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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000203-MR

DOUGLAS R. FULTZ — APPELLANT

v.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 06-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: Following a two-day trial, a jury convicted Douglas Ray Fultz (Fultz) of manslaughter in the second degree and recommended a sentence of ten years' imprisonment. The trial court entered a consistent judgment and it is from this jury verdict and judgment that Fultz appeals. In his appeal, Fultz argues that the trial court erred when it: (1) did not permit a witness to testify that Fultz had said he thought the victim was involved in terrorist activities; (2) it permitted the

Commonwealth to argue that Fultz was not acting in self-defense, but was simply paranoid; (3) it did not admonish the jury to refrain from interpreting a witness's reluctance to testify as evidence that the witness was afraid of Fultz; (4) it failed to hold a hearing to determine whether that witness had the "capacity for recollection and expression;" (5) it failed to give a "missing evidence" instruction to the jury; and (6) it failed to hold a hearing to determine if the jury had been tainted by observing a juror eating lunch with a deputy sheriff. Finally, Fultz argues that these errors, cumulatively, resulted in "manifest injustice" adversely affecting his right to a fair trial. For the reasons set forth below, we affirm.

FACTS

On December 11, 2005, Fultz shot Spyridon Armenis (Armenis). Armenis died five weeks later as a result of his gunshot wound. The shooting was the culmination of several months of discord among Armenis, Fultz, and several others. We will outline the history of that discord below, and will set forth additional facts as we address the issues raised by Fultz.

Armenis leased property in McClean County that contained an oil field (the Taylor farm). Because the oil wells were not operational, Armenis and Alen Guyan (Guyan) entered into an agreement for Guyan to repair the motors, pumps, and other infrastructure related to the oil field. Guyan brought Fultz to the Taylor farm to supervise and perform the rehabilitation work. During the summer of 2005, Armenis became dissatisfied with the progress of the rehabilitation work so he asked his nephew, Theodore Simeonidis (Simeonidis), to come to western

Kentucky to help Fultz. Simeonidis agreed and brought a friend, Ashley, with him. Initially, Fultz, Simeonidis, and Ashley lived in trailers on the Taylor farm within close proximity to each other, and had a friendly relationship.

During the summer of 2005, Guyan and Armenis traveled to Europe together. After they returned, their relationship became strained, and Guyan told Armenis that he no longer wanted to be associated with Armenis. Guyan also stated that he intended to purchase the Taylor farm, which he ultimately did, thus making Armenis his lessee. At the same time, the relationship between Fultz and Simeonidis also became strained, with Fultz siding with Guyan and Simeonidis siding with his uncle.

We note that, on two occasions, police officers were called to investigate and/or handle disputes among Fultz, Guyan, Armenis, and Simeonidis. In October of 2005, Kentucky State Police Trooper Trevor Scott (Trooper Scott) investigated a complaint by Armenis that Fultz had threatened him and was destroying property in the oil field. After speaking with Armenis, Fultz, and others, Trooper Scott advised Fultz and Armenis that their disputes were not criminal in nature and should be dealt with civilly.

In November of 2005, McClean County Sheriff's Deputy Jeff Palmer (Deputy Palmer) responded to a complaint that "there was going to be a shooting" on the Taylor farm. Deputy Palmer testified that Armenis wanted him and other officers to evict Fultz from the Taylor farm, stating that if something was not done, there would be a shooting. Officer Palmer advised the parties, as had Trooper

Scott, that their issues were civil in nature not criminal. We note that during Palmer's investigation, Fultz stated that Armenis had threatened to kill him.

In addition to complaining to Deputy Palmer that Armenis had threatened to kill him, Fultz also complained to Harold Ashcraft, Guyan, FBI Agent Jerry Garner (Agent Garner), attorney Harold Mathison, and Robbie Edmonds that Armenis had threatened him and that he was afraid of Armenis.

On December 11, 2005, Fultz discovered that a water line to his trailer had frozen and burst. After he repaired the water line, Fultz drove from his trailer to some storage tanks that were seven-tenths of a mile away so that he could turn on the water. While Fultz was by the storage tanks, two neighbors, Phillip Willoughby (Willoughby) and his daughter, drove up on a four wheeler. Fultz and Willoughby were having a friendly discussion when Armenis and his wife drove up to the storage tanks. Armenis got out of the car and walked toward Fultz, demanding to know what Fultz was doing by the storage tanks. Fultz advised Armenis that it was none of his business and moved away from Armenis. Armenis continued to approach Fultz, who testified that he felt trapped and feared for his life. Fultz further testified that Armenis reached under his coat, as if trying to get a gun, and Fultz shot Armenis in the chest. During their investigation, the police did not find any gun in Armenis's possession. We will set forth additional facts, as necessary, below.

STANDARD OF REVIEW

Because it differs for each of the issues raised by Fultz, we will address the standard of review as we analyze those issues.

ANALYSIS

A. Terrorist Activity Testimony

Prior to trial, the court ruled that Fultz would not be permitted to submit testimony from Agent Garner that Fultz and Guyan had complained to him that they believed that Armenis was engaged in terrorist activities. In doing so, the court found that such testimony was not relevant.

At trial, Fultz asserted that he shot Armenis in self-defense because he feared for his life. In support of that defense, Fultz offered testimony from Agent Garner, who testified that he met with Guyan and Fultz on October 24, 2005. Guyan and Fultz complained to Agent Garner that they feared for their safety and made allegations that Armenis was involved in fraudulent activities. When Agent Garner testified that Guyan and Fultz questioned whether Armenis was engaged in terrorist activities, the trial court sustained the Commonwealth's objection and admonished the jurors to ignore any testimony regarding fraudulent activities and terrorism.

Fultz argues that his belief that Armenis was involved in terrorist activities was relevant to establish the magnitude of his fear, and that the trial court's refusal to permit testimony regarding that belief was prejudicial to his defense. In reviewing this issue, we note that "[a] trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an

abuse of discretion standard." *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001).

Having reviewed the record, we discern no abuse of discretion by the trial court. In doing so, we note that Fultz was entitled to put forth evidence to show that he feared Armenis and that he was acting in self-defense. *Saylor v. Commonwealth,* 144 S.W.3d 812, 815 (Ky. 2004). Fultz put forth such evidence with his testimony and the testimony of Guyan, Ashcraft, Edmonds, and Mathison. Furthermore, although the court prohibited Agent Garner from mentioning terrorism, both Fultz and Guyan testified that Armenis stated that he could have them killed by "the Chinese," "the Russians," or "the militia," clearly raising the specter of terrorist activities without specifically mentioning that word.

Finally, we note that Fultz's entitlement to introduce evidence to support his self-defense claim is not limitless. KRE 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury." In his brief, Fultz argues that "[m]ost people remember the bombing of the Murrah Building in Oklahoma City . . . . [w]hat happened on September 11, 2001" and that "[o]ne of the common refrains in the Global War on Terrorism is that the United States must fight the war 'over there' or else terrorists will be 'over here' . . . ." This argument reflects the exact confusion of the issues and undue prejudice that the trial court was attempting to avoid by barring any direct mention of terrorism. There was no proof that Armenis was involved in any illegal activities,

let alone terrorist activities. In light of that, the introduction of "terrorism" into the trial would have epitomized the very wrongs KRE 403 attempts to avoid. Therefore, we hold that the trial court properly excluded any mention of terrorism.

B. Closing Argument

When recalling the day of the shooting, Fultz testified that, after he shot Armenis, he kept an eye on Willoughby, because he did not know "whose side" Willoughby would take. During closing argument, the Commonwealth's attorney stated "thank goodness a man can't come up with things in his own mind – paranoia – and be relieved of responsibility because he thought, and that thought process was wrong." He then stated:

> [w]e were one instant away from having two victims in this case – the same paranoia. Mr. Willoughby, who he had had conversations with the defendant before – after he shoots Mr. Armenis in the chest, what is his thought process? – I knew [Mr. Willoughby] was a Vietnam vet. I didn't know whether he was in this thing. He then said after the shooting, Fultz went to the truck and got another .45 and put it on. Can you imagine if Theo driving down the road or coming on there, if he had gotten there? Bam! Thought he was going to get me, too. The law does not authorize and exonerate a person with these type of everybody's gonna get me concept.

Fultz complains that these statements by the Commonwealth's attorney during closing "nullified" the court's self-defense instruction.

In order to preserve the issue of prosecutorial misconduct during closing argument, the defendant must object. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002). Fultz did not object to the statements made by the

Commonwealth's attorney during closing argument; therefore, that issue is not preserved for our review. However, had Fultz properly preserved the issue for our review, any error was not so flagrant as to have warranted a new trial.

C. Admonition to Jury Regarding Testimony of Larry Doss

During the Commonwealth's case, Larry Doss (Doss) testified that he had worked with Fultz. Doss was initially contacted by Officer Palmer during October of 2005, in connection with a complaint from Armenis that Fultz had threatened to kill him. At that time, Doss told Officer Palmer that he had never heard Fultz make any threats against Armenis. Shortly before trial, the Commonwealth was contacted by one of Doss's acquaintances, who indicated that Doss had told him that Fultz had threatened to kill Armenis. Officer Palmer re-interviewed Doss and Doss admitted that he had overheard Fultz threaten to kill Armenis.

In a pre-trial conference, the Commonwealth moved for permission to have Doss testify that he had heard Fultz threaten to shoot Armenis. The Commowealth argued that the testimony of this "prior bad act" was being offered to show Fultz's motive or state of mind and to refute Fultz's argument that he acted in self-defense. Fultz objected to admission of that testimony on the grounds that the most recent statement of Doss was contradicted by Doss's first statement. Additionally, Fultz objected because the statement was a "surprise" and highly prejudicial. The court found that Fultz had the statement for two weeks prior to

trial and there was no surprise. Furthermore, the court noted that, while the statement might be prejudicial, its probative value would outweigh that prejudice. Finally, the court noted that the prior inconsistent statement gave Fultz "great ammunition" to impeach Doss.

At trial, Doss admitted that he had made the two contradictory statements. As to the first, Doss explained that he lied to Officer Palmer because he did not want "to get involved." When the Commonwealth's attorney attempted to get Doss to repeat the specific threats, Doss did not answer. When prompted by the judge, Doss continued to sit silently. Eventually, after significant prompting, Doss admitted that Fultz had stated that he wanted to shoot Armenis. Fultz feared that the jury would interpret that Doss was reluctant to testify because he was afraid of Fultz and, during a bench conference, Fultz raised that fear with the trial court. However, Fultz did not specifically request an admonition.

Fultz argues before us that the trial court should have admonished the jury that "they were not allowed to consider Doss' [sic] statement as bearing upon Doug Fultz's character or his propensity to commit crimes in general." There are two deficits with Fultz's argument on appeal. As noted by the Commonwealth and above, Fultz did not request an admonition; therefore, that issue is not preserved for appeal. *See Bell v. Commonwealth*, 473 S.W.2d 820 (Ky. 1971).

Additionally, the argument Fultz is making before us is not the argument Fultz made to the trial court. Fultz cannot argue before the trial court that Doss's testimony should be barred because of surprise and undue prejudice

and argue before us that Doss's testimony was improper character evidence. *See Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976).

Finally, we note that under KRS 404(b) "[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, KRS 404(b)(1) provides that such evidence is admissible "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" The Commonwealth offered Doss's testimony for acceptable purposes, to show motive, plan, and absence of an accident. Therefore, the trial court committed no error in permitting Doss to testify.

D. Competency of Larry Doss

Near the end of his testimony, Doss stated that he was bipolar and was taking medication for that condition. Doss testified that, without his medication, he suffers from problems with his memory; however, when he takes his medication, his memory improves. Following this testimony, Fultz moved to have all of Doss's testimony stricken from the record as incompetent or, in the alternative, for a hearing to determine Doss's competence. The court denied Fultz's motion, noting that there was no evidence of Doss's incompetence. Furthermore, the court noted that Doss stated that he was taking his medication daily and therefore should have no significant memory deficits.

On appeal, Fultz argues that the trial court erred by not conducting a hearing to establish Doss's competency to testify. The Commonwealth argues that Fultz did not preserve this issue for review, and Fultz admits as much in his brief.

Having reviewed the trial video, we disagree with the parties. After Doss's testimony regarding his bi-polar disorder and memory deficits, Fultz objected to Doss's testimony and moved to strike it. When the court overruled that objection, Fultz asked the court for time to ask additional questions regarding Doss's mental illness, the medication he was taking, and whether Doss was aware of what he was doing in court. Fultz suggested that, to spare Doss from embarrassment, those questions could be asked during a separate, in-chambers hearing. The court denied Fultz's request for a separate hearing, but did permit Fultz to question Doss regarding his mental status. Under these circumstances, we hold that Fultz did request a competency hearing, albeit a limited one. However, we also hold that, based on our review of the trial video, Fultz had adequate opportunity to explore Doss's competency and did so.

Furthermore, we note that a person is competent unless a court determines that he:

> (1) [l]acked the capacity to perceive accurately the matters about which he proposes to testify;
>
> (2) [l]acks the capacity to recollect facts;
>
> (3) [l]acks the capacity to express himself so as to be understood, either directly or through an interpreter; or

> (4) [l]acks the capacity to understand the obligation of a witness to tell the truth.

KRS 601(b). Taking the preceding factors into consideration, the trial court has the sound discretion to determine whether a witness is competent to testify. *Pendleton v. Commonwealth,* 685 S.W.2d 549, 551 (Ky. 1985). In reviewing the trial court's exercise of its discretion, we bear in mind that it is in the unique position to observe witnesses and to determine their competency. *See Kotas v. Commonwealth,* 565 S.W.2d 445, 447 (Ky. 1978).

Having reviewed the trial video, we discern no abuse of discretion on the part of the trial court. In doing so, we note that, although Doss appeared reluctant to testify, he did not appear incapable of doing so. Furthermore, after prompting, Doss was capable of recollecting facts and of expressing himself to the jury. Finally, there was nothing in Doss's testimony or demeanor to suggest that he did not understand his obligation to tell the truth. Therefore, we hold that the trial court did not err when it denied Fultz's request for an in chambers hearing on Doss's competency.

E. Missing Evidence Instruction

Officer Payne, who investigated the crime scene, testified that he failed to collect the clothing Armenis was wearing the day of the shooting. When he did attempt to retrieve Armenis's clothing from the hospital, he was advised that the hospital no longer had it. Officer Payne admitted that he had made a mistake when he failed to get Armenis's clothing from the hospital, because any gunshot

residue on the clothing could have been used to determine the distance between Fultz and Armenis.

At trial, Fultz moved the court to give a "missing evidence" instruction to the jury. The court, noting that the Commonwealth had never had possession of the clothing, denied Fultz's motion.

Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). With that standard in mind, we note that:

> the purpose of a "missing evidence" instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . [T]he Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. . . . [A]bsent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.

Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002). (Emphasis in original).

Fultz argues that the Commonwealth should have secured Armenis's clothes so that they could be tested for gun powder residue. According to Fultz, the presence of such residue would have bolstered his case that he felt trapped and feared for his life when he shot Armenis. That may be the case; however, a "missing evidence" instruction is not mandated unless there is some evidence of intent or bad faith on the part of the Commonwealth. There is no evidence of

either intent or bad faith on the part of the Commonwealth, only evidence of a mistake. Therefore, the trial court properly denied Fultz's request for a "missing evidence" instruction.

F. Juror Misconduct

During lunch on the second day of trial, Officer Payne sat with a juror at a table in a local restaurant. When advised of this, the court held an in-chambers hearing to determine what, if any, misconduct had occurred. Officer Payne testified that the diner where he ate lunch was crowded, and there were not many available seats. There was a seat at the table where Officer Payne usually sat, and he chose to sit there despite the fact that a juror was already sitting at that table. Officer Payne testified that there was no conversation about the trial during lunch and that he did not remember having any direct conversation with the juror.

Fultz moved for a mistrial arguing that other jurors could have seen Officer Payne eating with that juror. Fultz further argued that any jurors who saw Officer Payne eating with that juror could have been prejudiced, although Fultz did not articulate with any specificity how the other jurors might have been prejudiced. The Commonwealth noted that there were thirteen jurors and that one juror would be dismissed prior to deliberations. Therefore, the Commonwealth suggested dismissing that juror, thereby mitigating any possible prejudice. The court found that there had been no prejudice or misconduct and overruled Fultz's motion for a mistrial. However, to remove any appearance of misconduct, and at the request of Fultz, the court dismissed that juror, designating him as the alternate.

Fultz argues that the trial court committed reversible error when it did not conduct a hearing to determine whether any of the other jurors had seen Officer Payne eating with that juror. The Commonwealth argues that Fultz did not preserve this issue. However, contrary to the Commonwealth's argument, Fultz did ask the court to conduct a hearing with that juror to determine if any other jurors were present at the restaurant. Therefore, we hold that Fultz did preserve this issue for our review.

In support of his argument, Fultz cites to *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966); and *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). However, those cases are distinguishable. In *Remmer*, a person remarked to a juror "that he could profit by bringing in a verdict favorable to the petitioner." *Remmer,* 347 U.S. at 228, 74 S.Ct. 451. The juror in question informed the judge of the contact and the judge advised the prosecutor, but not the defendant, of the contact. The FBI conducted an investigation and determined that the statement had been made in jest. Unlike the juror in this case, the juror in *Remmer* not only sat on the jury, but became the jury foreman. The defendant did not learn of these events until he read about them in a post-trial newspaper story. He moved for a mistrial, a motion the U.S. District Court denied.

The Supreme Court, in reversing the District Court, held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons,

deemed presumptively prejudicial . . . ." However, "[t]he presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer*, 347 U.S. at 229, 74 S.Ct. at 451.

The case before us obviously differs from *Remmer.* Officer Payne did not discuss the case with the juror and the juror was dismissed from the jury before deliberations. Fultz could not show that any other jurors were present in the restaurant or, if they were, how they might have been prejudiced by seeing Officer Payne eating lunch with that juror. Additionally, unlike in *Remmer*, the trial court herein brought the matter to the attention of the parties and conducted an in-chambers hearing. Therefore, *Remmer*, has no application to the case before us.

In *Parker,* the bailiff charged with escorting the jurors, commented to one of the jurors that he believed that the defendant was guilty and that any errors in a guilty verdict could be corrected by the Supreme Court. In finding error, the Supreme Court held that "the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" *Parker*, 385 U.S. at 365, 87 S.Ct. at 471, *citing Estes v. Texas*, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 1633, 14 L.Ed.2d 543 (1965).

As with *Remmer*, *Parker* is distinguishable on its facts. Officer Payne, unlike the bailiff in *Parker,* did not discuss the case with the juror at his table, let alone express any thoughts regarding Fultz's guilt or innocence.

Therefore, there was not the type of unauthorized conduct likely to cause the prejudice that the Supreme Court found in *Remmer*.

Finally, in *Turner*, the jury was sequestered during the trial and deliberations. Two of the deputies who ran errands for the jurors, ate with them, and conversed with them, were key prosecution witnesses. The Supreme Court held that such an association between the deputies and the jurors was highly prejudicial because the deputies were the jurors' "official guardians." *Turner* 379 U.S. at 474, 85 S.Ct. at 550.

Again, as noted above, the contact between Officer Payne and the juror was casual, not official. Furthermore, Officer Payne and the juror did not have any conversation about the trial. Therefore, as with *Remmer* and *Parker, Turner* is not relevant to the case before us, and we discern no error in the trial court's denial of Fultz's request for an additional hearing.

G. Cumulative Error

Finally, Fultz argues that the cumulative effect of the above errors acted to deprive him of a fair trial. We hold that no error occurred at the trial; therefore, there can be no cumulative error.

CONCLUSION

After careful review of the record and the arguments of counsel, we are unable to detect any error on the part of the trial court; therefore, we affirm the judgment of the McLean Circuit Court.

ALL CONCUR.

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