IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 29, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000250-MR

ALFRED FRANK SEARS — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 09-CR-001074

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Alfred Frank Sears, and Vaughn Tipton lived in separate apartments within the same house in Louisville, Kentucky. In March of 2009, Appellant sold Tipton crack cocaine. Both parties agreed that Tipton would pay Appellant for the drugs at a later time. Tipton, however, failed to compensate Appellant. After numerous threats, Appellant ultimately shot Tipton six or seven times in the alley outside of their residence. Overwhelming evidence linked Appellant to Tipton's murder. For example, Tipton's blood was recovered from Appellant's shoes at the time of his arrest. Also, a box of .22 caliber bullets that matched the bullets recovered from Tipton's body was found in Appellant's apartment. Lastly, and perhaps most damaging, Appellant's girlfriend testified that he confessed to the murder of Tipton.

A Jefferson Circuit Court jury found Appellant guilty of murder, tampering with physical evidence, possession of a handgun by a convicted felon, and being a persistent felony offender in the first degree. The trial court sentenced Appellant to life imprisonment. Appellant now appeals his conviction and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b).

Juror Communications

Appellant's first assignment of error concerns the trial court's allowance of juror access to cell phones during jury deliberations. The trial judge explained to the jury that cell phone use was restricted during deliberations and that each juror's cell phone would be placed with the bailiff until a verdict was reached. The trial judge also stated that if a juror needed to make a necessary phone call during deliberations, the bailiff would obligingly escort the juror to a secure place for the call to be made. The trial judge additionally admonished the jurors that they were not to discuss the case with anyone outside of deliberations. Appellant maintains that the trial judge's actions improperly allowed for outside influence and bestowed improper authority to the bailiff.

Appellant concedes that this issue is not preserved, but requests us to perform palpable error review pursuant to RCr 10.26. We are hesitant to address Appellant's argument due to any proof or allegation that a juror, in fact, made a cell phone call during deliberations. Yet, assuming *arguendo* that a juror actually placed a call, we conclude that the call itself does not constitute error.

In *Winstead v. Commonwealth,* we held that as long as jurors are properly admonished, it is perfectly acceptable to allow jurors access to cell phones and other electronic forms of communication in order "to allow appropriate communications by jurors (such as arranging for transportation, childcare, etc.) . . . ." 327 S.W.3d 386, 401-02 (Ky. 2010). Thusly, we cannot find that the trial court erred in allowing jurors to make necessary phone calls during jury deliberations.

Self-Protection Instruction

Appellant next urges the Court to find that he was entitled to a self-protection instruction based on circumstantial evidence that Tipton was the first aggressor. The trial court ruled that there was insufficient evidence to warrant an instruction on self-protection. We agree.

Generally, a trial court must instruct the jury on any defense supported by the evidence. *Sanborn v. Commonwealth,* 754 S.W.2d 534, 549-50 (Ky. 1988). A criminal defendant's right to an affirmative instruction is conditioned upon the existence of evidence introduced at trial which would allow a reasonable juror to conclude that the defense applies. *See Grimes v. McAnulty,* 957 S.W.2d 223, 226 (Ky. 1997) (citing *Brown v. Commonwealth,* 555 S.W.2d 252, 257 (Ky. 1977); *Jewell v. Commonwealth,* 549 S.W.2d 807, 812 (1977)). We will review the trial court's refusal to provide the jury with a self-protection instruction for abuse of discretion. *Sanders v. Commonwealth,* 301 S.W.3d 497, 500 (Ky. 2010) (citing *Williams v. Commonwealth,* 178 S.W.3d 491, 498 (Ky. 2005)).

The defense of self-protection is enumerated in KRS 503.050, which justifies the use of deadly physical force upon another person only "when the defendant believes that such force is necessary to protect himself against death . . . ." In order for an instruction on self-protection to be appropriate, there must be adequate evidence introduced at trial which would create a reasonable doubt pertaining to the defendant's guilt. *Hilbert v. Commonwealth,* 162 S.W.3d 921, 924 (Ky. 2005).

In the case before us, the only basis for Appellant's requested self-protection instruction comes from the testimony of a state-employed analyst. The analyst testified that gunshot residue is customarily the combination of lead, barium, and antimony which appears when one is less than four feet from the barrel of a discharging gun or less than six inches from the side of the barrel of a discharging gun. The analyst stated that while significant amounts of lead and barium were found on Tipton's hands, antimony was not. In explaining the absence of antimony, the analyst stated that it is usually lacking in Winchester brand .22 magnum bullets that are rim-fired; those being the exact bullets retrieved from Tipton's body and Appellant's apartment.

We do not believe that the analyst's testimony, standing alone, supports a theory that the victim was attempting to harm Appellant. The analyst's testimony lends more support to the conclusion that the lead and barium residue found on Tipton's hands was caused by Appellant firing multiple shots at Tipton at point-blank range. Absent additional evidence of self-defense, the sole existence of gun residue on the victim's hands is not sufficient to cast

reasonable doubt on Appellant's guilt. As a result, it was not an abuse of the trial court's discretion to deny Appellant's request to instruct the jury on self-protection.

Right to Present a Defense

Appellant also claims that the trial court erred in failing to require his attorney to call Devie Sanders to testify on his behalf. Sanders, an inmate at the time of Appellant's trial, was present in Tipton's apartment the night before and the day of Tipton's murder. Initially, the Commonwealth intended on calling Sanders as a witness, but then decided not to call him to the stand. At trial, Appellant subsequently requested that his attorney call Sanders to testify. Appellant's counsel, however, believed it would be of no benefit to Appellant to have Sanders testify.

The trial court held a brief hearing on the matter. Appellant's counsel stated that Sanders had not been previously interviewed and she was unaware what information, if any, Sanders may testify to. A Commonwealth's detective also explained to the trial judge that upon Sanders' transfer to the Jefferson County jail, he was "non-compliant and extremely hostile." The trial judge concluded that it was reasonable trial strategy for Appellant's counsel not to call Sanders to testify. On appeal, Appellant claims that the trial court's failure to have his attorney call Sanders to testify constituted a denial of his right to present a defense. We must note that Appellant is not asserting a claim of ineffective assistance of counsel in this direct appeal.

The due process clause affords a criminal defendant the right to present and develop a defense. *See, e.g., Crane v. Kentucky,* 476 U.S. 683 (1986). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973).

For obvious reasons, Appellant failed to argue this alleged error at the trial level. Therefore, we will conduct a palpable error analysis. As we have consistently underscored, for an error to be palpable it must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level,* 957 S.W.2d 218, 222 (Ky. 1997) (citing *Black's Law Dictionary* (6th ed.1995)). Appellant, however, fails to direct us to any case law, nor can we ourselves find any precedential authority which states that the constitutional right to present a defense extends to a situation in which the defendant, against his attorney's skilled determination, seeks to compel the calling of a potential witness.

This Court has discussed an analogous situation, albeit in an unpublished opinion, in *Sarabia v. Commonwealth,* 2007 WL 3226300, No. 2006-SC-000079-MR (Ky. Nov. 1, 2007). In *Sarabia,* the appellant was on trial for the murder of her abusive husband. *Id.* at 1. The trial court declined appellant's request to compel her attorney to place an expert witness on the stand to testify regarding battered woman syndrome. *Id.* at 3. On review, we refused to recognize "a constitutionally protected personal right of a defendant to compel the defendant's appointed lawyer to adopt a particular line of defense

or call a particular witness contrary to the lawyer's professional judgment." *Id.* We find no cause to part ways with the holding espoused in *Sarabia.*

Furthermore, there is no evidence indicating that Sanders had any information useful to Appellant's defense. His testimony was not preserved by avowal, nor did Sanders have any prior interviews which relayed information regarding the murder. Even on appeal, Appellant has failed to put forth any information Sanders may have maintained which would have aided him in his defense. Therefore, we do not believe a manifest injustice occurred when the trial court refused to compel Sears' attorney to call Sanders to testify.

Validity of KRS 527.040

Lastly, Appellant requests that we address the constitutionality of KRS 527.040, the statute which prohibits the possession of a firearm by a convicted felon. Appellant failed to pursue this argument in the trial court. Appellant also failed to meet the notification requirements prescribed in KRS 418.075(1) which states that "[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard . . . ." We must strictly adhere to the requirements of KRS 418.075(1). *Adventist Health Systems/Sunbelt Health Care Corp. v. Trude,* 880 S.W.2d 539, 542 (Ky. 1994) (overruled on other grounds by *Sisters of Charity Health Systems, Inc. v. Raikes*, 984 S.W.2d 464 (Ky. 1998)). Accordingly, we will not address the constitutionality of KRS 527.040.

Conclusion

For the forgoing reasons, the Jefferson Circuit Court's judgment is hereby affirmed.

All sitting. All concur.

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