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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000603-MR

ALASTAIR MARTEL COUCH — APPELLANT

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
NO. 10-CR-00212

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Tomma Graves was reported missing to Frankfort police on July 31, 2010. Two days later, her body was discovered in the driver's seat of her white truck. The vehicle was parked in a lot adjacent to a funeral home in downtown Frankfort. Ms. Graves died of a gunshot wound to the back of her skull, though she also sustained two additional gunshot wounds to her arm and hand.

The Commonwealth's proof at trial established that Ms. Graves was with Appellant, Alastair Couch, on the morning she was killed. On July 31, 2010, a witness working in downtown Frankfort saw a black male running near the parking lot where Ms. Graves' vehicle was ultimately found. Another witness, also parked in downtown Frankfort, saw a black male walking in the same area while talking on a cell phone. That witness overheard the man giving

directions. According to the witness, the man appeared to be carrying a shirt stained with blood. Minutes later, the witness observed the man getting into a red truck bearing a farm license plate.

Dusty Whitis testified that he contacted Couch on the morning of July 31, 2010, to purchase marijuana. The men made arrangements to meet, but Couch later changed the meeting location several times. Ultimately, Whitis picked up Couch in his red truck at a location in downtown Frankfort. When Couch entered the vehicle, he appeared nervous and agitated, lamenting that "someone had seen" him. Couch implored Whitis to drive quickly, even insisting that he run a red light. Whitis observed Couch empty shell casings from a silver revolver with a black grip and then toss the casings out the window.

Whitis drove to the home of his girlfriend. There, Couch asked for some gasoline. He then used the fuel to burn a blood-covered shirt and cell phone in the back yard. Shortly thereafter, he was picked up at the house by Bryce Hodges and Michael Williams. Couch instructed the men to drive out to the countryside. Once there, he got out of the car and appeared to dispose of something over a cliff. Later, acting on a tip, police officers recovered a discarded silver and black revolver from the area where the object had been thrown. Subsequent analysis confirmed that shell casings recovered from Ms. Graves' vehicle were fired from this revolver. Police also found the shell casings thrown from Whitis' red truck. These casings were also fired from the revolver that killed Ms. Graves.

Couch initially told police that he had not seen Ms. Graves for several days before she went missing, and that he had not driven her truck on July 31, 2010. However, at trial Couch provided a different story. He told the jury that he and Ms. Graves intended to drive into Frankfort in her truck on the morning of July 31, 2010. As they entered the vehicle, a masked man approached them with a gun and commanded Couch to get into the back of the truck. The man ordered Ms. Graves to drive, but a struggle ensued between Couch and the alleged assailant. Couch testified that he heard the gun fire and then Ms. Graves scream. The truck came to a stop and the assailant fled. At this point, Couch realized that Ms. Graves was dead.

Couch drove the truck to downtown Frankfort and parked it. He was scared and apprehensive about calling the police, in part because he is an admitted drug dealer. Instead, he gathered Ms. Graves' cell phone, his own firearm, and the alleged assailant's revolver, which had been left in the truck. He then called Whitis and disposed of the unknown assailant's revolver in a remote area outside of Frankfort.

The jury found Couch guilty of murder and tampering with physical evidence, as well as being a persistent felony offender (PFO) in the second degree. In accordance with the jury's recommendation, the Franklin Circuit Court sentenced Couch to imprisonment for a term of fifty years for the murder charge. The jury recommended a five-year sentence on the tampering charge, which was enhanced to ten years by virtue of the PFO conviction. The

sentences were ordered to run consecutive for a total term of imprisonment of sixty years. This appeal followed.

KRE 404(b) evidence

Couch first argues that the trial court improperly admitted prejudicial evidence of other crimes, without notice, in violation of KRE 404(c). The Commonwealth called Amanda Cardwell to testify about an incident during which Couch damaged a truck when he backed into Cardwell's fence. The purpose of the testimony was to establish that Couch had driven Ms. Graves' vehicle. Cardwell testified that the incident occurred on July 21, 2010. On cross-examination, defense counsel inquired how she could be certain of the date. Cardwell responded that she was able to remember specifically because she had entered drug rehabilitation the following day.

On re-direct examination, the Commonwealth asked Cardwell who supplied her drugs. Defense counsel objected, arguing that the question was designed to elicit evidence that Couch was a drug dealer. The trial court overruled the objection, opining that defense counsel had opened the door by eliciting testimony about Cardwell's drug rehabilitation. Cardwell responded that she purchased cocaine from Couch. On re-cross examination, defense counsel elicited that Cardwell had met Couch in April or May of 2010 and had purchased cocaine from several people in addition to Couch.

The trial court erred in allowing this testimony. The Commonwealth filed notice pursuant to KRE 404(c) of its intent to introduce evidence of Couch's drug dealing through two other witnesses. However, it did not do so with

respect to Cardwell. Regardless, the fact that Cardwell purchased drugs from Couch was irrelevant to the case and certainly more prejudicial than probative. KRE 403.

Nonetheless, the error was harmless beyond a reasonable doubt. The fact that Couch engaged in drug dealing was hardly a revelation to the jury. In fact, Cardwell's testimony was merely cumulative of numerous and repeated references to Couch's drug dealing.

Defense counsel mentioned Couch's drug dealing during voir dire, telling the panel that they would hear from witnesses who were trying to obtain drugs from Couch on the morning of the murder. The Commonwealth also discussed the fact that Couch dealt drugs during its opening statement, absent any objection from defense counsel. Whitis testified that he had called Couch on the morning of July 31st to purchase marijuana. Most importantly, Couch repeatedly acknowledged his "drug activities" during his own testimony. He stated that Ms. Graves was aware of his involvement in the drug trade, that he carried a firearm due to his "drug activities," and that he would often stay at a local hotel to deal drugs.

We do not believe that Couch's substantial rights were affected by the admission of Cardwell's testimony, as the jury had already been made aware of Couch's drug dealing. RCr 9.24. Generally, "the erroneous admission of cumulative evidence is a harmless error." *Torrence v. Commonwealth,* 269 S.W.3d 842, 846 (Ky. 2008). *See also Clark v. Commonwealth,* 267 S.W.3d 668, 680-81 (Ky. 2008) (admission of testimony that defendant physically

abused girlfriend was cumulative and therefore harmless). Looking more specifically at the totality of evidence heard by the jury in this case, we can conclude with fair assurance that the error did not substantially sway the verdict. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009).

Prosecutorial Misconduct

Couch argues that the Commonwealth engaged in prosecutorial misconduct by asking the panel, during *voir dire*: "I mean, do you understand that we ask in this country and today in Franklin County for citizens who are wandering around minding their own business, doing their jobs, whatever it is, to come in here and decide what kind of behavior you're going to tolerate in your community?" Couch maintains that this statement amounts to an improper "send a message" argument. Admittedly, this error is unpreserved and Couch requests palpable error review pursuant to RCr 10.26.

We permit "send a message" arguments during the sentencing phase when deterrence is being advanced as a sentencing consideration. *See Cantrell v. Commonwealth*, 288 S.W.3d 291, 297-98 (Ky. 2009). However, this Court has repeatedly cautioned the Commonwealth against using arguments during the guilt phase that ask the jury to send a message to the community, or place upon the jury the burden of doing what is necessary to protect the community. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 348-51 (Ky. 2006); *Young v. Commonwealth*, 25 S.W.3d 66, 73 (Ky. 2000). Accordingly, they are equally improper when delivered during *voir dire*.

Of course, counsel is afforded wide latitude in examining jurors during *voir dire*. *Lawson v. Commonwealth*, 53 S.W.3d 534, 539 (Ky. 2001). However, the Commonwealth exceeded those bounds by explaining to the panel that the role of a juror is to "decide what kind of behavior you're going to tolerate in your community." Nonetheless, we do not believe that the Commonwealth's improper commentary amounts to palpable error. When reviewing claims of prosecutorial misconduct, we "must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer*, 206 S.W.3d at 349. When the prosecutorial misconduct was not objected to, we will reverse "only where the misconduct was flagrant and was such as to render the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010).

Here, the improper comment was made in an effort to encourage potential jurors to set aside their reluctance to participate in the jury process by underscoring the important role of a juror. The Commonwealth did not directly reference Couch or the charges against him in conjunction with the statement. Considered within context, we do not believe this brief and isolated comment undermined the overall fairness of the proceedings. Reversal is not required.

Conclusion

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

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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