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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 26, 2010
NOT TO BE PUBLISHED

FINAL

DATE 11-18-10 Althea Hicks

Supreme Court of Kentucky

2006-SC-000684-MR

DAVID DRESSMAN — APPELLANT

V.

ON APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, SPECIAL JUDGE
NO. 03-CR-00081

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

David Dressman appeals as a matter of right from a Judgment of the Scott Circuit Court convicting him of complicity to commit murder, in violation of KRS 507.020 and KRS 502.020, and complicity to commit first-degree burglary, in violation of KRS 511.020 and KRS 507.020. In accord with the jury's sentencing recommendation, the trial court sentenced Dressman to concurrent terms of twenty and ten years' imprisonment, respectively. The Commonwealth alleged, and the jury found, that Dressman unlawfully entered the home of his girlfriend's mother, Diane Snellen, and either killed her himself or was complicit with either of two others—his girlfriend, Stephanie Olson, or an acquaintance, Timothy Crabtree—who did so. Olson and Crabtree were also indicted for the murder. Crabtree entered a guilty plea to lesser charges and

was sentenced to six years' imprisonment, and at a separate jury trial Olson was convicted of being complicit in the murder and was sentenced to twenty-five years' imprisonment.[1] On appeal, Dressman challenges the sufficiency of the Commonwealth's proof; he contends that Crabtree's statements to a cellmate, statements that Snellen made to a friend, and observations by two witnesses of Olson's demeanor shortly after her mother's death should not have been admitted into evidence; and he asserts that testimony by a forensic expert was tainted when he was referred to as an "expert" before the jury. Finding no reversible error, we affirm.

RELEVANT FACTS

The Commonwealth's case took more than a week to present and included some thirty-one witnesses. The Commonwealth's theory was that Dressman and Olson, students at Scott County High School when they became romantically involved about eight months prior to the June 2002 crime, murdered Snellen because they resented her disapproval of and interference with their relationship. The center of gravity of the Commonwealth's case was the testimony by Richard Roberts, Timothy Crabtree's cellmate for a time in the Scott County Jail. Roberts testified that in the early hours one morning while he and Crabtree were confined together, Crabtree confessed that he was present and lent assistance when Dressman killed Snellen by stabbing her repeatedly with a knife, a knife Dressman had pilfered from the restaurant

[1] This Court affirmed her conviction and sentence in *Olson v. Commonwealth*, No. 2006-SC-000694-MR, 2008 WL 746651 (Ky. March 20, 2008).

where he worked. According to Roberts, Crabtree told him that he and Dressman may have been spotted outside Snellen's house the night of the murder by the driver of a car that passed by.

The rest of the Commonwealth's proof amounted to an abundance of circumstantial corroboration of Roberts's testimony. It was established through several witnesses that Olson's relationship with her mother was bitter and conflicted and that Snellen would not allow Olson to move out of Snellen's home until she turned eighteen. Not long before the crime, Dressman was overheard by one witness when he told Olson, who had just ended an upsetting phone conversation with her mother, not to worry, that they "would take care of that problem." The same witness testified that within a few days following the murder he asked Dressman about Snellen's death and Dressman replied, "we took care of that problem."

Other witnesses had been present when, again not long before the crime, Dressman asked Crabtree, a person thought to be knowledgeable about such things, how one might kill a person in the city and avoid having the killing overheard. Crabtree advised stabbing the person in the lungs, for not only would stabbing avoid the noise of a gunshot, but a wound to the lungs would prevent the victim from screaming. Snellen was stabbed some sixteen times in her chest. The manager of the restaurant where Dressman worked part-time as a dishwasher testified that one day not long before the crime, his daily tally of kitchen knives revealed a knife was missing. He was able to say exactly what sort of knife was missing and identified another knife as being the same

kind. The autopsy examiner testified that Snellen's wounds were consistent with a knife of that type. Another witness testified that a few days before the murder he had observed Crabtree and Dressman talking at the restaurant.

On the basis of Snellen's phone records from the evening of June 5, 2002, Olson's 911 call the next morning reporting her mother's death, and the condition of the body when officials arrived at the scene, the Commonwealth contended that the murder probably occurred some time not long after 10:00 pm on June 5. Three witnesses testified that they saw a car like Olson's on her mother's street at about 11:30 that night, and two of those witnesses testified that as they drove by they saw a person crouching down outside Snellen's house, the sighting, perhaps, that Crabtree allegedly mentioned to Roberts.

Several witnesses testified that Olson did not seem upset by her mother's death, and one witness testified that when police officers first arrived at the scene and questioned Olson, she acted upset while being questioned but as soon as the questioning officer would walk away she appeared calm and unaffected.

Finally, there was proof that within days of the murder Crabtree and his girlfriend left Kentucky for North Carolina.

Dressman testified in his defense and denied any involvement in Snellen's murder. Crabtree, although called as a witness by the Commonwealth, also denied having had anything to do with the killing. When confronted with the fact that in conjunction with his Alford plea he had given a statement implicating Dressman, Crabtree testified that he had fabricated the

statement to avoid being tried for Snellen's murder and possibly exposed to the death penalty. He denied, before Roberts testified, having confessed to Roberts and expressly denied having made any of the statements Roberts thereafter attributed to him. Dressman otherwise sought to show that several of the Commonwealth's witnesses had legal problems of their own and thus had motives for currying favor with the prosecution. He also elicited testimony to the effect that just prior to her death Snellen may have ended a brief romance with a co-worker and argued that the police had not adequately investigated the co-worker's possible involvement.

The jury, as noted, was satisfied by the Commonwealth's proof and found Dressman guilty of complicity to both murder and first-degree burglary.[2] Dressman argues that those findings were unreasonably speculative and that the trial court erred when it denied his motions for a directed verdict. We begin with this contention.

ANALYSIS

I. Dressman Was Not Entitled to a Directed Verdict of Acquittal.

As Dressman concedes, our directed verdict standards, in both the trial court and on review, are well-established:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the

[2] We note that while the jury instructions referred to complicity to burglary, the facts the jury was asked to find—that Dressman illegally entered or remained in Snellen's house, intending to commit a crime, while either he or a fellow participant was armed with a deadly weapon—amount to first-degree burglary simpliciter. The complicity charge was surplusage, therefore, but neither party objected to this at trial and no prejudice arose as a result.

> evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. . . . On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). It is also well-established that "[e]ven 'circumstantial evidence may form the basis for a conviction so long as the evidence is sufficient to convince a reasonable jury of guilt.'" *Crossland v. Commonwealth,* 291 S.W.3d 223, 235 (Ky. 2009) (*quoting from Davis v. Commonwealth,* 147 S.W.3d 709, 729 (Ky. 2004)). Under this standard, the Commonwealth's proof, construed in its favor, must be more consistent with guilt than with innocence, *Hayes v. Commonwealth,* 175 S.W.3d 574 (Ky. 2005), must do more than merely cast suspicion, *id.,* must not be so tenuous as to call for mere speculation, *id.,* must be evidence of substance, *Johnson v. Commonwealth,* 885 S.W.2d 951 (Ky. 1994), and must amount to more than a mere scintilla of evidence. *Id.*

Dressman notes that two of the witnesses who saw a car like Olson's outside Snellen's house the night before Snellen's body was found were not sure that it was her car. Indeed, early in the investigation they told investigators that they thought it was not her car, although at trial they testified that they were not sure. Nor could they describe in any detail the male figure they saw crouching in front of the house. A forensic examiner testified that two hairs found on Snellen's body had a mitochondrial DNA sequence that matched Dressman's, and Dressman observes that that evidence

proved little since he had been in Snellen's house several times and could have left the hairs on any of those occasions. Dressman also insists that Crabtree's testimony, by itself, provided little basis for finding him, Dressman, guilty. While it may be true, as Dressman seems to contend, that these elements of the Commonwealth's case, considered in isolation, do not provide more than a speculative basis for finding Dressman guilty, the question is not what inferences do certain items of evidence permit in isolation, but what inferences does the evidence as a whole permit.

Here, construed favorably to the Commonwealth, Crabtree's confession to Roberts lends much more than merely speculative weight to the considerable circumstantial evidence that Dressman and Olson regarded Snellen as a problem to be eliminated, that Dressman and Crabtree planned a stabbing, that they procured a knife with which to carry it out, that they were seen, one of them at least, at about the time that they unlawfully entered or remained in Snellen's house, and that they entered or remained in the house with the intention to kill Snellen, an intention Dressman shared and at the very least helped to fulfill. The evidence was definitely sufficient to permit a reasonable juror to find Dressman guilty of complicity to murder and complicity to first-degree burglary. The trial court did not err, therefore, by denying Dressman's motions for a directed verdict.

II. The Trial Court Did Not Abuse its Discretion When it Permitted Roberts to Testify Concerning Crabtree's Prior Inconsistent Statements.

Dressman next contends that the trial court should not have permitted

Roberts's hearsay testimony concerning Crabtree's confession. As noted above, before Roberts testified, Crabtree was questioned concerning his alleged statements to Roberts and the circumstances surrounding those statements, and he denied having made them. The foundation required by KRE 613 was thus laid, and pursuant to KRE 801A(a)(1) the trial court then permitted Roberts to testify concerning Crabtree's prior inconsistent statements. Under that rule, once a proper foundation has been laid, a witness's prior inconsistent statement is admissible notwithstanding the fact that it is hearsay. It does not matter who called the witness, since KRE 607 permits a party to impeach his or her own witness. Under our rules, moreover, unlike the rules in some other jurisdictions, the prior inconsistent statement is admissible for substantive purposes as well as for impeachment. *Thurman v. Commonwealth,* 975 S.W.2d 888 (Ky. 1998).

Relying on authority from jurisdictions whose rules are different from ours, Dressman argues that the substantive use of a prior inconsistent statement should not be allowed where, as may have been the case here, a party's primary purpose in calling a witness, such as Crabtree, is to elicit testimony inconsistent with a prior statement and thus to render admissible the prior statement, which otherwise would be excluded as hearsay. We rejected this argument in *Thurman:* "Under KRE 801A(a)(1), . . . any prior inconsistent statement of a witness is admissible for substantive purposes. Thus, even if the Commonwealth's 'primary purpose' in calling Loretta Smith as a witness had been to impeach her with her prior inconsistent statements, the

evidence contained in those statements was not 'otherwise inadmissible.'" *Id.* at 893-94 (citing *Jett v. Commonwealth,* 436 S.W.2d 788 (Ky. 1969)). We decline Dressman's invitation to revisit that holding, and so conclude that the trial court did not err when it permitted Roberts to testify concerning Crabtree's confession.

III. Snellen's Statement to a Friend That She Would Not Let Olson Move Out Until She Was Eighteen Was Admissible Under an Exception to the Hearsay Rule.

Several witnesses testified to the effect that the relationship between Olson and Snellen was strained and that Olson resented her mother's control. Over Dressman's objection, one of Snellen's friends, Nancy Lusby, was permitted to testify that Snellen had once told her that she, Snellen, would not allow Olson to move out on her own before she turned eighteen. Although Snellen's statement to Lusby was hearsay, the trial court ruled that it was admissible under KRE 803(3), which excepts from the general rule against hearsay, statements "of the declarant's then existing state of mind . . . such as intent [or] plan." Dressman acknowledges that under this rule, statements casting light on future intentions, as opposed to past events, are not subject to the strictures of the hearsay rule, but he insists, correctly, that they remain subject to the rule of relevance. *Ernst v. Commonwealth,* 160 S.W.3d 744, 753 (Ky. 2005) ("[S]tatements that meet the state-of-mind exception are still inadmissible unless the [declarent's] state of mind is relevant."). He maintains that Snellen's "move out" statement to Lusby was not relevant because there was no evidence to suggest that Snellen ever conveyed her intention to Olson or

to him, and thus there was no reason to suppose that that particular intention contributed to Olsen's or to his alleged animosity against her. As noted in *Ernst,* however, the statement's relevance is determined not by asking what effect it may have had on someone else's state of mind, but rather whether the declarant's own state of mind, as revealed by the statement, is relevant.

Here, even assuming for the sake of argument that Olson and Dressman were unaware of Snellen's opposition to Olson's moving out, Snellen's intention not to allow Olson to move out before she was eighteen was relevant inasmuch as it tended to confirm the Commonwealth's theory that Snellen was still, at the time of murder, actively engaged in trying to rein in her daughter. The trial court did not abuse its discretion, therefore, by permitting Lusby to repeat Snellen's "move out" statement.

IV. Evidence That Olson Appeared Unmoved by Her Mother's Death Was Relevant and Not Unfairly Prejudicial.

Two witnesses who observed Olson on the morning she reported her mother's death testified that she did not seem as upset as they would have expected and one of them testified that she seemed to act more upset when investigators were questioning her than she did when they were not present. Dressman contends that this testimony was relevant, if at all, only to Olson's possible involvement in the crime, but had no relevance with respect to him, and further, even if it did have some marginal probative value, by associating him with an unfeeling daughter its unfair prejudicial effect outweighed whatever probativeness there may have been. This objection was not presented to the trial court and thus our review is limited under KRE 103(2)(e) and RCr

10.26 to asking whether the admission of this testimony was plainly erroneous, clearly prejudicial, and rendered the proceedings manifestly unjust. *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009).

We are not persuaded that the admission of this testimony was erroneous, much less plainly so. Dressman again seems to suggest that the relevance of each piece of evidence is to be determined in isolation. Relevance, however, is frequently a matter of context. Here, evidence that Olson was not shocked and surprised by her mother's murder but that in front of the investigators she attempted to appear so tended to show Olson's consciousness of guilt. Olson's guiltiness, in turn, tended to confirm all the evidence—from Roberts's testimony to the testimony about the knife missing from Dressman's workplace to Dressman's comment after the murder that "we took care of that"—that Dressman was guilty, and thus had substantial relevance to Dressman as well as to Olson and was not unfairly prejudicial. The admission of testimony about Olson's post-crime demeanor, therefore, was not plainly erroneous.

V. The Prosecutor's Reference to One of His Witnesses as an "Expert" Did Not Constitute a Palpable Error.

Having concluded his questions meant to qualify the forensic DNA analyst to give expert testimony, the prosecutor stated, "Your honor, at this time I would like to submit Mr. Winston as an expert." Dressman did not object to this reference to an "expert," and the court granted the Commonwealth's motion. Dressman's final contention is that by referring to the analyst as an "expert" in the presence of the jury the Commonwealth

impermissibly bolstered the witness's credibility. Our review, again, is for palpable error under KRE 103(2)(e) and RCr 10.26.

As Dressman correctly notes, because of the risk of improper bolstering, we have held that expert witnesses should not be referred to as "experts" in front of the jury. *Fields v. Commonwealth,* 274 S.W.3d 375 (Ky. 2008) (citing *Luttrell v. Commonwealth,* 952 S.W.2d 216 (Ky. 1997)). Granting that the relatively innocuous breach of the rule here was an error, we are not persuaded that it entitles Dressman to palpable error relief.

Mr. Winston testified that the mitochondrial DNA profile of two hairs recovered from Snellen's arm matched Dressman's profile. Although the jury was asked to believe that Mr. Winston was competent to make that determination, his opinion was not the sort of expert judgment call, such as an appraisal, about which experts could disagree and which might stand to gain weight from an improper emphasis on its expertise. Winston's testimony, moreover, as Dressman himself stressed in conjunction with his sufficiency-of-the-evidence argument above, had limited probative force because it was conceded that Dressman had been in Snellen's house and in Olson's bedroom, where Snellen's body was found, many times. There is no chance, therefore, that Dressman's rights were prejudiced by the lone reference to Mr. Winston as an "expert," and that reference came nowhere near rendering Dressman's trial manifestly unjust. Dressman is not entitled, therefore, to palpable error relief.

CONCLUSION

In sum, under our rules, a witness's prior inconsistent statement is

admissible not only to impeach the witness's contrary testimony, but as substantive proof of the matter asserted in the prior statement, and this is so even if the witness is called solely to establish the foundation for the prior statement's admission. The trial court did not abuse its discretion, accordingly, by permitting Richard Roberts to testify concerning statements Timothy Crabtree made to him in the Scott County Jail. In light of Roberts's testimony implicating Dressman in the murder of Diane Snellen, and in light of the considerable circumstantial evidence tending to corroborate Roberts's testimony, the trial court did not err when it denied Dressman's directed verdict motions. Nor did the court abuse its discretion by admitting evidence either of Snellen's intention not to permit her daughter to leave home before turning eighteen, or of the daughter's unusually calm demeanor immediately following her mother's death. The lone reference to a DNA analyst as an expert, finally, did not in any meaningful way impinge upon Dressman's right to a fair trial. Accordingly, we affirm the Judgment of the Scott Circuit Court.

All sitting. All concur.

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