

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000563-MR

KENNETH WAYNE LUKE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 04-CR-00158

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Kenneth Luke appeals from a March 7, 2005, judgment of the Daviess Circuit Court sentencing him to fourteen years' imprisonment for the offense of first-degree manslaughter.¹ In the early morning hours of January 31, 2004, Luke killed Robert Neal by cutting his neck with a knife. A jury found that Luke caused Neal's death while intending to seriously injure him. Luke maintains that the trial court erred by failing to excuse certain jurors for cause and by excluding

¹ KRS 507.030.

from evidence tape recorded statements Neal's widow gave to police that were inconsistent with her testimony at trial. Convinced that the court did not err with respect to the jurors and that any error with respect to Ms. Neal's statements was harmless beyond a reasonable doubt, we affirm.

Luke testified that he encountered Bob and Rhonda Neal during the late evening of January 30, 2004, at the Fraternal Order of Eagles bar in Owensboro. After drinking and dancing at the club for several hours, he was outside waiting for a cab when Rhonda Neal approached him and asked what he was doing. When they determined that he was headed in the same direction as Rhonda and her husband, he to Utica and they to Powderly, Rhonda offered him a ride. Testimony by employees and other patrons of the bar that night tended to show that the Neals, too, had been at the club for a few hours, were visibly intoxicated, and had become somewhat disorderly. Luke testified that he left the bar with the Neals, at about 1:00 or 2:00 a.m., Rhonda driving, Bob in the front passenger seat, and Luke in the back behind Bob. They drove first to Rhonda's mother's apartment in Owensboro. There Rhonda left the two men in the car and went inside to talk briefly with her mother and to pick up some food. While she was gone, Bob cursed and abused Rhonda and announced that he ought to kill her. When she returned and was climbing back into the

car, Bob slapped the plate of food she bore out of her hands and swore that he "should beat the f--- out of you."

Nevertheless, Rhonda restarted the car and proceeded to drive out of town on south Ky. Highway 81. According to Luke, Bob continued his verbal abuse, which grew progressively louder, and Rhonda responded by shouting at him to shut up and leave her alone. When Bob began making motions as though he were throwing things at Rhonda, which caused Rhonda to flinch and to allow the car to swerve, Luke became frightened that they were going to have an accident. He called out for Bob to desist, whereupon Bob turned around in his seat, brandished a knife, and told Luke to mind his own business. Luke testified that the sight of the knife terrified him. He feared an assault either upon himself or upon Rhonda. He then removed a knife from his coat pocket, reached with it over Bob's shoulder, and held it in front of Bob's face. Bob grabbed his arm, and in the ensuing struggle Bob suffered a deep gash along the right side of his neck. Once Luke realized that Bob was injured, he told Rhonda that they needed to go to a hospital. Rhonda, however, drove first to her Powderly residence, where she enlisted the aid of her babysitter. The babysitter drove them to the Greenville hospital, where Bob was pronounced dead on arrival. Luke admitted killing Bob, but claimed that he had

meant only to frighten or to injure him and that he had done so in self defense and in defense of Rhonda.

Rhonda's trial testimony differed in many particulars from Luke's. She denied that she had been intoxicated during the drive home that night. And though she admitted to the scene outside her mother's apartment when Bob had knocked the plate of food from her hands and swore that he ought to beat her, she claimed that that had been an isolated outburst of temper, something to which Bob was prone when drunk, and that otherwise she and her husband had not quarreled. Rather, she claimed that the two men had conversed, that concentrating on the road and listening to the radio she had tuned them out, but that at one point she had seen Bob raise his arms over his head and had thought that he and Luke were engaged in some sort of hand shake. That afterwards, when Bob fell silent, she thought he had just passed out. It was not until she had said to Luke that she was about to turn on Highway 1207 toward Utica and Luke had said, "Bobby's still got a pulse," that she had realized something was wrong. She panicked, then, she claimed, and drove home to get the babysitter because she did not want to be alone with Luke.

On cross-examination, defense counsel sought to play two audio tapes of statements Rhonda had made to the police, one at the hospital the morning of the killing and the other at her

home three days later. In attempting to lay a foundation for the tapes, counsel had Rhonda acknowledge where and when she had spoken to the officers and then asked her whether she had not told them several things inconsistent with her trial testimony. When Rhonda either denied having made the prior statements or claimed not to remember them, counsel read, or had Rhonda read, from transcripts of the police statements. In this way counsel managed to introduce prior statements by Rhonda to the effect that Luke had warned her that Bob had threatened her while she was inside her mother's apartment and that during the drive the men had argued vociferously and had finally fought "up over the seats." In light of these numerous inconsistencies, counsel moved to play the taped statements in their entirety for the jury. The court ruled, however, that it would only admit those portions of the tapes that directly contradicted Rhonda's trial testimony. The tapes were then made part of the record by avowal. Luke contends that the pervasive inconsistencies between Rhonda's testimony and her statements to the police justified the introduction of the entire statements and that the trial court erred by requiring him to isolate particular segments of the tapes.

As Luke correctly notes, it is now well settled in Kentucky that a witness's prior inconsistent statement is admissible not only to attack the credibility of the declarant,

but also as substantive evidence with respect to the matter asserted.² A statement is inconsistent for these purposes "whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."³ The prior statement must not be merely collateral, but must be "material and relevant to the issues of the case."⁴ With respect to relevant matters, however, the jury should be permitted to hear, as substantive evidence, all that the witness has had to say on the subject.⁵ Under this rule, both our Supreme Court and this Court have upheld the introduction of video and audio recordings of prior inconsistent statements.⁶ The rule appears to be that as long as the recording is not unduly cumulative and does not stray into collateral matters, it may be played for the jury in its entirety.⁷

² Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997) (citing Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969)).

³ Brock v. Commonwealth, 947 S.W.2d at 27 (citing Wise v. Commonwealth, 600 S.W.2d 470 (Ky.App. 1978)).

⁴ Askew v. Commonwealth, 768 S.W.2d 51, 56 (Ky. 1989) (internal quotation marks omitted).

⁵ Porter v. Commonwealth, 892 S.W.2d 594 (Ky. 1995).

⁶ Brock v. Commonwealth, *supra*; Porter v. Commonwealth, *supra*; Muse v. Commonwealth, 779 S.W.2d 229 (Ky.App. 1989).

⁷ Porter v. Commonwealth, *supra* (video tape of entire guilty plea proceeding properly admitted).

Here, Rhonda's recorded statements to the police differed in several respects from her testimony at trial. It is true that they were not completely inconsistent with her testimony, but they were not unduly long or cumulative and they did not stray from the events of the day leading to her husband's death. If the jury was entitled to hear all that Rhonda had had to say on the subject, then arguably the trial court erred by not permitting it to hear the tapes.

Even if the court erred, however, we are convinced that the error was harmless beyond a reasonable doubt and thus that it does not entitle Luke to relief. The erroneous exclusion of evidence is subject to harmless error analysis,⁸ with the test being "whether there is any reasonable possibility that absent the error the verdict would have been different."⁹ As noted above, although the jury was not permitted to hear the actual recording of Rhonda's statements to the police, Luke's counsel succeeded in introducing verbatim recitations from those statements of all the portions materially inconsistent with Rhonda's trial testimony. In particular, contrary to Rhonda's testimony that nothing seemed to lead to or precipitate Luke's attack upon her husband, the jury heard Rhonda's prior

⁸ Quarles v. Commonwealth, 142 S.W.3d 73 (Ky. 2004) Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987).

⁹ Crane v. Commonwealth, 726 S.W.2d at 307. Taylor v. Commonwealth, 175 S.W.3d 68 (Ky. 2005).

description of an argument between the two men that led to fighting "up over the seats." Admission of the tapes would have added little, if anything, to the evidence the jury heard, and there is no reasonable possibility that it would have changed the result.

Luke also contends that the trial court erred by refusing to strike several potential jurors for cause. Some of these jurors, numbers fourteen, sixty, sixty-seven, and eighty-five, had read and discussed with friends or family members a newspaper article about the case that appeared the day before trial. Our Supreme Court has made it very clear that the mere exposure to pre-trial publicity does not disqualify a prospective juror.¹⁰ The question, rather, is the effect of the exposure and whether the juror has prejudged the case so as to be incapable of fairly and impartially considering the evidence.¹¹ Here, the court questioned each of these four jurors individually. Although they all exhibited a clear memory of the article, none gave the slightest indication of having formed any preconception about the case, and they all demonstrated an intelligent and conscientious determination to consider the evidence impartially. The trial court did not abuse its discretion by refusing to strike any of them.

¹⁰ Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002).

¹¹ Gould v. Charlton Company, Inc., 929 S.W.2d 734 (Ky. 1996).

Nor did the court abuse its discretion by refusing to strike juror number sixty-eight. During *voir dire*, this juror revealed that she worked as a district court clerk, that she was married to a police officer, and that she was distantly acquainted with both Robert Neal, the victim, and his mother-in-law, who appeared as a witness. After trial it was learned that this juror had failed to reveal that she had previously worked as a deputy jailer, that she was acquainted with several attorneys, and that she was aware both that Luke was being represented by appointed counsel and that he had not been released on bail. Luke contends that together these facts suggest such a strong likelihood of bias against him that juror sixty-eight should have been excused for cause. It is true, as Luke notes, that a potential juror's close relationship with a party, an attorney involved in the case, or a witness may render her impartiality so suspect as to disqualify her without more.¹² But mere working relationships, involvement in law enforcement, distant family relations, or casual acquaintanceships, do not, either by themselves or in conjunction, necessarily imply bias.¹³ The question, as above, is the effect of the relationship(s) on the potential juror's ability to conform to the law and to

¹² Randolph v. Commonwealth, 716 S.W.2d 253 (Ky. 1986).

¹³ Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004); Sholler v. Commonwealth, 969 S.W.2d 706 (Ky. 1998).

render a fair and impartial judgment. Here, although we do not condone juror sixty-eight's lack of complete candor, there was no indication that her marriage, her work for the jail or the court, or her passing acquaintance with the victim and his mother-in-law colored her judgment or belied her stated ability to consider all of the evidence and to base her decision on it alone. The trial court did not abuse its discretion by refusing to excuse her.

In sum, Luke has failed to demonstrate that his jury pool was tainted by members that should have been dismissed for cause, or that he was prejudiced by the exclusion of Rhonda Neal's tape-recorded statements to the police. Accordingly, we affirm the March 7, 2005, judgment of the Daviess Circuit Court.

ALL CONCUR.

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