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RENDERED: APRIL 27, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000442-MR

BRIAN HATFIELD — APPELLANT

V.

ON APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
NO. 10-CR-00285

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the early morning hours of January 15, 2008, Appellant, Brian Hatfield, and his confederates went to Bill Taylor's house in order to obtain money to purchase drugs. One of Appellant's co-conspirators, Candy Maiden, claimed that Taylor was her "sugar daddy." Another co-conspirator, Deborah Partin, had also befriended the 91-year-old Taylor and believed that she could get some money from him. Partin cut Taylor's phone lines prior to their arrival so that Taylor would not call the police.

While at the Taylor residence, Appellant kicked Taylor and hit him in the head with a blunt force object until he stopped moving. Appellant and the others fled the scene in a truck driven by Jeramiah Evans. It is unclear exactly how much cash they stole from Taylor.

Sometime after the assault, Taylor revived and ran outside and attracted the attention of his neighbors. They testified that he had multiple abrasions and a deep wound in the back of his skull. He was bleeding severely and, according to his neighbors, made statements implicating Maiden and Partin. Todd Daugherty was a first responder who arrived at the scene shortly thereafter. Daugherty asked Taylor who had committed the crime. Taylor provided two names: Candy Maiden and Deborah Partin. Taylor was rushed to the University of Tennessee Medical Center in Knoxville, where he died as a result of his wounds.

Appellant, Maiden, Partin, and Evans were indicted for murder and complicity to commit murder. Evans pled guilty and testified against Appellant. A Bell Circuit Court jury tried and convicted Appellant, Maiden, and Partin of complicity to murder. Each was sentenced to 20 years' incarceration. Appellant appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Several issues are raised and addressed as follows.

The Right of Confrontation

Appellant argues that out-of-court statements introduced at trial to incriminate him were improperly admitted and violated his right to confront witnesses. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Bruton v. United States*, 391 U.S. 123 (1968); *Richardson v. Marsh*, 481 U.S. 200 (1987); *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009); and *Commonwealth v. Stone*, 291 S.W.3d 696 (Ky. 2009).

Appellant specifically argues that his right of confrontation under the Sixth Amendment as articulated in *Crawford* and *Bruton/Richardson* was violated when the trial court allowed into evidence seven out-of-court statements alleged to have been made by his co-defendants, Debbie Partin and Candy Maiden.

Appellant was indicted for murder or complicity to commit murder, along with Debbie Partin, Candy Maiden, and Jeremiah Evans. Hatfield, Partin, and Maiden were tried jointly. Evans had made a plea agreement and testified at the trial for the Commonwealth. Appellant chose to testify and was thus subject to cross-examination. Partin and Maiden chose *not* to testify and so the out-of-court statements attributed to them by other witnesses could not be challenged by cross-examination. Appellant complains that seven out-of-court statements, three attributed to Partin and four allegedly made by Maiden, were used against him at trial. As noted below, Appellant objected to only one of the seven statements.

1. Detective Lawson testified that Debbie Partin told him that on the evening of the murder, Appellant and several others took her to the victim's home where she got $100. Appellant and the others then picked her up and bought drugs, which they used together. Appellant objected to the admission of this statement due to his inability to cross-examine Debbie Partin but the trial court admitted it.

2. Francis Partin testified that shortly after the crime, Debbie Partin told her that she had cut the victim's telephone cord so that he could not call the

police for help. Francis Partin also testified that Debbie Partin denied that she put the gash in the victim's head, but that "they hit him," and he fell into a curio cabinet.

3. Co-defendant Evans testified that co-defendant Debbie Partin asked him to take "them" to the victim's house on the night of the murder and that Hatfield, Debbie Partin, and Maiden went to the victim's home to borrow some money.

4. Co-defendant Evans also testified that after he picked them up at the victim's house with the money, Maiden or one of her confederates said, "We'll have to go to Tennessee to get drugs."

5. Tara Hatfield testified that a month after the murder Maiden told her that "they" got high and "they" . . . she wanted to go get some money from her sugar daddy, the victim, so "they" could get higher and that "they" went to the victim's house and when "they" got there she got the money.

6. Scott Mason testified that shortly after the crime he saw Maiden, that Maiden was intoxicated and admitted to him that "they" committed the crime and that she got a pocket full of money.

7. Shanna Mason Daniels testified that several weeks after the crime she heard Maiden talk about her role in the victim's murder. Daniels testified that Maiden said that the victim was not supposed to have gotten hurt. Maiden told Daniels that the victim was fighting with "them." Daniels testified that Maiden admitted that she took $2000 from the victim's house.

Each of the out-of-court statements would have been admissible under KRE 801A(b)(1) (statements of a party) to prove the guilt of the individual who uttered it. But they also clearly implicate Appellant, either by a direct reference to his name or by the use of a plural pronoun that plainly refers collectively to the group of defendants on trial. Consequently, his inability to confront the declarants implicates his Sixth Amendment right.

As previously noted, Appellant's arguments are premised upon *Crawford v. Washington*, *Bruton v. United States*, and *Richardson v. Marsh*. *Crawford* holds that a defendant's Sixth Amendment right to confront witnesses against him is violated when an out-of-court "testimonial" hearsay statement of a declarant who is unavailable for cross-examination is introduced into evidence. *Bruton* holds that a defendant is deprived of his Sixth Amendment right of confrontation when he is incriminated by the admission into evidence of a non-testifying co-defendant's out-of-court statement. *Richardson* holds that a *Bruton* violation of the Sixth Amendment can be prevented by redacting the non-testifying co-defendant's out-of-court statement to eliminate any reference to the defendant's existence and by giving a proper limiting instruction.

As explained in *Stone*, 291 S.W.3d at 699-700, *Crawford* and its progeny address the use of "testimonial" out-of-court statements of an absent declarant to directly incriminate the defendant in a criminal trial. *Crawford* did not involve the joint trial of multiple defendants and the declarant was not on trial with the defendant. The *Bruton/Richardson* line of cases focus more specifically on the situation before us in this case: a joint trial of two or more

defendants, where the out-of-court statements of one defendant (the declarant), who chooses not to testify, is presented at trial to incriminate the declarant, but has also the collateral effect of incriminating another defendant in the joint trial. *Crawford*'s analysis of the Confrontation Clause does not displace and supersede the *Bruton/Richardson* analysis; it complements it.

Beyond the acknowledgment that formal statements to police investigators are "testimonial," *Crawford* and subsequent cases leave the meaning of the term vague and elusive. Recognizing the Sixth Amendment's focus upon the right to confront "witnesses," *Crawford* accepts the definition of "witnesses" as "those who bear testimony," testimony typically being a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51. Debbie Partin and Maiden may have uttered their out-of-court statements in a less than "solemn" manner, but when repeated by solemnly sworn witnesses at trial to prove the guilt of the accused, the statements become "testimonial" in every relevant aspect.

In any event, the use of Debbie Partin's statements as testimony makes her as much of a witness against Maiden and Appellant as if she had taken the stand, except that they could not confront her with cross-examination. Moreover, as noted above, all of the statements fall under a *Bruton/Richardson* analysis regardless of their "testimonial" character, or lack thereof.

The application of those analyses indicates that the out-of-court statements at issue were inadmissible against Appellant. However, we also conclude that, to the extent Appellant properly preserved the error for appellate

review, the statements were harmless under the constitutional error standard cited in *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010). To the extent that Appellant failed to preserve the errors with an adequate objection or a request for a limiting instruction, we conclude that in context with all the evidence the statements failed to generate the kind of prejudice necessary to establish palpable error under RCr 10.26. *See also, McCleery v. Commonwealth*, 410 S.W.3d 597, 606 (Ky. 2013).

Appellant did not request the limiting instruction that was available to him. He suggests on appeal that doing so would have been a useless gesture. Nevertheless, KRE 105(a) provides that the failure to make the request waives his appeal of the issue, except under the palpable error rule, RCr 10.26. We find no basis for finding palpable error here.

Mistrial

Appellant further argues that the trial court erred by denying his motion for a mistrial after the prosecutor briefly mentioned in its opening statement that Evans, a witness for the Commonwealth, "has, in fact, pled guilty to being a part of the actions that night." Appellant and his co-defendants moved for a mistrial at the end of the Commonwealth's opening statement.

When determining whether there was manifest necessity to declare a mistrial, we must consider whether the statements made by the prosecutor constitute information coming to the attention of the jury which is prejudicial to a fair trial. *Grimes v. McAnulty,* 957 S.W.2d 223, 224 (Ky. 1997) (citations omitted). It is also critical to note that "a finding of manifest necessity is a

matter left to the sound discretion of the trial court." *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000).

In addition to the prosecutor's comment during opening statement, she also asked Evans during direct examination whether Evans was a felon. He replied that he was. Defense counsel cross-examined Evans concerning his guilty plea, read part of the plea agreement to the jury, and later introduced the guilty plea documents as defense exhibits. Appellant argues that this line of questioning and evidence was only necessary because of the Commonwealth's erroneous assertion during its opening statement that Evans had pled guilty concerning his role in this case.

"It has long been the rule in this Commonwealth that it is improper to show that a co-indictee has already been convicted under the indictment." *Parido v. Commonwealth*, 547 S.W.2d 125, 127 (Ky. 1977) (citing *Martin v. Commonwealth*, 477 S.W.2d 506 (Ky. 1972)). However, we have refined this rule to bar only the "[*blatant*] use [of] the conviction [of a co-indictee] as substantive evidence of guilt of the indictee now on trial[.]" *Tipton v. Commonwealth*, 640 S.W.2d 818, 820 (Ky. 1982). We fail to see the blatant intent behind the prosecutor's statement here. Moreover, the contested statement was introduced during the Commonwealth's opening statement, not as substantive evidence. "It is well-settled that opening and closing arguments are not evidence and prosecutors are given considerable leeway during both." *Mayse v. Commonwealth*, 422 S.W.3d 223, 227 (Ky. 2013), as modified on denial of rehearing (March 20, 2014) (citations omitted). Prior felony evidence

is also expressly permitted under KRE 609 that may be employed tactically by prosecutors when examining witnesses. Therefore, the trial court did not abuse its discretion in denying Appellant's mistrial motion.

Jury Issues

Postponed Jurors

The Circuit and District Court venire panels were exhausted and additional jurors were needed. The Court then had the clerk to pull the names of those jurors who had been postponed or excused and not required to report to serve on this case. These postponed jurors were to serve from March to September of 2013, which was the time period during which the trial occurred. The clerk recalled these jurors by telephone.

Appellant contends that these jurors at issue here "were effectively excused from jury service for this case" and were no longer a part of the "randomized jury list" nor properly summonsed as required under KRS 29A.060.

That statute states:

> [w]hen there is an unanticipated shortage of available jurors obtained from a randomized jury list, the Chief Circuit Judge may cause to be summonsed a sufficient number of jurors selected sequentially from the randomized jury list beginning with the first name following the last name previously selected. The persons so chosen shall be summonsed as provided in this section, but need not be given the notice provided in subsection (3) of this section.

Subsection (3) requires that "[t]he service of summons shall be made by the court utilizing first class mail, [or] personally by the sheriff."

This statute is intended for when the jury pool is exhausted and new jurors are needed to supplement the panel. The postponed jurors were not new. They were initially chosen from a randomized jury selection list and initially summonsed pursuant to KRS 29A.060(3). As we stated in *Smith v. Commonwealth*, "[t]he practice of permitting jurors who appeared for service one term to volunteer in a later term to serve out the remainder of their trial days does not amount to reversible error." 734 S.W.2d 437, 444 (Ky. 1987). There is no error here.

Appellant also argues that the trial court violated KRS 29A.070(7) by denying him access to the back of the postponed jurors' qualification forms so that defense counsel could ascertain the reason for each juror's postponement. The court denied this request. In *Smith*, we determined that "defendant or his counsel's access to these forms is not unlimited because the statute vests jurisdiction in the trial judge to refuse access to the forms under certain circumstances." *Id.* at 443. Like our decision in *Oro-Jimenez v. Commonwealth*, it is clear that any discrepancy that occurred here "did not constitute a substantial deviation from the proper method and does not require reversal and re-trial simply for the sake of enforcing strict compliance with our rules." 412 S.W.3d 174, 178 (Ky. 2013).

Tainted Jury

Appellant also argues that the entire group of postponed jurors was tainted and that he was entitled to a mistrial. This issue was properly preserved. One of the postponed jurors was Larry Partin, the spouse of Francis

Partin, a witness for the Commonwealth. Mr. Partin was excused and did not sit on Appellant's jury.

Thereafter, several postponed jurors indicated that they heard Mr. Partin talking about the case where they were gathered. The trial court individually questioned each postponed juror about what they heard. Seven out of the seventeen jurors indicated that they had not heard anything. The remaining ten stated that they heard Larry Partin say that he knew the victim and the defendant because he lived in the community where the crimes occurred. Out of these ten individuals, several indicated that they heard that an older man had been murdered. Others stated that they heard speculation that this was the "Taylor case." None of the allegedly tainted jurors stated that Mr. Partin indicated that he thought the defendants were guilty.

Appellant takes specific issue with four potential jurors. Juror 759 heard that the victim's head had been bashed in with a crowbar. Juror 389 also said that Mr. Partin stated that the victim's brain was beaten in with a crowbar and that his daughter was friends with "these people" and lived across the street. These two jurors were dismissed.

According to Appellant, "the defense specifically challenged Jurors 483 and 675 for cause as they were the only two postponed jurors in the pool and they were tainted." Appellant also takes specific issue with Juror 220. We will address these three jurors in a subsequent section of this opinion.

However, Appellant's general claim that the entire group of postponed jurors was tainted must fail. As previously stated, Appellant has only taken

specific issue with five jurors, two of whom were dismissed by the court. Moreover, the trial court admonished the remaining postponed jurors not to consider anything they may have heard concerning the case. It is well-settled that "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). The court also asked if any of the jurors could not put aside facts, speculation, rumors, and any other topics that were discussed in the jury room. None of the jurors raised their hands. Therefore, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial.

Juror Selection

As previously noted, Appellant contends that the trial court erred by not excusing potential Jurors 220, 483, and 675 for cause. Prior to jury selection, defense counsel indicated on her strike sheet that she would have used a peremptory strike to strike other jurors 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 whether to strike jurors for cause under an abuse of discretion standard. *Id.* at 282.

Appellant takes issue with the fact that the Commonwealth's Attorney represented Juror 483 in a divorce proceeding 26 years before the trial in this case. When questioned whether this would impact the juror's service and decision, the juror indicated that it would not matter. Juror 483 also indicated she was in the jury room with Mr. Partin when he commented on the case. Although she stated that she heard what the case was about, she also said that

no one told her any details. Unlike Jurors 759 and 389, who provided details about the case and were excused, Juror 483 indicated that she heard only a general statement about the case. Based on these facts, we cannot say that the trial court abused its discretion in failing to dismiss Juror 483 for cause.

Appellant also argues that Juror 220 should have been excused for cause because he indicated that he wanted to hear from the defendant in a death penalty case. When the court clarified that this was not a death penalty case, the juror said "I've got no problem with it." There also appears to have been an issue with the juror's ability to hear what was being discussed. However, he was appropriately provided with headphones. Appellant's counsel argues that Juror 220 stated that he heard people talking about the case. When questioned by the court, however, the juror indicated that he was talking about a different case. Juror 675 was also questioned about what he heard from Mr. Partin in the jury room. The juror indicated that he heard nothing about the case. Therefore, the trial court did not abuse its discretion in failing to dismiss Jurors 220 and 675 for cause.

Witness Issues

During the Commonwealth's direct examination of its witness, Shanna Daniels, the prosecutor asked if she was a convicted felon and if the prosecutor recently filed a motion to revoke her probation. Appellant's counsel objected, stating that the prosecutor was impermissibly questioning the witness about the details of prior crimes thereby bolstering the witness. Appellant's objection was subsequently overruled.

Prior felony evidence is expressly permitted under KRE 609. That rule provides that "[t]he identity of the crime upon which conviction was based may not be disclosed *upon cross-examination* . . . ." KRE 609(a) (emphasis added). This witness was not the defendant, nor even a defense witness. She was a prosecution witness. Even assuming that the Commonwealth's questioning concerning the witness's pending probation revocation implicated the details of the felony for which she had been convicted, this testimony was elicited from the Commonwealth's own witness, and on *direct* examination, not cross-examination. *See Caudill v. Commonwealth*, 120 S.W.3d 635, 664 (Ky. 2003).

Appellant also takes additional issue with the Commonwealth's statements in closing argument where the prosecutor remarked that another witness, Tara Hatfield, was prosecuted by the Bell County Commonwealth Attorney's office and denied parole after she gave her statement in the present case. The prosecutor concluded: "so there were no deals for her." The prosecutor also asked several other witnesses, many of whom were witnesses for the Commonwealth, if they had been convicted of a felony and if the Bell County Commonwealth Attorney's office had prosecuted them. This type of questioning is expressly permitted under KRE 609.

Jury Instructions

Appellant argues that the trial court erred in denying his request to instruct the jury on reckless homicide, complicity to reckless homicide, facilitation to murder, facilitation to first-degree manslaughter, facilitation to second-degree manslaughter, and facilitation to reckless homicide.

There was no evidence in this case that required the court to instruct the jury on the alternative offenses requested by Appellant. The Commonwealth presented significant testimonial evidence in support of its case. For example, the jury heard evidence that Appellant and his confederates went to the victim's house in order to obtain money to purchase drugs, and that Appellant beat the 91-year-old victim in the head with a pipe and/or the butt of a gun until he stopped moving. Jeremiah Evans' testimony was particularly damaging. He testified in detail that Appellant confessed to beating the victim, Bill Taylor. Other witnesses also testified that Appellant acknowledged beating Taylor.

In contrast, Appellant denied all involvement in the murder and stated that he had never been to Taylor's residence. If the jury believed his testimony, then Appellant would have been acquitted. However, the evidence presented at trial was not sufficient to warrant a facilitation instruction. *See Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995) ("Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime.") (citing KRS 506.080(1)). Furthermore, only intentional crimes can be facilitated. A wanton or reckless crime cannot. *Finnell v. Commonwealth*, 295 S.W.3d 829, 833-34 (Ky. 2009). Finally, Appellant's voluntary intoxication argument does not warrant an instruction for reckless homicide. KRS 501.020(4).

Impeachment

Appellant contends that the prosecutor improperly impeached witness Jeff Stevens with irrelevant, prior bad acts. Stevens was called by Maiden to impeach Evans' testimony. On cross-examination, the prosecutor attempted to elicit information concerning Stevens' prior criminal record in order to demonstrate that he had made threats. The prosecutor was trying to show that because Stevens had made threats, he was not afraid of threats that he received from Evans.

Maiden objected and a bench conference ensued. Much of that exchange is unclear. Appellant subsequently joined Maiden's motion. Without citation, Appellant claims that "[t]he jury was told to disregard the prosecutor's statement about [Stevens'] conviction." However, our review of the record fails to indicate that an admonition was provided or requested. Although the admissibility of the disputed evidence at issue here is highly questionable, there was no reversible error.

Cumulative Error

Appellant claims that reversal is required because of cumulative error. However, reversal on the basis of cumulative error is only appropriate "where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown,* 313 S.W.3d at 631. Any errors that may have occurred here were not substantial and do not require reversal.

Conclusion

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

All sitting. Cunningham, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J. and Hughes, J., concur in result only.

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