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RENDERED: AUGUST 29, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000634-MR

TREY A. RELFORD — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 15-CR-00719

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Trey A. Relford, entered a conditional guilty plea in Fayette Circuit Court to murder, first-degree robbery, and tampering with physical evidence. Following the Commonwealth's recommendation, the trial court sentenced Appellant to thirty-one years' imprisonment. Appellant now appeals raising multiple issues involving (1) a motion in limine to exclude hearsay statements and (2) a motion to suppress filed by Appellant to exclude evidence from a cell phone seized by the police. For the following reasons, we affirm.

I. BACKGROUND

Salahuddin Jitmoud, a twenty-two-year-old Pizza Hut delivery driver, was stabbed and killed while attempting to make a pizza delivery to an apartment complex in Lexington, Kentucky. The insulated warming bag, food, and Jitmond's wallet containing ninety dollars were all missing. Jitmoud died at the scene.

One resident at the building, who initially said she saw nothing, eventually told police she saw Antonio Lewis standing over the victim's body. She also saw another person she believed to be Cameron McClellan but stated she did not see his face. Police subsequently interviewed both Lewis and McClellan.

During McClellan's interview at the police station, he first stated he was not at the apartment complex on the day of the crime. However, once the police told McClellan that Lewis implicated him (which was untrue, as police had yet to interview Lewis), McClellan admitted some involvement in the murder as a possible lookout. In his statement, McClellan told police he saw Lewis kill the victim. However, along with his statement about the murder, he also provided some incorrect details (such as telling police the pizza was left behind). After McClellan's confession, he recanted and told police his original story: that he was not present during the crime. As the questioning continued, McClellan told police yet another version of events.

After McClellan's interview, police interviewed Lewis. Lewis maintained his innocence and adamantly denied involvement in the crimes, even after police informed him of McClellan's statements. Lewis told police about personal conflicts he had with people in the apartment complex. After obtaining McClellan's and Lewis's statements, police arrested both for Jitmoud's robbery and murder.

During their investigation, police determined the telephone number used to place the order for delivery at Pizza Hut was not assigned to a mobile

telephone or landline account. After several search warrants, officers discovered the number had been altered by a phone application called Hushed. Using Hushed, an individual can mask his phone number and have it appear as if the call were placed from another number. Eventually, police tracked the phone call to an AT&T phone number owned by Appellant and identified the particular type of phone, a Samsung SGH-I337 with its IMEI number (a fourteen-digit identifying number).

With evidence pointing to Appellant's phone placing the call to Pizza Hut, the police went to interview Appellant at his residence. When the officers arrived, they posed as domestic violence detectives and used a ruse to speak with Appellant. The police talked with him about several previous domestic violence incidents. While the officers spoke with Appellant, Appellant answered a phone call. At that point, detectives recognized his phone as the same type which had made the pizza delivery phone call.

Police told Appellant they could use information in his text messages to help him. Under those pretenses, Appellant voluntarily surrendered his phone and gave police permission to search his messages. Once they left, the officers removed the phone's rear cover, obtained the IMEI number, and had a search warrant signed within the hour for the phone. The police then downloaded the contents of Appellant's phone pursuant to the search warrant.

Appellant was interviewed twice after the seizure and download of his phone. The second time, Appellant admitted involvement in the murder and robbery of Jitmoud and implicated another individual with assisting him.

Appellant admitted to placing the calls through the Hushed application and provided correct details, such as him calling Pizza Hut a second time to change the address of the delivery. He also provided detectives with the specific type of pizza ordered and told them about Jitmoud's wallet, another detail not publicly released. Appellant told police he did not know Lewis or McClellan.

The Commonwealth brought its cases against Appellant, Lewis, and McClellan before a Fayette County Grand Jury on the same day. The Grand Jury indicted Appellant and did not indict Lewis or McClellan.

Prior to trial, the trial court found McClellan's statements to police were inadmissible hearsay and denied Appellant's motion to suppress the evidence from his Samsung phone. Appellant entered conditional guilty pleas to complicity to murder, complicity to first-degree robbery, and criminal attempt to tampering with physical evidence. The trial court sentenced Appellant to 31 years' imprisonment. This appeal followed.

II. ANALYSIS

A. Hearsay

1. Preservation

While we acknowledge neither party raised this argument on appeal, we address it at the outset. After thoroughly reviewing the record in this case, including the trial court motions and orders related to the hearsay issues and hearings on the motion in limine, we note Appellant did not preserve this issue for our review.

The Commonwealth filed a motion in limine to exclude McClellan's statements to police. Appellant filed a response and included arguments for its admissibility, arguing both that it should be admitted as a statement against interest and as an alternative perpetrator theory. However, in spite of the written response, at the hearing on the motion, Appellant's counsel conceded the statements should not be admissible at trial. As such, it is inappropriate for Appellant to now argue the trial court erred in determining the statements were inadmissible.

"As we have often stated, an appellant may not 'feed one can of worms to the trial judge and another to the appellate court.'" *Jefferson v. Eggemeyer*, 516 S.W.3d 325, 339-40 (Ky. 2017) (citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976)). Furthermore,

> The trial court should be given a 'reasonable opportunity to consider the question during the trial so that any problem may be properly resolved at that time, possibly avoiding the need for an appeal'; and the rule ensures 'there is a discrete decision for an appellate court to review' by 'requiring that trial counsel focus the trial court's attention on a purported error by specifically identifying it[.]'

Henderson v. Commonwealth, 438 S.W.3d 335, 343-44 (Ky. 2014) (citing *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011)).

As noted, in response to the Commonwealth's motion in limine, Appellant argued the hearsay statements should be admissible under KRE 804(b)(3) (statement against interest) and as an alternative perpetrator theory; however, during the hearing on the motion, Appellant's counsel contradicted her position numerous times and conceded the statements should not be allowed.

Appellant's counsel voluntarily informed the trial court, "I would not try to say what [McClellan] said as far as his admission or anything like that."

Eventually, the trial court asked for clarification in the following exchange:

Judge:	So, out of the statements, what is it that you think you should be able to say one of them said?
Defense:	[short silence]
Judge:	. . . . What is it that you believe should come in that the Commonwealth says should not come in?
Defense:	Well, my understanding of reading of the motion is that the Commonwealth doesn't really want me to talk about any of the two other co-defendants and so.
Judge:	I don't think that's accurate.
Defense:	Okay.
Judge:	You're not trying to preclude that there were two other individuals that were arrested, correct?
Commonwealth:	No. . . .
Judge:	For purposes for this hearing, I am making an assumption that [McClellan and Lewis] would be unavailable and that it would be this detective that would be questioned. Now that I've heard all of this, I'm not really even sure what you would try to get him to say that would be considered hearsay—objectionable—and then whether or not there is an exception to it.
Defense:	Well, I think that there is always impeachment and hearsay is always allowed in impeachment.
Judge:	Impeachment of?

Defense:	Well, if Mr. McClellan or Mr. Lewis does end up testifying, then I believe that I can get into their statements.
Judge:	You [Commonwealth] agree with that.
Commonwealth:	We agree.
Judge:	Okay, we agree with that.
Defense:	I don't, I don't—there is nothing about me that believes that I get to walk in and say, "Detective Brislin you questioned Cameron McClellan did you not," "yes I did," and push play. I don't, I don't believe I ever get to do that.
Judge:	Okay, that's good. I think we're on the same page there.
Defense:	Yeah.
Judge:	But do you think that, if he, if McClellan does not appear, do you believe you get to ask this detective
Defense:	What he said?
Judge:	Yeah.
Defense:	Probably not.
Judge:	Okay, I don't think so either; and so, this was fine to do today, and I can understand you not knowing exactly where the Commonwealth is kinda coming from.

It is clear Appellant's counsel only wanted the statements for impeachment if either of the two individuals decided to take the stand; all parties agreed. Everyone was on the "same page." The trial court went further to clarify if the door was opened during trial or if circumstances changed, then "there could be impeachment or all kinds of things." Consequently, due to

Appellant's counsel's concession that the hearsay should not come in except for impeachment, Appellant waived any claim of error on this issue.

In order to determine whether McClellan would, indeed, assert his Fifth Amendment privilege, the trial court set a hearing to bring him in. Prior to that hearing, Appellant filed a motion[1] to include McClellan's hearsay statements. This motion concerned the same statement the trial court had already ruled would be excluded. Appellant argued the same hearsay exception and alternative perpetrator theory it had previously used in response to the Commonwealth's motion in limine (though in greater detail). At the hearing, after McClellan asserted his Fifth Amendment privilege and the court officially found McClellan to be an unavailable witness, Appellant's counsel stated he filed for the judge to "I guess reconsider the ruling" and "I guess we wanted to lay out the record with the law a little bit better than it had previously been written."

The trial court responded:

> there wasn't anything filed for me to reconsider within 10 days of my ruling. This [hearing] was just simply making sure Mr. McClellan was still invoking his Fifth Amendment right, there had not been any type of change of heart or change of circumstances. *There has not been any new law that has been presented to me* – that is deemed new law – it's the same requirements the Court previously considered.

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[1] The motion was styled as a "motion in limine." We note that a motion in limine is "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial." MOTION IN LIMINE, Black's Law Dictionary (11th ed. 2019). However, the trial court treated it as a motion to admit a statement and we will do the same.

(Emphasis added.)

Appellant is appealing, in part, on the "denial of a so-called motion to reconsider," filed four months after the trial court ruled on the exact same arguments, which Appellant's counsel conceded would not be allowed. "Motions such as this asking the trial court to change its mind have become a very common practice in the circuit courts of this Commonwealth." *Moore v. Commonwealth*, 357 S.W.3d 470, 496 (Ky. 2011). We have held:

> While it is true that under CR 54.02 the trial court retains broad discretion to revisit its interlocutory rulings at any time prior to the entry of a final judgment, that discretion is properly invoked only when there is a *bona fide* reason for it, *i.e., a reason the court has not already considered.* Otherwise a motion to reconsider amounts to no more than badgering the court, a practice that could well be deemed a violation of Civil Rule 11.

Id. at 496-97 (emphasis added). Just as in this case, *Moore* involved a party asking the trial court to reconsider an evidentiary ruling. The trial court herein did not have any valid reason to revisit its prior ruling on the exact same motion, and Appellant's counsel did not offer any new theory or law other than merely wanting to reargue the issue in greater depth.

2. No Abuse of Discretion

Even if we assume, arguendo, Appellant properly preserved this issue for appeal, "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Applying this standard, the trial court did not abuse its discretion when it excluded McClellan's hearsay statements.

> Hearsay,
>
> [a]n out of court statement offered, in court, to prove the truth of the matter asserted is *not admissible unless it meets one of our well established exceptions.* These exceptions grew from ancient common law supported by the theory that the character and context of such statements adds sufficient reliability to permit admission.

Wells v. Commonwealth, 892 S.W.2d 299, 301 (Ky. 1995) (emphasis added). One of the hearsay exceptions is a "statement against interest," defined as

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is *not admissible unless corroborating circumstances clearly indicate the trustworthiness* of the statement.

KRE Rule 804(b)(3) (emphasis added). "KRE 804 applies only to situations in which the declarant—the individual whose out-of-court statements are proffered as evidence—is unavailable as a witness." *Moore v. Commonwealth*, 462 S.W.3d 378, 381 (Ky. 2015). Additionally, "[t]he burden of establishing the requirements under the rule rests with the proponent of the statement." *Fugett v. Commonwealth*, 250 S.W.3d 604, 620 (Ky. 2008).

"At common law, trustworthiness of a hearsay statement against penal interest is a prerequisite to its admissibility." *Harrison v. Commonwealth*, 858 S.W.2d 172, 175 (Ky. 1993). The United States Supreme Court set forth in

Chambers v. Miss., 410 U.S. 824 (1973), "four considerations relevant to the trustworthiness of such statements: (1) the time of declaration and the party to whom made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against the declarant's penal interest; (4) the availability of a declarant as a witness." *Crawley v. Commonwealth*, 568 S.W.2d 927, 931 (Ky. 1978).

It is undisputed McClellan was properly found to be an unavailable witness after he asserted his Fifth Amendment right against self-incrimination. However, Appellant's counsel, as proponent of the statements, did not meet the burden of proof establishing the hearsay statements as trustworthy with corroborating evidence. In order to meet this burden, Appellant had to demonstrate, through the use of the four factors, the statement was trustworthy. During the hearing, Appellant's counsel never brought up the trustworthiness factors, nor did she argue statement against interest to the trial court at all. In fact, Appellant's counsel stated she "would not try to say what he said as far as his admission or anything like that."

It is true that four months after the trial court's initial ruling on the matter, Appellant eventually tried to get the trial court to reconsider; however, Appellant did not offer any new law or legal theory as to why the judge should change her finding. *See Moore*, 357 S.W.3d at 496-97. As such, the trial court did not abuse its discretion in excluding the hearsay statements.

3. Harmless Error

Even if we hold the trial court abused its discretion in excluding McClellan's hearsay, any error would be harmless. "The relevant inquiry under the harmless error doctrine 'is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Jarvis v. Commonwealth*, 960 S.W.2d 466, 471 (Ky. 1998) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). "But '[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" *Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Here, Appellant provided a confession to involvement in this crime and included details not released to the public. Also, the Commonwealth had other substantial evidence at its disposal, such as phone records leading directly to Appellant. Consequently, there is not a reasonable probability, let alone substantial influence, that merely excluding McClellan's hearsay statements—while the trial court left open every other avenue for an alternative perpetrator defense—contributed to Appellant's decision to plead guilty.

4. Alternative Perpetrator Defense

Appellant also argues the hearsay statements should come in as an alternative perpetrator theory and cites *Chambers v. Mississippi*, 410 U.S. 284 (1973), in support of his contention. The United States Supreme Court has

stated, "we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

It is important to note the trial court did not close off any avenues for an alternative perpetrator defense. The trial judge even went into detail explaining to Appellant additional ways to introduce alternative perpetrator evidence and left the *only limitation* at McClellan's hearsay statement. The trial judge explained Appellant could basically do everything else and may possibly get in the hearsay statement depending on how the trial developed. As such, the trial court did not err regarding Appellant's alternative perpetrator defense.

Regarding *Chambers*, it "was concerned with a situation in which a defendant could not impeach his own witness and whether that inability deprived a defendant of a right to defend himself—a concern not present in the case at hand." *Paulley v. Commonwealth*, 323 S.W.3d 715, 730 (Ky. 2010). Here, the trial court agreed Appellant could use the hearsay statements for impeachment if McClellan took the stand and offered Appellant a very broad range of discretion to use all other evidence for his alternative perpetrator defense. We fail to see how the trial court's denial of the hearsay statement, which Appellant's counsel stated would not come in, deprives Appellant of "a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

B. Cell Phone

Appellant next argues that the trial court erred in denying in part his motion to suppress evidence related to his cell phone. "Our standard of review of [a] trial court's denial of a suppression motion 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." *Milam v. Commonwealth*, 483 S.W.3d 347, 349 (Ky. 2015). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 415 (Ky. 1998) (internal quotation marks and citation omitted).

The Fourth Amendment of the U.S. Constitution (applicable to the states through the Fourteenth Amendment) and Section 10 of the Kentucky Constitution provide safeguards against unreasonable searches and seizures. "Consent is one of the exceptions to the requirement for a warrant." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992) (citing *United States v. Watson*, 423 U.S. 411 (1976)). "Where there is coercion there cannot be consent." *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). Consent is invalid when deception employed by police is "so unfair and unconscionable as to be coercive." *Krause v. Commonwealth*, 206 S.W.3d 922, 927–28 (Ky. 2006).

In the case at bar, police used a ruse to initiate contact with Appellant and convince him to turn over his phone. We have held, "[t]he mere employment of a ruse, or 'strategic deception,' does not render a confession

involuntary so long as the ploy does not rise to the level of compulsion or coercion." *Matthews v. Commonwealth*, 168 S.W.3d 14, 21 (Ky. 2005) (citing *Illinois v. Perkins*, 496 U.S. 292 (1990)). The trial court found Appellant voluntarily surrendered his phone to the police. "Whether consent is the result of express or implied coercion is a question of fact, . . . and thus, we must defer to the trial court's finding if it is supported by substantial evidence." *Krause*, 206 S.W.3d at 924.

In *Krause*, this Court held the trial court's findings of fact that the search of the appellant's residence (which led to the seizure of evidence of crimes in plain view) was not based on substantial evidence. *Id.* at 924-25. In that case, officers knocked on the appellant's door around 4:00 a.m. and purported to be investigating the rape of a young girl. According to police, the girl had implicated Krause's roommate and they wanted consent to walk through the residence to determine if her description of the house was accurate. Krause and his roommate eventually agreed to the search for this limited purpose. There was actually no rape investigation and police were there to follow up on a lead that another individual had bought drugs from Krause. In their walkthrough, police saw drugs in plain view and seized them. *Id.*

In *Krause* we stated, "'[t]he guiding factor here is to determine whether this particular ruse frustrated the purpose of the constitutional requirement that consent to make a warrantless entry into and search of a home must be voluntary, and thus, free of implied or express coercion." *Id.* at 925. Granted, this case is somewhat different. Here, police did not use the ruse to search

Relford's home; rather, they used the ruse to seize his phone and then obtained a search warrant to examine its electronic contents. However, in spite of these differences, we still find *Krause* instructive.

In *Krause*, we considered three factors to determine the coercive nature of the search and seizure. First, we looked to the vulnerable state of the appellant. Officers knocked on his door at four in the morning telling them of the rape of a young girl. Then, this Court considered the fact that the officers' tactics were not "based on any pressing or imminent tactical considerations." Finally, we stated that if we sanctioned the type of ruse used in that case, "citizens would be discouraged from 'aiding to the utmost of their ability in the apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them." *Id.* at 926 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973)).

Here, detectives knocked on Relford's door and told him that they were from the domestic violence unit and wanted to speak with him. After Relford, who had recently awoken, excused himself to get dressed, he consented to speak with detectives and they entered his residence. Relford had court scheduled for that day in a domestic violence case that originated from a February 2015 incident. He was represented by counsel in that case and would accept a plea deal just a few short hours after speaking with detectives at his residence.

Detective Brislin was the lead detective on the homicide investigation and he testified at the suppression hearing. Brislin indicated that he was aware of the domestic violence charges Relford faced from February in which he had counsel, but that he was also aware of an uncharged incident which had taken place in May, just a few weeks before the interview. He asked Relford if Alaysha Clay, the supposed domestic violence victim, had ever hit him and if she initiated contact. Relford said that Clay had hit him, but that he had never pressed charges against her—and he told Brislin of some text messages Clay had sent him. Brislin told Relford that if he would give Brislin his phone, that Brislin would "download" it and get the information on there to his attorney to help in his case.

In the suppression hearing, Brislin insists that he was speaking of the more recent, uncharged domestic violence incident when he told Relford he would help with his case. And the trial court found that to be the case. However, that finding was not supported by substantial evidence. Relford was unrepresented regarding the May incident. Therefore, how could Brislin have been alluding to Relford's attorney for that matter? Relford was only hours away from attending court regarding the February incident, in which he had been charged with fourth-degree assault. The trial judge pointed out that he did not seek a continuance in that hearing based on the supposedly helpful information Brislin was attempting to derive from his phone. However, Relford's counsel also testified at the suppression hearing and stated that she had been able to work out a plea deal in that case in which Relford got credit

for time served and had to spend no further time in jail. With such a deal on the table, it is unsurprising Relford did not seek the assistance of the information Brislin offered to provide in the report.

While Brislin testified that he was speaking only of the May domestic violence incident, this claim is not borne out by the progression of the interview. This is particularly so when he offered to provide the information to Relford's attorney to help with his case. There was no case concerning the May incident—and certainly no attorney.

Relford argues that this questioning constituted a violation of *Massiah v. United States*, 377 U.S. 201 (1964). "In *Massiah*, the police surreptitiously taped a conversation between co-defendants after both were indicted." *Haynes v. Commonwealth*, 657 S.W.2d 948, 951 (Ky. 1983). "[T]he government violates the accused's Sixth Amendment right to counsel *when it uses against him* a statement 'deliberately elicited' from the accused after indictment and in the absence of counsel." *McBeath v. Commonwealth*, 244 S.W.3d 22, 30 (Ky. 2007) (quoting *Massiah*, 377 U.S. at 204) (emphasis added).

"[A]fter the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning *regarding the charge at issue* (even if the accused purports to waive his rights) are inadmissible." *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991) (emphasis added).

> We find no constitutional right, federal or state, precluding police-initiated custodial interrogation on new charges, once *Miranda* warnings have been given and a voluntary waiver obtained, and no

> reason to imply such a right in order to protect existing rights, *so long as the evidence thus obtained is not used to incriminate the accused on old charges for which he already has counsel.*

Keysor v. Commonwealth, 486 S.W.3d 273, 278 (Ky. 2016) (quoting *Linehan v. Commonwealth*, 878 S.W.2d 8, 11 (Ky. 1994)). Furthermore, "[t]he Sixth Amendment right [to counsel] . . . is offense specific." *McNeil*, 501 U.S. at 175. "'The police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.]'" *Id.* at 175-76 (quoting *Maine v. Moulton*, 474 U.S. 159, 179 (1985)).

In this case, the police ruse brought up a domestic violence case in which Appellant was represented by counsel; however, nothing from their discussions was "used to incriminate the accused on [the] old charges for which he already had counsel." The entire police interaction with Appellant was for an investigation into this current case involving a murder, not domestic violence. Therefore, while this is a factor in our analysis regarding whether Relford's consent was voluntary, it did not amount to a *Massiah* violation.

Turning back to the voluntariness of Relford's consent, we hold that, like in *Krause*, the trial court's finding that the consent was not the result of express or implied coercion was not supported by substantial evidence. Detectives arrived at Relford's residence just hours before he was scheduled to appear in court regarding a fourth-degree assault domestic violence case in which he was represented by counsel.

Detectives asked various questions regarding Relford and Clay (the purported victim of both domestic violence allegations) and offered to help Relford out by supplying his attorney with a report of the evidence from his phone. On that pretext, he turned his phone over to detectives.

We hold that the detectives' repeated assurances that they were going to help Relford with his domestic violence cases and supply information to his attorney negated his consent, as this deception was "so unfair and unconscionable as to be coercive." *Krause*, 206 S.W.3d at 927-28. Here, while officers did not approach Relford's residence at 4:00 a.m. as they had in *Krause*, they did knock on his door as he was beginning his day, and he excused himself to get dressed. Moreover, this interaction began just hours before Relford was due in court on a domestic violence charge—a charge like those detectives assured Relford they were there to help with.

As we have held, "[t]he question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). Looking at all the surrounding circumstances in this case, we hold that Relford's consent for the seizure of his phone was the result of police coercion and was, therefore, invalid. As in *Krause*, we note that this holding is narrow and fact-specific. We reiterate our holding in *Matthews*, 168 S.W.3d at 21, that "[t]he mere employment of a ruse, or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the

level of compulsion or coercion." Whether the ruse rises to that level is to be decided on a case-by-case basis, giving careful attention to all surrounding circumstances.

While we have held that the seizure and subsequent search of Relford's phone should have been suppressed, we must still determine whether he should be allowed to withdraw his plea on this basis. We find guidance in the Sixth Circuit's decision in *United States v. Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996) wherein that court stated:

> We do not mean to imply that every time a defendant manages to exclude any evidence on appeal following a conditional plea of guilty, he is entitled to withdraw his plea. The inquiry requires an examination of the degree of success and the probability that the excluded evidence would have had a material effect on the defendant's decision to plead guilty.

Here, officers gleaned very little from Relford's phone that they did not already know. As defense pointed out in the suppression hearing, one of those things was that police were able to verify that Relford did, indeed, have possession of the phone. However, this only went to show that Relford possessed the phone on the particular day the detectives interviewed him—it did not show that Relford had the phone at the time the call was placed to Pizza Hut. Here, detectives already knew the model of the phone, its identifying IMEI number, the phone number associated with it, and the fact that the number belonged to Relford. Officers had already obtained the phone's records from AT&T. Those records included incoming and outgoing text messages and a call log. Detectives had entered several numbers into their database and

determined the identity of the individuals who had called or texted Relford's number. Officers knew that number had used the Hushed application on the night of the murder in question to call Pizza Hut to order a pizza. This evidence created a stronger inference that Relford was the user of the phone on the night of the murder (particularly his call and text logs with calls and texts to family members and friends around the time of the murder) than was the fact that he possessed his phone at the time of the interview. Detectives shared all of this information with Relford before he made two statements to police providing many details regarding the murder and eventually making a confession.

Relford seeks to have that confession suppressed as fruit of the poisonous tree. However, the limited information officers gleaned from the phone (the fact that Relford possessed the phone when the detectives interviewed him and that the Hushed application had been deleted from the device) were not substantial. Officers already believed the phone to be in Relford's possession based on the phone records—both the fact that he owned the number and the fact that they had linked numbers in the call log to his friends and family members through their database. Furthermore, detectives knew from the documents they received pursuant to search warrants leading them to the Hushed application that the number in question had used Hushed to place the Pizza Hut call.

Given the overwhelming evidence police had even in the absence of the phone, Relford is not entitled to withdraw his guilty plea—nor do we believe his

subsequent statements and ultimate confession were derivative of the improper search and seizure.

Therefore, while we hold the trial court erred in failing to grant Relford's suppression motion as to the phone, it did not err in failing to suppress his subsequent statements. Because of the limited impact of the phone search, Relford is not entitled to withdraw his plea, as the improperly admitted evidence did not have a material effect on his decision to plead guilty.

III. CONCLUSION

For the reasons stated herein, we affirm the trial court.

All sitting. Minton, C.J.; Buckingham, Hughes, Keller, VanMeter and Wright, JJ., concur. Lambert, J., concurs in result only without separate opinion.

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