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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-11-03 EllAGrew-HD

2001-SC-0232-MR AND 2001-SC-0923-MR

JASON D. SHAVERS — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONALD ARMSTRONG, JUDGE
ACTION NO. 99-CR-000666

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jason Shavers, was tried as a youthful offender and convicted in the Jefferson Circuit Court of murder, first-degree burglary, first-degree robbery, and tampering with physical evidence. He was sentenced to terms of fifty (50), ten (10), ten (10), and five (5) years respectively, with the robbery and burglary counts to run concurrently with one another and consecutively with all other counts for a total of sixty-five (65) years imprisonment.

Appellant went to the home of David Chavous to purchase marijuana. Appellant entered the house after being told that a friend would be returning with some marijuana shortly. Once inside, Appellant held a gun to Mr. Chavous' throat and ordered him to "give me all you've got." Mr. Chavous was shot while attempting to empty his pockets.

Appellant raises ten issues on appeal, specifically: (1) that he was denied a fair trial when he was tried by a jury that was "death-qualified" under the mistaken belief that Appellant was sixteen when the crimes were committed; (2) that the trial court erred when it refused to give a reckless homicide instruction to the jury; (3) that he was entitled to a directed verdict on the burglary charge, as there was no evidence that he entered the premises unlawfully; (4) that he was entitled to a directed verdict on the charge of tampering with physical evidence because he did not know that police were conducting an investigation; (5) that the trial court erroneously applied the sentencing statutes, resulting in an impermissible maximum sentence; (6) that reversible error occurred when the trial court allowed the introduction of a prior misdemeanor during the penalty phase of the trial; (7) that the photo identification technique used by police was unduly suggestive to one witness; (8) that the prosecutor failed to present exculpatory evidence to the grand jury; (9) that the prosecutor's behavior regarding the applicability of the death penalty and her comments during closing argument amounted to prosecutorial misconduct; and, (10) that the cumulative effect of errors committed during trial amounted to a denial of due process. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

"DEATH-QUALIFICATION" OF THE JURY

Appellant argues that the trial court erred when it refused to grant a mistrial after it became known that he was only fifteen at the time of the crimes, and therefore, ineligible for the death penalty under KRS 640.040(1), yet the trial was allowed to proceed with a "death-qualified"[1] jury.

[1] That is, juries from which those venirepersons who would not or could not impose the death penalty are excluded.

Apparently, at some point during the trial, the Commonwealth discovered that Appellant was only fifteen years old when the crimes were committed. The Commonwealth withdrew the death penalty from consideration but did not explain its reason for doing so. It was not until approximately one day later that defense counsel also figured out that Appellant had never been eligible for the death penalty, and at that point a motion was made for a mistrial. The trial court refused to grant Appellant a mistrial and informed the jury that the death penalty was no longer an option due to the mutual agreement of the parties.

The United States Supreme Court has twice addressed the issue of whether death qualification of a jury deprives a defendant of a fair trial. The Court held in Lockhart v. McCree, 476 U.S. 162, 177, 106 S. Ct. 1758, 1767, 90 L. Ed. 2d 137, 150 (1986), that death qualification of a jury did not violate a defendant's Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. The Court also found no merit to McCree's claim that a death-qualified jury is *per se* more conviction-prone.[2] Id. at 171-172.

The defendant in McCree, supra, was in fact eligible to receive the death penalty, whereas in the case *sub judice*, Appellant was never eligible to receive the death penalty. In Buchanan v. Kentucky, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), however, the defendant was not eligible for the death penalty, but was jointly tried with an eligible co-defendant by a death-qualified jury. The Court in Buchanan reaffirmed its holding in McCree that a death-qualified jury did not deny a defendant his right to an impartial jury drawn from a fair cross-section of the community, even though

[2] In fact, the Court, for purposes of the opinion, assumed that the studies submitted by McCree, that found a death-qualified jury to be somewhat more conviction-prone, were valid. The Court held that even in spite of these findings, the Constitution did not prohibit death qualification of juries. Id. at 173.

in that case the death penalty was only sought against the co-defendant. Id. at 415. We believe McCree and Buchanan, although somewhat factually dissimilar from the case at bar, lend enough guidance to require that we also reject Appellant's claim.

Appellant attempts to distinguish Buchanan from his case by noting that the Court in Buchanan only upheld the death qualification of the jury because the state had a legitimate interest in trying the defendants jointly. 483 U.S. 402 at 418-419. It is true that the Buchanan Court indicated that the state had a significant interest in trying certain co-defendants jointly; however, the Court did not rely solely on this fact as the basis for its holding. See Furman v. Wood, 190 F.3d 1002, 1005 (9th Cir. 1999) (stating that there was clearly no negative implication from Buchanan that the state must have a compelling interest in order to try a non-capital defendant by a death-qualified jury; and thus the defendant, who was never legitimately eligible for the death penalty, but was tried by a death-qualified jury, was not prejudiced).

Appellant seems to argue that our decision in Brown v. Commonwealth, Ky., 890 S.W.2d 286 (1994), also by negative implication, stands for the proposition that it is error for the state to try a non-capital defendant before a death-qualified jury, when in fact, in Brown, supra, we did not reach the issue of whether death qualification of the jury was appropriate for a non-capital defendant because Kentucky did have jurisdiction to charge the defendant with a capital offense in that case. Id. at 288. Appellant's argument otherwise is unpersuasive.

In Buchanan, supra, the Supreme Court emphasized that. . .

> the particular concern about the possible effect of an "'imbalanced' jury" in the "special context of capital sentencing," is not present with respect to the guilt and sentencing phases of a noncapital defendant in this case. For, at the guilt phase, the jury's discretion traditionally is more channeled than at a capital-sentencing proceeding,

> and, at the penalty phase, the jury's sentence is limited to specific statutory sentences and is subject to review by the judge.

483 U.S. at 420 (citations omitted). Buchanan implicitly recognized that a non-capital defendant tried during the guilt phase by a death-qualified jury is not denied his right to an impartial jury. See Furman, supra at 1005; U.S. v. Edelin, 118 F. Supp. 2d 36, 45-50 (D.D.C. 2000). Further, "'the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.'" Buchanan, supra, at 420 (quoting McCree, supra at 184). Death qualification of a jury does not erase this supposition. Accordingly, we hold that Appellant was not denied an impartial jury from a fair cross-section of the community, in violation of the Sixth and Fourteenth Amendments, when he was tried by a death-qualified jury.

Appellant also contends that our decision in Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001), mandates that we reverse his convictions because during voir dire the jury was misled as to the proper penalty ranges. In Lawson, the question before this Court was how much information to give potential jurors during voir dire regarding the possible range of penalties. Id. at 543. We held that "in all non-capital criminal cases where a party or the trial court wishes to voir dire the jury panel regarding its ability to consider the full range of penalties for each indicted offense, the questioner should define the penalty range in terms of the possible minimum and maximum sentences. . . ." Id. at 544. However, McCree and Buchanan properly govern the case at bar, and as stated above, Appellant was not prejudiced by the questioning of potential jurors about

their ability to follow statutory guidelines and impose a penalty within the permissible range.

RECKLESS HOMICIDE INSTRUCTION

Appellant next contends that the trial court's failure to give the jury an instruction on the lesser-included offense of reckless homicide was prejudicial error requiring reversal for a new trial. The trial court gave the jury instructions on murder (KRS 507.020) and second-degree manslaughter (KRS 507.040). Appellant argues that it is possible that the jury could have believed that he was not able to fully understand the consequences of his actions due to his age, thus requiring a finding that Appellant's conduct was merely reckless rather than intentional or wanton. The trial court ruled that there was no way a jury could have believed that Appellant failed to perceive the "substantial and unjustifiable risk" involved in holding a loaded gun to the neck of David Chavous. KRS 501.020(4). Appellant urges us to consider his infancy, not as a defense to his actions, but instead as a factor in determining whether the trial court erred in not issuing a reckless homicide instruction.

"Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, . . . that duty does not require an instruction on a theory with no evidentiary foundation." Neal v. Commonwealth, Ky., 95 S.W.3d 843, 850 (2003). Appellant offers no credible evidence that he did not perceive the substantial risk that the death of the victim would result from his actions.

"An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty

of the lesser offense." Id. Regardless of Appellant's age at the time of the crimes, we do not feel that an instruction on reckless homicide was warranted based on the evidence. In fact, the jury was given the option of convicting Appellant of the less culpable offense of second-degree manslaughter, which requires that a defendant "wantonly[3] cause[ ] the death of another person," KRS 507.040, yet it chose instead to convict Appellant of murder. Accordingly, we do not believe that the jury could have reasonably convicted Appellant of the even less culpable offense of reckless homicide. Thus, the trial court did not err in refusing to give the jury an instruction on reckless homicide.

DIRECTED VERDICT ON FIRST-DEGREE BURGLARY

Appellant argues that he was entitled to a directed verdict on the burglary charge because there was no evidence that he knowingly entered or remained unlawfully in the building with the intent to commit a crime. KRS 511.020. Appellant maintains that he was invited into the victim's home to wait for a friend to return. He also asserts that he fled the house immediately after the victim was shot.

Appellant refers us to Robey v. Commonwealth, Ky., 943 S.W.2d 616 (1997), where this Court held that the elements of first-degree burglary were not met because the defendant had been invited to stay the night and immediately fled the victim's home after raping her. Here, however, there was evidence that Appellant remained in the victim's house briefly after shooting him in the neck. Contrary to the assertions in Appellant's brief, the victim's girlfriend testified that after Appellant demanded, "give me all you've got," he shot the victim while he was reaching into his pockets, and then

[3] Defined as an awareness and conscious disregard of a substantial and unjustifiable risk that death will result. KRS 501.020(3).

walked the victim back towards the kitchen. The girlfriend ran out the front door and it is unclear what transpired between Appellant and the victim while in the kitchen.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Mills v. Commonwealth, Ky., 996 S.W.2d 473, 489 (1999) (quoting Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991)). Therefore, in light of the testimony of the victim's girlfriend, it would not have been clearly unreasonable for the jury to have believed that Appellant remained inside the house subsequent to shooting David Chavous. The trial court correctly denied Appellant's motion for a directed verdict.

DIRECTED VERDICT ON TAMPERING WITH THE EVIDENCE

Appellant argues that it would be absurd to apply KRS 524.100 to his case because, as a child, he did not have the foresight necessary to perceive that a criminal investigation would be initiated against him. The Commonwealth contends that this issue is not preserved for our review because at trial Appellant only argued that there was insufficient evidence of tampering. The Commonwealth points out that the first time Appellant raises the issue of lack of knowledge of a criminal investigation is on appeal to this Court. We agree. We have consistently held that an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). Therefore, this issue is not preserved for our review.

SENTENCING

Appellant next submits that he was impermissibly sentenced beyond the maximum allowable range permitted by KRS 532.110, KRS 532.080, and KRS 640.040.

Appellant was sentenced to a total of sixty-five years imprisonment. KRS 640.040(1) is applicable due to Appellant's status as a youthful offender and it reads in relevant part:

> No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. . . . A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.

Likewise, KRS 532.110(1)(c) limits multiple sentences of imprisonment by stating:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

The authorized maximum term for a person convicted of a Class A felony is not less than twenty years nor more than fifty years, or life imprisonment. KRS 532.060; KRS 532.080. Since Appellant, a youthful offender, was convicted of a capital offense and sentenced to a term of years, he was eligible for the punishments appropriate for a Class A felony offender. KRS 532.110 limits that sentence to no more than fifty years imprisonment, which is what Appellant received. His other sentences run concurrently still result in a total of less than the limit imposed by KRS 532.110(1)(c). There is no error.

JUVENILE MISDEMEANOR CONVICTIONS

Appellant next argues that the trial court erroneously submitted information regarding a prior misdemeanor conviction for possession of marijuana to the jury during the penalty phase of the trial. KRS 532.055(2)(a)(6) states that "[j]uvenile court records of adjudications of guilt of a child for an offense that would be a felony if committed by

an adult" may be offered by the Commonwealth at the sentencing hearing. Since the prior possession of marijuana conviction was only a misdemeanor, the jury was not entitled to hear evidence related to that conviction. However, the trial court admonished the jury to disregard the conviction and overruled Appellant's motion for a mistrial.

"[F]or a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 863 (2002). Appellant has not shown how he was prejudiced by this information, particularly in light of the fact that the jury had already properly heard information regarding two prior felony convictions for wanton endangerment and first-degree assault. Here, the trial court properly admonished the jury to disregard the evidence relating to Appellant's misdemeanor conviction and we are to presume that the jury followed that admonition. Id. Therefore, any error was harmless and the trial court properly overruled Appellant's motion for a mistrial.

WITNESS PRE-TRIAL IDENTIFICATION

Appellant contends that the manner in which two photo packs were shown to witness, James Ingram, was unduly suggestive because Mr. Ingram was only able to identify Appellant after he was shown a second photo pack where Appellant's picture was the only picture repeated. Mr. Ingram later testified and identified Appellant at trial. The Commonwealth responds that Mr. Ingram was hesitant to identify Appellant from the first photo pack because the picture was several years old and blurry. After the police showed Mr. Ingram a more recent photo of Appellant, approximately eight days later, he had no trouble in identifying Appellant.

"A conviction based on identification testimony following pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is so 'impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" Dillingham v. Commonwealth, Ky., 995 S.W.2d 377, 383 (1999) (quoting Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986). There is a two-step inquiry to determine if the in-trial identification violated Appellant's due process. Id. First, the court is to determine if the identification prior to trial was unduly suggestive. If the court determines that the pre-trial identification was not unduly suggestive, there is no need to reach the second step that requires the court to look at the totality of the circumstances to determine if the identification was still reliable. Id.

Here, the trial court ruled that the pre-trial identification made by Mr. Ingram was not unduly suggestive primarily because the two photos of Appellant were different. The trial court stated that there was quite a bit of difference between the two photos of Appellant. Detective Mike Crask testified that the first photo pack contained a picture of Appellant obtained from Appellant's school and that the photo was several years old. We also note that Mr. Ingram had an opportunity to observe Appellant for approximately thirty seconds to one minute prior to Appellant entering the victim's house and again for approximately twenty to thirty seconds after leaving the house. Mr. Ingram testified that he got a good look at Appellant and that he had seen him around the neighborhood before. Therefore, we agree with the trial court's assessment that the pre-trial identification by Mr. Ingram was not the result of an unduly suggestive procedure and in violation of Appellant's due process rights. There was no error.

FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

Appellant argues that the prosecutor failed to present evidence to the grand jury that several witnesses at the scene failed to identify Appellant as the shooter. Appellant contends that this was exculpatory evidence that the grand jury was entitled to hear before returning an indictment.

A prosecutor is not required to present exculpatory evidence to the grand jury. United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). In fact, "requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." Id. at 51. Therefore, Appellant's argument has no merit and his motion to dismiss the indictment was properly overruled.

PROSECUTORIAL MISCONDUCT

Appellant alleges that the prosecutor's behavior surrounding the withdrawing of the death penalty and her comments during closing arguments amounted to prosecutorial misconduct. The Commonwealth responds that neither of these arguments is preserved for our review. We agree. Nevertheless, there was no allegation that the Commonwealth willfully attempted to impose the death penalty on an ineligible juvenile and we have already ruled that being tried by a death-qualified jury did not prejudice Appellant. Therefore, no error occurred.

Likewise, the prosecutor's comment during closing argument that it was time to "strip [Appellant] of this presumption of innocence" was not error. Reversal due to prosecutorial misconduct during closing argument is only required if the conduct was flagrant. Barnes v. Commonwealth, Ky., 91 S.W.3d 564, 568 (2002). Accordingly, regardless of preservation, Appellant's arguments are without merit.

CUMULATIVE ERROR

As stated above, any errors during Appellant's trial were harmless. The cumulative effect of these errors did not deprive Appellant of a fundamentally fair trial. See Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 40 (1998); cf. Funk v. Commonwealth, Ky., 842 S.W.2d 476, 483 (1992). Appellant's argument to the contrary is therefore rejected.

The judgment of the Jefferson Circuit Court is hereby affirmed.

Lambert, C.J.; Graves, Johnstone, Stumbo and Wintersheimer, JJ., concur. Cooper, J., concurs in result only. Keller, J., dissents without separate opinion.

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