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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001712-MR

CLIFFORD WARFIELD APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NO. 02-CR-000991

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE: A Jefferson County jury convicted Clifford Warfield of first-degree assault in the shooting and wounding of William Miles. The Court then sentenced Warfield to a maximum of twelve years' confinement. He appeals the judgment to this Court as a matter of right.

Warfield argues that the trial court erred by: (1) prohibiting the use of a statement contained in the emergency room record for the purpose of impeaching Miles's

testimony, (2) permitting the introduction of hearsay statements in which "Cliff" was identified as the person who shot Miles, (3) combining in a single jury instruction two distinct mental states, intentional or wanton, (4) failing to instruct the jury on assault under extreme emotional disturbance, (5) combining in a single jury instruction the presumption of innocence and the right to remain silent, (6) permitting the Commonwealth to make prejudicial comments during its closing argument, and (7) permitting the Commonwealth during the penalty phase to introduce evidence that a gun was involved in two of Warfield's prior convictions. Finding no merit in any of these arguments, we affirm the judgment.

THE SHOOTING OUTSIDE THE TAVERN

On the night he was shot, Miles was returning home from an evening of drinking and card playing when he decided to stop by a neighborhood tavern for another beer. At the tavern door, Miles encountered a young man standing nearby who had been put out of the establishment by one of the bouncers. Somehow, Miles got into an argument with this young man. According to Miles, the young man pulled out a large chrome pistol and put it to Miles's chest. Miles grabbed the gun barrel, and the two scuffled until Miles released the gun and the young man moved away.

As the young man moved away from the front door, Miles spoke with the doorman, Timothy Johnson. Johnson peered out the door and spotted the young man, who was holding a gun and standing some distance from the door of the tavern. Meanwhile, the tavern owner, Wendi Taylor, alerted by the commotion, also headed for the front door. As Johnson was reentering the building with Miles at his heels, a number of shots were fired. Taylor and Johnson retreated inside the building to escape the gunfire, and they saw Miles fall to the pavement. They also saw the young man leaving the scene.

Miles sustained a gunshot wound to the left thigh that fractured the left femur. The wound required surgical repair and an extended hospitalization. For more than a year after the shooting, Miles required physical therapy and he needed crutches to walk.

At first, Miles and Johnson did not know the name of the young man whom they contended had fired the shots; although, both of them recognized him from the neighborhood. A man at the scene referred to the young man as "Cliff." Police investigation then focused on Warfield. Miles, Johnson, and Taylor all three identified the shooter as Warfield from a police photo lineup. Ultimately, Warfield was indicted on the charge of first-degree assault. The case came to trial and the jury

convicted Warfield. The trial court sentenced him in accordance with the jury's recommendation. This appeal followed.

THE STATEMENT FROM THE EMERGENCY ROOM RECORD

While cross-examining Miles at trial, defense counsel sought to emphasize inconsistencies in Miles's versions of the distance between himself and the shooter through the use of a statement possibly made by Miles on the night of the shooting. This statement, as recorded in the Emergency Room Physician Record, says "GSW (L) THIGH → STATES UNKNOWN ASSAILANT SHOT HIM IN (L) THIGH FROM ≈ 10 FT. AWAY . . . ." Following a bench conference and, later, at a hearing outside the presence of the jury, the trial court refused to allow the use of this statement for impeachment purposes. The trial judge ruled that the statement was inadmissible hearsay because the identity of the declarant is unclear.

Warfield acknowledges that the trial court correctly recognized the ER record itself to be a part of a medical record and admissible under Kentucky Rules of Evidence (KRE) 803(6). He further acknowledges that "the business records exception of KRE 803(6) is not sufficient alone to resolve the hearsay problems associated with the evidence" where, as here, the person supplying the information to the person preparing the

record is not also acting under a concomitant business duty.[1] But Warfield insists that the statement is indisputably Miles's and, therefore, admissible as a prior inconsistent statement under KRE 801A(a)(1). We disagree.

Since the introduction of evidence is a matter within the sound discretion of the trial judge, we must defer to the trial judge's findings on this point unless the judge has abused her discretion.[2] The trial judge observed that the ER record does not say that Miles made the statement. And Dr. Nathan Ready, one of the residents who treated Miles in the ER that night, testified in a KRE 104(a) hearing that this statement could have been made by the patient, someone with the patient, a police officer, or an EMS worker in the ER. So in the absence of any evidence attributing the statement to Miles himself and in light of the variety of possible sources of the detail contained in the statement, we hold that the trial judge did not abuse her discretion by excluding it.

In argument on this point at the bench during trial, the Commonwealth's Attorney dismissed KRE 803(4), the hearsay exception admitting statements made for purposes of treatment or diagnosis, to dissuade the judge from considering that rule as a possible vehicle for admitting the statement. After that,

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[1] Robert G. Lawson, Kentucky Evidence Law Handbook, § 8.65[8] at 690 (4th ed. 2003).

[2] Welsh v. Galen of Virginia, Inc., Ky.App., 128 S.W.3d 41, 51 (2001).

neither side mentioned KRE 803(4) again. But we consider analysis under KRE 803(4) to be the best approach since "the rule is clearly broad enough to catch statements made by other persons on behalf of patients (so long as they were made for treatment or diagnosis), and has occasionally been so used."[3] Having said that, we still believe that the trial court did not abuse her discretion in refusing to admit the statement. Construing the federal rule equivalent to KRE 803(4), Professor Weinstein writes:

> Statements relating someone else's symptoms, pains, or sensations may be admissible, provided they are made for purposes of diagnosis or treatment of that person.
>
> The relationship between declarant and patient will usually determine admissibility. . . .
>
> As the relationship between declarant and patient becomes more distant, the statement becomes less reliable, both because the motive to tell the truth becomes weaker, and because a stranger, even in good faith, may not be able to describe another's physical pain and suffering as reliably as the victim. The court in its discretion will assess the probative worth of the statement, which will depend on its significance, its contents, by whom it was made, and in what circumstances it was made.

[3] *See* Lawson on Evidence, § 8.55[2] at 652.

> The court must then decide whether admission is warranted despite the risk of prejudice, confusion, and waste of time.[4]

In the absence of some evidence clearly linking the statement directly to Miles or to some other identified person who is in close enough relation to him to give reliable information on his behalf for treatment or diagnosis, the trial court did not abuse her discretion by rejecting the proffered statement.

THE CONVERSATION IDENTIFYING THE SHOOTER AS CLIFF

The Commonwealth's Attorney mentioned in opening statement that a bystander at the tavern had identified the shooter as "Cliff." But before the statement was discussed, defense counsel interrupted with an objection and a bench conference followed. Defense counsel argued at the bench that his own pretrial investigation revealed that this identification, which in the Commonwealth's discovery materials was attributed to a man who had identified himself to Taylor as Warfield's father, had not been made by Warfield's father. The defense claimed to have a written statement from Warfield's father stating that he was in Chicago on the night of the shooting. So according to the defense, Taylor's declarant is

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[4] 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 803.06[5] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997).

unidentifiable. Defense counsel argued that the Commonwealth should not be permitted to mention the statement because it is a hearsay assertion without an applicable exception. The Commonwealth responded that the statement is admissible as an excited utterance.[5] The trial court overruled the objection. And the Commonwealth proceeded to discuss this anticipated identification.

Before opening statements began, the trial judge had admonished the jury that attorney statements in opening statement and in closing argument were not evidence; and such statements were not to be considered by them as evidence. At this point in the trial proceeding, any potential prejudice by the Commonwealth's discussion of possible hearsay was cured by the trial court's admonition.[6]

Later in the case, the Commonwealth put on Taylor, who testified as follows:

Prosecutor:	Did you know Mr. Warfield that night? Did you know his name?
Taylor:	Uh . . . .
Prosecutor:	When the shooting occurred.
Taylor:	No.
Prosecutor:	Okay.

[5] KRE 803(2).

[6] *See* Price v. Commonwealth, Ky., 59 S.W.3d 878, 881 (2001).

Taylor: Afterwards, the man that he was with came up to me and I said, "Who are you to him? And he said, "I'm his father." And I said, "His father?" He said, Yes." I said, "Who is he? He said, "That's Little Cliff." And I said, "Well, you know, Little Cliff just shot this man." He's like, "Oh, he did." And then he left.

Defense counsel made no contemporaneous objection or motion to strike Taylor's statements. Defense counsel questioned Taylor further on cross-examination concerning this conversation. Without a contemporaneous objection or a motion to strike, the statement came in without scrutiny by the judge. The Commonwealth, as the proponent of the statement, was not called upon to justify the admissibility of the statement. So the record simply does not contain evidence to support a finding that "the declarant was under the stress of excitement caused by the event or condition."[7] And the judge made no such finding. Contrary to Warfield's argument on appeal, we hold that raising the admissibility issue in opening statement did not preserve this evidentiary issue for appeal.[8]

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[7] Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 470 (1998).

[8] Justice v. Commonwealth, Ky., 987 S.W.2d 306, 315-316 (1998); KRE 103(a); RCr 9.22.

Reviewing for palpable error,[9] we conclude that the admission of this testimony does not rise to the level of palpable error. "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.'"[10] In light of the identification of Warfield by Miles, Johnson, and Taylor through the photo pack, it is not reasonably probable that the admission of this statement contributed to the conviction. Thus, even if Warfield had preserved these issues, the outcome would have been the same.

THE JURY INSTRUCTIONS

Warfield argues that the instructions violated his right to a unanimous verdict because the jury was permitted to find him guilty of either intentional or wanton first-degree assault. Arguing that the evidence supports submission only on a theory of intentional first-degree assault, Warfield posits that there was insufficient evidence to support his conviction under the wanton theory of first-degree assault.[11] We disagree.

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[9] KRE 103(e); RCr 10.26.

[10] Jarvis, *supra* at 471, *quoting* Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230-31, 11 L.Ed.2d 171, 173 (1963).

[11] Burnett v. Commonwealth, Ky., 31 S.W.3d 878, 884 (2000) (holding that when a juror is presented, in a single instruction, alternate theories of guilt for the same offense, "each juror's verdict [must] be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.").

As the trial court observed when ruling on the instructions, the jury heard evidence that the shooter was firing from a distance of 50 to 75 feet away while the victim was standing with a number of other people at or near the front door of the tavern. The shooter fired several shots in that direction. And the shooter never testified as to why or at whom he was shooting. Such conduct could support an inference of wanton conduct sufficient to support a conviction under that theory. There was no error.[12]

Next, Warfield argues that the trial court erred in refusing to give an extreme emotional disturbance (EED) instruction based upon evidence that Warfield was intoxicated, he had scuffled with Miles, and he had been kicked out of the bar. Again, we disagree. In order to use the EED instruction, there must be some definitive and nonspeculative evidence that the onset of the extreme emotional disturbance was caused by a triggering event.[13] Since Warfield did not testify, the only evidence of his state of mind came from others, none of whom described him as appearing to be disturbed. Specifically, Taylor testified that Warfield did not appear to her to be upset after being bounced out of the bar. Thus, we find no error in the trial court's refusal to instruct on EED.

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[12] Wells v. Commonwealth, Ky., 561 S.W.2d 85, 88 (1978).

[13] Morgan v. Commonwealth, Ky., 878 S.W.2d 18, 20 (1994).

Finally on the instructions, Warfield argues that the trial court erred by consolidating into a single instruction the presumption of innocence instruction and the right to remain silent instruction. As given by the trial court, each of these instructions appears as a separate paragraph of text under a single instruction number. Warfield cites no authority for the proposition that putting these instructions on the same page abridged his right to a fair trial. We perceive no prejudice here.

THE CLOSING ARGUMENT

It is well settled that counsel for the Commonwealth and for the defense are granted wide latitude in opening statement and closing argument. Warfield argues that the Commonwealth's closing argument exceeded proper bounds and that such constitutes prejudicial error. Specifically, Warfield argues that the Commonwealth effectively shifted the burden of proof by statements made in closing argument to the effect that the jury had to find Warfield's defense of an unknown assailant to be reasonable in order to find that the Commonwealth had failed to prove its case beyond a reasonable doubt. Warfield also argues that the Commonwealth's Attorney's comments crossed the line prohibiting definition of the terms "reasonable doubt." Finally, Warfield argues that the Commonwealth's Attorney

improperly appealed to the jury's sense of responsibility to the community when he argued for the jury to "render a verdict that says we're not going to allow this senseless act of gun violence in our community to go unpunished."

The standard of review for alleged prosecutorial misconduct in closing arguments is whether the conduct was so egregious that Warfield was denied a fair trial.[14] A prosecutor does not shift the burden of proof to the defendant by arguing that the defendant failed to present evidence which rebuts the Commonwealth's case.[15] Consequently, the Commonwealth's comments on Warfield's failure to present a reasonable defense to the Commonwealth's evidence consisting of witnesses who had positively identified Warfield as the shooter neither shifted the burden of proof to deny Warfield a fair trial nor attempted to define reasonable doubt. Finally, the Commonwealth's argument asking for a verdict punishing senseless gun violence in the community did not suggest unjust punishment for Warfield in light of the Commonwealth's evidence against him. Our decisions "have not engaged in any blanket condemnation of prosecutorial comment related to deterrence. We have condemned argument only where the prosecutor suggests that the jury convict or punish on grounds or for reasons not reasonably

[14] Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987).

[15] Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 38 (1998).

inferred from the evidence."[16] Our review of the closing argument indicates that the Commonwealth's argument was fairly confined to the evidence.

THE PENALTY PHASE TESTIMONY

In the penalty phase of a felony trial, under KRS 532.055(2)(a), "[e]vidence may be offered by the Commonwealth relevant to sentencing including: 1. [] prior convictions of the defendant, both felony and misdemeanor [and] 2. [t]he nature of prior offenses for which [the defendant] was convicted." As to what the term "nature" means, the Kentucky Supreme Court has stated that "all that is admissible as to the nature of a prior conviction is a general description of the crime."[17] In any case, it is hoped that counsel for the defense and prosecution can, with negotiation, agree on the language to be used.[18] But if they cannot agree, the trial judge is to make that determination.[19]

In the just-concluded guilt-innocence phase of Warfield's trial, the jury had convicted Warfield of shooting Miles. And the Commonwealth wanted to inform the jury in the upcoming sentencing phase that Warfield's prior convictions had

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16 Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 234 (1983).

17 Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 855 (1996).

18 *See id.*

19 *See id.*

involved his use or possession of a gun. So the Commonwealth requested a bench conference in which the trial judge determined a carefully circumscribed way for the Commonwealth to inform the jury of the undisputable fact that these prior convictions involved gun crimes. The trial court determined that this evidence fit the purpose of KRS 532.055(2)(a)1-2. Warfield argues that this evidence "went beyond the 'nature of prior offenses' for which [he] was convicted and instead delved into inadmissible information regarding the factual circumstances of those convictions."

The Kentucky Supreme Court has endorsed the theory of an "enlightened jury in its consideration and assessment of an appropriate penalty," and found that the purpose of KRS 532.055 was to assure a well-informed jury.[20] More recently, the Supreme Court observed that the purpose of the statute "is to [e]nsure having a jury well informed about all pertinent information relating to the person on trial."[21] We disagree with Warfield that his history of gun-related convictions is irrelevant to the jury's decision fixing the appropriate punishment in this gun-related assault conviction.

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[20] Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 672 (1994).

[21] Cornelison v. Commonwealth, Ky., 990 S.W.2d 609, 610 (1999).

DISPOSITION

The judgment of conviction and sentence imposed by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth B. McMahon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky