of his incarceration in Kentucky . . . provides the setting and context within which he called and confessed to his father of the murder of Marlene."); Chumbler v. Commonwealth, 905 S.W.2d 488, 494 (Ky. 1995) (harmless error where statements did not represent confession).

2. Appellant's Statement

Appellant also sought to prevent the introduction of his admission to police that he had just gotten out of a Minnesota prison prior to or during 2007. Reference to his Minnesota imprisonment was made at trial when the statement was played for the jury and when mentioned in the Commonwealth's closing argument. Though the statements may have been admissible as an admission pursuant to KRE 801A(b)(2), we believe it was, nonetheless, error for the trial court to admit Appellant's statement from his interview. The fact of Appellant's Minnesota imprisonment had absolutely nothing to do with the crime charged, offered the Commonwealth no necessary context, and was not inextricably tied to essential evidence in the case. As such, it was, pursuant to KRE 401, irrelevant and the trial court should have simply redacted any such reference.

This error notwithstanding, because we cannot say that "'the error itself had substantial influence'" upon Appellant's trial such that it "substantially swayed" his conviction, the error was harmless. Winstead v. Commonwealth, 283 S.W.3d 678, 688-89 (Ky. 2009) (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)); see also RCr 9.24. The Commonwealth did not draw great attention to Appellant's Minnesota imprisonment. It was mentioned briefly by Appellant in his statement and the prosecutor for the Commonwealth only referenced it (mistakenly) as the setting of Appellant's confession to Steadman. The underlying offense was never identified and it was not used to establish Appellant's criminal character. Moreover, independent evidence at trial – notably Appellant's confession to Steadman and his multiple police interviews – so strongly pointed to Appellant's guilt that the error could not have had substantially swayed his conviction.

B. Failure to Exclude Prosecution Witness

Appellant's next argument on appeal is without merit and warrants little attention. He contends that the trial court improperly allowed Gerald Sizemore's brother, Larry, to sit at the prosecution's table and remain in the courtroom after he had testified.

KRE 615 provides, in part, that "[a]t the request of a party[,] the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion." KRE 615. This Court has explained that "the purpose of [KRE 615] is to ensure the integrity of the trial by denying the witness an

opportunity to alter testimony in the light of that presented by other witnesses." Epperson v. Commonwealth, 197 S.W.3d 46, 58 (Ky. 2006) (citing Smith v. Miller, 127 S.W.3d 644 (Ky. 2004)).

Here, however, it is readily apparent that Larry Sizemore was *the first witness to testify* – a fact that Appellant does not contest. As such, there was no violation of KRE 615 and thus the trial court properly denied Appellant's motion.

Though Appellant also suggests that it was, nevertheless, somehow error for the trial court to permit Larry Sizemore to be present at the prosecution table, we have rejected similar contentions before:

> This practice is neither new nor unusual. It is so well established that there is no need for a citation of authority and, as a matter of fact, it has been the law of this Commonwealth for so long that the mind of man runneth not to the contrary that in a criminal case the trial judge, in his discretion, may allow one witness to remain in the courtroom to aid the Commonwealth's Attorney.

Brewster v. Commonwealth, 568 S.W.2d 232, 236 (Ky. 1978). Here, the Commonwealth merely desired Larry Sizmore's presence at its table as a representative and Appellant makes no argument that he engaged in any improper conduct or was similarly used while seated. The trial court did not abuse its discretion in this matter.

C. Sufficiency of the Evidence

Appellant also argues that his conviction should be reversed because the trial court, in denying his motion for a directed verdict, permitted his conviction for complicity to murder on insufficient evidence and, in so doing, denied him due process pursuant to Jackson v.

Virginia, 443 U.S. 307 (1979). Having reviewed the record, we cannot agree.

In Jackson, the United States Supreme Court held that "an essential" protection "of the due process guaranteed by the Fourteenth Amendment" is that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson, 443 U.S. at 316. While "the critical inquiry on review of the sufficiency of the evidence . . . must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt," it "does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" Id. at 318-319 (quoting Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 282 (1966)) (emphasis in original). "Instead, 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." Id. at 319 (citing Johnson v. Louisiana, 406 U.S. 356, 362 (1972)).

The above principles are reflected in our familiar standard of review for the denial of a directed verdict:

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of

> ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). For our purposes, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Id. (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)). Therefore, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." Id.

Here, the jury was instructed pursuant to KRS 502.020(1).[9] "In the context of criminal homicide, a defendant can be found guilty by complicity of an intentional homicide [KRS 507.020(1)(a)] . . . under KRS 502.020(1) only if there is evidence that he/she either [1] actively participated in the actions of the principal . . . [2] *with the intent* that the victim's death . . . would result." Tharp v. Commonwealth, 40 S.W.3d 356, 361 (Ky. 2000) (emphasis in original) (citing Skinner v. Commonwealth, 864 S.W.2d 290, 300 (Ky. 1993) and Gilbert v. Commonwealth, 838 S.W.2d 376, 380 (Ky. 1991)).

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[9] The relevant portions of KRS 502.020, "Liability for the conduct of another; complicity," read as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense . . .

Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth but reserving to the jury questions of witness credibility, we hold that there was sufficient evidence presented for the jury to convict Appellant of complicity to murder. By Appellant's own admission, Gerald was with Appellant and at his home the night Gerald was fatally attacked. In his first interview, Appellant stated that he fought with Gerald; in his second interview, Appellant stated that he "split his brains out" with "anything he could get a hold of"; in his third interview, Appellant again stated that he struck Gerald with an ashtray, that Michael and Nathan "beat the hell out of Gerald" and stomped on his body in the driveway, and that Michael cleaned the scene with bleach. Steadman's testimony corroborated many of these statements, wherein Appellant also admitted to holding Gerald down as the others attacked him, before they killed him with a large object. In light of such evidence, it was not clearly unreasonable for the jury to find guilt.

D. Prosecutorial Misconduct

Finally, Appellant alleges that he was substantially prejudiced by the Commonwealth's improper closing argument. This Court will "reverse for prosecutorial misconduct in a closing argument only if the misconduct is 'flagrant' *or* if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury." Matheney v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006) (emphasis in original) (citing Barnes v.

Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002)). Appellant concedes, however, that he did not object at trial. We, therefore, "need only evaluate whether the prosecutor's [conduct] was 'flagrant'" and do not believe it so. Id.

Appellant first claims that it was misconduct for the prosecutor to state that Appellant was "a liar" in his closing argument. We cannot agree. A prosecutor "is entitled to draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make a reasonable argument in response to matters brought up by the defendant." Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971). Appellant conducted three interviews with the police and all accounts differed materially. Moreover, prior to the Commonwealth's closing, defense counsel for Appellant conceded the Commonwealth's point in his closing:

> I can say that after listening to the Commonwealth's case, that it would be easy to be convinced beyond a reasonable doubt that [Appellant] was not entirely honest to the [police officer] when he talked to him. . . . The Commonwealth has convinced you that [Appellant] lied, and I understand that.

The prosecutor's remarks were, therefore, proper and Appellant's contentions otherwise lack merit.

Similarly unpersuasive is Appellant's contention that the prosecutor for the Commonwealth improperly characterized Appellant's defense as trying "pull one over on you [the jury]." As we have previously explained, "[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that – *an argument.* A prosecutor may comment on

tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter, 744 S.W.2d at 412 (emphasis in original).

Appellant's final claim of prosecutorial misconduct, though ultimately unconvincing, merits greater discussion. In recounting Appellant's confession to Steadman and its implications, the prosecutor mistakenly stated that the confession occurred while the two were imprisoned together in a *Minnesota* prison. While it is true that Appellant had been in a Minnesota prison prior to the crimes at some point prior to or during 2007, Steadman's testimony placed the two in a *Kentucky* prison at the time of Appellant's confession in March of 2008. Upon this clear mistake of fact,[10] the prosecutor further argued that Appellant likely confessed in Minnesota because the two were significantly removed from any pending investigation in Clay County, Kentucky.

We, however, do not believe that the prosecutor's mistaken argument was, by any means, flagrant. Cf. United States v. Carroll, 26 F.3d 1380, 1389-90 (6th Cir. 1994) ("[T]hese improper remarks were isolated, and there is no indication that they were *deliberate*.") (emphasis added). A vigilant juror would have immediately recognized the prosecutor's mistaken geography based upon the similar evidence presented at trial. As a result, the prosecutor's additional faulty

[10] A review of the record demonstrates that the prosecutor was apparently under this mistaken assumption for some time. He earlier indicated that Appellant and Steadman were incarcerated together in a Minnesota prison during a bench conference on a separate matter.

inference could not have been accorded significant weight in bolstering Steadman's testimony.[11]

III. Conclusion

Therefore, for the above stated reasons, we hereby affirm Appellant's sentence and conviction.

All sitting. All concur.

[11] Even if the conduct were flagrant, "we would also have to find that Appellant suffered 'manifest injustice' before we could grant any relief to which he might have been entitled as to the unpreserved error." Matheney, 191 S.W.3d at 607 n.4 (noting proper analysis); see RCr 10.26; Brooks v. Commonwealth, 217 S.W.3d 219, 225 (Ky. 2007) ("To prove palpable error, Appellant must show the probability of a different result or error so fundamental as to threaten his entitlement to due process of law.") (citing Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006)). While the prosecutor's mistake may have been error, it was not so grave as to render Appellant's entire trial fundamentally unfair.

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