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NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000848-MR

JUAN R. PELEGRIN-VIDAL — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NO. 02-CR-002886

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Juan Pelegrin-Vidal, was found guilty by a Jefferson Circuit Court jury of murder and burglary in the first degree. Appellant was later sentenced to twenty years for his burglary conviction and life without parole for the murder conviction, to be served concurrently. He now appeals his convictions as a matter of right. Ky. Const. 110(2)(b).

I. Background

In 1995, Appellant moved to the United States from Cuba. He later married Sonia Ramos in February of 1999. In July of 2002, however, Appellant met the victim, Elaine Fonseca, herself a Cuban immigrant, and the two began dating despite their twenty-year age difference. About a month later, Appellant

and Sonia separated. Neither Appellant nor Elaine informed her parents of their relationship.

In December of 2002, Elaine became pregnant. She decided to terminate the pregnancy and informed Appellant of her decision. Thereafter, Appellant admitted their relationship to Elaine's mother, telling her that he was the father of Elaine's child. Elaine's mother demanded that Appellant never return to their house.

Subsequently, Elaine asked her friend, Zaurys Batista, to drive her to a local abortion clinic.[1] Calling Appellant from the clinic, Elaine informed Appellant that her mother was forcing her to have an abortion. Upset, Appellant later entered the clinic and confronted Batista, telling her that Elaine should not be getting an abortion. Appellant then attempted to enter several examination rooms before clinic personnel arrived and asked him to leave the premises.

Apparently trying to halt Elaine's abortion, Appellant then visited Elaine's father at his workplace and expressed fear that she could be harmed by the procedure. As he had done with Mrs. Fonseca, Appellant admitted their relationship and told Mr. Fonseca that Elaine was having an abortion. Though angry in hearing of her pregnancy, Mr. Fonseca replied that there was nothing he could do and that Appellant had disrespected his family and home.

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[1] Elaine confided that she was ending her relationship with Appellant and had refused to answer his phone calls.

After the abortion, Batista took Elaine back to her apartment, where Elaine's mother picked her up and took her home.[2] Appellant later called, asking Mr. Fonseca whether his daughter had arrived home from the clinic. Mr. Fonseca told Appellant that Elaine had not yet gotten home. The next morning, December 12, Mr. Fonseca left for work at 6:00 a.m., clocking in at 6:17 a.m. Mrs. Fonseca left for work around 6:20 a.m. According to Appellant, Elaine called him at 6:30 a.m. Aware that he had been at the clinic, Elaine told Appellant that she did not want him to be upset, explaining that she had no choice in the matter. She thanked him for coming to the clinic, told him to give her some time, and reassured him that things would work out and her parents would eventually understand.

At 6:39 a.m., 911 dispatch received a phone call from the Fonseca residence from a Spanish-speaking woman, indicating that someone was breaking into her house. Upon arrival, the police found a window pane broken in the front door, blood spots on the front steps leading up to the house and on the floor inside the door. Inside, they discovered Elaine on the living room floor, lying in a pool of blood. She was transported to the hospital and pronounced dead at 8:29 a.m. The cause of death was multiple blunt force injuries to the head including two injuries from a weapon with a circular surface.

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[2] Once there, Elaine began packing for a scheduled trip to Puerto Rico to visit family and friends.

The police went to the Jefferson County Board of Education, Appellant's employer, and spoke with his supervisor. There, they learned Appellant's address and that he drove a bus for the school system. They also learned that Appellant ordinarily reported to work at 5:45 a.m. and left to drive his route at 6:00 a.m. That day, however, Appellant had not come to work. His supervisor was concerned because it was unusual for Appellant to miss work, especially since he did not call to report his absence. She called Appellant's house and cell phone, leaving messages for him to return her calls. Leaving Appellant's workplace, the police then went to his apartment. After obtaining a search warrant, the police searched the apartment and found Appellant's passport, birth certificate, cell phone, and a picture of Elaine with Spanish writing on the back. The police contacted Appellant's friends and family, including Sonia Ramos, to ascertain Appellant's whereabouts, with no success.

On December 14, Sonia Ramos received a phone call from Appellant. She immediately asked whether he had any proof of his innocence, but Appellant claimed to be unaware of Elaine's death or any related investigation. Sonia proceeded to tell Appellant that the police were looking for him in connection with Elaine's death. He quickly ended the call without revealing his whereabouts.

At some point thereafter, Appellant fled to Texas, where he resided with Sonia's son, Luis. He called Sonia many times and, in late February of 2003,

she called police to inform them of their conversations.[3] Appellant eventually left Luis' home and traveled to Florida so that he might stay with his former brother-in-law, Angel Serrano-Garcia, and his family. Similar to his stay in Texas, Appellant talked to Sonia almost every day by phone. In March of 2003, Det. Virola, of the Louisville Metro Police Department, learned that Appellant was possibly staying with relatives in Florida and contacted Lt. Rafael Garcia with the City of Hialeah Police Department with information concerning Appellant's possible location. That same morning, officers arrived at the Serrano-Garcia residence where they arrested Appellant without incident.

After his arrest, Appellant told police that he knew he was wanted, but denied killing Elaine. Appellant claimed that he had not turned himself in because his truck had broken down and he did not have the money for its repair. The police then interrogated Appellant and he agreed to give a taped statement, in which he generally told police about how he and Elaine met and how their relationship had developed – adding that he did not approve of her abortion. Appellant went on to explain that Elaine called him on December 12 at 6:30 a.m. and talked about the abortion, about Appellant going to the clinic, and about Appellant calling the previous night. After this conversation, Appellant stated that he went to a laundromat just around the corner from Elaine's house and, upon seeing police and fire trucks at the house, thought

[3] Sonia said that Appellant was afraid to turn himself in because the jails did not have enough beds and he would have to sleep on the floor.

Mr. Fonseca had possibly harmed his wife, Mrs. Fonseca.[4] He then returned to his apartment, choosing not to not wash any of his clothes at the laundromat. Appellant allegedly had a doctor's appointment that same day at 1:00 p.m., but chose not to enter the office for fear of the apparent police investigation. Two days later, he fled the state. At this point in the interview, police played a tape of Elaine's 911 call, but Appellant had no visible reaction while listening.

On December 19, 2003, a Jefferson County Grand Jury indicted Appellant for the murder of Elaine Fonseca and burglary. At the conclusion of trial, the jury found Appellant guilty of the aforementioned charges. Appellant was sentenced to twenty years imprisonment for the burglary conviction and life without parole for the murder conviction, to be served concurrently. On appeal, Appellant raises five principal allegations of error: 1) that the trial court erroneously admitted the recording of the 911 call and the accompanying Commonwealth's transcript of the recording; 2) that the trial court erroneously admitted a photograph found in his apartment; 3) that the trial court permitted his burglary conviction upon insufficient evidence; 4) that the trial court erred in denying his motion to suppress his Florida statements; and, 5) that the trial court erroneously allowed the Commonwealth to define reasonable doubt during its voir dire. For the reasons that follow, we reverse Appellant's convictions.

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[4] Appellant believed that Elaine's father had something to do with Elaine's murder. He said that Mr. Fonseca knew a hit-man named "Rafael" from Cuba.

II. Analysis

A. 911 Call and Transcripts

Appellant first argues that the trial court erred by denying his motion to exclude the audiotape recording of Elaine's 911 call and the Commonwealth's transcript thereof. Though we find that admission of the audiotape was proper, we must agree that it was reversible error for the trial court to admit the Commonwealth's unsubstantiated transcript of the recording and, accordingly, we address that issue in greater detail.

1. Tape of the 911 Call

Admission of a tape recording rests within the sound discretion of the trial court. See Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988) (citing United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983)). Even if a portion of a recording is difficult to understand, the recording is nonetheless admissible unless the inaudible portions render the entire recording "wholly inaudible [or] unintelligible." Norton v. Commonwealth, 890 S.W.2d 632, 636 (Ky. App. 1994). In other words, a recording may be admitted unless "the inaudible portions are . . . so substantial as to render the recording untrustworthy as a whole." Id.

Having reviewed the recording, it cannot be said that the entire recording was "wholly inaudible [or] unintelligible." Id. Rather, we conclude that it was sufficiently comprehensible for admission, as it "offered competent, reliable evidence to assist the finder of fact in the deliberation of this matter." Id.

Thus, the trial court acted within its discretion in admitting the recording into evidence. Appellant's contentions otherwise are without merit.

2. Commonwealth's Transcript of the Call

Similarly, it has been held that the trial court's admission of recording transcripts is a decision reviewed for an abuse of discretion. See id. at 637. This standard asks whether a trial court's ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). For reasons hereinafter set out, we conclude that the trial court abused its discretion in allowing the jury to use the Commonwealth's full transcript and that such error, here, cannot be deemed harmless.

At trial, the Commonwealth introduced the 911 tape recording during the testimony of the dispatcher who received the call and requested the trial court to permit the jury to use a transcript of the call that it had prepared. Appellant objected, citing the Commonwealth's proposed interpretation of certain inaudible portions of the recording. The trial court overruled Appellant's objections and ruled, pursuant to Norton, 890 S.W.2d at 637, that the Commonwealth could properly submit its transcript of the recording along with Appellant's version of the transcript for the jury's use while listening to the tape.[5] Neither transcript was admitted as an exhibit, nor were they available during deliberations.

[5] For guidance, we note the trial court made no findings that the disputed parts of the recording were audible and identifiable.

The initial transcript was prepared by a police department transcriber and read, in relevant part:

> (Person speaking in Spanish) . . .
>
> (Inaudible) . . .
>
> Please, someone want to come to my house in the force.
>
> Let me connect you to Louisville Police
>
> 91 f..., f...
>
> (Dial tone) . . .
>
> (Phone dialing, rings 4 times) . . .

Based upon this initial police transcription, Appellant prepared his own transcript for the jury and it read, in relevant part:

> (Person speaking in Spanish)
>
> (Inaudible)
>
> CALLER: Please, someone wants to come to my house in the force.
>
> 911 Operator: Let me connect you to Louisville Police.
>
> CALLER: Please 915 . . .
>
> (Dial tone)
>
> (Phone dialing, rings 4 times) . . .

The transcript that the Commonwealth sought to introduce and the trial court admitted for the jury's use read:

> Elaine: *Vidal* . . . please no Rafa . . . [911 operator is speaking simultaneously, but his words are unclear] Please 911 to come to my

house in the fourth(?) Please 91 . . . fa . . .
Ah . . . [phone disconnects]

Police: Louisville Police, Cam Kuhn(?)

(Emphasis added).

We have confronted similar situations in the past. In Sanborn, this Court found reversible error where a trial court admitted into evidence the Commonwealth's disputed version of a transcript of the defendant's tape-recorded statement to a police officer where the defendant was not allowed an opportunity to challenge its accuracy.[6] 754 S.W.2d at 540. On appeal, such use of the Commonwealth's transcript was held to warrant reversal as it "certainly would sway [the jurors] as to the proper interpretation of the tape." Id. Sanborn concluded that it was not "within the discretion of the court to provide the jury with the prosecutor's version of the inaudible or indistinct portions." Id.

In Robinson, the issue concerned when and how the jury may use competing transcripts – indeed, a different and more complex situation than that presented in Sanborn. Robinson first noted that the preferred practice was *not* to submit transcripts to the jury *at all* unless both parties stipulate to their accuracy. 707 F.2d at 876. Without such stipulation and where a dispute still exists as to the recording's proper interpretation, "the trial court [should] make a pretrial determination of accuracy by reading the transcript[s] against the tapes" before allowing the jury to use the transcripts. Id. (quoting

[6] The jury was also allowed to view the transcript while listening to the recording at trial, as was the case here.

United States v. Slade, 627 F.2d 293, 302 (D.C. Cir. 1980)). Robinson explained that "[t]he third and least preferred method is to present two transcripts to the jury, one of which contains the government's version and the other the defense's version," this method being the least preferred because "the jury becomes the final arbiter of which version is most accurate." Id. Indeed, if the recording is significantly inaudible, any jury determination as to which version is correct is purely speculative: "where . . . the tapes are partially inaudible, the juror is precluded from making an intelligent comparison" and "the likely result is that the transcript becomes the evidence." Id. at 878. Robinson concluded that such "[s]hepherding [of] hearsay to the jury via the transcripts, without employing traditional safeguards, can be considered nothing less than prejudicial." Id.

We believe that such a speculative determination is an unacceptable result, as the purpose of all of the enumerated procedures is to establish "basic safeguards to ensure reliability." Id. at 877. We, therefore, adopt the Robinson "preference for using a transcript when the parties stipulate to its accuracy." Id. at 878. Where the parties, however, have not stipulated to the accuracy of the transcript's accuracy, "the transcriber should verify that he or she has listened to the tape and [has] accurately transcribed its content." Id. at 878-79. In addition to this measure, the "court should also make an independent determination of accuracy by reading the transcript against the tape." Id. at 879. However, where "there are inaudible portions of the tape, the court should direct the deletion of the unreliable portion of the transcript," which

"assumes that the court has predetermined that unintelligible portions of the tape do not render the whole recording untrustworthy." Id. For these reasons, the trial court's "submission of two versions of the transcript [is] prejudicial when the tape is significantly inaudible," as "[s]uch a practice would undoubtedly inspire wholesale speculation by the parties and engender jury confusion." Id.

Turning back to the case at bar, we hold that the trial court abused its discretion in allowing the Commonwealth's transcript to be used by the jury in listening to the 911 recording because the transcript contained an unsubstantiated interpretation of Appellant's last name – Vidal.[7]

Though the recordings (due to the denoising and slowed replay speed) arguably reveal the term "Rafa" – a common nickname for "Raphael" – in none of the modified and enhanced recordings can it be said that the name "Vidal" was discernable. As a result, the trial court submitted to the jury an interpretation that amounted to sheer speculation. See Sanborn, 754 S.W.2d at 540 ("It is not . . . within the discretion of the court to provide the jury with the prosecutor's version of the inaudible or indistinct portions."). Absent defense counsel's stipulation, the trial court should have rejected the unfounded and baseless "Vidal" interpretation asserted by the Commonwealth.

[7] In so concluding, this Court is fully aware that Sanborn involved a case where the contested transcripts were admitted into evidence and thus available during jury deliberations. Yet, the Court in Sanborn did not indicate that this additional fact was necessary to find error, only that it "compounded the error even further." See 754 S.W.3d at 540; see also Robinson, 707 F.2d at 878 ("The government urges this Court to give deference to the fact that the transcripts are mere aids which were not introduced into evidence. . . . However, the distinction becomes nebulous where, as here, the evidence is unintelligible.).

See Robinson, 707 F.2d at 878 ("Where, as here, there are inaudible portions of the tape, the court should direct the deletion of the unreliable portion of the transcript.").[8]

In the context of Appellant's case, we do not believe that this error was harmless. Of any word added to this transcript, few could be more purely incriminating than the defendant's last name – especially when directly tied to a common nickname for Raphael, "Rafa." Moreover, in this setting, we think it important to recognize that a suggestion – indeed, any suggestion – may make all the difference in the world when charged with deciphering an otherwise inaudible and unintelligible statement. See id. ("The practical effect of using an aid to comprehend unintelligible matter is that the aid becomes the evidence."). Given that the Commonwealth's addition to the transcript of Appellant's last name represented the only direct evidence against him in a circumstantial case, we are bound to conclude that it "substantially swayed" Appellant's conviction, thus warranting reversal. Kotteakos v. United States, 328 U.S. 750, 765 (1946); see also Winstead v. Commonwealth, 283 S.W.3d 678, 689 (Ky. 2009) ("The inquiry is . . . 'whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'") (quoting Kotteakos, 328 U.S. at 765); RCr 9.24.

[8] None of this is to say, however, that the trial court must be absolutely positive of the accuracy of the proposed interpretation in order to admit it as a part of the party's transcript. What is required is that the trial court, in listening to the recordings, find a reasonable basis for the proposed interpretation from the recording – i.e., the interpretation must at least be arguably correct.

Having found cause for reversal, we will consider such other issues as may call for dismissal, or are capable of repetition.

B. Sufficiency of the Evidence

Appellant next argues that the trial court erred in failing to direct a verdict on the charge of first-degree burglary. Specifically, Appellant now argues that the Commonwealth failed to prove that Elaine did not give Appellant permission to enter the Fonsecas' home. This argument, however, is one raised for the first time on appeal and, as such, is not preserved for our review.

At trial, Appellant made a general motion for a directed verdict at the close of Commonwealth's case-in-chief, which was renewed at the close of all evidence. Although Appellant claims his motion for directed verdict adequately preserved the insufficiency of the evidence claim in relation to the first-degree burglary charge, we note that neither motion addressed this more specific contention.[9]

By failing to raise this argument below, Appellant effectively denied the trial court "the opportunity to pass on the issue in light of all the evidence." Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998)). For this reason, we have held that "[a] new theory of error cannot be raised for the first time on appeal." Springer v. Commonwealth, 998 S.W.2d 439, 446 (Ky. 1999) (citing

[9] Indeed, Appellant's actual argument to the trial court centered on whether the Commonwealth failed to prove the identity of the perpetrator as Appellant.

RCr 9.22; Ruppee v. Commonwealth, 821 S.W.2d 484, 486 (Ky. 1991)); Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996) ("It must appear that the question was fairly brought to the attention of the trial court.") (overruled on other grounds by Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005)). This rule applies "both as to the matter objected to and as to the grounds of the objection." Id. Therefore, we do not address the merits of Appellant's argument any further.

C. Admission of Photograph

Appellant next claims that the trial court erred by admitting a photograph of Elaine that was recovered from Appellant's apartment. In particular, Appellant takes issue with the introduction of certain handwriting located on the back of the photograph, which, in Spanish, read: "Rafi, in what way will I tell you, I love you, I adore you, I need you. Tell me one thing..., do you believe me...?"

Appellant objected to the handwriting because the photograph did not reveal its author. Appellant, therefore, argued that the Commonwealth did not properly authenticate the photograph and, also, that the writing represented inadmissible hearsay. The Commonwealth countered that it was not arguing that any particular person wrote the note, but rather that it was merely introducing the photograph of the victim, found in Appellant's apartment, dated within the time frame of their relationship. The trial court admitted the photograph and allowed the court interpreter to interpret the writing for the jury.

Beginning with Appellant's authentication argument, we note that, pursuant to KRE 901(a), "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." We have held that the burden of authentication is slight, requiring "only a *prima facie* showing of authenticity." Johnson v. Commonwealth, 134 S.W.3d 563, 566 (Ky. 2004) (citing United States v. Reilly, 33 F.3d 1396, 1404 (3rd Cir. 1994)). The trial court's determination in this respect is reviewed for an abuse of discretion, see id., a standard asking whether its decision was "arbitrary, unreasonable, unfair, or unsupported by legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000) (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)).

Here, we do not believe that the trial court abused its discretion. Appellant's argument is similar to one rejected by the Eighth Circuit in United States v. Hyles, 479 F.3d 958 (8th Cir. 2007). There, the prosecutor introduced three photographs with writing on the back showing the appellant and a co-defendant standing in front of a vehicle. The appellant in that case objected to their admission, arguing "that there was no foundation for the admission of the writings because the government did not offer evidence as to . . . who wrote them." Id. at 968. There, as here, the prosecutor countered that who actually inscribed the writing on the photograph was irrelevant; the photograph and its writing were introduced to prove the association between the parties depicted in the photograph.

In determining that the photographs and writings had a proper foundation and were thus sufficiently authenticated, the Eighth Circuit noted the limited purpose for the photographs and writings was to prove the association between the parties. The Court found that the prosecutor had met its burden,[10] holding:

> The deputy who seized the photographs from Cannon's property at the jail testified that he saw the writing on the back when he seized them. Other officers identified Hyles and Cannon as the people pictured in the photographs, and the car as the same car they had seen Cannon and Tonya driving. The government demonstrated a rational basis for its claim that the pictures were of Cannon and Hyles, that the car was the Pontiac Parisienne, and that the writings shed light on the relationship between the co-conspirators. The district court did not abuse its discretion when it admitted the pictures and writings over Hyles's objection as to foundation.

Hyles, 479 F.3d at 969.

Similarly, here, the photograph that Appellant objected to was offered to prove that Appellant had a photograph of Elaine in his apartment and to establish the time frame of their relationship. The lead detective in this case, Det. Crask, testified that he participated in the execution of the search warrant on Appellant's apartment. Inside the apartment, he recovered the photograph of Elaine. He further testified that the photograph had writing on the back of it and the writing was in Spanish. The message was dated 9/11/02 and addressed to "Rafi."

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[10] The burden was on the prosecutor to prove the "evidence [was] sufficient to support a finding that the matter in question is what its proponent claims." FRE 901.

As we have noted, authenticating evidence need only pass a low threshold, requiring only a *prima facie* showing of authenticity. Thus, given the limited purpose of introducing the photograph, we believe that the Commonwealth properly authenticated the photograph. The trial court, therefore, properly exercised its discretion in admitting the photograph and the writing on its back.

As to Appellant's argument that the writing on the back of the photograph constituted inadmissible hearsay, we disagree. KRE 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Though Appellant argues that the writing was offered for the truth of the matter asserted, the Commonwealth was clearly not attempting to prove that the unidentified author of the writing loved, adored, or needed "Rafi." The photograph was entered for the limited purposes of showing that Appellant had a picture of Elaine in his apartment and showing that as of September 11, 2002 their relationship was ongoing.

D. Admission of Appellant's Statement

1. Waiver of Miranda Rights

Lastly, Appellant argues that the trial court erred in denying his motion to suppress his statement to the Hialeah, Florida police because he did not voluntarily waive his Miranda rights. Specifically, Appellant claims that he did not fully understand the implications of his waiver, due to his Cuban heritage. We disagree.

After Appellant's arrest by the Hialeah police department, he was interrogated by two Spanish-speaking officers. In their interrogation, the police officers established that Appellant spoke little English but understood their Spanish. They then obtained Appellant's date of birth, address in Louisville, and place of employment and established that he was not under the influence of drugs, alcohol, or medication. Appellant was then advised that he had the right to remain silent; that he had the right to consult with an attorney to get advice prior to and during the interrogation; that an attorney would be assigned to him before being questioned if he did not have the resources to hire an attorney; and if he decided to answer questions immediately, without the presence of an attorney, he had the right to stop answering until he consulted with an attorney. When asked, Appellant clearly indicated that he understood all of those rights.

Appellant now argues that the trial court failed to consider the implications of his Cuban background. Specifically, he argues that under the totality of the circumstances, he did not voluntarily waive his Miranda rights because his waiver was not made with a full awareness of the nature of the right being abandoned or the consequences of the decision to abandon it. See Mills v. Commonwealth, 996 S.W.2d 473, 481-482 (Ky. 1999).

We begin by noting that, under the Due Process Clause of the Fourteenth Amendment, the question of the voluntariness of a confession turns on the presence or absence of coercive police activity. See Colorado v. Connelly, 479 U.S. 157, 167 (1986). Accordingly, while an individual's cultural heritage is an

element to be considered in the totality of the circumstances analysis, it is only relevant inasmuch as its presence causes a defendant to be acutely sensitive to coercive police tactics.

It is well-settled law that a statement is not compelled within the meaning of the Fifth Amendment if an individual "voluntarily, knowingly and intelligently" waives his constitutional privileges. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Under Moran v. Burbine, 475 U.S. 412, 421 (1986), the United States Supreme Court explained that a finding of coercion involves two distinct considerations:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

(internal citations omitted). The Court concluded that "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both [1] an uncoerced choice and [2] the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (internal citation omitted). We also note that "the Commonwealth only needs to prove waiver of Miranda rights by a preponderance of the evidence." Mills v. Commonwealth, 996 S.W.2d 473, 482 (Ky. 1999) (citing Colorado v. Connelly, 479 U.S. 157, 168 (1986)).

Here, Appellant makes no argument that the Hialeah police department engaged in intimidation, coercion, or deception. Rather, he argues that he did not waive his rights with a full awareness of the right being abandoned or the

consequences of that decision due to his Cuban heritage. Yet, a transcript of the interrogation evidences no lack of understanding as to the nature of his Miranda rights:

> Lt. Garcia: Yes, ok-Umm, gentlemen, in the first place, what we are going to do before I ask you question about this case, I'm going to read you your rights. Ok?
>
> Appellant: That's all right.
>
> Lt. Garcia: If you don't understand your rights, I need you to tell me.
>
> Appellant: Correct.
>
> Lt. Garcia: At any moment did anyone speak to you about your rights, in some cases before, is this the first time you hear anything about this?
>
> Appellant: No, it's the first time.
>
> Lt. Garcia: Have you ever been arrested?
>
> Appellant: Never – never, you can check my criminal record that never.
>
> Lt. Garcia: Then I am going to tell you and let me know of any problem. You have the right to remain silent. Do you understand?
>
> Appellant: Yes.
>
> Lt. Garcia: Anything you say can and will be used against you in court. Do you understand?
>
> Appellant: Yes.
>
> Lt. Garcia: If you do not have the resources to hire an attorney, one will be assigned to you if you wish before being questioned. Do you understand me?
>
> Appellant: Yes.

Lt. Garcia: If you decide to answer questions now without the presence of an attorney, you still have the right to stop answering in whatever moment or until you consult with an attorney. Do you understand?

Appellant: Yes.

Lt. Garcia: Ehh. I wanted to ask you ask you about the case. Would you want to talk to me about what happened?

Appellant: I would like...

Lt. Garcia: I – I know – and, I am informing you that everything you are telling me it is being recorded.

Appellant: Mm-hmm.

Lt. Garcia: - and this recording will...

Appellant: Yes.

Lt. Garcia: ...will be taken up there, to the state of Kentucky.

Appellant: Yes, you explained it to me.

Lt. Garcia: He explained it to you, so – if you want to tell me something now or anything or wish ahh – to tell me everything that happened, you have the right to do so.

From this exchange, it is clear that Appellant was advised of his rights and understood each right, evidenced by the fact that he immediately began to tell his version of the events in question. We held in Ragland v. Commonwealth, 191 S.W.3d 569, 586 (Ky. 2006), that "[a] suspect may waive his Miranda rights either expressly or *implicitly*." (emphasis added) (citing North Carolina v. Butler, 441 U.S. 369, 375-76 (1979)). Indeed, "[w]hen a suspect has been advised of his rights, acknowledges an understanding of those rights,

and voluntarily responds to police questioning, he may be deemed to have waived those rights." Id. (citing Gorham v. Franzen, 760 F.2d 786, 795 (7th Cir. 1985); United States v. Ogden, 572 F.2d 501, 502-03 (5th Cir. 1978)). There being no evidence that Appellant otherwise misunderstood his rights, we hold that the trial court did not err in finding that Appellant knowingly, voluntarily, and intelligently waived his Miranda rights.

2. Invocation of Right to Counsel

Appellant also argues the trial court erred in overruling his motion to suppress his statement to the Hialeah police department for failing to honor his request for counsel. At issue is Appellant's following statement:

> I, I, I, - I am – I am here in Florida because I, I one – I one way or another would like to confront the situation, do you understand? - (cough) – but – because if I had wanted – if I – if I had wanted I – I woul – I would be, maybe, in Ar – arriving in Argentina by now. I am telling you because – because I looked for evidence, somehow – I don't know, maybe I made mistakes, but I looked for a way to – to – to – what is it called? To – to show – to show that I didn't – that I didn't create the situation but, this is not a movie that one – the hero looks for the evidence when – like, and goes out and looks for – because if it were up to me – I would make the father talk, do you understand? Because he would have told me something, because I know – I know that, if he – if he has a person; that person that he says that – that – that kills and that defends him because – that's why there are some things that I want to talk to an attorney about, because he knows how to manipulate the situation and – and – and – and maybe, things that I could tell you are important to him, do you understand?

Appellant argues this statement was a request for counsel. While it is true that "[i]f at any time during a police interrogation the suspect has 'clearly asserted' his right to counsel, [that] interrogation must cease until an attorney is present," Ragland, 191 S.W.3d at 586 (quoting Edwards v. Arizona, 451 U.S.

477, 485 (1981)), where "a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." Id. (quoting Davis v. United States, 512 U.S. 452, 459 (1994)); see also Dean v. Commonwealth, 844 S.W.2d 417, 420 (Ky. 1992) (request must be "unambiguous and unequivocal" to be "clearly asserted"). For example, the statement, "'Maybe I should talk to a lawyer,' was held not to have been a clearly asserted request for counsel." Id. (quoting Davis, 512 U.S. at 544).

Here, in light of the circumstances, we do not believe that Appellant's statement was a clear assertion of his right to counsel: "there are some things that I want to talk to an attorney about, because he knows how to manipulate the situation and – and – and – and maybe, things that I could tell you are important to him." Appellant's later statement to Det. Virola of the Louisville Metro Police Department further demonstrated his own awareness that he did not assert his right to counsel:

> I already talked with them [the Hialeah police department] and issued my statement. Enough that – that if – I – I didn't have to make a statement, I could have waited for a lawyer or something – but I did my – my statement and if that is – and if that statement is not enough for the truth, then they can do what they want with me. I am going to keep saying the same – because it was what happened, do you understand?

The trial court, therefore, properly overruled Appellant's motion to suppress his statement to the Hialeah police department.

III. Conclusion

For the foregoing reasons, we reverse Appellant's convictions and sentence and remand for further proceedings consistent with this opinion.

Schroder, Scott, and Venters, JJ., concur. Noble, J., concurs in result by separate opinion. Abramson, J., concurs in part and dissents in part by separate opinion in which Minton, C.J., and Cunningham, J., join. Cunningham, J., concurs in part and dissents in part by separate opinion in which Minton, C.J., and Abramson, J., join.

NOBLE, J., CONCURRING IN RESULT: I concur in the result reached by the majority, but would state that I do not think that dual transcripts should ever be submitted to the jury. I believe the taped statements are not the best evidence, they are the *only* evidence. Unless the parties stipulate to a transcript, it amounts to nothing more than someone saying "this is what the witness means." The jury has ears to hear, so we should let them.

ABRAMSON, J., CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I concur in part and dissent in part. The record and our standard of review compel the conclusion that the trial court appropriately addressed the 911 call and transcripts. Thus, the majority has needlessly ordered a retrial of this serious case.

This is a murder case in which the victim, Elaine Fonseca, was brutally beaten to death in her parents' home. Moments before the fatal attack, as her attacker was breaking into the residence, Fonseca called 911 for assistance. The call was recorded, and the recording was introduced at trial, as it originally

sounded but "denoised," and then in four "denoised and expanded" versions which progressively slowed the conversation. In conjunction with the recording, the trial court allowed the parties to provide the jury with transcripts of the call, and it is this provision of transcripts that the majority maintains necessitates a retrial. Respectfully, I disagree.

A transcript, of course, repeats in written form a recorded conversation. Although not evidence itself, the written version often significantly expedites the introduction of the recorded evidence by helping the jurors follow the conversation when the recording is difficult to hear or when it contains the voices of several people speaking over each other, speaking in rapid succession, or speaking in heavily accented English. Transcripts can thus be valuable trial aids, but their use entails a certain risk. The risk is that "the jurors may substitute the contents of the more accessible, printed dialogue for the sounds they cannot readily hear or distinguish on the tape and in so doing transform the transcript into independent evidence of the recorded statements." *United States v. Holton*, 116 F.3d 1536, 1540 (D.C. Cir. 1997).

To guard against this risk, appellate courts have insisted that certain precautions be taken to ensure that transcripts have at least "a semblance of accuracy," *United States v. Jacob*, 377 F.3d 573 (6th Cir. 2004), and that the juries using them know that they are interpretations of, but not substitutes for, the actual recordings. *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983). With respect to accuracy, as the majority notes, the preference is for the parties to stipulate that the proffered transcript is accurate. When the parties

disagree, however, as they often will, the trial court is to make a pretrial determination of accuracy by comparing the proffering side's proposed transcript with the recording. The court need not find that the proposed transcript is perfectly accurate before authorizing its use. *United States v. Hogan*, 986 F.2d 1364 (11th Cir. 1993). The transcript must, however, be a reasonable interpretation of the recording, and where portions of the recording are so unclear as to render any interpretation merely speculative, the transcript should indicate that those portions are unintelligible and should not purport to interpret them. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988) (*citing United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983)). If the court finds that the proffered transcript is sufficiently accurate and reasonable to be an aid to the jury and if the opposing side does not offer an alternative transcript, the court may allow use of the transcript, but it should inform the jury that the transcript is only one party's version.

An opposing party's remedy for an allegedly inaccurate transcript is to propose an alternative transcript of its own. *United States v. Holton, supra*; *United States v. Hogan, supra*; *United States v. West*, 948 F.2d 1042 (6th Cir. 1991) (*citing United States v. Slade*, 627 F.2d 293 (D.C. Cir. 1980)). The court should ensure that the alternative transcript, too, "has the semblance of accuracy" and is not unreasonable.

No matter which procedure is used—a transcript stipulated to by the parties, a single transcript which the opposing party will not stipulate to but which the court deems accurate enough to be an aid to the jury, or dual

transcripts both of which provide reasonable, non-speculative interpretations of the recording—the jury should be instructed that the recording is actual evidence of the recorded conversation and that the transcript is merely an interpretation of the recording. They should further be instructed to disregard anything in the transcript that they do not hear on the recording itself.

Whether any particular portion of the recording is clear enough to permit interpretation, and hence transcription, or is so unclear as to render any interpretation speculative and thus not to permit transcription is a matter left to the sound discretion of the trial court. *Sanborn v. Commonwealth*, supra. A trial judge's decision either to allow or to disallow a given transcript is not to be overturned unless "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In this case, the parties disputed whether the recording of Elaine Fonseca's 911 call was clear enough to be interpreted, but after listening to an enhanced version of the recording, one from which noise had been removed and which was slowed to about half its original speed, the trial judge determined that the brief call permitted interpretation and that the Commonwealth's interpretation—in particular its assertion that near the beginning of the call Fonseca says, "Vidal, please no Rafa . . ."—was sufficiently accurate and reasonable to be included in its transcription of the recording. Because Appellant Juan Pelegrin-Vidal contested that interpretation, the trial court, consistent with the case law discussed above, permitted him to offer a

counter-transcript.[11] He offered a transcript a police officer had prepared early in the investigation. That transcript characterized the initial part of Fonseca's portion of the 911 call as "inaudible." Both transcripts were presented to the jury in conjunction with the enhanced recording, but they were not introduced as evidence and were collected from the jury prior to its deliberation. During closing argument, moreover, both parties referred to the transcripts and invited the jury to listen carefully to the recording so as to hear the version that party favored. Both parties emphasized, however, that the transcripts were not evidence and that the jury was to rely ultimately and solely on what it heard on the recording.

The majority asserts that the trial court abused its discretion by authorizing the transcription of an "inaudible" portion of the 911 recording,

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[11] The record reflects that the issue arose on July 14, 2004, when Vidal moved to exclude the 911 tape and, if the tape was to be admitted, to exclude any transcript of the recording. On August 27, 2004, the court held a hearing on Vidal's motion, at which time the Commonwealth acknowledged its proposed transcript (which was in the record as part of Vidal's motion and was read at the hearing) and submitted as exhibits a copy of the original tape recording and a CD with the denoised and slowed versions of it. By order entered August 30, 2004, the court noted that it had listened to the enhanced versions of the recording and in light of that exhibit ruled that the Commonwealth's transcript was permissible under the law. By comparing the proposed transcript with the tape and satisfying itself, reasonably in my judgment and certainly within its discretion, that the transcript was a reasonably and sufficiently accurate reflection of the tape to be an aid to the jury, the trial court properly fulfilled its role as screener of the proposed transcript. The majority's characterization of the 911 tape as "inaudible" manufactures an abuse of discretion where in fact there was none.

that portion just mentioned when, according to the Commonwealth, Fonseca says, "Vidal, please no Rafa . . . ." The majority maintains that the name "Vidal" cannot be distinguished on the recording and that by including it in its transcript the Commonwealth introduced an interpretation of the recording that amounted to sheer speculation. With all due respect, the majority has apparently applied a standard of total clarity to the underlying recording and complete accuracy to the proffered transcript. As discussed above, those are not the proper standards. The recording need only be clear enough to make possible a reasonable, non-speculative interpretation, and the transcript need only have the semblance of accuracy. Under these standards, the trial court's decision to submit the parties' alternative transcripts to the jury was not arbitrary or unreasonable or in any other way an abuse of discretion, for, as enhanced, the recording is not at all "inaudible," as the majority posits. It plainly includes, if not the exact expression—"Vidal, please no Rafe . . ."—as interpreted by the Commonwealth, something so like it that the Commonwealth's interpretation is perfectly reasonable and anything but merely speculative.

By labeling the disputed portion of the recording as "inaudible"—again, it is not, it clearly contains words, not merely noise or garbled sounds, and at the least the words are very like the Commonwealth's interpretation—the majority has found an abuse of discretion where none exists and has needlessly imposed a retrial. Accordingly, I respectfully strongly dissent on this issue.

Minton, C.J.; and Cunningham, J., join.

CUNNINGHAM, J., CONCURRING IN PART AND DISSENTING IN PART: I join the opinion of Justice Abramson and wish to add to it.

It seems to me, that with our decision here today, we move further down the road in complicating what should be a fairly simple issue. Furthermore, by continuing to be guided by the 1983 *Robinson* case, we are falling more and more into the minority of states as to how transcripts should be handled.

Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988), cited by the majority, deals more with the unfairness of the method used than the admissibility of transcripts. In that case, the prosecutor's transcript was the only one offered into evidence, even though there were twenty-five incidents where the defense disagreed with the Commonwealth's transcript. It appears that the defendant there was not given an opportunity to offer his own transcript of the tape. Significantly, the Commonwealth's transcript was not used for the demonstrative purpose only, but was introduced into evidence for the jury to take into the jury room.

Transcripts are merely interpretations of original tape recordings. The source itself – the tape – may range from being totally inaudible to totally audible, but in most instances is somewhere in between. Someone has to interpret what is being said, and the fact that a tape is partially inaudible does not preclude it from being admissible. *Potts v. Commonwealth*, 172 S.W.3d 345, 352 (Ky. 2005) (citing *Norton v. Commonwealth*, 890 S.W.2d 632, 636 (Ky.App. 1994)).

Juries are just as capable of interpreting tape recordings as are judges and lawyers. Therefore, the critical threshold of the admissibility of this type of evidence is the tape itself. It is longstanding law that the decision to employ recordings and transcripts is a matter entrusted to the sound discretion of the trial judge. *Johnson v. Commonwealth*, 90 S.W.3d 39, 45 (Ky. 2002) (citing *United States v. Bryant*, 480 F.2d 785, 789 (2nd Cir. 1973)). *See also* McCormick on Evidence § 212 (2nd Ed.).

The *Robinson* case states the obvious preference for using a transcript when the parties have stipulated to its accuracy. This suggestion offers little help. Defense counsel will most likely be reluctant to stipulate to the accuracy of transcripts when the tape is damning and incriminating. To require a stipulation as to the accuracy of a transcript would place its admission solely in the hands of the defendant.

Evidence regarding the consideration of transcripts is not the most critical determination. The tapes themselves must be authentic, accurate, and trustworthy. *Commonwealth v. Brinkley*, 362 S.W.2d 494, 497 (Ky. 1962) (listing the 7 foundational requirements for admissibility).

Once the authenticity and integrity of the tape recording have been established, there must be a showing of relevance. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. KRE 401. A totally inaudible tape recording would have no relevancy because it is not "of consequence to the

determination of the action." This is a low threshold, however, because small bits and pieces of a tape recording may be of tremendous "consequence" while the rest of it is not.

Trial courts are allowed broad discretion in admitting the tapes themselves and, with the showing of their authenticity and relevancy, the judgment of the court should not be reversed unless there is a showing of an abuse of discretion. *Johnson*, 90 S.W.3d at 45. Once a tape has been admitted into evidence, each side has fair access to its own interpretation. For instance, counsel for each side may play the tape recording during closing argument and provide his or her own oral interpretation for the jury. There is no difference in this method of interpretation than a written interpretation through a transcript, which the jury may read during the playing of the tape recording. The only requirement should be that the methodology be fair. In other words, both sides must get their shot at submitting their own transcript – or interpretation – of what the tape relates.

That was done in this case. And the evidence in this case reveals that the tape recording was played several times so the jury had the opportunity to compare each of the transcripts with the actual recording. Since the Sixth Circuit federal case of *Robinson* was decided, other states have dealt much more liberally with the use of transcripts. *U.S. v. Robinson*, Slip Copy, 2008 WL 5381824 (S.D.Fla.) (If there is a dispute as to the transcript, each side should produce its version and/or each side may introduce evidence supporting the accuracy of its version or challenging the accuracy of the other

side's version. The jury must reconcile the accuracy.); *U.S. v. Ervin*, 300 Fed.App. 845 (11th Cir. 2008) (The proper protocol when a party disputes the accuracy of a transcript is for each side to produce its own version of the transcript or its own version of the disputed portions.); *Turner v. State*, 950 So.2d 243 (Miss.Ct.App. 2007) (Transcripts of audiotapes may be introduced into evidence for the same purpose that an expert witness's testimony is introduced – as a device to help the jurors understand other types of real evidence – and when there is a disagreement as to the accuracy of the transcripts, the proper procedure is for the jury to receive both sides' versions.); *Leal v. State*, 782 S.W.2d 844 (Tex.Crim.App. 1989) (If an agreed or stipulated transcript cannot be produced, then each side should produce its own version of a transcript, or its own version of the disputed portions of the transcript.); *State v. Rogan*, 640 N.E.2d 535 (Ohio Ct.App. 1994) (Defense counsel should be allowed to produce to the jury at the time of the playing of the tapes the defendant's version of the words being heard by the jury.); *People v. Haider*, 829 P.2d 455 (Colo.Ct.App. 1991) (If the parties do not stipulate to an official transcript, the judge may either make a pretrial determination of the accuracy of the transcript by comparing it to the tapes, or may permit the jury to examine both versions of the transcript so it can determine which is more accurate.)

I would simplify our own rule concerning the use of transcripts of tape recordings at trial. If the tape itself is admitted, then the interpretation should become a jury question. The jury can be assisted by interpretations distilled by

the adversarial process. As long as the transcript is duly authenticated by the person who transcribed it and each side is given an opportunity to use a transcript for demonstrative purposes, it is a fair process. The court should make sure that the tape is played through one time for each of the interpretative transcripts. This procedure was essentially followed in this case. I would affirm.

Minton, C.J.; and Abramson, J., join.

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