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RENDERED: AUGUST 20, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000023-MR

MICHAEL ERNEST MOORE — APPELLANT

V.

ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY FROHLICH, JUDGE
NO. 09-CR-00641

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In 2009, Appellant, Michael Moore, was living with his parents at their home in Union, Kentucky. Appellant had been prescribed pain medication for years as a result of an employment related back injury. However, Appellant had abused his medication and admitted to being a drug addict. His addiction caused great friction between him and his parents.

Appellant's mother, Madge Moore, suffered from multiple sclerosis. Her illness required her to consume prescribed medication on a daily basis. Ms. Moore would often share some of her pain medication with Appellant. Appellant also stole her medication as well. This angered Appellant's father, Warren Moore, who began keeping some of the medication in a safe located in their home. Warren also stored his wife's pills at his place of employment and on his person. This angered his wife, who believed that she should have total control over her medication.

On the evening of June 12, 2009, Appellant and his parents were arguing over Appellant's continued use of his mother's pills. His parents were also upset with Appellant because he had failed to attend mediation in Georgia concerning his pending divorce. Instead of going to Georgia, Appellant stayed at a Super 8 motel in Florence and got high. The argument on the 12th of June led to a physical altercation between Appellant and his father. Appellant shot his mother and father in the head with his father's pistol. Appellant was also shot in his thigh.

Soon thereafter, Appellant walked outside and into the backyard, and threw the murder weapon onto the roof. Appellant then walked back inside the house and eventually called the police approximately 30-45 minutes after the shooting. Appellant informed the 911 operator that a masked intruder entered the Moore residence, shot him, shot his parents, and then left. Appellant continued to tell this narrative to the police as well as friends and family in the years leading up to trial.

However, Appellant changed his trial theory to self-defense. Appellant testified that his father shot and killed his mother and then shot him in the leg and groin. Appellant stated that he shot his father twice in the head in an attempt to save his own life.

A Boone Circuit Court jury convicted Appellant of two counts of murder, one count of tampering with physical evidence, and one count of falsely reporting an incident. Presented with the option of imposing the death penalty, the jury recommended a sentence of life without the possibility of parole on

each murder conviction, five years' imprisonment for the tampering conviction, and twelve months for the false reporting conviction. The trial court sentenced Appellant in accord with the jury's recommendation. Appellant now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Six issues are raised and addressed as follows.

Improper Evidence

Appellant argues that the trial court erroneously admitted improper evidence of prior crimes or bad acts. KRE 404(b). In addition, Appellant asserts that the evidence presented was irrelevant and unduly prejudicial. Appellant also contends that some of this evidence constituted impermissible hearsay. We review the trial court's evidentiary rulings for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 120 (Ky. 2007).

Evidence of prior crimes or bad acts must be relevant "for some purpose other than to prove the criminal disposition of the accused . . . ." *Meece v. Commonwealth*, 348 S.W.3d 627, 662 (Ky. 2011). Evidence admissible under KRE 404(b) must also be relevant, probative, and not unduly prejudicial. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). *See also* KRE 401; 402; and 403. The evidence with which Appellant takes issue satisfies the *Bell* test. Each item of contested evidence will be discussed in turn. However, it is first necessary to provide some additional background information.

The Commonwealth's theory of the case was that Appellant killed his parents as the culmination of growing animosity between Appellant and his parents concerning his sharing and theft of his mother's prescribed pain

medication. In support, the Commonwealth presented evidence that Appellant stole money from his parents and others through several instances of check forgery and credit card fraud. Appellant himself provided extensive testimony that confirmed his addiction, multiple instances of check forgery, and the continuing friction between him and his parents. Yet, Appellant claims that it was error to admit evidence conveying sentiments that were similar or identical to those introduced by Appellant himself in support of his own defense.

The Note

The Commonwealth introduced an undated note that was handwritten by Appellant's father, Warren Moore. The note was admitted into evidence after Appellant's brother, Warren Smith Moore III., identified that the note contained his father's handwriting. Appellant confirmed that the note was written by his father, and also testified that he discovered the note in a safe located at the Moore residence in 2005. Appellant stated that Warren Moore stored his wife's pain medicine inside the safe for the purpose of excluding Appellant's access to the medication.

The note stated that "Michael - if even a single pill is missing from the safe, [d]on't <u>ever</u> come back - you'll never be welcome again." (Emphasis in original). Appellant argues that the note constitutes impermissible hearsay evidence and improper KRE 404(b) evidence. We disagree.

First, the note does not appear to be an assertion wherein the truth can be discerned as much as an admonition or warning. Even assuming that the statements contained in the note were offered by the Commonwealth for their

truth, the note indicates Mr. Moore's present state of mind. Therefore, the statements contained in the note constitute an exception to the hearsay rule. KRE 803(3). The note provided evidence that Mr. Moore did not approve of his son's drug habit and that there would be consequences if Appellant continued to use his mother's medication. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.50[2][e], at 651 (5th ed., 2013) (citing *Ernst v. Commonwealth*, 160 S.W.3d 744, 752-54 (Ky. 2005) (homicide victim's statement of intent to evict the defendant from her home found admissible under KRE 803(3), and to prove strained relations with defendant and motive for murder)).

Like in *Ernst*, Warren Moore's note demonstrates his "mental or emotional state existing at the time the statement was made." *Ernst*, 160 S.W.3d at 753.

Even so, the note must be relevant. The statements contained in the note were relevant to prove Appellant's motive. *Id.* at 753-54; KRE 404(b)(1). "Although motive was not a necessary element of proof, murder is 'not a crime in which motive is no consequence.'" *Rackley v. Commonwealth*, 674 S.W.2d 512, 514 (Ky. 1984)) *overruled on other grounds by Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1993). Furthermore, "[e]vidence of a drug habit along with evidence of insufficient funds to support that habit, is relevant to show a motive to commit a crime in order to gain money to buy drugs." *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003) (citing *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003)). The same logic applies here.

The note is highly relevant to prove the Commonwealth's theory of the case; that Appellant murdered his parents because of a dispute over access to drugs and funds with which to purchase drugs. Also, the note carried a direct threat from Appellant's father to evict him from the home if any pills were missing. This is relevant to motive. Furthermore, the note is highly probative because it was written by the victim himself, and was not unduly prejudicial. *Bell,* 875 S.W.2d at 889.

Appellant also contends that admitting the note into evidence violated his rights under the Confrontation Clause. He cites *Shepard v. United States* in support. 290 U.S. 96 (1933). Appellant's argument is based upon the premise that the hearsay rule has its origin in the Confrontation Clause. However, there was no error here under either mandate. As in *Shepard*, Warren Moore's statements contained in the note were forward looking, rather than impermissible "declarations of memory pointing backwards to the past . . . ." Lawson, § 8.50, at 437, quoting *Shepard,* 290 U.S. 106. Therefore, the note was properly admitted as evidence.

Check Forgery Evidence

Appellant's ex-girlfriend, Sherri Kenneda, testified that Appellant had forged checks from her account. The Commonwealth also introduced an email dated May 6, 2009, that was sent from Warren Moore to Ms. Kenneda. The email referenced Appellant's check forgery and unauthorized use of Mr. Moore's American Express card. The email also demonstrated that Mr. Moore's continued frustration with Appellant had been pushed to a breaking point.

This evidence was properly admitted for the same reasons previously discussed. Specifically, the email from Warren Moore was admissible under KRE 803(3). *See also Ernst,* 160 S.W.3d at 752-54. As such, the introduction of this evidence did not violate the Confrontation Clause. Lawson, § 8.50, at 437, quoting *Shepard,* 290 U.S. at 106. The email was also relevant to prove Appellant's motive and intent. Furthermore, this evidence was highly probative and not unduly prejudicial. *Bell,* 875 S.W.2d at 889. Any possible error here is harmless due to Appellant's own testimony confirming the forgeries and the circumstances surrounding those forgeries.

Employment History

Appellant also contests the Commonwealth's impeachment of his trial testimony concerning his previous employment as Deputy with the Warren County Sheriff's Department. Appellant testified that he injured his back while working there, and that the injury made it difficult to perform his work. The trial court determined that Appellant's testimony created the impression that Appellant had ended his employment at the Sheriff's Department due to his work injury. Accordingly, the court permitted the Commonwealth to cross-examine Appellant, revealing that he had in fact been terminated from the Sheriff's Department. The details concerning Appellant's termination were not discussed.

Appellant opened the door to this issue. Also, Appellant's assertion supports his claim of the severity of his back injury which led to his abuse of prescription medicine. The Commonwealth had the right to challenge that

mitigation. Thus, the trial court did not err in allowing the Commonwealth to impeach Appellant's misleading testimony.

Additional Evidence

Appellant further argues that the trial court erred by admitting "doctor shopping evidence." For example, the Commonwealth introduced testimony from a local pain specialist, Dr. Mitchell Simons, who had treated Appellant from January 2009 until June 2009. Dr. Simons testified as to what medications Appellant had been taking during that time period, and that Appellant repeatedly indicated during treatment sessions that he had not received medication from any other source. However, Appellant's ex-wife testified that Appellant had been treated by physicians in Georgia after they were separated in 2008. During cross-examination, the Commonwealth also elicited testimony from Appellant that he had visited multiple doctors during 2009 and had consumed a cocktail of different drugs during that time period.

The contested testimony demonstrates the type and quantity of medications that Appellant was taking at or around the time of the murder. This evidence also demonstrates that Appellant attempted to procure narcotics from numerous physicians, thus tending to prove the Commonwealth's theory that Appellant had a drug problem and would go to great lengths to satisfy his addiction. Therefore, this evidence satisfies the *Bell* test. From this testimony and the weight of the other evidence introduced in this case, the jury could reasonably infer that Appellant's motive for the murder was related to his

addiction and the culminating conflict with his parents resulting from that addiction. KRE 404(b)(1).

Appellant further claims that the court erred in admitting additional evidence of Appellant's drug use. For instance, Appellant's dealer, Michael Jackson, testified that he sold crack cocaine to Appellant two days before the murder. Jackson also testified that Appellant approached him sometime during the morning hours on the day of the murder. Jackson stated that he and Appellant had a dispute over money, and that he left the scene because of Appellant's disconcerting demeanor. Appellant's friend, Michael Morey, also testified that he consumed crack cocaine with Appellant the day before the murder.

This evidence also satisfies the *Bell* test. The evidence tends to prove that Appellant was a drug addict, and that he had purchased and consumed narcotics just days before the murder. While some of this evidence may have been cumulative, it is nevertheless proper to prove Appellant's motive for murdering his parents as well as to provide context for the events that occurred on the date of the murder. KRE 404(b)(1).

Appellant also contests the admission of a photo depicting a crack pipe that was recovered from the basement of the Moore residence. The pipe tested positive for cocaine. The court determined that the photo was admissible because it depicted the pipe near the chair in which Appellant sat when he called 911 to report the murder. The phone call was made approximately 30-45 minutes after the shooting. This delay in telephoning the police—and the

reasons therefore—was certainly relevant to rebutting Appellant's self-defense theory. Since Appellant denied using cocaine on the night of the murder, the pipe supported an inference that Appellant had ingested cocaine sometime surrounding the commission of the murders, thus furthering the Commonwealth's theory of the case and providing context for the crimes.

Lastly, Appellant affirmed the evidence with which he now takes issue. Appellant's drug addiction in particular was central to his defense. Therefore, evidence of his addiction and the strife it caused his family could not have been avoided under defendant's self-defense theory, whether he testified in his own defense or not. However, he chose to testify—a logical decision in any alleged self-defense case. He cannot now claim error regarding evidence that further explained to the jury his addiction, and the circumstances surrounding that addiction. Compare *Harrison v. U.S.*, 392 U.S. 219 (1968) (finding reversible error where defendant's testimony was obtained only as a result of the erroneous and unlawful admission of Appellant's confession). Accordingly, any possible error here is harmless due to Appellant's own testimony.

Suppression and Redaction

Appellant also contends that the trial court erred in denying his motion to suppress his statements made to the police while he was in the hospital. In the alternative, Appellant argues that the trial court erred by not properly redacting his statements. These statements were recorded and played for the jury. The jury was also presented with written transcripts of the audio

recording to follow. However, the transcripts were withdrawn during deliberations.

Our standard of review here is twofold. First, the trial court's findings of fact are conclusive if they are supported by substantial evidence; and second, the trial court's legal conclusions are reviewed de novo. *Commonwealth v. Marr*, 250 S.W.3d 624, 626 (Ky. 2009); RCr 9.78.

While recovering from his gunshot wound at the University of Cincinnati Hospital, Appellant was approached by Boone County Police Detective Matt Mullins on June 13, 2009, and again on June 14, 2009. Appellant takes primary issue with the June 13th interview, where Detective Mullins questioned Appellant regarding his parent's murder and possible suspects. Detective Mullins did not inform Appellant of his *Miranda* rights. After much discussion, Appellant eventually stated, "I want an attorney. I'm done. Thank you." Detective Mullins continued his questioning. After additional protest, Appellant asked the detective to come back later.

The Commonwealth contends that because Appellant was not in custody, his *Miranda* rights did not attach. *Wilson v. Commonwealth*, 199 S.W.3d 175, 179 (Ky. 2006). *See also Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006) (defining custodial interrogation). The Commonwealth specifically argues that Appellant was free of any arrest restraints to leave the hospital at any time, and did return home when his treatment was completed. *See Griggs v. Commonwealth*, No. 2006–SC–000846–MR, 2008 WL 1851080, at *5, (Ky. April

24, 2008) ("the majority rule is that confinement to a hospital bed does not, by itself, amount to 'custody' for *Miranda* purposes.") (citations omitted).

Even if we presume that Appellant was in custody and, thus, entitled to the protection his of *Miranda* rights, any error here may still be harmless beyond a reasonable doubt. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 n. 1 (2009) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.")). Having reviewed the portions of the transcripts documenting the interviews with which Appellant takes issue, we determine that none of the contested statements could have prejudicially impacted the jury's verdict.

As to the June 13th interview in particular, the trial court redacted the portion of the transcripts and recording wherein Appellant requested counsel. The court also admonished the jury not to consider Detective Mullins' recorded statements as evidence. *See Walker v. Commonwealth*, 349 S.W.3d 307, 312-13 (Ky. 2011) (detective's personal comments during interview were relevant to provide context for detective's attempt to elicit responses from defendant); *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005) (law enforcement officer's statements during interrogation that defendant was lying were admissible to provide context for defendant's answers).

In addition, Appellant has failed to present any evidence that "an inference of guilt from [the invocation of the right to counsel] was stressed to the jury . . . ." *Baumia v. Commonwealth*, 402 S.W.3d 530, 539 (Ky. 2013).

Moreover, Appellant testified at length as to his version of events, including his altered narrative. *Id.* at 539-40. *See also Spears v. Commonwealth*, 448 S.W.3d 781, 787-88 (Ky. 2014) (finding any error harmless beyond a reasonable doubt where evidence strongly indicated Appellant's guilt, including that Appellant was the only living witness to the death of two victims). Thus, any error here was harmless beyond a reasonable doubt.

As previously noted, Appellant argues in the alternative that the trial court erred by not redacting the interrogation evidence. Having found harmless error under the constitutional standard, it logically follows that any error arising from a failure to redact is also harmless.

Discovery Violation

Appellant argues that the trial court erroneously denied his motion to dismiss resulting from the Commonwealth's alleged concealment of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); RCr 7.24. He now asserts that reversal is required. We disagree.

Appellant was indicted in 2009 and tried in September of 2013. Appellant contends that his counsel received a DNA report from the Commonwealth on February 12, 2010. That report analyzed the pistol grip of the murder weapon and revealed that it contained the DNA of at least two individuals. The report stated that, "given the close genetic relationship between Michael Moore and Warren Moore, no conclusions could be drawn as to their presence in this mixture."

A subsequent DNA report was prepared in 2012. Appellant contends that he did not receive that report until 2013, and only upon the request of counsel. He claims that the 2012 report demonstrated that there was a third "unknown" DNA profile located on the grip of the murder weapon. Appellant argues that this evidence was exculpatory because it tended to prove his initial narrative—that an unknown individual killed his parents, shot him, and then left.

Appellant acknowledges that his counsel received the 2012 report prior to trial. *See Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002) (*Brady* "only applies to 'the discovery, after trial, of information which has been known to the prosecution but unknown to the defense.'"). Appellant has also failed to demonstrate any prejudice that resulted from the belated discovery of the 2012 DNA report. Any prejudice that could have possibly occurred was obviated when Appellant changed his trial strategy to self-defense. He admitted that he shot his father with the murder weapon that was the subject of the DNA reports. Neither report contained exculpatory evidence, certainly not in light of Appellant's admissions. The trial court did not err in denying Appellant's motion to dismiss.

Juror Selection

For his next argument, Appellant asserts that the trial court erred by failing to excuse potential Jurors CL and RB for cause, and that reversal of his conviction is required. We disagree.

Defense counsel exercised two peremptory challenges to excuse Jurors CL and RB. This exhausted all of Appellant's peremptory strikes. Prior to jury selection, defense counsel, in writing, informed the court that she would have used a preemptory strike on Juror 11, who eventually sat on the jury. Thus, Appellant properly preserved this issue. *Sluss v. Commonwealth*, 450 S.W.3d 279, 284-85 (Ky. 2014).

We review the trial court's decision not to strike Jurors CL and RB for cause under an abuse of discretion standard. *Id.* at 282. In *Sluss*, we summarized our considerations as follows:

> Kentucky Criminal Rule ("RCr") 9.36 states clearly that 'when there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.' We must also adhere to the long standing principle 'that objective bias renders a juror *legally partial,* despite his claim of impartiality.' *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky.1991) (emphasis added). *Id.*

According to Appellant, Juror CL stated that he could not consider mitigation evidence such as a bad upbringing or intoxication. *See Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008). Juror RB stated that he fundamentally subscribed to "an eye for an eye and a tooth for a tooth," and that he could not consider a sentence in which the defendant could get parole for an aggravated, intentional murder with no defense. However, Appellant neglects the totality of both jurors' interrogatories.

Specifically, the interrogatories were lengthy and included meandering questioning by defense counsel. The jurors were also afforded great liberty in

explaining the intricacies of their personal beliefs. However, having reviewed the entirety of the jurors' responses to questions posed by defense counsel and the trial court, it is clear that there was no error here.

Every juror brings with them a lifetime of experiences and beliefs. Many, if not most, have beliefs steeped in religious teachings such as the "eye for an eye" concept. Also, it is most likely the reasonable belief of many, if not most, that a person should not be paroled if they have committed murder. The critical test which each juror must pass is the ability to subjugate their belief system to the law and instructions of the court. That examination was successfully completed in this case.

The trial court expressly asked both jurors whether they would consider mitigation evidence, the full range of potential penalties, and could heed the court's instructions. Both jurors responded in the affirmative. Therefore, the court did not abuse its discretion here.

Cross-examination of Appellant

For his next assignment of error, Appellant contends that the Commonwealth improperly elicited information that he had not volunteered his defense to the police at any time prior to trial. Appellant claims that this constitutes an impermissible comment on his silence in violation of the Fifth Amendment. *Doyle v. Ohio*, 426 U.S. 610 (1976).

On cross-examination, the Commonwealth inquired whether, in the four years between his indictment and trial, Appellant had ever informed the police of the same story that he presented to the jury. Appellant replied in the

negative. We addressed a similar issue in *Standifer v. Commonwealth*, No. 2000-SC-0526-MR, 2003 WL 21254858, at *4 (Ky. May 22, 2003). In that case, a detective testified at trial that "she was not aware of [the defendant's] self-defense claim until defense counsel's opening statement at trial." *Id.* Like the present case, the defendant in *Standifer* initially told the police that he had no involvement in the victim's death. *Id.*

We held that the detective's testimony and the Commonwealth's comment during closing argument conveying the same sentiments was, "not a comment upon [the defendant's] silence, but proper comment upon a statement made by [the defendant]." *Id.* at *5. Similarly, Appellant in the present case was cross-examined as to his previous statements to police, which directly contradicted his trial defense. Appellant was not questioned as to his pre or post-arrest silence. Thus, there was no error here.

Missing Evidence Instruction

Appellant claims that he was entitled to a missing evidence instruction concerning a section of drywall and red carpet runner from the lower stairwell of the house near where Warren Moore was shot. It appears that this evidence was not preserved for trial. Appellant contends that this piece of evidence contained blood and tissue matter that was "possibly exculpatory."

A missing evidence instruction is necessary "only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002); *Tinsley v.*

Jackson, 771 S.W.2d 331, 332 (Ky. 1989) (holding that a court may give a missing evidence instruction to eliminate prejudice resulting from the unavailability of exculpatory evidence). In the absence of bad faith or any other information demonstrating the potentially exculpatory nature of the material, we find that a missing evidence instruction was not warranted here.

Conclusion

For the foregoing reasons, we hereby affirm the judgment of the Boone Circuit Court.

All sitting. Minton, C.J.; Barber, Cunningham, Keller, Noble, and Venters, JJ., concur. Abramson, J., concurs in result only.

COUNSEL FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate

Jason Apollo Hart
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Hays Lawson
Assistant Attorney General of Kentucky