Supreme Court of Kentucky.
Glenn Anthony HUDSON Appellant
v.
COMMONWEALTH OF KENTUCKY Appellee
No. 2006-SC-000269-MR.
March 22, 2007.

Appeal from Fayette Circuit Court Honorable Pamela Goodwine, Judge. Indictment No. 04-CR-01035.
Angela Johnson, Assistant Public Advocate, Department of Public Advocacy, Frankfort, KY, for Appellants.
Gregory D. Stumbo, Assistant Attorney General, Michael L. Hamed, Assistant Attorney General, Office of Criminal Appeals, Attorney General's Office, Frankfort, KY, for Appellees.

MEMORANDUM OPINION OF THE COURT

AFFIRMING

*1 Glenn Anthony Hudson entered a conditional guilty plea to the wanton murder of a two-year-old girl and received a sentence of life in prison. At the time of the guilty plea, Hudson reserved the right to appeal the trial court's rulings denying (1) his motion to suppress incriminating statements, arguing that these statements were coerced from him by detectives; and (2) denying his motion in limine to exclude evidence of the girl's vaginal injuries, arguing that the highly prejudicial nature of this evidence outweighed its marginal relevance. Finding no error in the trial court's rulings on either of these issues, we affirm.

I. BACKGROUND FACTS AND PROCEEDINGS IN CIRCUIT COURT.

This case arose out of the tragic death of A.G., who was the daughter of Hudson's girlfriend. An autopsy of the child's body revealed that she died of hemoperitoneum [FN1] due to liver lacerations and blunt impacts to the head, trunk, and extremities. The medical examiner reported that the blunt impact injuries pointed to child abuse. Since this case was resolved by Hudson's conditional guilty plea rather than by trial, most of the factual background for our analysis derives from the record of a hearing on Hudson's motion to suppress the incriminating statements he made to detectives.

FN1. Hemoperitoneum signifies “blood in the peritoneal cavity.” MedLine Plus: Merriam-Webster Medical Dictionary, *http://www.nlm.nih.gov/medlineplus/mplusdictionary.html* (last visited February 28, 2007). In lay terms, this means internal bleeding.

Police and firefighters responded to a residential 911 call reporting an unresponsive child. Upon arrival, firefighters performed CPR on the child, A.G., who was then transported-accompanied by her mother-to the hospital where she died. The responding police officer noticed that Hudson, who remained at the residence, was nervously repeating, “I didn't do anything wrong, I wouldn't hurt a kid.” These statements aroused the officer's suspicion, so he read *Miranda* [FN2] warnings to Hudson before questioning him about what had happened to A.G. According to the officer, Hudson was “tearful” and “remorseful” at that time. Hudson told the officer that A.G. had been sick and had been taken to the hospital a few days earlier because her stomach had been hurting. He said that he gave A.G. medication earlier that day, took her to the bedroom to let her rest, and later found her unresponsive. He repeated that he would never hurt a baby, but he made no incriminating statements to this officer.

FN2. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Hudson was taken to police headquarters for further questioning, where he was interviewed by Detectives Shearer [FN3] and Schoonover. Hudson again made no incriminating statements to them, and the detectives did not record the interview. Following this interview, Hudson was arrested on an unrelated warrant.

FN3. The parties sometimes refer to “Detective Shearer” and sometimes to “Detective Sheer.” It appears from the record that this is Detective Martin Shearer.

The next day, Detectives Shearer and Schoonover had a second interview with Hudson after giving *Miranda* warnings. This time, they videotaped the interview, which lasted approximately two to two-and-a-half hours. And this time, Hudson made incriminating statements concerning A.G.'s death. He was later indicted for A.G.'s murder.

During pretrial proceedings, Hudson moved to suppress the statements he made to the detectives at the second interview, alleging that his statements were involuntary because he was coerced by implied promises of leniency and distracted by physical and emotional pain from his own recent surgery, his brother's recent murder, and the recent death of his grandmother.

*2 The trial court held a suppression hearing at which Detective Shearer read from a written transcript of the second interview, and he answered questions from the Commonwealth and defense counsel. Hudson argues that the detective's testimony proved the improperly coercive nature of the interview. According to Hudson's recitation of facts surrounding the interview,

The police made implied promises of leniency. At one point, Detective Schoonover told Mr. Hudson: “If they [impliedly referring to Mr. Hudson] don't confess, I guarantee you *I'm* not going to settle for any damn plea agreement. If you make me work, I'm gonna make you work. If you want a plea agreement, I'm gonna make you work for it.” When Mr. Hudson asked what would happen to him if he confessed, Detective Schoonover replied that whomever [sic] caused [A.G.]'s death would probably be evaluated. Schoonover also told Mr. Hudson of a defendant who shot a firefighter that had received

mental evaluation rather than being sent to prison.

Detective Schoonover then told Mr. Hudson: “If you did something just let us know and we will help you. We'll deal with it and tell you what to do.” Schoonover continued: “We'll give you time to write down what happened to her. If you hit it on the money, then we will work something out.” Naturally, Mr. Hudson wanted to know what would be worked out. Detective Schoonover's answer was: “Whatever you write down, we'll talk about it.” He then told Mr. Hudson that other people charged with killing someone were charged with manslaughter rather than murder.

Mr. Hudson then expressed his belief that most people have their lawyers present when speaking to the police. To this the officer responded: “No they don't, not the ones that have remorse.” Officer Schoonover then went into detail about how he grabbed his daughter, illustrating to Mr. Hudson that everyone loses control from time to time.

When Mr. Hudson again expressed concern about what would happen to him, he was told that the officers would tell their boss and the Commonwealth that Mr. Hudson was cooperative and take their advice and see what happened. He told Mr. Hudson that if a person cooperates, he bends over backwards to help them. Detective Sheer [sic] at that point chimed in, assuring Mr. Hudson that Detective Schoonover did bend over backwards for defendants that cooperate.

In short, it was demonstrated for the court that Mr. Hudson was told that he would receive help, that he would not necessarily be charged with murder and that he could be sent to a mental institution rather than prison. Defense counsel also brought to the court's attention that the Detectives were aware that Mr. Hudson was in physical pain and that he was still in the process of grieving his brother's recent murder and his grandmother's death. Counsel communicated to the court that Mr. Hudson told the officers that he wished someone would kill him. The point was, defense counsel argued, the police made promises to a man that was emotional and was crying out for help.[FN4]

FN4. We quote this summary verbatim from pages 2 and 3 of the appellant's brief, omitting citations to the record. Having examined the record of the suppression hearing, appellant's summary appears to summarize the testimony favoring suppression accurately.

*3 In response to the Commonwealth's questioning at the suppression hearing, the detective denied making promises to Hudson concerning his treatment in the legal system or the ultimate outcome of his case. He also quoted excerpts from the transcript of the interview in which the detectives informed Hudson that he would be appointed an attorney, that the ultimate outcome of his case would be determined by the court system, and that the detectives did not control what happened to him in the court system. The detective testified that mental health treatment was the kind of help that he and his cohort had in mind for Hudson and that they made good on their promise to help by calling the jail to request a mental health counselor for Hudson.

The trial court denied the motion to suppress. The court found that the detectives gave

Hudson *Miranda* warnings and that Hudson understood them. Hudson does not challenge this finding. The court noted that Hudson never invoked his *Miranda* rights by telling police he wanted to stop talking to them or wanted to talk to an attorney. The court also found that the interview was not unduly lengthy and noted that Hudson never said he needed to stop because he was in pain, needed to take medication, or needed to rest. The court also stated that the fact that Hudson cried did not necessarily make his statement involuntary, especially in light of the fact that anyone would find this event emotional and traumatic whether or not they were guilty.

Hudson followed the suppression motion with a motion in limine to exclude evidence of the victim's vaginal injuries as being unduly inflammatory and of limited probative value since the child did not die of these injuries. The Commonwealth argued that evidence of these injuries was admissible, both to show intent and to show an injury that was just as relevant as any of the other injuries.[FN5] The trial court denied the motion in limine, finding that any and all injuries sustained by the victim at or near the time of death were admissible to show the extent of the victim's injuries and the intent of the perpetrator.

FN5. In response to the trial court's questioning, the Commonwealth stated that it had elected not to seek Hudson's indictment for sex offenses because of the difficulty in proving the elements of sexual gratification and because its expert could not state with certainty that the vaginal tear could not have been caused accidentally. But the Commonwealth indicated that if the trial court ruled the vaginal injuries were relevant only if sex offenses were charged, it would seek Hudson's indictment for sex offenses.

Immediately after the trial court denied the motion in limine, defense counsel requested time to confer with Hudson. About an hour later, defense counsel announced Hudson's desire to plead guilty conditionally to wanton murder, reserving an appeal on the trial court's denial of the suppression motion and the motion in limine. The Commonwealth did not object to a conditional guilty plea to the charge of wanton murder. The Commonwealth further indicated that this was an open plea, meaning that it had not offered to plea bargain. Upon an open plea of guilty, the Commonwealth would seek the maximum punishment of life imprisonment. Hudson proceeded to enter a conditional plea of guilty; and he informed the court during the *Boykin* colloquy [FN6] that he had thrown A.G. into her crib and had hit her in the stomach, knowing these actions could cause her death. The trial court accepted his guilty plea and ultimately imposed the maximum sentence of life. Hudson then filed this appeal as a matter of right.

FN6. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

II. ANALYSIS.

A. The Trial Court's Finding that Hudson's Statement to Detectives was Voluntary Is Supported by Substantial Evidence.

*4 Kentucky Rules of Criminal Procedure (RCr) 9.78, which governs motions to suppress

confessions and other incriminatory statements, states that "[i]f supported by substantial evidence[,] the factual findings of the trial court shall be conclusive." Specifically, a trial court's finding that a statement is voluntary must not be disturbed on appeal unless this finding is clearly erroneous.[FN7] Applying this highly deferential standard of review to the record provided to us,[FN8] we find no reason to reverse on the basis of the trial court's denial of the motion to suppress Hudson's statements to police in the recorded interview.

FN7. *Henson v. Commonwealth,* 20 S.W.3d 466, 470 (Ky.1999).

FN8. Since Hudson failed to ensure that either the videotape of the second interview or the transcript of the interview, which was quoted extensively at the suppression hearing, was included in the record on appeal, we have only the videotape of the suppression hearing to review to determine this issue. We must assume that the videotape or transcript of the interview at issue would not provide any additional support for Hudson's contentions. *See, e.g., Commonwealth v. Thompson,* 697 S.W.2d 143, 145 (Ky.1985).

While appellate courts prefer that trial courts make written findings of fact on suppression motions, the trial court's findings on the videotaped record were sufficiently enunciated to allow meaningful review on appeal. So the trial court complied with the requirement of findings in RCr 9.78.[FN9]

FN9. *Coleman v. Commonwealth,* 100 S.W.3d 745, 749 (Ky.2002).

In determining whether a confession was made voluntarily, we must examine the "totality of the circumstances" surrounding the confession.[FN10] Hudson argues that the trial court failed to consider the "totality of the circumstances" but instead focused narrowly on his receiving and understanding his *Miranda* rights. He argues that his statement was involuntary in light of the detectives' "implied promises of leniency" and his physical and emotional vulnerability at the time of the interview. But having examined the record of the suppression hearing and applicable case law on these points, we find no reason to disturb the trial court's ruling.

FN10. *Soto v. Commonwealth,* 139 S.W.3d 827, 847 (Ky.2004).

Regarding the "implied promises of leniency," Detective Shearer testified at the suppression hearing that neither he nor Detective Schoonover made any promises as to the crime with which Hudson would be charged, the sentence he would ultimately receive, or any leniency he might receive in the court system. And Hudson fails to identify any promise made-except for vague promises to get him help and to inform superiors in the police department and the Commonwealth's Attorney's office of his cooperation-or any threat made-except for a vague threat that the detectives would not accept a plea agreement if he did not confess. Naturally, the detectives were not ultimately responsible for whether Hudson received a favorable plea offer. But the record also shows attempts by the detectives to clarify for Hudson that the court system, not they, would determine the outcome of the case.

In essence, Hudson points to no explicit promises of lenient treatment for his confession.

He does point to the detectives mentioning in the interview several examples of killers being charged with crimes less than murder or being treated psychiatrically without being convicted. Apparently, as a result of hearing these examples, he alleges he "understood the police to tell him that if he confessed to the crime, he would be evaluated and most likely charged with manslaughter rather than murder." Even if the detective's discussion of these examples led Hudson to believe that he would be more likely to receive a lesser charge or sentence if he confessed, this did not render his statement involuntary.[FN11]

FN11. *Peak v. Commonwealth,* 197 S.W.3d 536, 542 (Ky.2006) (holding that a promise to tell prosecuting authorities of cooperation does not render statement involuntary). *See also U .S. v. Nash,* 910 F.2d 749, 752-53 (11 Cir.1990) (holding that law enforcement officer's statement that cooperating defendants generally fared better in terms of sentence did not render confession involuntary as this merely allowed defendant to make an informed decision as to whether to cooperate with the government); *U.S. v. Roman-Zarate,* 115 F.3d 778, 781 (10 Cir.1997) (holding that defendant's statement not rendered involuntary by agents' promises that cooperation would be "helpful" to defendant because no promises were made that defendant's statements would not be used against him and *Miranda* warnings had been read).

*5 Regarding Hudson's claim of physical and emotional vulnerability, he fails to demonstrate that the trial court's ruling was clearly erroneous. While the physical and emotional state of the accused can and should be taken into account when weighing the totality of the circumstances, Hudson has not demonstrated a level of physical and emotional stress that would render him unable to make a voluntary decision. He points to no specific evidence that he told the detectives he was in pain during the interview. And he has not provided us with a copy of the recorded interview itself to see if there is some other indicator of his being in pain. So even assuming that he was in some pain from a recent surgery, this would not necessarily make his statement involuntary.

This case is distinguishable from *Mincey v. Arizona,*[FN12] in which the United States Supreme Court deemed involuntary the statement made by a barely conscious defendant, who was suffering in an intensive care unit from a gunshot wound. The police persisted in questioning the defendant despite his repeated requests to end the questioning and allow him to speak to a lawyer.[FN13] Far from requiring that the accused be in an ideal physical condition, our courts have often held that statements from an accused suffering some injury or illness at the time were voluntary so long as the accused was in "sufficient possession of his faculties" to make a reliable statement.[FN14] For instance, we have ruled that a statement taken from a defendant in the hospital was voluntary because he was alert and spoke of his own free will.[FN15]

FN12. 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

FN13. *Id.* at 396.

FN14. *Mills v. Commonwealth,* 996 S.W.2d 473, 481 (Ky.1999).

FN15. *Simmons v. Commonwealth,* 746 S.W.2d 393, 400 (Ky.1988) (holding that statement of hospitalized defendant was voluntary where defendant was only suffering from superficial wounds and admitted for observation because defendant was alert, advised of his rights, was not suffering from a substantial injury, and understood what was going on). *See also* *Mills,* 996 S.W.2d at 479-81. In *Mills,* the defendant had been "bleeding profusely" from one wrist and was lying on the ground with blood all over him when questioned by police while being treated by medical personnel. *Id.* at 479. Nonetheless, we affirmed the trial court's finding that this statement was voluntary since the accused was not sufficiently intoxicated or injured to render his statement unreliable; and there was no evidence of police coercion such as physical force or other means to overcome the defendant's will. *Id* . at 480-81.

Hudson similarly fails to demonstrate that he was entitled to suppression of his statement due to his depressed mental state after having recently lost his grandmother and his brother. While Hudson would naturally grieve over these losses, his emotional state did not necessarily render his statement involuntary so long as he was in sufficient possession of his faculties to give a reliable statement. As the trial court noted, most defendants would be upset knowing that the victim had been killed or injured; and merely being emotional or upset does not render a statement involuntary.[FN16] The record reveals no indication that emotional strain rendered Hudson incapable of making a statement. Even the facts as characterized by Hudson himself show him rationally weighing his options and asking the detectives questions to determine if confession would be in his best interest.

FN16. *See* *Bell v. Commonwealth,* 684 S.W.2d 282, 283 (Ky.App.1984) (upholding the trial court's finding that a statement was voluntary despite the accused's being emotionally distressed, based upon scarcity of evidence to indicate that emotional distress was so severe as to make the statement involuntary).

We have identified the three main factors in assessing the voluntariness of a defendant's incriminating statements as follows:

1) whether the police activity was "objectively coercive[";] 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the "crucial motivating factor" behind the defendant's confession.[FN17]

FN17. *Henson,* 20 S.W.3d at 470, *quoting* *Morgan v. Commonwealth,* 809 S.W.2d 704, 707 (Ky.1991).

In the instant case, substantial evidence supports a finding that the police activity was not objectively coercive. After reading Hudson his rights, the interviewing detectives stated that if Hudson had something to do with A.G.'s injuries or death, they could work with him or help him if he told them what happened. Their vague promises to get him "help" and their suggestions that cooperation might yield a better outcome were not objectively coercive, especially in light of their repeated statements that they were not in control of the punishment he might ultimately receive. Hudson has pointed to no threats of physical violence or other means of duress to overbear his will. Even with any emotional or

physical difficulties suffered by Hudson at the time, there is substantial evidence that they did not overbear his will because Hudson and the detectives engaged in a give-and-take in which he freely asked about his various options and what might happen if he confessed. Furthermore, the evidence does not compel a finding that Hudson demonstrated that the crucial motivating factor behind his confession was police coercion, in light of substantial evidence indicating that no "objectively coercive" police activity took place.

*6 In short, we cannot find clear error in the trial court's finding that Hudson's statement to police was voluntary.

B. The Trial Court Did Not Abuse its Discretion In Admitting Evidence of Vaginal Injuries.

Hudson contends that the trial court erred in denying his motion in limine to exclude evidence of A.G.'s vaginal injuries, claiming that these injuries did not lead to A.G.'s death. So he argues that evidence of vaginal injuries has little probative value but is highly inflammatory and unduly prejudicial. We disagree.

Since the indictment was disposed of before trial, the record does not definitively show whether and to what degree any of A.G.'s vaginal injuries led to her death. The medical examiner's one-page report lists the cause of death as hemoperitoneum due to "liver lacerations" and "blunt impacts of head, trunk and extremities-child abuse." The report also lists a number of indications of injury under the heading of "Blunt Impacts of Head, Trunk and Extremities" without indicating when each injury was believed to have occurred. The report does not explain specifically whether or how the various individual injuries, including the vaginal injuries, led to the child's death. We have no expert testimony to explain how various injuries may or may not have ultimately led to the child's demise.

Other than the autopsy report, all we have to review is the Commonwealth's and defense counsel's arguments in pleadings or at hearings concerning the relation of the vaginal injuries to death. Defense counsel argued to the trial court that the vaginal injuries did not cause the victim's death. And Hudson's appellate counsel now argues that the Commonwealth's expert could not rule out an accidental vaginal tear resulting from mere "fingers," meaning that it is possible that an adult caused the tear while changing the child's diaper. The Commonwealth stated in pleadings that the victim had older, healing injuries as well as new, fresh injuries to the vagina and other areas and that all of these injuries were part of the manner of death and contributed to the death. We cannot pass judgment on the merits of any of these contentions since we have no evidence but only arguments on this issue. If a trial had occurred, defense counsel could have cross-examined the medical examiner as to whether the vaginal injuries actually contributed to the death and how these injuries might have been inflicted, even whether they might have been accidentally inflicted through diaper changes.

But evidence of vaginal injuries was admissible whether or not these injuries actually

contributed to the cause of death. “Proof of intent in a homicide case may be inferred from the character and extent of the victim's injuries.” [FN18] Injuries that were not life-threatening in and of themselves or did not directly cause the death can, nonetheless, be admitted in homicide cases for the purpose of showing intent or lack of accident or mistake.[FN19] Although Hudson attempts to distinguish his case from *Parker* and its progeny by pointing out that he admitted to doing something that led or contributed to the victim's death rather than denying any involvement, the evidence of all of the victim's recent injuries,[FN20] including vaginal ones, was still admissible to show intent, which was clearly still at issue because Hudson sought to be convicted of manslaughter rather than murder.

FN18. *Parker v. Commonwealth,* 952 S.W.2d 209, 212 (Ky.1997).

FN19. *See, e.g., id.* at 213 (concluding that the trial court properly admitted evidence of prior injuries including facial bruises and broken leg to show intent); *Ratliff v. Commonwealth,* 194 S.W.3d 258, 268 (Ky.2006) (holding that evidence of cigarette burns was admissible, although victim actually died of suffocation, since all injuries sustained at or near the time of death were admissible to show intent).

FN20. We do not distinguish between injuries that allegedly occurred on the day of death (or fatal injury) versus those injuries that may have occurred a few days earlier since there is no actual evidence of this distinction before us and since Hudson did not raise this issue in the motion in limine. We note that the trial court expressed some concern about admitting evidence of injuries inflicted a few days before since Hudson had only confessed to the one incident of throwing the child into her crib and hitting her. The trial court was unaware of evidence linking Hudson to earlier injuries. The Commonwealth told the court that it would prove at trial that Hudson had caused these earlier injuries and that the prior injuries were also admissible to refute Hudson's statements to police that he had never “touched” the child [apparently, meaning in a sexual manner] after recounting that she had been taken to the hospital a few days before due to problems including her bleeding in her diaper. Hudson did not respond or otherwise follow up on this point to the trial court. In any event, Hudson would have been free to introduce evidence or cross-examine Commonwealth's witnesses about any facts showing that he had abused the child in the past.

*7 And the fact that the vaginal injuries might suggest that an additional, uncharged crime had occurred does not make such evidence inadmissible. “Relevant evidence which is probative of an element of the charged crime is admissible, even though the evidence may also prove commission of other crimes.” [FN21]

FN21. *Major v. Commonwealth,* 177 S.W.3d 700, 706 (Ky.2005) (holding that evidence of sexual abuse of children was admissible in case where the defendant was charged with the homicide of his wife).

The evidence of vaginal injuries-as well as the other injuries suffered at or near the time of death-was relevant evidence of intent under Kentucky Rules of Evidence (KRE) 401.[FN22] We conclude that the trial court did not abuse its discretion in determining that

the probative value of this relevant evidence was not outweighed by undue prejudice and, thus, that exclusion of the evidence was not authorized by KRE 403.[FN23] Furthermore, since the vaginal injuries did not relate to extrinsic "bad acts" but to the homicide itself and the manner of death, KRE 404(b) [FN24] is not relevant to this issue.

FN22. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 402 states that "[a]ll relevant evidence is admissible," subject to any exceptions provided by constitution, statute, or court rule.

FN23. KRE 403 states, in pertinent part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice[.]" A trial court's determination of whether evidence should be admitted or excluded pursuant to KRE 403 is subject to an abuse of discretion standard of review. *Simpson v. Commonwealth,* 889 S.W.2d 781, 783 (Ky.1994).

FN24. KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts" is not admissible to show character. Such evidence may be admissible for other purposes, however, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1).

Because we find no abuse of discretion in the trial court's allowing evidence of the victim's vaginal injuries, Hudson is not entitled to relief on this issue.

III. CONCLUSION.

For the foregoing reasons, the judgment of the Fayette Circuit Court is hereby affirmed.

All concur.

Ky.,2007.
Hudson v. Com.
Not Reported in S.W.3d, 2007 WL 858809 (Ky.)