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RENDERED: MAY 22, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0822-MR

DATE June 12, 2003 Ellen A. Groutt, D.C.

DENNIS SCOTT MOE

APPELLANT

V. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
2001-CR-00200

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Moe of first-degree manslaughter, assault under extreme emotional disturbance and first-degree assault. He was sentenced to a total of thirty-four years in prison.

The questions presented are whether Moe was denied a fair trial because of the alleged mishandling of exculpatory evidence by the police; whether telephone records were properly excluded as a jury exhibit; whether Moe was entitled to a directed verdict of acquittal; whether a prior criminal complaint against one of the victims was properly excluded; whether the alleged inconsistent jury verdicts require reversal and whether the jury verdict was supported by credible and competent proof.

On the evening of March 31, 2001, Moe and his wife arrived at the home of brothers Kelly and Chuck Minton. Moe was well acquainted with the Mintons, having stayed at their house in the past. At the time Moe and his wife arrived, Kelly was preparing dinner while Chuck and a friend, Chester, watched television in the living room. The purpose of the visit by Moe and his wife and what occurred while they were there is greatly disputed by the defense and the Commonwealth. What is not disputed is that Moe shot all three men, Kelly Minton, Chuck Minton and Chester, inside the house and fled the area. Kelly Minton died from his gunshot wound but the other two victims survived.

Moe was indicted for murder and two counts of first-degree assault. At trial, the Commonwealth theorized that Moe was at the Minton house to collect on a debt. Chuck Minton testified that when Moe first arrived he walked into the living room and stated that he was there "kicking ass and taking names and they were next." According to Chuck, Moe returned to the kitchen and he and Kelly began discussing the whereabouts of a truck owned by Moe's wife, which Moe left in Kelly's possession. Moe also inquired about some tools he had left behind as well as some money Kelly allegedly owed him. At that point, Chuck sat down at the kitchen table with Kelly to eat dinner. Moe and his wife continued standing in the kitchen while Chester remained in the living room.

According to Chuck, the discussion between Moe and Kelly escalated into an argument and Moe made several threatening statements. While the two men continued to argue, Moe walked over to Kelly and the two men began to physically struggle. Moe then shot Kelly in the right eye at close range. Chuck stated that Moe

immediately turned and shot him in the face. He testified that both he and his brother were unarmed and were shot while still seated in their chairs.

Chester also testified at trial and denied hearing the threat in the living room by Moe but stated he heard other threats made by Moe in the kitchen. He stated that he overheard the argument between Kelly and Moe and that it ended with two nearly consecutive gunshots. According to Chester, Moe then walked into the living room and shot him in the back of the head.

Both surviving victims admitted smoking marijuana on the night in question. In addition, the Commonwealth and the defense stipulated to evidence relative to the toxicology results and medical records of all three victims on March 31, 2001. This included the effects that these drugs, which were being used by each of them, have upon human beings.

Moe testified at trial and claimed he acted in self-defense and defense of his wife. According to Moe, he and his wife stopped to visit the Mintons on their way home to Arkansas. He denied making any threats but acknowledged that an argument started between him and Kelly. Moe stated that he shot Kelly after Kelly lunged at him with a steak knife. Moe claimed that when he stepped back to protect his wife, Chuck Minton sprang up from his chair. Unsure whether Chuck was armed, he shot him. Shortly after shooting Chuck, he claims that Chester came at him screaming and he shot Chester to repel his threat. Moe admitted leaving the scene and returning to his home in Arkansas where police arrested him the next day.

The jury convicted Moe of first-degree manslaughter for the death of Kelly Minton, assault under extreme emotional disturbance for the shooting of Chuck Minton and first-degree assault for the shooting of Chester. He was sentenced to twenty years,

four years and ten years on the respective charges, said sentences to run consecutively for a total of thirty-four years in prison. This appeal followed.

I. Crime Scene Investigation

Moe argues that the initial investigation of the crime scene by the police destroyed evidence which was exculpatory in nature. He contends that the investigation was flawed because the officers accepted as totally true all that the surviving victims told them about the incident. Moe claims that the police failed to properly examine the scene and because of this failure they did not recover the vast quantities of drugs that were always present at the residence. He also asserts that weapons, blood splatter, and gun powder evidence was overlooked. In his reply brief, Moe states that the trial judge failed to give a tendered missing evidence instruction.

Our review of the record reveals that defense counsel did originally tender a missing evidence instruction. However, at a subsequent instruction conference, he told the trial judge that he should not give the instruction because it was not an issue in the case. Thus, defense counsel waived this issue.

In any event, a missing evidence instruction would not have been proper in this case. See Estep v. Commonwealth, 64 S.W.3d 805 (2002) which stated that absent some degree of bad faith a defendant is not entitled to an instruction that the jury may draw an adverse inference from the failure to preserve or collect any evidence. Here, there is absolutely no credible evidence of bad faith by the Commonwealth or its agents. All the arguments raised by Moe in this issue are completely without merit.

II. Bell South Records

Next, Moe contends that the trial judge committed reversible error when he refused admission of the Bell South telephone records. We disagree.

The Commonwealth subpoenaed the telephone records and provided them to the defense in discovery. At trial, defense counsel used the records to impeach Chuck Minton on his claim that Moe had called the Minton home on several occasions in the weeks preceding the shootings. At an in-chambers hearing the next day, the Commonwealth objected to the introduction of the records because the proper foundation had not been laid. The prosecutor indicated that the records were incomplete and stated that a custodian from the telephone company was needed to interpret the various codes contained in the records. Ultimately, the trial judge decided to allow the records as a trial exhibit but not as a jury exhibit.

We agree that the proper foundation was not laid for the introduction of these records. Simply because the records were subpoenaed by the Commonwealth does not make them admissible.

In any event, Moe cannot claim any prejudice in this matter. Defense counsel used the telephone records to impeach Chuck Minton about his statement to the police concerning the alleged calls made by Moe. Further, Moe reviewed the telephone records during his testimony and testified that there were no incoming telephone calls from his home area code to the victim's home. Considering all the circumstances, any error in not allowing the records to be used as a jury exhibit was certainly harmless.

Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969).

III. Directed Verdict

Moe argues that the trial judge committed reversible error by failing to direct a verdict for him on the issue of self-protection and protection of others. He contends that the testimony of the two surviving victims was so full of inconsistencies and outright lies as to make them totally untrustworthy and without their testimony there was no

basis for allowing the case to go forward. Moe also claims that the trial judge erred by failing to direct a verdict on the assault charges because the Commonwealth failed to prove serious physical injury. We disagree with both arguments.

On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Id. The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

Here, the Commonwealth presented sufficient evidence to support the conviction of Moe on all charges. Chuck Minton testified that he and his brother were unarmed when Moe shot them. Neither threatened Moe in any way. Chester also testified that Moe shot him without justification. Defense counsel exhaustively cross-examined both of the surviving victims concerning their statements to police and their testimony at trial. Moe simply argues questions of fact which are matters for the jury. See Skimmerhorn v. Commonwealth, Ky.App., 998 S.W.2d 771 (1998). The trial judge properly denied the motion by Moe for a directed verdict on the issue of self-protection and protection of others.

The trial judge also properly denied the motion for a directed verdict as it relates to serious physical injury. Chuck Minton testified that the bullet which struck him is still lodged in his neck, near his spine. He stated that the bullet was not removed because

medical professionals believed that attempting to remove the bullet would do more damage than allowing the bullet to remain in his body.

Chester testified that when Moe shot him in the back of the head he lost consciousness. He also stated that he sustained scarring and disfigurement as a result of being shot. Although no medical expert testified to either of the victims' injuries or prognoses, the jury could infer serious physical injury from the testimony of the victims. See Commonwealth v. Hocker, Ky., 865 S.W.2d 323 (1993). Consequently, there was sufficient evidence presented for the jury to find that Moe intentionally caused serious physical injury to both surviving victims by means of a deadly weapon.

IV. Prior Charges of Kelly Minton

Moe claims that the trial judge committed reversible error by refusing to admit proof of prior criminal charges relative to Kelly Minton. We disagree.

Moe testified about the "crazy" behavior of Kelly when he used drugs. In that regard, he referred to an incident where Kelly threatened to blow up a residence. Defense counsel then sought to introduce a criminal complaint made by a third party against Kelly for terroristic threatening. The Commonwealth objected because it was not provided the information in reciprocal discovery. Defense counsel responded that when he asked the prosecutor about discovery the prosecutor stated that he only cared about expert witnesses. The trial judge sustained the objection to the introduction of the complaint and noted that the defense got the question and answer into evidence.

Moe never offered any proof to the trial judge that Kelly Minton actually committed the offense of terroristic threatening. Moe merely offered a criminal complaint filed by an unknown/unavailable person. Although Moe contends that the complaint was offered by avowal, it was not part of this record. In any event,

considering all the circumstances, the error, if any, in not allowing the criminal complaint to be introduced into evidence was harmless. Abernathy, supra.

V. Inconsistent Verdict

Moe challenges the jury verdict as being inconsistent with regard to emotional distress. Moe admits that he is unable to find any legal authority directly on point. Moreover, the defense did not object to the instruction.

The jury verdict finding Moe guilty of first-degree manslaughter, assault under extreme emotion disturbance and first-degree assault was entirely proper. Reliance by Moe on Pace v. Commonwealth, Ky., 636 S.W.2d 887 (1982) is without merit. Pace, supra, which reversed a conviction based on inconsistent verdicts was overruled by Commonwealth v. Harrell, Ky., 3 S.W.3d 349 (1999). Harrell, supra, held that when reviewing jury verdicts the focus should not be on the concept of consistency but rather the focus should be upon the concept of sufficiency of evidence to sustain each conviction. Here, as noted earlier in this opinion, there was sufficient evidence to support each conviction.

VI. Competent Proof

Finally, Moe argues that the verdict should be reversed because it is not supported by competent and credible proof. He contends that the testimony of the two surviving victims is so full of inconsistencies, outright lies and contradictions that no group of reasonable people could be led to believe them, absent some bias or prejudice, unknown to him therein. We disagree.

All the witnesses including the two surviving victims were exhaustively cross-examined. Once again, Moe simply argues questions of fact which are matters for the

jury. Skimmerhorn, supra. His allegations of bias or prejudice are not supported by any credible evidence in the record and are completely without merit.

The judgment of conviction and sentence is affirmed.

All concur.

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