RENDERED: June 26, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2005-MR

WILLIAM ROSS — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 96-CR-0058

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * *

BEFORE: ABRAMSON, KNOPF, and MILLER, Judges.

ABRAMSON, JUDGE: William Ross appeals from a July 16, 1996, judgment of Pulaski Circuit Court convicting him, in accordance with a jury verdict, of manslaughter in the first-degree (KRS 507.030) and sentencing him to ten years in prison. Ross claims that four errors by the trial court entitle him to relief from this judgment. The trial court failed, he alleges, to excuse for cause two potential jurors likely to have prejudged him; it unfairly limited the scope of voir dire; it incorrectly excluded evidence of his state of mind; and it permitted the Commonwealth to introduce during rebuttal evidence which it should have

introduced during its case-in-chief. Having examined the record and finding no reversible error, we affirm.

In November 1993, the Rockcastle Grand Jury indicted Ross for murder in the shooting death of Charles Hopkins. Trial commenced in Rockcastle County in April 1996, but when a jury could not be seated, the trial court transferred venue to Pulaski County. Trial was convened there in May 1996.

Charles Hopkins, the victim, was married to Ross's niece Shirley. Charles and Shirley lived on Water Tank Hill in the Brodhead area of Rockcastle County. Ross's brother Jerry lived nearby on Kentucky Highway 3245. For several months prior to the shooting Ross also lived in the area. He had come to Kentucky from his mother's home in Indiana to stay with Shirley following a quarrel between her and Charles. When Shirley and Charles reconciled, Ross moved in with Jerry.

At trial, the Commonwealth presented evidence tending to show that Ross and Hopkins had, on the day of the shooting, been together smoking marijuana and drinking beer. The shooting, the Commonwealth claimed, had been the culmination of a day-long, off-and-on argument over a marijuana plant which Ross accused Hopkins of having stolen.

Ross admitted having shot Hopkins, but claimed to have done so in self-defense. He alleged that Hopkins had grown progressively belligerent that day as he had become increasingly intoxicated, until he had finally attacked Ross and threatened to beat him. Ross maintained that he had been terrified by Hopkins' aggression because of a prior head injury that had left him

partially paralyzed and unable to defend himself with his hands. That injury, he asserted (the result of a 1991 automobile accident), had also left him susceptible to further neurological damage and for that reason greatly increased his fear of Hopkins and made him quick to believe that forcible self-defense was necessary.

The jury was instructed on murder, on manslaughter in the first and the second-degree, and on reckless homicide. The jury was also instructed concerning self-defense, including the distinction under KRS 503.120 between reasonable exercises of that privilege and wanton or reckless ones. After nearly seven hours of deliberation, the jury requested further guidance on the difference between first and second-degree manslaughter. Encouraged by the court to do as well as it could with the instructions it had been given, the jury then deliberated another hour before finding Ross guilty of manslaughter in the first-degree. Ross received the minimum authorized penalty of ten years in prison.

Ross first claims that the trial court erred by failing to dismiss for cause two prospective jurors who admitted during voir dire that the indictment seemed to them strong evidence of Ross's guilt. Their voir dire proceeded in part as follows:

> James Cox [attorney for Ross]
>
> Does anybody believe that because somebody is indicted . . . How many people have heard that term "indictment?" . . .
>
> Prospective Juror Eaton
>
> I feel like the grand jury thought he was guilty or there wouldn't have been an indictment returned.

Cox

Okay. I think Judge Cain would tell you and I think everybody would agree that just because somebody has got an indictment returned that that's not evidence of guilt at all.

Eaton

I understand.

Cox

What do you feel? And there's no wrong answer. That's why we ask these questions.

Eaton

I stated how I felt. . . . I feel like the grand jury thought he was guilty or they wouldn't have returned an indictment. . . . I think that's just common sense. . . .

Cox

Okay. Mr. Eaton, . . . if the judge told you, Judge Cain told you, said, "Sir, you cannot hold that indictment. It's basically just an accusation. You can't hold that against him as any evidence of guilt," could you follow that?

Eaton

Yes, sir.

Cox

And you could absolutely . . . Could you look at Mr. Ross and say, "I know you've got an indictment against you, but I'm not holding that against you as any evidence of guilt"? . . .

Eaton

I'm not sure it wouldn't have some effect on my decision. . . .

Cox [after explaining grand jury procedure]

Would that be fair, . . . if you just heard one side of the story and believed it? "I just think they're guilty"? Doesn't sound too fair, does it? . . . If you just heard one side, you don't think that would be fair, would it?

Prospective Juror Hansford

No, but I think if all of the rest of them heard that he was guilty, maybe he is guilty.

Cox

But you understand that they didn't say he was guilty. Nobody said that. That's not the way we work.

Hansford
They wouldn't have brought him up in court if they hadn't showed that. . . . If a man was out there drinking all day and they get into it and one kills the other one, it don't sound too good to me.

Cox
I see what you're saying. Well. . . . How can you say you could presume somebody not guilty but then say, "Well, if he's indicted, I think he's guilty"? That don't square, does it?

Hansford
No, not really.

Cox
Can you presume that he's right now not guilty of murder?

Hansford
I don't know. I've not heard all the facts. . . .

Cox
. . . What about it, Mr. Hansford? Do you think right now if the judge told you, "You have to presume that he's not guilty of this offense of murder," could you do that?

Hansford
I suppose I'd have to because that's . . .

Cox
All right. and you wouldn't worry about that indictment and what those people may or may not have heard?

Hansford
I don't know. I don't know.

The trial court denied Ross's motions to remove for cause prospective jurors Eaton and Hansford. Ross used peremptory strikes to remove both men and exhausted his remaining peremptory strikes against other prospective jurors. If either Eaton or Hansford should have been removed for cause, then Ross's right under RCr 9.40 to eight peremptory strikes was violated by

this procedure, and the violation is presumed to have been prejudicial. Thomas v. Commonwealth, Ky., 864 S.W.2d 252 (1993).

RCr 9.36(1), addressing when it is appropriate to remove a prospective juror for cause, provides that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified." Application of this rule, which furthers a defendant's fair trial rights under the federal and state constitutions, is addressed to the trial court's discretion. Absent an abuse of that discretion, this Court will not disturb the trial court's decision. Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1994).

Under RCr 9.36(1), then, in a ruling on a challenge for cause, it is the likelihood of bias or prejudice that is determinative. Thompson v. Commonwealth, Ky., 862 S.W.2d 871 (1993). That likelihood is to be assessed not from the prospective juror's response to a "magic question"--one permitting him or her merely to disavow any partiality--but instead from the surrounding circumstances, such as the juror's exposure to pre-trial publicity, his or her relationship to the parties or other participants, and the juror's knowledge, attitudes, and beliefs as revealed during the course of voir dire. Thomas v. Commonwealth, supra, 864 S.W.2d at 258 (citing Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1992)). A criminal defendant's right to an impartial tribunal is fundamental. If a prospective juror indicates any inability to adhere to the proper evidentiary presumptions and burdens, his or

her qualification becomes suspect, and a thorough examination of the juror's potential bias is called for. Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997). On the other hand, allowance may be made for a prospective juror's lack of familiarity with technical requirements of the law. A juror's initial uneasiness with those requirements is not necessarily disqualifying as long as it appears that the juror will be able to abide by them once they have been sufficiently explained. Mabe v. Commonwealth, supra.

Applying these principles to this case, we note that prospective jurors Eaton and Hansford each acknowledged serious reservations about his ability to presume Ross's innocence and not to think of the indictment as evidence against Ross. Even after counsel's explanation of the grand jury system, each man continued to doubt his ability to disregard the indictment. In someone familiar with the grand jury system, this attitude would amount to a rejection of the rule that the state bears the burden of proof and would tend to shift that burden to the defendant. Here, however, Eaton and Hansford were not familiar with the grand jury system. As their presumptions about that system were drawn out and corrected, each stated that he understood and could, however reluctantly, base his judgment on the evidence presented at trial. Counsel's examination of these men was thorough. It revealed not their inability to be indifferent or to adhere to the proper presumptions, but rather their inexperience with these notions and their gradual coming to terms with them. Being mindful of the trial court's opportunity to

assess Eaton's and Hansford's demeanor, we are not persuaded that the court abused its discretion by refusing to strike either of these potential jurors for cause.

Ross's other allegations of error are similarly unavailing. Ross claims that soon after his 1991 automobile accident he began to carry an unconcealed gun for protection. It was this gun that he used to shoot Hopkins. During voir dire, Ross sought to canvass the prospective jurors' attitudes about people who carry guns. He introduced this topic, however, by referring to legislation subsequent to the shooting which related to concealed weapons. The trial court, correctly wanting to avoid the extraneous concealed-weapon issue, disallowed Ross's question. Ross neither objected nor sought to rephrase the inquiry. His claim on appeal that the trial court erred by foreclosing this line of questioning is thus not preserved. RCr 9.22; Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992).

Ross also claims that the trial court erred by excluding his brother Jerry's testimony concerning a physician's explanation of Ross's auto accident injuries. By avowal Jerry Ross testified that his brother was hospitalized following the 1991 accident for approximately a month. During that time, Jerry said, a doctor performed a Magnetic Resonance Imaging (MRI) examination of his brother's head and discussed the results of that exam with the two of them. Jerry claimed that the doctor, a Dr. Stewart, pointed out to them on the MRI injured portions of Ross's brain and warned them that any further trauma to Ross's head could prove debilitating or even fatal.

The trial court excluded this testimony as inadmissible hearsay. Ross contends that it was not hearsay because it was offered to prove, not the truth or accuracy of the doctor's diagnosis, but only that the diagnosis was made and gave rise to Ross's strong desire to protect himself against blows to the head.

As Ross points out, KRE 801 defines "hearsay" as encompassing only out of court statements "offered in evidence to prove the truth of the matter asserted." Arguably, then, the doctor's explanation of the MRI would not be hearsay if offered into evidence only on the narrow issue of whether the doctor had made the explanation and Ross had heard it or been apprised of it. Norton v. Commonwealth, Ky. App., 890 S.W.2d 632 (1994). This is Ross's contention, and as far as it goes we agree. Nevertheless, we are not persuaded that the trial court abused its discretion by excluding this testimony. KRE 403 provides for the exclusion of otherwise admissible evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury . . ." Although theoretically Jerry Ross's testimony can be distinguished from hearsay, the distinction is a fine one. There is a clear danger that a jury would misunderstand Jerry's testimony as asserting the accuracy of the purported diagnosis. Such a misunderstanding would substantially prejudice the Commonwealth, for claims of self-defense raise issues concerning the reasonableness as well as the genuineness of the defendant's belief in the need for self-defense. KRS 503.120. This

testimony is inadmissible hearsay on the issue of the reasonableness of Ross's belief, but the jury is very likely to consider it in that regard. The exclusion of this testimony, moreover, did not deny Ross a meaningful opportunity to present to the jury his claim that a brain injury left him with a heightened sense of the need for self protection. The trial court did not clearly err, therefore, by excluding Jerry Ross's testimony concerning Dr. Stewart's alleged explanation of the MRI.

Finally, Ross claims that the Commonwealth relied upon improper rebuttal testimony. During the presentation of his defense, Ross testified at some length concerning the effects of his automobile accident. He claimed that his left side had been significantly paralyzed, making it difficult for him to walk, to steady his hand, and to defend himself. On rebuttal, Hopkins's sister Jenny Bishop testified that in 1993, not long before the shooting, she had seen Ross use both arms to pick up a 19-inch television set and that he had done so without seeming to favor his left side. Ross maintains that this testimony should have been included in the Commonwealth's case-in-chief and that its presentation at the end of trial was unduly prejudicial.

In Wager v. Commonwealth, Ky., 751 S.W.2d 28 (1988), our Supreme Court, addressing rebuttal evidence, noted that the

> admission of rebuttal evidence is largely a matter of judicial discretion, RCr 9.42(e)[:] "[t]he Commonwealth should not be permitted to take undue advantage of the defendant and withhold important evidence until near the close of the trial, and then introduce it in the guise of rebuttal evidence.

> . . . [A]ny out-of-court statement . . . that may reasonably be interpreted as being in the nature of an admission of guilt is admissible in chief as affirmative evidence of guilt, and should not be introduced in rebuttal under the guise of contradicting or impeaching the defendant in his capacity as a witness."

Wager, supra, 751 S.W.2d at 29 (quoting Gilbert v. Commonwealth, Ky., 633 S.W.2d 69, 71 (1982)).

We are not persuaded that Jenny Bishop's rebuttal testimony violated these precepts. Her testimony, bearing not at all on the alleged events of the day of the shooting, would not have contributed to the Commonwealth's case-in-chief. Nor did it concern what could be construed as an "admission of guilt" by Ross. His alleged lifting of a television in no way suggested his participation in a crime. It did not serve to disguise criminal acts or to help Ross elude police apprehension. Gilbert v. Commonwealth, Ky., 633 S.W.2d 69 (1982) (discussing when nonverbal behaviors might be deemed "admissions" of guilt). Bishop's testimony did nothing except challenge Ross's claim that he suffered from so severe a disability as to give rise to a heightened sense of the need for self-defense. The trial court did not clearly err by admitting it for that purpose after Ross's proof.

For these reasons, we affirm the July 16, 1996, judgment of Pulaski Circuit Court.

KNOPF, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS.

MILLER, JUDGE, DISSENTING. I dissent. I would reverse and remand this matter for a new trial based upon the court's refusal to excuse the two jurors for cause. I am of the opinion that the appellant was adjudged by a constitutionally deficient panel.

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