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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000494-MR

MARCUS CHAPMAN APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM JR., JUDGE
ACTION NO. 11-CR-002604

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND SMALLWOOD,[1] JUDGES.

COMBS, JUDGE: Marcus Chapman appeals from a judgment of the Jefferson Circuit Court convicting him of second-degree assault and evidence tampering

[1] Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

following a jury trial. He was sentenced to serve terms of ten and five years of imprisonment, respectively -- to run consecutively. After our review, we affirm.

On August 23, 2011, an altercation occurred involving a group of teenagers at the McDonald's restaurant on Greenwood Road in Louisville. Later, a brawl broke out among some of the same people outside the home of the Cotton family on Memory Lane. Chapman, a friend of the Cottons who had not been at the McDonald's restaurant, and Christopher Payton (a stranger to Chapman) began wrestling and throwing punches. Payton pushed Chapman into a nearby woods. Payton's friend, Troy Walters (also a stranger to Chapman), approached Chapman and Payton as they were wrestling. Walters and Chapman became entangled and Chapman stabbed Walters in the head and neck with a knife, causing devastating injuries. Chapman hid the knife in ductwork at the Cottons' home.

At 2:40 the following morning, Chapman gave a recorded statement to detectives. Initially, Chapman told them that one of the boys with whom he fought had brought the knife to the scene. Chapman indicated that he believed that the group of boys intended to kill him and that he feared for his life. He said that the boy who had brought the knife to the scene took it with him when he left. Eventually, Chapman admitted that the knife belonged to him and that he had hidden it in the basement of the Cottons' home. Detectives recovered the knife. They collected numerous other items from the scene (concrete blocks, metal bars, a

metal pipe) that had apparently been used as weapons by others during the disturbance.

On August 31, 2011, Chapman was indicted and charged with two counts of attempted murder, two counts of assault, and one count of tampering with evidence. A warrant was issued for his arrest. At his arraignment, Chapman pleaded not guilty.

A jury trial began on January 17, 2017. Chapman testified at trial and presented his self-protection defense. After closing arguments and a period of deliberation, the jury acquitted Chapman of the charges involving Payton. However, it found him guilty of second-degree assault with respect to Walters and guilty of tampering with evidence for hiding the knife. A judgment of conviction was entered on February 3, 2017. This appeal followed.

On appeal, Chapman presents five arguments: (1) that the trial court erred by denying him the right to act as his own co-counsel at trial; (2) that he was entitled to a continuance upon the failure of two witnesses to appear; (3) that the trial court erred by failing to declare a mistrial following the improper testimony of Detective Jon Lesher; (4) that he was entitled to a directed verdict because the Commonwealth failed to prove that he was not acting in self-defense; and (5) that the penalty phase of trial was so riddled with prejudicial error that he was deprived of a fair hearing. We shall address each of the allegations of error.

Chapman argues that the circuit court committed reversible error by denying him the right to represent himself as co-counsel at trial. We disagree.

When he made the request to serve as his own co-counsel, Chapman was given an *ex parte* hearing during which he discussed with appointed counsel and the court -- at some length and detail -- his strong desire to be permitted to act as hybrid counsel so that he could object to certain witness testimony at trial. During this hearing, the court patiently advised Chapman that the course he plotted was ill-conceived, giving him numerous examples of how the jury might react negatively to his intended input at trial. The court indicated to Chapman that he would be permitted to take notes and be given adequate time to discuss with his counsel any suggestions he might have with respect to witness testimony -- particularly cross-examination. Chapman appeared entirely satisfied with the alternative that the court proposed. In fact, two days later, Chapman, *pro se,* filed a motion in which he stated as follows:

> The fact that Chapman desires to submit certain motion to the court, shall in no way be considered, construed or otherwise be deemed as requesting to represent himself without counsel at trial, thus no *Faretta v. California*, 422 U.S.806 (1975) [illegible] or concerns are implicated.

Chapman's conduct demonstrated a waiver of his request to proceed as hybrid counsel. "Even if a defendant requests to represent himself, the right may be waived through [his] subsequent conduct indicating he is vacillating on the

issue or has abandoned his request altogether." *Swan v. Commonwealth,* 384 S.W.3d 77, 94 (Ky. 2012)(*quoting Brown v. Wainwright,* 665 F.2d 607, 611 (5th Cir. 1982)). Chapman was satisfied with the court's assurance that he would be given plenty of time to share his objections with counsel throughout trial. Additionally, he filed a motion in which he specifically stated that he was not invoking his right to act as counsel. There was no error.

Next, Chapman's second argument is that he was entitled to a continuance upon the failure of two witnesses to appear on the morning of trial. Chapman filed affidavits predicting the expected testimony of the missing witnesses. Both witnesses were subject to warrants and neither had seen the stabbing.

The trial court has wide discretion when considering a motion to continue. *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). On appellate review, we must consider whether the court abused its discretion.

In this case, there was no indication of when -- if ever -- the absent witnesses would be available. They appeared to be avoiding being located. "[I]t is not an abuse of discretion for the trial court to deny a continuance of a trial for the appearance of a witness when there is no indication that the witness will ever appear. If this were allowed, it would result in some defendants never being tried."

Farris v. Commonwealth, 836 S.W.2d 451, 455 (Ky. App. 1992), *overruled on other grounds by Commonwealth v. Day,* 983 S.W.2d 505 (Ky. 1999).

Moreover, there is no indication that Chapman's defense was prejudiced in a meaningful way by the absence of these witnesses. He anticipated that they would testify that the group of teenagers initiated the disturbance at the Cottons' house. Both the Commonwealth and Chapman presented witnesses who had been at the scene – some of the teenagers and some of the Cottons. Chapman had the opportunity to examine and cross-examine all of them. And he testified that he had acted in self-defense. Importantly, the Commonwealth indicated that one of the absent witnesses had provided a statement to police indicating that Chapman had been the aggressor. The Commonwealth intended to impeach any testimony that this witness would offer to the contrary.

The trial had been continued several times previously. Chapman had been indicted **more than five years** prior to trial. The jury was assembled; counsel had prepared; witnesses had appeared; and the court had arranged its schedule for trial. In light of all the facts and circumstances, a further delay could not be justified. The trial court did not abuse its discretion by denying the motion for a continuance.

In his third argument, Chapman contends that the trial court erred by failing to declare a mistrial following the improper testimony of Detective Jon Lesher. We disagree.

Lesher was the lead detective in the investigation of the stabbing. At trial, the Commonwealth asked him why he had arrested and charged Chapman despite having told him during the interview at the police station that "I understand your self-defense." Lesher replied that he had worked several self-protection cases and in light of the detailed statements of eye-witnesses, he did not believe that Chapman had acted in self-defense. He explained that under the circumstances, he felt compelled to charge Chapman with assault and attempted murder.

During his trial testimony, Lesher used the phrase, "there was no self-defense by law." Defense counsel immediately objected. The trial court admonished the jury as follows:

> Ladies and gentlemen, I'm going to tell you what the law is on self-defense, and you're going to decide if the facts of this case fit in that or not. So we're going to let [the Commonwealth] try to work with Detective Lesher to explain what he just said, but you and I are going to figure out whether in this case there's a self-defense defense.

Following the admonition, Lesher told the jury that as an investigator he had to examine the totality of the circumstances and evidence and "apply the law at that time" in order to make a charging decision. Then, he clarified, "and like the judge

told you, then it gets here and you all make that decision whether or not you believe it's self-defense or not." Following Lesher's testimony, defense counsel made its motion for a mistrial. Counsel argued that the testimony was improper because it went to the ultimate issue.

The trial court did not err by refusing to order a mistrial. A mistrial is an extreme remedy to be used cautiously and sparingly. *Cardine v. Commonwealth,* 283 S.W.3d 641 (Ky. 2009). It should be ordered only where it is manifestly necessary due to an error "of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Id.* at 647 (internal citations omitted).

We are not persuaded that the court erred on this point. The court immediately and thoroughly admonished the jury that Lesher was not defining the law for them. A jury is presumed to follow a court's admonition. *Hoppenjans v. Commonwealth*, 299 S.W.3d 290 (Ky. App. 2009). There are two exceptions to this presumption: first, where there is an overwhelming probability that the jury will be unable to follow the court's admonition **and** there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; and second, where a question was asked without a factual predicate **and** was inflammatory or highly prejudicial. *Johnson v. Commonwealth,* 105 S.W.3d 430 (Ky. 2003).

Neither exception applies here. There is every reason to believe that the jury was able to follow the court's clear admonition. Furthermore, it was clear given the charges lodged against Chapman and his subsequent indictment that Lesher was not persuaded that Chapman had acted in self-protection. Lesher merely stated the obvious. The statements could not be characterized as devastating or even highly prejudicial to Chapman. Lesher's testimony did not deprive Chapman of a fair trial. The trial court did not abuse its discretion by denying the motion for mistrial.

In his fourth allegation of error, Chapman contends that he was entitled to a directed verdict because the Commonwealth failed to prove that he was not acting in self-defense. Once again, we disagree.

A directed verdict is to be granted only where it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991). The prosecution must present more than a mere scintilla of proof that the defendant is guilty. *Id.*

Chapman explains that many witnesses testified that the boys were the aggressors and that they had weapons. And, while Walters could not remember the moments leading up to the stabbing, Chapman testified that Walters attacked him and put him in fear for his life. However, there was trial testimony from many witnesses indicating that Chapman was the aggressor. Chapman was acquitted of

attempted murder; the jury accepted his argument for self-protection as an imperfect self-defense, convicting him of assault in the second degree. Given the evidence, it was not unreasonable for the jury to find him guilty of the offense. He was not entitled to a directed verdict, and we conclude that there was no error on this issue.

In his fifth and final argument, Chapman contends that the penalty phase of his trial was so riddled with prejudicial error that he was deprived of a fair hearing. He argues that the court's decision to allow Walters's mother to present a victim-impact statement constituted palpable error. We disagree.

A palpable error is one that affects the substantial rights of a party and causes manifest injustice. *Martin v. Commonwealth,* 207 S.W.3d 1 (Ky. 2006). Manifest injustice results in "a repugnant and intolerable outcome." *McCleery v. Commonwealth,* 410 S.W.3d 597, 606 (Ky. 2013).

Chapman argues that Walters's mother did not qualify as a victim capable of offering victim-impact evidence by statutory definition. He cites KRS[2] 532.055(2)(a)(7), which provides as follows:

> (a) Evidence may be offered by the Commonwealth relevant to sentencing including: . . .
>
> (7)The impact of the crime upon the victim or victims, as defined in KRS 421.500, including a description of the

[2] Kentucky Revised Statutes.

> nature and extent of any physical, psychological, or financial harm suffered by the victim or victims[.]

Chapman then cites the definition of "victim" as defined in KRS 421.500(1), which would allow the parent of an adult child to offer a victim-impact statement "[i]f the victim is deceased, and the relation is not the defendant . . . ." He argues correctly that the victim was alive and that he testified during the guilt phase of the trial.

We agree that Walter's mother was not competent to offer victim-impact evidence pursuant to the provisions of KRS 532.055(2)(a)(7). However, we do not agree that her testimony resulted in manifest injustice. Throughout most of her testimony, Walters's mother was able to give a factual account of her son's injuries and recovery. Her show of emotion was not inappropriate. When she mentioned threats made against Walters when he was in the hospital, the court interrupted and told the jury that Chapman did not make any threats because he was incarcerated at the time. Following her testimony, the court admonished the jury that none of the testimony concerning the Cottons should have a bearing on its sentencing decision; to disregard her statements about the possibility of future medical complications that Walters might face; and to ignore any arguments she made because argument would be made by the Commonwealth. Again, the jury is presumed to have heeded the admonition of the court. *Hoppenjans, supra*.

Chapman also contends that the plea made by Walters's mother for the jury to give him the maximum sentence rose to the level of reversible error. We do not agree. In *Hilton v. Commonwealth,* 539 S.W.3d 1 (Ky. 2018), the Supreme Court of Kentucky held that a victim's plea for the maximum sentence was erroneous but harmless. The *Hilton* court held that reversal was not required because it could not "discern any substantial effect upon [the defendant's] sentence." *Id.* at 19. The jury had already learned of the defendant's serious criminal history. The court reasoned that given the defendant's criminal history and the serious nature of the crimes for which the jury had just convicted him, it could say "with fair assurance that the jury's verdict was not swayed by the testimony. . . ." *Id.*

Similarly, in this case, the jury had learned of Chapman's substantial criminal history, and they had convicted him of yet another serious crime. The evidence of Walters's suffering and lasting injuries was compelling. We cannot discern any substantial effect of the erroneous testimony upon Chapman's sentence.

Lastly, we are not persuaded that the Commonwealth erred in the closing argument that it made to the jury during the penalty phase of trial. The Commonwealth told the jury that no matter what sentence it imposed, Chapman would be eligible for parole in January 2019. It explained that the parole board

could either grant parole, defer parole, or order Chapman to serve out his sentence. In telling the jury that if he were given the maximum sentence and the parole board were to parole him, the Commonwealth made the statement that: "and they're wrong, then we can have control of him for a longer period of time to make sure there are no other victims in our community." The Commonwealth was referencing its power to revoke his parole. The jury was not misinformed regarding the consequences of its sentencing decision. The Commonwealth was simply explaining (albeit somewhat inartfully) that Chapman would be eligible for parole and what the possibilities were – including revocation of parole. There was no reversible error.

Based upon the foregoing, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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