

RENDERED: NOVEMBER 16, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

**MODIFIED: MARCH 14, 2008; 2:00 P.M.**

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002309-MR

RODNEY MERIDA

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 05-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

HOWARD, JUDGE: Rodney Merida appeals from a judgment entered upon a jury verdict finding him guilty of first-degree manslaughter and sentencing him to twelve years' imprisonment. Finding no reversible error, we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## FACTUAL AND PROCEDURAL BACKGROUND

In April 2005, Rodney Merida (hereinafter Merida) and Kayleen Merida (hereinafter Kayleen) were married but living separately. They had two children together, who were living with Merida's parents. A Domestic Violence Order (DVO) was in effect, requiring that Merida not go near Kayleen. Nevertheless, on April 2, 2005, Merida, Kayleen, and Cody Mills all went out drinking together. Eventually all three returned to Kayleen's apartment.

According to Kayleen's trial testimony, Merida eventually left. Mills went upstairs. About 10 to 15 minutes later Brandon Kelly, the victim, came to the door and was let in by Kayleen. Kayleen testified that Kelly indicated that he had papers signed by Merida and that if she would sleep with him, he would help her get her children back. Shortly thereafter, Merida came back into the apartment through the back door.

Upon discovering Kelly in the apartment, Merida began to yell at him and "got in his face." Kayleen testified that Kelly flinched and accidentally hit Merida on the chin with his hand. Merida then began hitting Kelly in the face. Both Kelly and Kayleen repeatedly asked Merida to stop the beating, but to no avail. Kelly eventually fell to the floor and Merida continued to hit and kick the victim as he attempted to crawl toward the front door. Kelly began having convulsions. Merida eventually drug Kelly outside the apartment and left him. Kelly died in the hospital the next day, April 3, 2005, at approximately 12:30 p.m., as a result of the beating.

Merida was arrested at Kayleen's apartment during the early morning hours of April 3, 2005. According to police testimony Merida emerged from his hiding spot in a closet and stated, "I done it. I done it. Take me to jail." During a later recorded statement taken at the jail, which was played at trial, Merida admitted to hitting Kelly; stated Kelly offered Kayleen \$500.00 to have sex with him and asked, "When another man hits on your woman, what is a man supposed to do?" He also made statements attributing the bulk of the beating to Kayleen, admitting only to striking Kelly twice himself. Merida's recorded statement also included admissions to prior bad acts, which made their way into the trial proceedings when the statement was played for the jury.

Additional evidence was presented at trial showing that Merida had Kelly's blood on his clothing and that his hands and knuckles were swollen and red, evidence consistent with the appellant having administered the beating. Mills testified that while he was not an eyewitness to the actual beating, he overheard the incident from upstairs and what he overheard was consistent with Merida having administered the beating.

On May 13, 2005, Merida was indicted for murder, pursuant to KRS 507.020. Following a trial, he was convicted of first-degree manslaughter, pursuant to KRS 507.030. The jury recommended a sentence of twelve years. On October 6, 2006, the trial court issued a final judgment of conviction and sentenced Merida to twelve years' imprisonment, consistent with the jury's recommendation. This appeal followed.

On appeal, Merida contends that the trial court erred by permitting that portion of his post-arrest statement which contained admissions of prior bad acts to be

played; by precluding him from cross-examining Kayleen as to her probationary status at the time of trial; and by preventing him from presenting evidence that the beating was administered by someone else.

#### EVIDENCE OF PRIOR BAD ACTS

As previously noted, following his arrest Merida gave a recorded statement to police at the jail. In the course of the statement Merida made comments, among other things, to the effect that a DVO had been placed against him and that he had violated the DVO on three occasions, including the night of the beating. He also stated that his children had been taken by social services. Toward the end of the statement, Merida commented that on one occasion Kayleen had accused him of threatening to cut off her head and the children's heads, but he denied that he had ever made such a threat.

Merida did not move prior to trial to exclude or redact any portion of the recorded statement. The statement lasted about a half-hour and was introduced through the testimony of a police detective. About twenty minutes into the statement Merida began talking about his having violated the DVO two times previously and that this last occasion was the third violation of the order. He mentioned that Kayleen had attempted to get the DVO amended. He stated, on the tape, that his children had been removed by the social workers. He talked about other criminal charges against him having been dropped and his having pled guilty to fourth-degree assault. Only at this point did Merida, for the first time, make any objection to this evidence. His counsel asked to approach the bench and, at the bench, objected to the tape being played, insofar as it contained

statements relating to DVO violations and the social workers. The court overruled the objection, stating that Merida should have raised the issue by a pre-trial motion, or at least before the tape was played.

By this time, of course, substantial evidence of prior bad acts had already been entered into evidence. Even then, Merida did not request an admonition that the jury disregard this evidence, nor did he request a mistrial. Nor did he specifically object to, or request the redaction of, the yet unplayed statements on the tape, including the statements concerning his alleged threat to cut off the heads of Kayleen and his children. Nor did he make any further objection to those statements when they were played.

Generally, evidence of “prior bad acts,” unrelated to the charged offense, is inadmissible pursuant to KRE 404(b). That Rule states,

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;
- or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The Commonwealth has not argued that this evidence fits within any of the exceptions set out in RCr 404(b), nor that it would have been impossible to redact the recorded statement, so as to eliminate the offending portions. Therefore, it appears that the evidence of Merida's prior bad acts should have been excluded, had a proper and

timely objection been made. When the objection to this evidence was made, we believe that objection should have been sustained, to the extent that any evidence objected to was not already before the jury. RCr 9.78.

However, Merida made no motion to exclude or redact any part of the recorded statement, made no objection until after much of the objectionable evidence had been played for the jury and, when he did object, did not ask the trial court for either an admonition or a mistrial. Under RCr 9.22, a party is obligated to tell the court what action he wants taken at the time of the court's ruling. *Taylor v. Commonwealth*, Ky. 432 S.W.2d 805, 808 (Ky. 1968). “[A]n admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition.” *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005) (internal citations omitted). However, Merida did not request such an admonition. Therefore, we must conclude that this issue is not properly preserved for our review.

#### EVIDENCE OF KAYLEEN'S PROBATIONARY STATUS

Following the events in question, Kayleen was charged with an unrelated felony offense. That charge was reduced to a misdemeanor, to which she pled guilty and received probation. She was still on probation at the time of this trial.

Citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), Merida contends that the trial court erroneously prevented him from cross-examining Kayleen concerning her probation, so as to reveal her motive to tailor her testimony to conform to the Commonwealth's theory of the case. He argues that the

evidence was relevant to show Kayleen's bias against him and her motive to testify falsely, making it admissible under *Davis*. *Davis* held that under the confrontation clause of the Sixth Amendment, a defendant is constitutionally entitled to challenge a witness' credibility by means of cross-examination, directed toward revealing possible biases, prejudices, or ulterior motives of the witness. *Id.* 415 U.S. at 316, 94 S.Ct. at 1110. *Davis* further held that it was reversible error for the trial court to have excluded cross-examination concerning the probationary status of a juvenile witness, in order for the defense to demonstrate that he may have had an ulterior motive to identify the defendant as the perpetrator of a burglary. However, in *Davenport v. Commonwealth*, 177 S.W.3d 763, 771 (Ky. 2005) the Kentucky Supreme Court pointed out that a trial judge still has “broad discretion in regulating cross-examination,” and affirmed a trial court's refusal to permit defense counsel to cross-examine a witness about his probationary status and pending misdemeanor charges, finding that any claim of bias, on the facts of that case, was “purely speculative.” *Id.* 177 S.W.3d at 771.

Once again, Merida has failed to preserve this issue for appeal. “[A]n alleged error in the trial court's exclusion of evidence is not preserved for appellate review unless the words of the witness are available to the reviewing court,” by way of an avowal. *Commonwealth v. Ferrell*, 17 S.W.3d 520, 524 (Ky. 2000), citing *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996). The purpose of an avowal is to make the substance of the offered evidence known to the trial court and also to allow a reviewing court to determine whether the exclusion was erroneous and whether it affected a

substantial right. Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 1.10(3) at 31 (4th Ed. 2003). During the discussion surrounding the trial court's ruling on this issue the court specifically inquired as to whether counsel wanted to take avowal testimony on the issue and counsel declined. As Merida failed, by way of avowal, to assure that the appellate record contained Kayleen's proposed testimony on this issue, it is not properly preserved. As such we will not address this issue on the merits.

#### EVIDENCE OF ALTERNATIVE PERPETRATOR

Finally, Merida contends that the trial court erred by not permitting him to call Daniel Peterson as a witness. Merida alleges that Peterson would have testified that on the night of April 2, into the early morning hours of April 3, 2005, he was incarcerated in the local jail; that a man named Sandy Rice was brought into the jail that night; and that “Rice told him that he had the decedent Brandon Kelly's blood on his shirt and had to throw the shirt away.” Citing *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003), Merida argues that this testimony was improperly excluded because it denied him his “due process right to present a defense that [the] crime was committed by someone other than the defendant.”

Again, however, this issue was not properly preserved by the avowal testimony of Peterson. *Ferrell, supra*. While at the bench conference in which this issue was discussed, trial counsel referred to placing the proposed testimony into the record by avowal, he did not ultimately do so. Accordingly, this issue is not properly before us.

In any event, we believe this testimony was properly excluded. The due process clause affords a criminal defendant the right to a fair opportunity to present and develop a defense. *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). A proper defense includes the right to introduce evidence that someone else committed the crime. *Beatty v. Commonwealth*, *supra*. However, evidence of an alternative perpetrator is not “automatically admissible simply because it tends to show that someone else committed the offense.” *Id.* 125 S.W.3d at 208. *Beatty* goes on to state that neither motive alone nor opportunity alone is necessarily sufficient without the other, and that a trial court may limit such evidence “when the defense theory is 'unsupported,' 'speculat[ive]' and 'far-fetched' and could thereby confuse or mislead the jury.” *Id.* 125 S.W.3d at 207, citing *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).

Merida's theory that Rice could have been the perpetrator of the Kelly beating was indeed “unsupported, speculative and far-fetched,” and was properly excluded. Nowhere else in the record does Rice emerge as having had either the motive or the opportunity to have administered the beating. To the contrary, the statements and testimony of all present at the scene, Merida, Kayleen, and Mills, contain no suggestion that Rice was even present at Kayleen's apartment that evening. As such, even if the issue had been properly preserved, we do not believe the trial court erred in excluding the testimony.

For the foregoing reasons the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David S. Hoskins  
Corbin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Susan Roncarti Lenz  
Assistant Attorney General  
Frankfort, Kentucky