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RENDERED: SEPTEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000757-MR

WOODY SMITH — APPELLANT

V.

ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
NO. 09-CR-00239

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Woody Smith, was indicted by a Campbell County Grand Jury for the murder of his wife. He was subsequently tried and convicted of murder and sentenced to life in prison. Appellant now brings this appeal as a matter of right. Ky. Const. § 110(2)(b).

On May 4, 2009, Amanda Hornsby Smith was discovered dead in the master bedroom of the home she shared with Appellant. She was found lying in bed with her hands and feet bound and ligature marks were on her throat. Earlier that day, around 3:00 p.m., Appellant showed up unexpectedly at the home of his mother, Phyllis Pflueger. He told her that he had done something to Amanda and that his life was over. When Pflueger asked him if he had choked Amanda, he responded affirmatively. Appellant was visibly upset, so Pfleuger gave him some Xanax to calm him down. Appellant took the

medication and then collapsed onto the kitchen floor. Pflueger called 911, thinking Appellant had possibly overdosed. After police and paramedics arrived, Appellant explained that he was upset because his wife was leaving him and taking their kids.

Appellant was eventually taken to the hospital. He told medical personnel that he was there because he had strangled his wife, and that his mother had given him some pills to calm him down. After these statements, Appellant was given his *Miranda* warnings by Bellevue Police Department Major Leland Estep. Major Estep testified that Appellant told the emergency room doctor that he had killed his wife. Appellant also said that he and Amanda were having sex when she threatened to accuse him of rape. He told the doctor that she kept "pushing his buttons."

Highland Heights/Southgate Police Authority Chief Carl Mullin spoke to Appellant at the hospital as well. In that interview, Appellant said that while he was at work Amanda would have sex in their bed with one of her co-workers, and that she had threatened to leave him and take their children. Appellant also stated that, on the day of the incident, Amanda said she wanted to work their problems out. However, she scratched him while they were having sex and then threatened to file rape charges against him. He said that they started fighting and he "choked her to death." He explained that he wrapped a cord around her neck and held it tight. He also stated that he tied her up because he was not sure how people die and he did not want her running off.

Corporal James Baldwin of the Dayton, Kentucky Police Department also interviewed Appellant at the hospital. Appellant told Corporal Baldwin that he had choked Amanda to death with an extension cord. Appellant stated that he knew what he had done was wrong. He also said that he had tied Amanda up with a blue extension cord and that he was wearing a blue shirt at the time. Both the extension cord and the shirt were found at the scene.

Statements Obtained Through RCr 7.24(3)(B)(ii) Examination

Prior to trial, and pursuant to KRS 504.070 and RCr 7.24(3)(B)(i), Appellant gave notice of his intention to introduce evidence pertaining to his mental condition. Appellant was examined by defense psychologist, Dr. Robert Noelker, who opined that Appellant had suffered a brief psychotic episode as the result of weeks of sleep deprivation and the ingestion of substances designed to keep him awake. The Commonwealth also had Appellant examined by its mental health expert, Dr. Douglas Mossman, as provided by RCr 7.24(3)(B)(ii).

At trial, Appellant testified that he did not remember the events surrounding his wife's death or what he had told authorities. On cross-examination, the Commonwealth challenged Appellant's lack of memory by questioning him about details he had recalled to Dr. Mossman during an examination at the Campbell County Detention Center. Dr. Mossman's report, which included Appellant's statements, was used on both cross-examination of Appellant, as well as on direct examination of Dr. Mossman. The

Commonwealth went over many details that Appellant had recounted with Dr. Mossman.

Dr. Mossman testified for the Commonwealth. He testified that when he met with Appellant he was logical and did not seem disorganized in his thoughts. He said Appellant never had trouble answering questions or providing information during the interview. According to Dr. Mossman, Appellant was able to remember events and details from both the day before and the day of his wife's death. Dr. Mossman testified that Appellant had recalled specific aspects of the fateful day and then proceeded to report to the jury each of those details. These included time lines, people he saw, what he had to eat, and a very specific chronology of all the events.

Dr. Mossman explained that, when people describe memories with such specific details, it is an indication that the memories are accurate. Dr. Mossman testified that Appellant's recollection of the type of music he listened to and what he ate for lunch that day were spontaneous details that tended to show the veracity and accuracy of Appellant's memories. He testified that, while Appellant did have a depression disorder, he was not delusional. He stated that Appellant could appreciate the wrongfulness of his conduct because he knew that he might be arrested after his wife's murder. Lastly, Dr. Mossman testified that Appellant could have conformed his conduct to the requirements of law because his other actions around the time of the incident exhibited the ability to exercise self-control.

Appellant objected to the introduction of his actual statements from his interview with Dr. Mossman. He objected to the statements being used to impeach him on cross-examination and as they came in through the expert's testimony. The trial court overruled the objections and held that RCr 7.24(3)(B)(ii) allowed the use of Appellant's statements where he had put his mental condition at issue, and that Appellant had waived his Fifth Amendment privilege against self-incrimination by taking the stand. Because this question involves the construction and interpretation of RCr 7.24(3)(B)(ii), we review it de novo. *Bob Hook Chevrolet Isuzu, Inc. v. Com. Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

RCr 7.24(3)(B)(ii) states in pertinent part:

> No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony.

A plain reading of this rule indicates that the Commonwealth is allowed to rebut evidence that a defendant puts forth regarding his mental condition. However, the reading urged by the Commonwealth that *any* evidence obtained during the mental examination may be used on rebuttal when a defendant puts his mental condition at issue is strained. The language in RCr 7.24(3)(B)(ii) "was adopted almost verbatim from Federal Rule of Criminal Procedure

12.2(c)," which was designed to protect a defendant from being compelled to violate his Fifth Amendment right against self-incrimination. *Coffey v. Messer*, 945 S.W.2d 944, 948 (Ky. 1997). Thus, the apparent purpose of RCr 7.24(3)(B)(ii) is to provide the Commonwealth with adequate methods of discovery as to a defendant's mental condition, while limiting any infringement on the defendant's Fifth Amendment rights.

In order to protect those rights, RCr 7.24(3)(B)(ii) provides restrictions on what evidence the Commonwealth may use from the compulsory mental health examination. The rule, read in its totality, first prohibits any statements made by a defendant during the course of a psychiatric examination from being used against him in any criminal proceeding. It clearly states that *no* statement made by the defendant during the course of the examination shall be admitted into evidence, regardless of whether he consents to the examination. That exclusion is without qualification. The second part of the rule, however, is independent of the first and simply allows an expert to give an opinion as to the psychiatric condition of a defendant based on statements the expert gleaned from the defendant, as well as other matters. The qualifying language in the second section only allows the psychiatrist to give an opinion, not to recite the statements given by the defendant upon which that opinion is based. We cannot agree with the Commonwealth that the exception in the latter sentence was meant to apply to the type of evidence contained in the former.

Therefore, we find that RCr 7.24(3)(B)(ii) prohibits statements made by a defendant during a mental health examination conducted pursuant to this rule

from being introduced into evidence either on direct or cross-examination. It was error for the trial court to admit the statements. However, the rule does permit the introduction of expert testimony that is based upon, but does not recite, a defendant's statements. As a result, we find that Dr. Mossman's testimony stating that Appellant remembered details of the event was admissible. But he should not have been allowed to recite any of Appellant's statements. In light of this, we now turn to consider whether the admission of Appellant's statements from the examination was harmless error.

Because the admission of these statements affected Appellant's Fifth and Sixth Amendment rights, we evaluate them under the harmless error test set forth in *Chapman v. California,* 386 U.S. 18, 24 (1967). "That test . . . is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id. See also Winstead v. Commonwealth,* 283 S.W.3d 678, 689 n.1 (Ky. 2009). In this case, the erroneously admitted statements from Appellant's examination with Dr. Mossman largely concerned routine details from the day before and the day of his wife's death. They were introduced by the Commonwealth to impeach Appellant's credibility regarding his claim that he could not remember anything that happened during those two days. This impeachment was properly accomplished by Dr. Mossman's general testimony that Appellant had no difficulty recalling details or providing information from the days in question. Although some of the improperly admitted statements were incriminating, they did not provide any information that was not gleaned from Appellant's

numerous confessions made while at the hospital. As such, we find beyond a reasonable doubt that the erroneously admitted statements did not contribute to the verdict obtained.

Lack of Suppression Hearing

Appellant objected numerous times during trial to the introduction of the statements he made during the examination with Dr. Mossman. A bench conference was held on this issue when the Commonwealth began to question Appellant about the examination, and again when Dr. Mossman was testifying. Appellant argues that the trial court erred in failing to conduct a suppression hearing, pursuant to RCr 9.78, to determine the admissibility of his statements.

RCr 9.78 provides in part:

> If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of a confession or other incriminating statements alleged to have been made by the defendant to police authorities . . . the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.

Here, although the trial court held several bench conferences entailing lengthy discussions concerning the admissibility of the statements, it did not conduct a hearing outside the presence of the jury or enter its findings of fact into the record. However, after review of the record, we cannot imagine any arguments that could have been made by either side that were not discussed during the bench conferences. Therefore, it was of no consequence that a

suppression hearing was not conducted. We find that the failure to hold a hearing under RCr 9.78 was harmless error. *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999); *see also Lewis v. Commonwealth*, 42 S.W.3d 605, 611 (Ky. 2001) ("[I]t does not follow that the failure to hold a suppression hearing automatically results in a new trial").

Exclusion of David Bacon's Testimony

At trial, the Commonwealth called David Bacon, the victim's co-worker and illicit lover. On cross-examination, the defense began to ask Bacon about his girlfriend's reaction after she discovered text messages that had been exchanged between him and Appellant's wife. The defense asked Bacon if his girlfriend "flipped out" after reading the messages. The Commonwealth immediately objected to this question. The trial court sustained the Commonwealth's objection and instructed the jury to strike the question. Appellant, however, preserved Bacon's testimony on avowal.

The trial court stated that it excluded the testimony because it suggested Bacon's girlfriend as an alternate perpetrator, and that pursuing such a theory required more than just mere speculation. Appellant argues that this testimony was not alternate perpetrator evidence and, thus, it was error for the trial court to exclude it. He claims the question's purpose and relevance went to his contention that the police should have considered Bacon's girlfriend as a possible suspect. Although Appellant attempts to frame it differently, the inescapable conclusion of his reasoning is that the police investigation was insufficient because they did not consider a possible alternate perpetrator.

In support of his argument, Appellant cites *Holmes v. South Carolina*, 547 U.S. 319 (2006). In *Holmes*, the state law at issue allowed for the exclusion of evidence of an alternate perpetrator where there was strong forensic evidence of a defendant's guilt. The U.S. Supreme Court struck down the law as unconstitutional because it did not allow for adequate consideration of the proffered evidence itself. However, the Court specifically approved the analysis for the admission of such evidence set out by this Court in *Beaty v. Commonwealth,* 125 S.W.3d 196, 207-08 (Ky. 2003). Accordingly, the evidence must pass the balancing test under KRE 403 to be admissible. *Id.* at 209.

In *Beaty,* this Court held that, while a defendant has the right to present exculpatory evidence in his defense, a trial court may exclude that evidence if it tends to show a person as an alternate perpetrator and is speculative, unsupported, or far-fetched and thereby may confuse or mislead a jury. *Id.* at 207 (citing *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997)). Evidence of an alternate perpetrator showing that he or she had both motive and opportunity is generally admissible. However, "evidence of motive alone is insufficient to guarantee admissibility. In a homicide case, a defendant is not entitled to parade before the jury every person who bore some dislike for the victim without showing that the 'aaltperps' at least had an opportunity to commit the murder." *Beaty* at 208 (internal citations omitted). We review the trial court's ruling for abuse of discretion. *Meece v. Commonwealth*, 348 S.W.3d 627, 696 (Ky. 2011).

In this case, the evidence of Appellant's guilt was overwhelming and included a confession. His defense was lack of mental capacity. There was no evidence suggesting Bacon's girlfriend had any opportunity to commit the murder; and introducing testimony that she "flipped out" when learning about the text messages could have very easily confused the jury. Any probative value that it may have had with respect to Appellant's insufficient police investigation theory was outweighed by the potential it had to mislead the jury. Accordingly, there was no abuse of discretion.

Introduction of Appellant's Phone Conversation

During cross-examination of Appellant, the prosecutor asked him about a phone conversation he had with his mother while he was in jail awaiting trial. Appellant objected on the grounds that he had not been provided with any notice of the phone call until the first morning of trial when the Commonwealth gave him a disc containing approximately 100 recorded phone calls. At the ensuing bench conference, the Commonwealth stated that it had just received the phone calls over the past weekend. The specific call at issue was made approximately six days before trial. The trial court ruled that, under the circumstances, it did not find bad faith and that the call could be introduced. The trial court also gave defense counsel time to review the particular phone call in question and confer with Appellant. We review the trial court's ruling for abuse of discretion. *Beaty* at 202.

We find no abuse of discretion. RCr 7.26(1) provides in pertinent part that "not later than forty-eight (48) hours prior to trial, the attorney for the

Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony," unless good cause is shown. The call at issue was placed less than a week before trial, and the Commonwealth received it the weekend immediately preceding trial. It would have been difficult for the Commonwealth to have provided the call to Appellant prior to the first morning of trial. The Commonwealth's explanation for the lack of notice given to Appellant was sufficient to constitute good cause. Further, defense counsel was given time to review the call and advise Appellant accordingly. Thus, the trial court did not abuse its discretion.

Police Should Have Collected Hairs for Testing

At some point prior to trial, the Commonwealth and defense counsel had a phone conversation concerning the testing of hairs from both the victim and Appellant. There was a dispute as to what was said during the conversation, but it appears the Commonwealth either offered to have the victim's body exhumed for testing of hair samples or to allow Appellant to have it exhumed for testing. In either event, Appellant declined. Because Appellant had some opportunity to have the hairs tested himself, the trial court excluded both a letter from Kentucky State Police Analyst Lara Mosenthin and part of Mosenthin's subsequent testimony at trial. The trial court ruled that it would be misleading to the jury to allow Appellant to infer that the police investigation was inadequate, based on the fact that hair samples were not collected from the victim and tested, when, in fact, there was an effort of some sort by the

Commonwealth to have the testing performed.

Appellant contends that inadequacy of the police investigation was part of his defense and that he should have been allowed to assert that the police were negligent by not collecting hair samples. Evidence, even if relevant, may be excluded where its probative value is substantially outweighed by dangers of misleading the jury or needless presentation of cumulative evidence. KRE 403. Here, Appellant was allowed to introduce ample evidence to question the thoroughness of the police investigation. In fact, the substance of both the letter and Mosenthin's avowal testimony came in through Mosenthin's testimony in front of the jury. Mosenthin explained in each of them that hair analysis was not conducted in this case because (1) Appellant was the only suspect in this case and his hairs would be expected to be found in his home, as well as on the victim; and (2) the lab had no standard hair from the victim with which to make a comparison. The trial court did not err in finding that, because the Commonwealth gave Appellant an opportunity to collect his own sample and conduct his own testing, it would be more misleading to the jury than probative to assert that police were negligent by not collecting a hair sample. There was no abuse of discretion.

Allowing Testimony Concerning the Ultimate Issue

The Commonwealth called Corporal James Baldwin to testify at trial. The specific part of the testimony at issue came while defense counsel was questioning Corporal Baldwin on cross-examination. Defense counsel's line of questioning challenged the thoroughness of the police investigation and

whether police became overly focused on Appellant as the murderer:

Defense: Isn't it true that you are trained to let all of the evidence lead you to the ultimate conclusion, not just one piece of it?

Baldwin: (Agreed that was correct).

On redirect, the Commonwealth asked Corporal Baldwin:

Prosecutor: Where did all the evidence lead you?

Baldwin: All the evidence kept pointing back to the defendant.

At this point, the defense objected to the question and the trial court overruled it. The Commonwealth continued:

Prosecutor: Where did all the evidence lead you? Point me to where the evidence led you.

Baldwin: (Pointed toward Appellant).

Appellant argues that Corporal Baldwin testified to the ultimate issue, and that it was error for the trial court to allow his testimony. However, Appellant cannot now complain of the Commonwealth's questioning on redirect when he opened the door for it during his cross-examination. *Harris v. Thompson*, 497 S.W.2d 422, 430 (Ky. 1973). The reasonable inference drawn from defense counsel's question is that the police became focused on Appellant as the perpetrator and did not thoroughly investigate other potential suspects. The Commonwealth's question merely completed the inference. The trial court did not abuse the broad discretion it has in regulating cross-examination. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).

Hale Testimony

The Commonwealth also called property officer Jim Hale to testify at trial. On cross-examination, defense counsel asked Officer Hale if he had done a forensic search of two computers and two thumb drives that had been collected from Appellant's residence. Officer Hale responded that they had not been tested, and that he did not have the capability to conduct those tests. Defense counsel then asked Officer Hale whether he agreed that a forensic search of the computers and thumb drives could not have been done based upon the fact that the computers could not leave the property room. Officer Hale agreed. The Commonwealth objected and the trial court sustained the objection and struck the question. Defense counsel then asked Officer Hale if the capability existed to conduct such a search and Officer Hale responded that it did.

Appellant argues that the exclusion of the question improperly hindered his ability to present his defense concerning the inadequacy of the police investigation. We disagree. Through defense counsel's questioning of Hale, the jury heard that the capability to conduct a forensic search of the computers and thumb drives existed, but such was not done by the police in this case. There is nothing else Appellant could have gained through the excluded question.

"[A] connection must be established between the cross-examination proposed to be undertaken and the facts in evidence. A defendant is not at liberty to present unsupported theories in the guise of cross-examination and

invite the jury to speculate as to some cause other than one supported by the evidence." *Id.* The trial court excluded the question because it suggested that there may have been evidence contained in the computers and thumb drives that was relevant to the case. This implication was misleading because the defense could have had its own forensic search of the computers performed if it wished to. There was no abuse of discretion.

During the redirect of Officer Hale, the Commonwealth asked whether there was any indication that the computers had any evidentiary value as the investigation progressed. Appellant objected, arguing that the testimony was speculative and that the issue was a question for the jury. The trial court overruled the objection because Appellant had raised the issue during his cross-examination of Officer Hale.

Appellant's questions concerning the capability of a forensic search of the computers implied that they may have had evidentiary value, but that the police failed to discover it. Thus, it was reasonable to allow the Commonwealth to ask Officer Hale if he believed there was any reason to have conducted a forensic search of the computers. The Commonwealth's rebuttal was permissible since Appellant's questions on direct created a basis for the inquiry. *Harris* at 430. The trial did not abuse its discretion.

Pflueger's Testimony

The Commonwealth also called Appellant's mother, Phyllis Pflueger, to testify at trial. On cross-examination, Pflueger testified that she had noticed changes in Appellant's behavior after he discovered that his wife was having an

affair. Defense counsel asked if she thought Appellant was being paranoid. This drew an objection from the Commonwealth. The trial court ruled that Pflueger could continue her testimony, but could not use the word "paranoid." Defense counsel then proceeded to ask Pflueger about Appellant's specific actions that caused her to think he was being paranoid. This also drew an objection from the Commonwealth, which the trial court sustained.

Appellant argues Pflueger's testimony should have been allowed because paranoia is a commonly understood term that does not require the testimony of an expert. It is true that lay witnesses may testify to the sanity of a defendant. *Brown v. Commonwealth.*, 934 S.W.2d 242, 248 (Ky. 1996); *see also Burgess v. Commonwealth,* 564 S.W.2d 532, 534 (Ky. 1978) (concluding that "[L]aymen who have had the opportunity by association and observation to form an opinion as to the sanity of a person, may testify to that opinion, giving the facts upon which the opinion is based so the jury may determine the weight to be given to the evidence."). However, Appellant did not preserve this issue with an avowal. "[W]ithout an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial." *Cain v. Commonwealth,* 554 S.W.2d 369, 375 (Ky. 1977).

Photographs of Victim's Body

At trial, the Commonwealth introduced approximately thirty photos depicting the victim. Appellant argues that the photos were repetitive to the point that their probative value was substantially outweighed by undue

prejudice. He cites *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989) for support. In that case, this Court declined to find whether introduction of nineteen photographs of the deceased was error, but held that "on retrial the [trial] court should utilize selected photographs which fairly present the evidence sought to be introduced and not overwhelm the jury with repetitive photographs." *Id.* at 60-61. In this case however, the photographs were not repetitive.

The general rule is that "a photograph of the crime scene 'does not become inadmissible simply because it is gruesome and the crime is heinous.'" *Adkins v. Commonwealth,* 96 S.W.3d 779, 794 (Ky. 2003) (quoting *Funk v. Commonwealth,* 842 S.W.2d 476, 479 (Ky. 1992)). "Because the Commonwealth must prove the *corpus delicti,* photographs that are probative of the nature of the injuries inflicted are not excluded unless they are so inflammatory that their probative value is substantially outweighed by their prejudicial effect." *Id. See also* KRE 403.

After review of the record, we find that the photos were relevant under KRE 401, and their probative value into the cause and nature of the victim's injuries outweighed their prejudicial effect under KRE 403. The trial court did not abuse its discretion in admitting them.

For the abovementioned reasons, the judgment of the Campbell Circuit Court is hereby affirmed.

Minton, C.J.; Abramson, Noble, Scott and Venters, JJ., concur. Cunningham, J., concurs in result by separate opinion. Schroder, J., not sitting.

CUNNINGHAM, J., CONCURRING IN RESULT: I think Appellant waived his protection under RCr 7.24 when he took the stand, and any and all of his statements to Dr. Mossman are admissible for impeachment purposes. It seems to be a "half pregnant" proposition when we allow Dr. Mossman to testify that Appellant recounted details, but then not allow him to explore those details. Either way is to wander away from the dictates of the rule. It seems cleaner to me to simply find that Appellant waived the protection by taking the stand. That is exactly what he did. Appellant took the stand at trial and testified inconsistently with prior statements he had made to Dr. Mossman. "When [a defendant] takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined." *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980) (quoting *Raffel v. United States*, 271 U.S. 494, 496-97 (1926)).

In *Harris v. New York*, 401 U.S. 222 (1971), the defendant was charged with twice selling heroin to an undercover police officer. The defendant took the stand at trial and denied making one of the sales. He also testified that the bag involved in the second sale did not contain heroin. However, the defendant had made statements following his arrest that were contradictory to his testimony on direct. On cross-examination, the prosecutor recited those statements and asked the defendant about them. The defendant responded

that he could not remember making them. It was undisputed that the statements were taken in violation of the defendant's *Miranda* rights, but the issue was whether they could be used to impeach the defendant's testimony at trial. The Supreme Court found that the statements, although taken in violation of the defendant's *Miranda* rights, were properly used for impeachment. The Court held that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Harris* at 224 (citing *Walder v. United States,* 347 U.S. 62, 65 (1954)).

Here, Appellant, like the defendant in *Harris*, voluntarily took the stand and gave testimony that was inconsistent with statements he had made earlier. While RCr 7.24(3)(B)(ii) ordinarily prohibits the introduction of those statements, the purpose of that prohibition is to prevent compulsory self-incrimination, in violation of a defendant's Fifth Amendment privilege. *See* G. SEELIG, KENTUCKY CRIMINAL LAW, 199 n.58 (2nd ed. 2008). However, "that privilege cannot be construed to include the right to commit perjury." *Harris* at 225 (citing *United States v. Knox,* 396 U.S. 77 (1969)); *cf. Dennis v. United States,* 384 U.S. 855 (1966). "No person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" *Wise v. Commonwealth,* 600 S.W.2d 470, 472 (Ky. App. 1978).

Just as in *Harris,* Appellant, "[h]aving voluntarily taken the stand . . . was under an obligation to speak truthfully and accurately" and "the prosecution here did no more than utilize the traditional truth-testing devices

of the adversary process." *Harris* at 226. Accordingly, I do not believe that Appellant's Fifth Amendment right against self-incrimination was violated. Therefore, we do not reach the harmless error analysis.

For this reason, I concur in the result of this opinion and the analysis as to all other issues.

COUNSEL FOR APPELLANT:

Thomas More Ransdell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

William Bryan Jones
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601