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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 18, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000647-MR

DATE 4/8/10 Kelly Klaben D.C.
APPELLANT

CAREY MCNEIL

V.
ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
NO. 07-CR-000329

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Carey McNeil, was convicted of one count of murder, one count of assault in the first degree, two counts of robbery in the first degree, one count of kidnapping, and one count of tampering with physical evidence. He was sentenced to a total of sixty-nine years' imprisonment and now appeals as a matter of right.¹ Appellant asserts four arguments on appeal: that the trial court erred in denying his motion to suppress his statements to the police; that the trial court erred in allowing an unsworn interpreter to interpret the testimony of a witness; that the trial court erred when it ordered the capital and noncapital sentences to be served consecutively instead of concurrently;

¹ Ky. Constitution §110.

and that the trial court erred in not declaring a mistrial when the jury could not agree on a sentence.

Appellant's story begins about 11:00 A.M. on January 12, 2007, when the Louisville Metro Police were called to the Jefferson Square Apartments on Outer Loop. Upon arriving, they found a man on the steps in the hall, bleeding from a head wound. His name was Angel Martinez. Martinez told the police that he came out of the adjacent apartment, and that they would find two dead men in the apartment. Police entered the apartment and found the bodies of Isaac Perez and Isaias Gallegos. Perez appeared to have been shot once in the head and Gallegos had sustained multiple blunt force injuries to the head. The police asked Martinez what happened. Martinez explained that three other men had also been in the apartment earlier. Two were Hispanic—one younger and one older. The third man was African American.

The police investigation revealed that the apartment was rented to Antonio Solis, who lived there with his wife Xaviera and their young child. Solis was not to be found. Police believed that he had fled to Mexico and was in the custody of the Tijuana Police. His wife Xaviera was found at her mother's address in Indiana. Xaviera Solis reported that, a little after seven on the morning of January 12th, she had picked up her husband (Antonio Solis) near a liquor store on Dixie Highway, and they had gone to her mother's house in Indiana. After a brief time, at about nine in the morning, she drove Antonio to a gas station to drop him off. She saw Antonio get into a black Camero

driven by Antonio's brother, Jesus Solis. There appeared to be another male in the car, either Hispanic or black. When asked what her husband did for a living, she said he sold narcotics.

Appellant became a person of interest because he lived next door to Jesus Solis and he was African American. He was picked up on an outstanding bench warrant on another matter and brought to the police station for questioning about the two murders. The interrogation lasted about eight hours. Initially, Appellant admitted that he was a friend and neighbor of Jesus, but denied that he was in the apartment at the time of the shooting. He denied shooting anyone or knowing who did the shooting. As the interrogation progressed, Appellant admitted he was present at the apartment at the time of the killings, but maintained that he did not shoot or beat anyone. Instead, he pointed the finger at Antonio as the shooter of Perez, and Jesus as the shooter of Martinez. He also said that both Antonio and Jesus beat Gallegos with a hammer.

After the police wrapped up the investigation, the grand jury indicted Appellant, Antonio Solis, and Jesus Solis on two counts of murder; one count of assault in the first degree; three counts of robbery in the first degree; one count of kidnapping; one count of trafficking in marijuana over five pounds with a firearm; and one count of tampering with physical evidence. The prosecutor filed a notice of aggravating circumstances, making the three charged eligible for capital penalties.

Three weeks prior to trial, Jesus Solis entered a plea to all charges and was sentenced to a total of thirty-five years in prison. Appellant elected a trial, and the trial took place from February 25, 2008 to March 11, 2008.

Numerous witnesses were called to testify during the trial. The police testified about the results of their investigation. A tenant in the apartment below the homicides, Francisco Garcia, was called to testify. Garcia testified through a Spanish-language interpreter who translated both the questions to Garcia and Garcia's answers. Garcia was in his apartment when a bullet came down from the ceiling. He went to get the apartment manager to show her the hole in the ceiling. As they were leaving his apartment, Garcia saw the injured man on the steps (Angel Martinez). Garcia testified that he saw a black car with dark windows, like a Trans Am, parked in front of the apartment building earlier that morning.

The apartment manager, Senda Murray, also testified. She saw the hole in the ceiling, the injured man, and was the one that called the police. She recalled seeing a black car frequently sitting in front of the building. She recalled that a black male and a Hispanic male would frequently be working on the car but she could not identify either.

Angel Martinez, the injured man who was shot in the head, testified. Martinez recounted the night before the shooting. He spent a night on the town, at bars and at a mobile home, drinking and using cocaine. At about 4:30 or 5:00 in the morning, he and four others left the mobile home and went

to Antonio Solis's apartment.² Perez and Gallegos were at the apartment, along with others. At the apartment the men continued drinking, doing drugs, and playing cards. While at the apartment, there was a knock at the door. Martinez saw a Hispanic man (Jesus Solis) and a black man (Appellant) enter and go directly to the bathroom with Antonio Solis.

About fifteen minutes later, Antonio Solis came out of the bathroom and continued playing cards. A few minutes later, Appellant came out of the bathroom with a gun and shot Isaac Perez in the head. He then put the gun to Martinez's head and held him to the ground. While this was going on, Antonio Solis and Jesus Solis beat Isaias Gallegos. Both Martinez and Gallegos were being questioned about where drugs and money were hidden, until Gallegos stopped breathing. Martinez told the men what they wanted to hear, and made up a location where drugs and money were hidden. Antonio Solis left to check for the money and drugs.

Jesus Solis started making phone calls while Appellant remained at Martinez's back with a gun. Jesus Solis and Appellant then dragged the two bodies to the bedroom and came back for Martinez, who was tied up and lying on the floor. At this point, Jesus Solis was holding a gun and Appellant was carrying a pillow. Martinez felt the pillow on his head and the gunshot, after which he too was dragged to the bedroom. The two assailants left. After

² While Martinez did not know the names of the people involved, their names are added here for clarity.

waiting ten to fifteen minutes, Martinez left the apartment looking for help. Martinez could not pick Appellant out of a police lineup.

The jury convicted Appellant of the capital crime of murder (Isaias Gallegos), recommending thirty-five years. The jury also convicted Appellant of first-degree assault (Angel Martinez), recommending twenty years to run concurrently; kidnapping (Angel Martinez), recommending twenty years to run concurrently; first-degree robbery (Isaias Gallegos), recommending ten years to run concurrently; first-degree robbery (Angel Martinez), recommending ten years to run consecutively; and tampering with physical evidence, recommending four years to run consecutively. This resulted in a total sentence of thirty-five years for the capital crime and thirty-four years for the noncapital crimes. The jury deadlocked on the issue of whether these two sentences should run consecutively or concurrently. The trial court determined that the sentences should run consecutively, and imposed a total sentence of sixty-nine years of imprisonment.

APPELLANT'S STATEMENT TO POLICE

Appellant's first assignment of error is that the trial court should have suppressed his statements to the police for two reasons: (1) the statement was the result of an illegal arrest not based on probable cause in violation of the Fourth Amendment and Section 10 of the Kentucky Constitution, and (2) the statement was involuntary and the result of extortion in violation of KRS 422.110.

Appellant's contention that the arrest was illegal because it was not based on probable cause conveniently ignores the fact that Appellant was not arrested for murder or for any other charge at issue in this case. Instead, Appellant was arrested on a bench warrant for an unrelated charge. This valid bench warrant provided all the probable cause that was necessary for Appellant's arrest. And once Appellant was under arrest, nothing prohibited the police from questioning him about another investigation. See *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Therefore, we need not inquire as to whether police had probable cause to arrest Appellant for the charges at issue in this case. See *Whren v. United States*, 517 U.S. 806, 813 (1996); *Commonwealth v. Kelly*, 180 S.W.3d 474, 479 (Ky. 2005). In addition, Appellant executed a valid waiver of his *Miranda* rights, which has not been challenged, and police informed Appellant that he was being investigated for the murders at issue in this case. Appellant's arrest was not illegal.

Appellant also requests his statement to police be suppressed because his statements were the result of "sweating" and coercion in violation of KRS 422.110. KRS 422.110 provides that

No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

Appellant contends that his interrogation was coercive and illegal because police interrogated him for eight hours, continued after he denied any involvement, and discussed his fears for his family's and girlfriend's safety.

“[T]he question of the voluntariness of a confession turns on the presence or absence of coercive police activity.” *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999) (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). See also *Soto v. Commonwealth*, 139 S.W.3d 827, 847 (Ky. 2004).

We agree with the trial court that the confession was not coerced. Other than its length, the interrogation was quite tame. However, the length of the interrogation in this case is not bothersome. The Appellant was arrested on another matter. He was informed that he would probably also be charged with murder near the beginning of the interview. Appellant talked freely, and he first brought up the issue of his family's and girlfriend's safety. He was concerned that, because a drug deal had gone bad, his family was in danger from the “Mexican Cartel” or the “Houston Mafia.”³ However it was not for something the police had done. Appellant never asked to end the interview and never requested an attorney. No “sweating” occurred, and there was no error by the trial court in not suppressing Appellant's statements.

UNSWORN INTERPRETER

The second assignment of error contends the trial court erred in failing to put a Spanish-language interpreter under oath. KRE 603 requires that before

³ Isaac Perez, the shooting victim, was from Mexico. Isaias Gallegos, the victim of the beating, was from Houston. Jesus Solis, another indicted defendant, had fled to Mexico and was in a Tijuana jail on unrelated charges.

testifying, every witness shall be required to swear or affirm to state the truth. KRE 604 provides that “[a]n interpreter is subject to . . . the administration of an oath or affirmation to make a true translation.”

Francisco Garcia was the downstairs tenant who testified that a bullet came through his ceiling. Garcia spoke limited English, and the court provided him with a Spanish-language interpreter. The court administered an oath to Garcia, but for some unknown reason, no oath was administered to the interpreter. This error went unnoticed during the trial and was not objected to. Therefore, Appellant requests review for palpable error under RCr 10.26. “A palpable error is one that ‘affects the substantial rights of a party’ and will result in ‘manifest injustice’ if not considered by the court.” *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (quoting RCr 10.26). “[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

The interpreter was not under oath when he translated Francisco Garcia’s testimony. However, the error was not palpable in this case. Garcia saw a bullet come through his ceiling and land on his coffee table. Garcia also testified that he saw a black vehicle outside of the apartment building on the morning of the murders. He did not see anything else. Garcia’s testimony directly mirrored that of Senda Murray, who also testified that a black vehicle was parked outside the apartment building, and that there was a hole in

Garcia's ceiling and a bullet on the floor.

Garcia's testimony did not add any prejudice to Appellant's case. The case against Appellant was based on Appellant's statement that he was present in the apartment at the time of the shooting and beating, and the testimony of one of the victims, Angel Martinez, who described in detail what happened to him and the others. Even though Martinez did not know Appellant's name, and could not pick Appellant out of a line-up, Martinez knew there was only one African American present.

With Appellant's partial confession, and the relative insignificance of Garcia's testimony, there was no substantial possibility of a different result due to Garcia's testimony through an unsworn interpreter. Therefore, there was no palpable error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

CAPITAL AND NONCAPITAL SENTENCES TO BE SERVED CONSECUTIVELY

Appellant also contends it was reversible error for the trial court to order his sentence for the capital offense of murder to run consecutively to his sentence for the noncapital offenses. The jury fixed a thirty-five year sentence for Appellant's capital offense (murder). The jury also, through a combination of concurrent and consecutive sentences, set a total sentence of thirty-four years for Appellant's noncapital offenses. The jurors were not able to agree, however, on whether the noncapital sentences should run consecutively or concurrently with the capital sentence. The parties agreed to release the jury after it was clear that further deliberations would be useless. After hearing

arguments from counsel, the court ordered that the capital and noncapital sentences run consecutively for a total of sixty-nine years' imprisonment.

Appellant asserts this was an abuse of discretion, because his co-defendant, Jesus Solis, received thirty-five years on a plea of guilty to all charges, which was the same as what the jury recommended for Appellant's one capital offense. Although the instructions ask the jury to recommend whether multiple sentences should run consecutively or concurrently, it has long been held that the ultimate decision is a judicial function. *Benet v. Commonwealth*, 253 S.W.3d 528, 536 (Ky. 2008) ("a trial court has the inherent discretion to decline to follow a jury's recommendation regarding whether multiple sentences should be served concurrently or consecutively"); *Dixon v. Commonwealth*, 478 S.W.2d 719, 719 (Ky. 1972) (citing *McBride v. Commonwealth*, 432 S.W.2d 410 (Ky. 1968)).

The co-defendant received thirty-five years on a plea of guilty to all charges, which included two capital murders and first-degree assault. Appellant went to trial and received a sixty-nine year sentence for one count of murder, one count of first-degree assault, two counts of first-degree robbery, one count of kidnapping, and one count of tampering with physical evidence. The sentence does not appear unreasonable. The co-defendant's sentence appears to be the result of a good defense attorney's negotiated plea. Attorneys often negotiate plea agreements so a defendant can receive a lesser sentence than what a jury would be likely to impose. Likewise, the

Commonwealth frequently offers a lesser sentence in order to avoid a trial. Appellant gambled and lost. There was no abuse of discretion by the trial court in running the sentences consecutively.

JURY DEADLOCKED ON SENTENCING

Finally, Appellant alleges the trial court erred in not granting a mistrial when the jury could not reach a decision as to sentencing. Sentencing was an issue with this jury. After several hours of deliberation, and a question about parole eligibility, the jury sent the court a question asking, “What if we cannot become unanimous during the sentencing process?” The trial court responded by giving the jury an *Allen* charge pursuant to RCr 9.57.

After further deliberation, the jury advised the court that it was “stuck [at] 10 to 2” and had “not budged” in five hours. The jury requested that the court “Please Advise[.]” Appellant’s counsel agreed to further deliberations only if the jury agreed that it would be useful, but believed a mistrial would be appropriate if the jury indicated further deliberations would be useless. The court agreed that, because it had already given the jury an *Allen* charge pursuant to RCr 9.57, a mistrial would be necessary if the jury felt further deliberations would not be helpful. The jury then returned to the courtroom.

The Court: Mr. Foreperson, do you think that any further deliberation would be useful?

Foreperson: Sir, I think that we’re stuck at where we stand.

The Court: Alright, now, without telling me the

specifics on this next question, . . .
has the jury reached a verdict on
any of the charges?

Foreperson: No, sir.

The Court: Okay. Now it's quarter to eight. *If*
[emphasis original] we were to send
you home for the night, let you get a
full night's sleep, to come back and
resume deliberating in the morning,
do you think that might be useful?

Foreperson: Perhaps.

The Court: Well that's what I'm going to do
then. I'm going to send you home
for the night.

The next morning, the court received a question from a juror, asking about the consequences if the jury could not agree. After discussing the issues, the parties agreed that the court should respond that it cannot answer the question. By early afternoon, after another question to the court about sentencing, the jury had arrived at sentences for each crime and had decided whether each noncapital sentence should run concurrently or consecutively. The only issue not decided was whether the noncapital offenses should run consecutively to, or concurrently with, the capital offense. With the jury indicating that it would not be able to decide this issue, the court dismissed the jurors.

The issue here is whether the court coerced the jury to reach a verdict.

[T]he ultimate test of coercion is whether the instruction actually forces an agreement on a verdict or whether it merely forces deliberation which results

in an agreement. We analyze the totality of the circumstances. The time lapse between the alleged coercive comment and the verdict may be relevant as part of the totality of circumstances, though not decisive. Statements which merely impress upon the jury the propriety and importance of coming to an agreement do not rise to the level of reversible error. At the same time, however, it must be remembered that the words and acts of a presiding judge have great weight with juries, and for that reason we have often written that he should at all times be cautious in what he says or does in the presence of the jury.

Bell v. Commonwealth, 245 S.W.3d 738, 742-43 (Ky. 2008), *overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008) (internal citations and quotation marks omitted).

Upon review of the record, it is clear that the trial court did not coerce the jury to reach a verdict. The jury deliberated on sentencing for approximately nine hours over a two-day period. Given the complexity of the case, the jury was bound to have questions and to take some time in arriving at a unanimous sentence on each charge. The jurors' questions to the court show that they took their responsibility seriously.

The exchange between the trial court judge and the foreperson was not coercive. The court simply asked whether it would be helpful to break for the night and resume deliberations the next day, and the foreperson responded "perhaps." The jury then reached a decision the next day on all sentencing issues but one, and it did so without any interference from the trial court. In no way did the trial court force agreement on a verdict; therefore, there was no

error.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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