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NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 19, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000407-MR

CONNOR JORDON GALENSKI — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 11-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Connor Galenski of one count of complicity to commit murder as a result of the shooting death of Mackenzie Smyser. The trial court sentenced Galenski to thirty years' imprisonment to be served concurrently with a five-year sentence he was already serving, for a total of thirty years. Galenski appeals from the resulting judgment as a matter of right.[1]

Galenski contends that the trial court erred by (1) denying his motion to suppress his confession, and (2) prohibiting him from drawing an analogy to the "Beatrice Six" in his closing argument.

Finding no error, we affirm the conviction.

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[1] Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

Following the shooting death of Mackenzie Smyser, Galenski was arrested. While in police custody, Galenski was interrogated by two detectives. During the interrogation, the detectives drew on Galenski's emotional response to his father and discussed the availability of the death penalty as a punishment for a murder conviction. After being afforded the opportunity to speak with his father via telephone, Galenski confessed to his involvement in Smyser's murder. As a result of his confession, Galenski was indicted on charges of complicity to commit murder and tampering with evidence.

Before trial, Galenski moved the trial court to suppress his confession. He alleged that the confession was involuntary and the result of police coercion. After a suppression hearing, the trial court entered findings of fact and conclusions of law supporting its decision to deny Galenski's motion to suppress the confession.

The jury convicted Galenski on the tampering charge, and he was sentenced to five years' imprisonment. But the jury failed to reach a unanimous verdict on the complicity to commit murder charge, so the trial court declared a mistrial.

Galenski's second trial dealt only with the complicity charge, for which the jury rendered a guilty verdict. The jury recommended a thirty-year sentence to run concurrently with the five-year sentence for his tampering conviction. The trial court entered judgment consistent with this

recommendation. This appeal involves the second trial and the resulting judgment of conviction for complicity to commit murder and sentence.

II. ANALYSIS.

Galenski first argues that the trial court erred by denying his motion to suppress his confession. He argues that the detectives' discussion of "a needle in [his] arm," as potential punishment for a murder conviction was coercive and overbore his freewill. As such, Galenski claims his confession was not properly admissible because it was involuntary. We disagree.

Due process prohibits the admission of confessions procured when the defendant's "will has been overborne and his capacity for self-determination critically impaired."[2] The United States Supreme Court has held, and this Court has endorsed, the "ultimate test" of voluntariness as asking: "Is the confession the product of an essentially free and unconstrained choice by its maker?"[3] In determining whether a confession has met this test of voluntariness, we must assess the totality of the circumstances. This includes consideration of "both the characteristics of the accused and the details of the interrogation."[4] In *Bailey v. Commonwealth*, this court acknowledged that the inquiry in determining voluntariness is as follows: "(1) whether the police activity was 'objectively coercive'; (2) whether the coercion overbore the will of

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[2] *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973).

[3] *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006) (quoting *Schneckloth*, 412 U.S. at 225).

[4] *Schneckloth*, 412 U.S. at 226; *see also Bailey*, 194 S.W.3d at 300.

the defendant; and (3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession."[5]

Here, Galenski takes the position that his confession was involuntary based upon the interrogating detectives' references to "a needle in [his] arm" as a viable sentence for a murder conviction. Galenski argues that this threat of "violence" overrode his freewill and resulted in a coerced and involuntary confession. This position, however, neglects to acknowledge our case law providing that "truthful, non-coercive advisement of potential penalties" does not render a confession involuntary.[6] In fact, Galenski fails to direct us to any point in the record that contains any oppressive or offensive practices undertaken by the detectives during questioning. In accordance with the trial court's findings, our examination of the record finds that mention of a "needle in [his] arm" did not faze Galenski. He even felt bold enough to joke with the detectives that if he were to meet his demise as a result of the death penalty, he "can be just like Tookie."[7]

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[5] *Bailey*, 194 S.W.3d at 301 (quoting *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999)).

[6] *Benjamin v. Commonwealth*, 266 S.W.3d 775, 786-87 (Ky. 2008).

[7] Stanley "Tookie" Williams was a co-founder of the Crips street gang originally located in Southern California. Tookie was sentenced to death in California after being convicted of four murders that took place during two separate robberies. Tookie became nationally renowned and the subject of numerous clemency campaigns after he became an anti-gang advocate and children's book author while in prison. Tookie's advocacy work resulted in a Nobel Peace Prize nomination, and his books have received national accolades. His clemency campaigns, supported by the likes of Archbishop Desmond Tutu, NFL Hall of Famer Jim Brown, and actor Jamie Foxx, were ultimately for naught because he was executed on December 13, 2005. *See, e.g.*, Dave Zurin, *The Fight to Save Stanley Tookie Williams*, THE NATION, December 12, 2005, *available at* http://www.thenation.com/article/fight-save-stanley-tookie williams#; Bryan Robinson, *Tookie Williams: Gang Founder Versus Nobel-Nominated Peacemaker,*

The trial court's thorough findings of fact and conclusions of law similarly found that the detectives' references to a "needle in [his] arm" were not objective or actually coercive under the circumstances. The trial court further found that even if the references to the death penalty were objectively coercive, such coercion "did not overbear Galenski's will, nor were they the crucial motivating factor in Galenski's decision to confess." "When a trial judge's decision on a motion to suppress is supported by substantial evidence, and is correct as a matter of law, such findings are conclusive."[8]

Galenski has made no effort to demonstrate that the trial court's ruling was not supported by substantial evidence, nor has he provided any compelling evidence that the trial court incorrectly applied the law. Accordingly, we find the trial court's determination that Galenski's confession was voluntary to be conclusive, and we affirm its denial of Galenski's motion to suppress.

Galenski's second assignment of error concerns an alleged limitation on the content of his closing argument. Galenski argues that the trial court erred in preventing him from drawing an analogy between his position and that of the "Beatrice Six"[9] when discussing the inherently coerced nature of confessions when the possibility of the death penalty is discussed.

ABC News (Dec. 8, 2005), http://abcnews.go.com/US/LegalCenter/story?id=1377890&singlePage=true.

[8] *Benjamin*, 266 S.W.3d at 787 (citing *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002); RCr 9.78).

[9] The Beatrice Six is the colloquial name given to a group of six youths that were wrongly convicted of murder in Beatrice, Nebraska, as a result of confessions induced by the threat of the death penalty. *See, e.g.*, Innocence Project, *Nebraskans*

Galenski fails to cite any point in the record where this alleged error was preserved.[10] In fact, he does not even discuss how, or if, the alleged limitation by the trial court even took place. Because Galenski has not shown that this issue is preserved for appeal, the only appellate review available to him is under the palpable error standard.[11]

Appellate courts in the Commonwealth often undertake palpable error review of unpreserved errors but doing so is within the sole discretion of the appellate court.[12] "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review under RCr 10.26 unless such a request is made and briefed by the appellant."[13] Here, Galenski never asks for palpable error review, nor does he ever mention RCr 10.26 in his brief. Galenski's argument also does not state how the alleged error amounts to palpable error or how he suffered a manifest injustice at the hands of the trial court. As a result of Galenski's failure to cite where the alleged error was preserved and his failure to request palpable error review, we decline to engage in a substantive analysis of this argument.

Mark a Year of Freedom, (Feb. 2, 2012, 3:20 PM), http://www.innocenceproject.org/Content/Nebraskans_Mark_a_Year_of_Freedom.php.

[10] Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) requires appellant's briefs to contain "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

[11] *See* RCr. 10.26.

[12] *See id.* ("A palpable error . . . *may* be considered . . . by an appellate court on appeal . . . .") (emphasis added); *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002) ("An appellate court *may* consider an issue that was not preserved . . . .").

[13] *Shepherd v. Commonwealth*, 251 S.W.3d.309, 316 (Ky. 2008).

Moreover, even if we were to address the merits of Galenski's argument, he has failed to provide this Court with a record of the trial court proceedings for our review.[14] In such situations, this Court "[w]ill not engage in gratuitous speculation . . . based upon a silent record."[15] Instead, "when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court."[16]

III. CONCLUSION.

Based on the foregoing, we find that the trial court did not err and affirm Galenski's conviction.

All sitting. All concur.

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[14] *McDaniel v. Commonwealth*, 341 S.W.3d 89, 98 (Ky. 2011) ("It is appellant's duty to designate the contents of the record on appeal."); *Chestnut v. Commonwealth*, 250 S.W.3d 288, 304 (Ky. 2008) (It is incumbent upon Appellant to present the Court with a complete record for review.").

[15] *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

[16] *Id.*; *see also McDaniel*, 341 S.W.3d at 98; *Chestnut*, 250 S.W.3d at 304 ("Appellant has failed to provide this Court with a complete record for review. As such, we are bound to assume that the omitted record supports the decision of the trial court.").

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