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RENDERED: APRIL 27, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000685-MR

ROBERT NEWELL — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 14-CR-00258

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A McCracken Circuit Court jury convicted Appellant, Robert Newell, of first-degree manslaughter for stabbing and killing Gerald Stafford. He was sentenced to 20 years in prison. In this matter-of-right appeal, *see* Ky. Const. § 110(2)(b), he claims that the trial court erred in (1) excluding statements he made to police at the scene of the stabbing, (2) excluding a statement the victim allegedly made to his estranged wife before the stabbing, and (3) ordering restitution without affording him the required due process laid out in *Jones v. Commonwealth*, 382 S.W.3d 22, 32 (Ky. 2011). This Court affirms.

I. BACKGROUND

Newell lived with John Johnson in the latter's trailer and paid him rent. On a Saturday morning or early afternoon[1] in March 2014, Newell exited his room to discover several visitors congregated in the trailer. This included Johnson's girlfriend, Doris Austin; Johnson's co-worker, Gerald Stafford; and a neighbor, Otis Kelley. Stafford had brought a bottle of whiskey, which the men were enjoying.

After Newell and Stafford were introduced, they learned that Stafford was then employed by a landscaping company which Newell had also worked for in the past. The witnesses' accounts differed somewhat about what happened next. It suffices to say that the conversation between Newell and Stafford escalated in volume and anger. In response, Johnson ordered them to "take it outside."

All witnesses agreed that Stafford stepped outside. There was disagreement, however, over what happened at that point. Johnson testified that Newell then went to his room, and he never saw him go outside after that. According to Kelley, Newell returned from his room with a knife and smacked the bar with both hands before telling Johnson to "get him out of my face or I'm gonna stab him." On the other hand, Austin's version of events differed significantly. According to her, it was Newell who ordered Stafford to leave the

[1] The witnesses' accounts, including timelines, differed to varying degrees. These differences will be highlighted when relevant.

trailer, at the same time threatening to kill him. She claimed that Newell then retrieved a knife before exiting the trailer.

However it played out, though, all agreed that Stafford reentered the trailer a short time later, saying he had been stabbed. Indeed, he had been stabbed—once, in the stomach. Despite emergency surgery, the wound eventually proved fatal.

Although Stafford gave police a recorded statement before his surgery in which he accused his estranged wife, Londa Stafford, of stabbing him, it appears that the identity of who actually inflicted the fatal wound—Newell—was not contested. In her statement to police, Austin reported that a remorseful Newell had been apologetic after the stabbing (although she would later testify at trial that she did not remember telling this to police). Similarly, Newell also admitted as much to police at the scene, telling them that he had not wanted to stab Stafford, but that he had left him with no choice but to defend himself. (When Newell sought to introduce these statements at trial, the court excluded them, as is discussed in more detail below.)

Newell was tried for murder. He raised self-defense at trial but did not testify. The jury ultimately convicted him of the lesser offense of first-degree manslaughter and recommended a prison sentence of 20 years. The trial court sentenced him accordingly.

II. ANALYSIS

A. The trial court's finding that Newell's hearsay statements to police did not satisfy KRE 803(2)'s excited-utterance exception was not clearly erroneous.

Newell first claims that the trial court erred in excluding statements he made to police at the scene shortly after the stabbing. In these statements, he repeatedly emphasized that he had not wanted to injure Stafford, who he insisted had left him with no choice but to defend himself.[2] He points out that these statements are highly relevant to his defense that Stafford was the aggressor whom he stabbed only in self-protection. So reversal is required, he maintains, because the trial court hindered his ability to present his defense by excluding them.

Hearsay is an out-of-court statement offered into evidence as substantive proof that the matter asserted in the statement is true. KRE 801(c). It is inadmissible unless it falls under one of the exceptions laid out in our rules. KRE 802. One such exception, which is at issue here, allows for admitting

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[2] Defense counsel entered into the record for appeal the transcript of the recording of Newell's arrest. The statements at issue, made right after Newell gave his name to the arresting officer, began as follows: "I didn't want to hurt him. I really didn't. I asked him, I begged him to leave me alone. I said, 'Leave me alone.' He just wouldn't do it. He just kept on. I didn't want to hurt him or nothing."

The officer then interjected to clarify the spelling of his name and ask for his address and Social Security number. After answering those questions, Newell resumed:

> I didn't want to hurt that boy. He didn't give me any fucking choice. He was going to hurt me. (Inaudible.) I had no choice. I had to stop him. And I told him, I said, "You fuck with me, I'll (inaudible). I'll drop you." He wouldn't listen. (Inaudible) whatever. I don't know. Oh, good god, all mighty. Can I rub my nose to get that (inaudible) or something?

These statements were not prompted by the arresting officer or anyone else.

what our rules label *excited utterances*. KRE 803(2). These are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* This exception's premise is that "statements made under the stress of the excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate." *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002). So it "is defined to require focus on the declarant's mental state at the time of the statement (did she speak 'under the stress of excitement')." Robert G. Lawson, *Kentucky Evidence Law Handbook* § 8.60[3][c], at 673 (5th ed. 2013).

In deciding whether the exception applies, the question that must be asked boils down to: Was "the declarant's condition at the time . . . such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation"? *Noel*, 76 S.W.3d at 926 (quoting *United States v. Iron Shell*, 633 F.3d 77, 86 (8th Cir. 1980)). The answer to that question depends entirely upon the particular circumstances under which the statement was made. *Souder v. Commonwealth*, 719 S.W.2d 730, 733 (Ky. 1986). Circumstances this Court has listed as especially significant to this inquiry include:

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the

> utterance was made in response to a question, (viii) whether the declaration was against interest or self-serving.

Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998). These factors are not exclusive, however, and are to be used only as guidelines for determining admissibility based on the specific facts and circumstances of a given case. *Noel*, 76 S.W.3d at 926. As Professor Lawson predicted, despite our recognizing these express guideposts' utility, this Court indeed "fully concur[s] . . . that 'the ultimate question is whether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event.'" Lawson, *supra*, § 8.60[3][c], at 674 (quoting *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 379 (6th Cir. 2009)).

The proponent of the hearsay evidence bears the burden of proving that it falls within the exception. *See Jarvis*, 960 S.W.2d at 470. In close cases, we will defer to trial courts' decisions to admit or exclude this evidence, *Souder*, 719 S.W.2d at 733, and such decisions are subject to reversal only for clear error, *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001). A trial court's findings are not clearly erroneous if supported by substantial evidence. *Id.*

Turning to the case before us, there is no dispute that Newell's post-stabbing statements to police are hearsay under KRE 801(c). The statements were indeed offered to prove the truth of the matters asserted in them: namely, that Newell had not wanted to stab Stafford, but that the latter had forced his hand. Implicit in the statements is the assertion that Stafford had been the aggressor and Newell the self-defender. It is the truth of that implied assertion that Newell sought to prove with his out-of-court statements. So they are

inadmissible hearsay under KRE 802 unless one of the exceptions to that rule applies. Here, the only one in play was KRE 803(2)'s excited-utterance exception.

The trial court ruled that the statements did not meet the requirements for admission under that exception. It based this ruling primarily on its finding that approximately 13 or 14 minutes passed between the exciting event, the stabbing, and the making of the statements.[3] In light of that passage of time, the court also questioned how these later statements to police proposing self-protection could be squared with the recording of the 911 call, which of course was made after the stabbing and on which Newell can be heard threatening to kill Stafford if he went back outside. In the end, the court concluded that the time period between the stabbing and the statements was too long to believe that they were a spontaneous reaction to the traumatic event, especially given their self-serving nature. The circumstances surrounding the statements convinced the court that they were, instead, the deliberate result of reflection and thought.

We can find no fault in the trial court's decision. The record makes clear that the court considered all of the circumstances surrounding Newell's hearsay statements before concluding that he failed to carry his burden of showing that the exception applies. Substantial evidence supported that

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[3] This approximation is based on the arresting officer's testimony that he arrived on the scene about 12 minutes after the 911 call, which was made immediately after the stabbing. Newell made these statements to the arresting officer almost immediately after police arrived.

conclusion. The trial court did not err in excluding Newell's hearsay statements to police.

B. Newell has not shown that the trial court abused its discretion in excluding Stafford's alleged statement on relevance grounds.

Newell also claims that the trial court erroneously excluded Stafford's statement, "I'd rather die than be without you," allegedly made to his estranged wife, Londa Stafford, hours before his fatal altercation with Newell.

Newell called Londa as a witness at trial. She testified that she was with her boyfriend at a car wash when she saw Stafford two or three hours before his stabbing. When they noticed each other, they were several yards apart. She denied that they spoke to each other; instead, they both turned and walked in separate directions to avoid an encounter. She began to explain that they did this "because we had an emergency—" but the prosecutor interjected, objecting that KRE 404(b) barred her from informing the jury about an emergency protective order against Stafford. A bench conference ensued.

During this conference, defense counsel explained that his intent was to elicit from Londa that Stafford had told her he would rather not live than have to live without her. This, counsel offered, brought some light to why Stafford, in his statement to police at the hospital, initially accused Londa. He argued it was "part of the totality of the circumstances of what was going on in his state of mind." Counsel emphasized that this statement was evidence of Stafford's state of mind right before, and presumably throughout, his altercation with Newell—as counsel argued, it helped show "why he was drinking that day; why he started a fight with my client; why he was up in my client's face. It's because

. . . he was stewin' on her." Counsel suggested that the fact that Stafford did not inform police that Newell stabbed him, combined with his statement to Londa about not wanting to live without her, tended to show that he was really just angry over the situation with his wife and, in truth, felt guilty for starting the fight with Newell.

The trial court rejected these arguments. In its view, whatever Stafford's state of mind was at that time vis-à-vis Londa was irrelevant to proving the facts of what later occurred between him and Newell. Evidence that is not relevant is of course inadmissible. *See* KRE 401, 402. Decisions excluding evidence as irrelevant are reviewed under the abuse-of-discretion standard. *E.g., Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). Under that familiar standard, a trial court's decision is an abuse of discretion if it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On appeal, Newell has somewhat refined his argument. Now, in his view, this evidence of Stafford's state of mind—being "heartbroken" and "not want[ing] to live," as he puts it—lends credence to his claim that it was Stafford who picked the fight with him and was the initial aggressor, and so it was relevant to his self-protection defense. Its relevance lies in showing that the deceased "was depressed to the point of being suicidal," which Newell posits, "shows that he may have been looking for a fight."

Newell's relevance arguments are logically appealing. Taking them at face value, we agree that using the statement to paint Stafford as having been

so emotionally unbalanced as to have preferred dying to living would allow one to infer that this may have caused him to be prone to engaging in the type of antisocial, violent behavior Newell alleges. In that sense, Stafford's state of mind as reflected in the alleged statement to Londa is relevant. After all, relevance under KRE 401 is not a high bar, reflecting our evidentiary rules' strong inclusionary thrust. Meeting that bar requires only that the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. "Relevance is established by any showing of probativeness, however slight." *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). The evidence described above satisfies this definition.

The problem for Newell, though, is that his description of the evidence that we have provided above does not entirely hold up under scrutiny. Simply put, Newell's argument assumes what the record does not bear out. As the Commonwealth highlights in its brief, all the record here shows is that Londa and Stafford saw each other at a car wash hours before the stabbing. It does not show that they spoke at that time—indeed, not only does Londa's testimony about their intentionally avoiding an encounter suggest that they did not, but she even denied as much when first asked about it. Indeed, other than defense counsel's arguments to the trial court below, the record provides no assurance that Stafford's alleged statement to Londa even occurred at all, let alone that it occurred in the lead up to the ultimately fatal encounter with Newell.

But even taking counsel's arguments at face value and assuming that Stafford did tell Londa that he would rather die than not be with her, we are still left to wonder when that actually took place. Importantly, nothing in the record shows that it happened hours before the stabbing, which Newell's argument on appeal assumes. Yet this fact—the statement's temporal proximity to the altercation with Newell—is paramount to the relevance inquiry here. After all, if the statement was in fact made days or weeks earlier than the day in question, its claimed relevance in showing Stafford's state of mind at the time of the altercation and stabbing dissipates entirely.

This, in the end, is fatal to Newell's claim. Absent a showing that the alleged statement was made close in time to the stabbing, we cannot say that the trial court abused its discretion in deeming it irrelevant and thus inadmissible. A ruling in Newell's favor would require engaging in speculation, and we do not reverse based on speculation.

C. The trial court's procedure for ordering restitution satisfied due process and did not constitute palpable error.

Newell last complains about the trial court's ordering him to pay $2,636 in restitution to cover Stafford's funeral expenses, which the Commonwealth requested, perhaps for the first time, at final sentencing. The trial court agreed to do so over Newell's objection that the statutory definition of restitution in KRS 532.350(1)(a) does not include compensation for funeral bills. Under the court's order, Newell will be required to pay this amount in $100 per month installments beginning upon his release from prison, to which defense counsel

again seemed to object, predicting that Newell would not be able to make these payments. The trial court dismissed that concern as premature.

Newell now claims that the trial court thus imposed restitution without affording him minimal due process. He argues that this requires reversal of that order and remand for an adversarial hearing on restitution.

But as the Commonwealth points out, this particular claim of error is unpreserved—although Newell objected below, he did so on the substantive grounds mentioned above and not on the procedural grounds he now argues on appeal. So his claim is subject only to palpable-error review under RCr 10.26, which means that he will be entitled to relief only if "manifest injustice" would result from the error if left uncorrected. "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Newell insists that he has made that showing here and cites *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011), as mandating the relief he requests. In that case, this Court held that when there is no agreement between the defendant and Commonwealth on the issue of restitution, constitutional due process requires trial courts to conduct an adversarial hearing and afford a number of basic procedural protections. *Id.* at 31–32. The particular due-process requirements laid out in *Jones* are:

> [1] reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed; and

> [2] a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and
>
> [3] a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and
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> [4] the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

Id. at 32. Yet despite that directive, the Court in *Jones* also made clear that "trial courts retain broad discretion to manage the proceedings as needed to implement the mandate of KRS 532.032 in a manner that protects constitutional due process and achieves substantial justice." *Id.*

Newell alleges that he received none of the *Jones* protections. According to him, he did not receive reasonable advance notice of the amount and nature of the claimed expenses. Nor did the trial court, he insists, afford him an opportunity to examine and rebut whatever evidence or information the Commonwealth presented to support restitution. He also argues that the Commonwealth failed to meet its burden of establishing a valid restitution claim and its amount by a preponderance of the evidence and, in the same vein, claims that the order was not supported by substantial evidence.

But after reviewing the video record of Newell's final sentencing hearing, we find these complaints wanting.

First, it is apparent that Newell indeed had advance notice of the amount and nature of the claimed restitution. When the judge broached the subject of

restitution, defense counsel responded, "Is that for the funeral bill?" Implicit in that response is his prior knowledge of the bill.

Second, it is clear that Newell received the type of informal hearing that *Jones* speaks to. As we clarified in that case, all our statutory scheme contemplates is "an adversary hearing, ordinarily conducted in conjunction with the final sentencing hearing, at which the trial court will have broad discretion to make findings based upon reliable information, but not bound by the rules of evidence or traditional rules of pleading." *Jones*, 382 S.W.3d at 31. In most cases, we noted, restitution under KRS 532.350(1)(a) will be "readily ascertained and easily verified by medical records, insurances, receipts, pay records, income tax records, repair estimates, purchase invoices, and the like," and ordinarily these losses will have been recent or certain to be incurred in the near future. *Id.* So "[i]n such cases, the issue will be summarily resolved with minimal formality and with practical efficiency." *Id.* What happened here appears to have been just this sort of summary proceeding involving easily ascertainable and verifiable costs.

The record also shows that Newell was given an opportunity to challenge the funeral-bill evidence and dispute its sufficiency—again, as mentioned above, we can infer from the hearing record that he received some advance notice of that evidence. He failed to challenge that evidence when given the chance.

In sum, Newell has not shown that the trial court's procedure for ordering restitution was palpably erroneous or violated his right to due process.

III. CONCLUSION

The judgment of the McCracken Circuit Court is affirmed.

All sitting. All concur.

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