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RENDERED: APRIL 27, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000498-MR

CANDY MAIDEN — APPELLANT

V.

ON APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
NO. 10-CR-00284

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the early morning hours of January 15, 2008, Appellant, Candy Maiden, and her confederates went to Bill Taylor's house in order to obtain money to purchase drugs. Appellant claimed that Taylor was her "sugar daddy." One of Appellant's co-conspirators, 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, co-defendant Brain Hatfield 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 Appellant and Deborah 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: Appellant and Deborah Partin. Taylor was rushed to the University of Tennessee Medical Center where he died as a result of his wounds.

Appellant, Hatfield, 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, Hatfield, and Partin of complicity to murder. Each was sentenced to 20 years' incarceration. Appellant appeals her 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.

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 her 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 she 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.

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. Appellant properly preserved this issue in accordance to *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, 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." The court understood that Juror 220 wanted to hear defendants in a death penalty case and that since this was not a death penalty case, he had "no problem" with a defendant not testifying. 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.

The Right of Confrontation

Next, Appellant argues that the Commonwealth's use of out-of-court statements allegedly made by non-testifying co-defendant Debbie Partin violated her right to confront witnesses as protected in the Sixth Amendment and as explained in *Crawford v. Washington*, 541 U.S. 36 (2004). Appellant also asserts that the admission of Debbie Partin's out-of-court statements violated *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987).

As stated previously, Appellant and three others, namely, Debbie Partin, Brian Hatfield, and Jeremiah Evans, were indicted for murder or complicity to commit murder. Appellant was jointly tried with Hatfield and Debbie Partin. Evans had made a plea agreement and testified at the trial for the Commonwealth. Hatfield chose to testify and was thus subject to cross-examination.

Debbie Partin chose *not* to testify.

Therefore, any out-of-court statements attributed to her by witnesses at trial could not be challenged by cross-examination. Appellant complains that witnesses at trial were permitted to testify about the contents of four out-of-court statements allegedly made by Debbie Partin which incriminated Maiden.

Appellant was unable to cross- examine Debbie Partin about the following statements.

1. Jeffrey Daughtery testified that a few days before the assault, Debbie Partin told him that she went to the victim's house to warn him about Appellant. Appellant objected and the jury was admonished to disregard any statements about her.

2. The Commonwealth also introduced Debbie Partin's out-of-court statement to Detectives Hatmaker and Lawson that Appellant was "really bad on drugs" a few nights before the assault. Appellant's objection based upon hearsay and the confrontation clause was overruled.

3. Francis Partin testified that Debbie Partin said that she had cut the victim's telephone line so that he could not call the police for help, and that "they hit him" causing him to fall onto the curio cabinet. "They" is a readily apparent reference to Appellant and Hatfield, the co-defendants on trial with Debbie Partin. No one else was identified with the crime to be even included in "they."

4. Co-defendant Evans testified at trial that Debbie Partin asked him to take "them," another obvious reference that included co-defendant Maiden, to the victim's home on the night of the crime to borrow some money. Evans admitted that he then took Hatfield, Partin and Appellant to the victim's home.

Appellant's arguments are premised upon *Crawford*, *Bruton*, and *Richardson*. *Crawford* holds that a defendant is denied his Sixth Amendment right to confront the witnesses against him by the admission of an out-of-court

"testimonial statement" made by a declarant who is unavailable for cross-examination. *Bruton* holds that a defendant is deprived of his Sixth Amendment right of confrontation when a non-testifying co-defendant's facially incriminating out-of-court statement is introduced at their joint trial. *Richardson* requires the trial court to protect a defendant's Sixth Amendment rights from the incriminating effect of a non-testifying co-defendant's out-of-court statement by redacting the statement to eliminate any reference to the defendant or to limit the incriminating effect of the statement by an appropriate limiting admonition to the jury.

As explained in *Commonwealth v. Stone*, 291 S.W.3d 696 (Ky. 2009), *Crawford* and its progeny address the use of testimonial hearsay against a non-declarant 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 one defendant, the declarant, has allegedly made out-of-court statements that implicate not only himself, but also the other defendants on trial. *Crawford*'s analysis of the Confrontation Clause does not displace and supersede the *Bruton/Richardson* analysis; it complements it.

Debbie Partin's out-of-court statements to Daughtery and to the detectives are, from Appellant's and Hatfield's perspective, statements of a co-defendant being used as testimony at trial to directly implicate Appellant. Debbie Partin's out-of-court statements are admissible against her under KRE

801A(b)(1) as statements of a party. But to the extent such statements also implicate a co-defendant in the same trial (Appellant and Hatfield) they are inadmissible as testimonial hearsay because Appellant had no opportunity to cross-exam Debbie Partin about the contents or the veracity of her statements. Appellant's right of confrontation was violated pursuant to *Crawford* and *Bruton/Richardson.*

The analysis applies with equal force to Debbie Partin's statements to Francis Partin and Evans. The use of the plural pronouns "they" and "them" as obvious references to the co-defendants must be analyzed for redaction under *Bruton/Richardson.*

Daughtery's testimony was followed by the trial court's admonition to the jury that it could be considered as evidence only against Debbie Partin. We recognize two circumstances when an admonition will not cure an erroneous admission of evidence: (1) when "there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant," and (2) when "the question was asked without a factual basis and was inflammatory or highly prejudicial." *Dickerson v. Commonwealth*, 485 S.W.3d 310, 322 (Ky. 2016) (quoting *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (internal quotation marks and emphases omitted)). Appellant fails to advance an argument to place Daugherty's testimony in either category and so we should presume that the error of admitting that out-of-court statement was corrected.

Debbie Partin's statement to the detectives that a few days before the murder Appellant was "really bad on drugs" does not directly implicate Appellant in the murder, but the allegation of illegal drug use would ordinarily be prejudicial enough to deserve corrective attention if improperly admitted. Nevertheless, Appellant's counsel acknowledged in the opening statement that she was a drug addict and so this evidence can only be regarded as harmless.

Appellant did not object to the introduction of Debbie Partin's out-of-court statements through witnesses Francis Partin and Evans. 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 may have uttered her 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, her statements become "testimonial" in every relevant aspect. The use of Partin's statements as testimony makes her as much of a witness against Appellant and Hatfield as if she had taken the stand, except that they could not confront her with cross-examination. Moreover, as noted above, the statements fall under a *Bruton/Richardson* analysis regardless of their "testimonial" character, or lack thereof.

We held in *Rodgers v. Commonwealth*, 285 S.W.3d 740, 746 (Ky. 2009), that a Sixth Amendment or *Bruton* violation was avoided in a joint trial when a declarant-co-defendant's self-incriminating out-of-court statement was introduced with the defendant's name redacted and a neutral term substituted. Here, the use of the pronouns "they" and "them," in context, clearly implicate Appellant, as well as others, in the crime. Without a redaction to eliminate the plural pronoun's apparent inclusion of Appellant, or an appropriate admonition pursuant to KRE 105(a)[1] to confine the prejudicial effect of the statement of the non-declarant defendants, *Richardson* is violated.

Appellant did not request a limiting admonition and she 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 her appeal of the issue, except under the palpable error rule, RCr 10.26. We find no basis for finding palpable error here.

Dying Declarations

Appellant further argues that the trial court erroneously permitted the introduction of testimony indicating that the victim, Bill Taylor, identified Appellant and Partin as being responsible for the crimes against him. This

[1] KRE 105(a) provides: "When evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. In the absence of such a request, the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule."

issue was extensively argued before the trial court. The court subsequently held that "given all the surrounding circumstances that Mr. Taylor's statements were made while believing that his death was imminent." We review the court's evidentiary rulings for an abuse of discretion. *Walker v. Commonwealth*, 288 S.W.3d 729, 739 (Ky. 2009).

As previously discussed, several witnesses testified that Taylor made remarks concerning Partin and Appellant that implicated them in the crime. One witness stated that Taylor claimed that Partin and Appellant had been to his house earlier in the day asking for money and a place to stay. When he declined their request, the women suggested that Taylor find another place to stay because his house might burn down. When asked by a first responder on the scene who assaulted him, Taylor mentioned Partin and Maiden. Detective Tyson Lawson later arrived at the scene and erroneously believed that Taylor had been shot. When Detective Lawson asked Taylor who shot him, he named Partin and Maiden.

In *Turner v. Commonwealth*, we discussed what is necessary to introduce a statement as a dying declaration:

> The proponent of a dying declaration need prove only three elements: (1) the declarant is unavailable as a witness as that term is defined in KRE 804(a); (2) the declaration was made at a time when the declarant believed that his death was imminent; and (3) the declaration concerned the cause or circumstances of what the declarant believed to be his impending death.
>
> 5 S.W.3d 119, 121-22 (Ky. 1999).

Only the second element is at issue here. In *Turner*, we further observed that "[t]he United States Supreme Court long ago held that a declarant's awareness

of his own impending death can be inferred from proof of 'the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive.'" *Id.* citing *Mattox v. United States,* 146 U.S. 140, 151 (1892).

Taylor walked to his neighbor's house, which was between 100 and 200 yards away. He provided his neighbors with a detailed account of his encounter with Appellant and Partin that occurred earlier that day as well as the details of the assault that occurred later that evening. Hospital records indicated that Taylor was alert and cooperative several hours after the beating. He died one week later in the hospital.

These statements were erroneously admitted as a dying declaration. However, they were admissible as excited utterances. *See Wells v. Commonwealth,* 892 S.W.2d 299 (Ky. 1995) (holding that victim's identification of appellant was proper under KRE 803(2) where victim identified the perpetrator to a paramedic, to an accompanying policeman, and to a police officer at the hospital.).

Furthermore, this evidence does not violate the Confrontation Clause because it was nontestimonial. *See Hartsfield v. Commonwealth,* 277 S.W.3d 239 (Ky. 2009).

It is unclear in the present case how much time expired between the assault and Taylor's contested statements. In any event, temporal proximity is not dispositive. For example, *Smith v. Commonwealth* involved a prosecution for wanton murder where the trial court admitted statements by the

defendant's former girlfriend to a police dispatcher naming the defendant as the killer of her present boyfriend. 788 S.W.2d 266, 268 (Ky. 1990). The Court held that these statements were properly admitted under the excited utterance exception to the hearsay rule, even though twenty-six minutes passed between the shooting and her utterance. *Id.*

It is clear that Taylor's statements were made in the presence of an ongoing emergency. It is also clear from the evidence that it was tragically chaotic, fraught with excitement. Mr. Taylor had staggered from his blood splattered home, where he had received a lethal beating, beseeching help and assistance from a neighbor. His neighbors—the Daughterys—lived only 1,000 feet away from the incredibly cruel beating. A bloody trail was left all the way from Mr. Taylor's home to that of his neighbors. His skull was exposed and the brain had sustained bruising and hemorrhaging. He was confused, thinking he had been shot, and gave contradictory accounts of who had assaulted him. Mr. Taylor soon lapsed into a coma and died within a week. We cannot imagine statements made under more excited and desperate circumstances. The questions asked and answered were for the primary purpose of resolving the situation, which included seeking immediate medical attention and securing the crime scene and the surrounding area. For example, Detective Lawson testified that after Taylor was transported to the hospital, Lawson cleared the Taylor residence to make sure that the assailant was not still at the scene. Also, there was no formality whatsoever to this exchange between the

testifying witnesses and Taylor. Therefore, Taylor's statements were nontestimonial and did not violate the Confrontation Clause.

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. Hatfield's counsel objected, stating that the prosecutor was impermissibly questioning the witness about the details of prior crimes thereby bolstering the witness. Hatfield's objection was subsequently overruled. Because Appellant's own trial counsel did not object, Appellant requests palpable error review.

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 on *direct* examination, not cross-examination. *See Caudill v. Commonwealth*, 120 S.W.3d 635, 664 (Ky. 2003). Appellant's counsel also elicited significant evidence concerning witness Daniels' probation revocation, pending felonies, and outstanding warrants.

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. There was certainly no palpable error here.

Jury Instructions

Appellant argues that the trial court erred in denying her requests 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. For example, the jury heard evidence that Appellant and her confederates went to the victim's house in order to obtain money to purchase drugs, and that co-defendant Brian Hatfield 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 Hatfield confessed to beating the victim, Bill Taylor. Other witnesses also testified that Hatfield acknowledged beating Taylor. In addition,

several witnesses testified concerning Appellant's involvement in the crime. These witnesses testified that Appellant told them that she went to Taylor's house to get money for drugs, that she took money from Taylor, and that he was not supposed to get hurt but that things did not unfold as planned.

In contrast, Appellant denied all involvement and stated that she was not at Taylor's residence on the night of the murder. If the jury believed her testimony, then Appellant would have been acquitted. However, the evidence presented at trial fails to indicate that she was "wholly indifferent" to the completion of the crimes in order to warrant a facilitation instruction. *See Thompkins v. Commonwealth*, 54 S.W.3d 147, 150 (Ky. 2001); and 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).

Closing Argument

During the sentencing phase of trial, the prosecutor informed the jury that Partin thought that Appellant and Hatfield committed the crime. Appellant's counsel objected and requested a mistrial which was denied by the trial court. The prosecutor was commenting on Appellant's statements to the police that were played for the jury. Prior to the introduction of those statements, the parties and the court went through transcripts of those recordings in order to redact inadmissible material. None of the defendants

requested that the court redact the statements with which Appellant now takes issue. There was no error here.

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 v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). 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, Hughes, Keller, VanMeter, and Wright, JJ., concur. Venters, J., concurs in result only by separate opinion in which Minton, C.J., joins.

VENTERS, J., CONCURRING IN RESULT ONLY: I concur with the majority's reasoning on each issue except the admission into evidence of the victim's hearsay statement shortly after the assault upon him. Based upon speculation and inferences never suggested or examined at the trial court level, the majority rules the statement is admissible as an excited utterance. The failure of the trial court to consider that hearsay exception and make a ruling based upon the evidence precludes us from interjecting that theory at the

appellate level. I concur in result because I believe the admission of this improper evidence was harmless.

Minton, C.J., joins.

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