

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2002-SC-0600-MR

DATE 11-13-03, EIA Gravit, D.C.

EMILIO CAMESO REYES

APPELLANT

V. APPEALED FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
CRIMINAL NO. 01-CR-0705

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Emilio Cameso Reyes, was convicted in the Fayette Circuit Court of murder and tampering with physical evidence. He was sentenced to life imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant's convictions stem from the May 9, 2001, shooting death of his former girlfriend, Maria Castro Cruz. Evidence at trial indicated that the victim had ended the relationship earlier that year, much to Appellant's dismay. At the beginning of May 2001, the victim moved into the Zandale Terrace Apartments with her new boyfriend, who was also Appellant's coworker. Sylvia Johnson, another resident of the apartment complex, testified that on the day of the shooting she observed Appellant crossing the

parking lot holding a gun. Shortly thereafter, Johnson heard four gunshots. Resident Greg Flora further testified that following the gunshots, he saw Appellant leaving the building. Appellant was apprehended at his apartment later the same day. In fact, when police arrived, Appellant walked out of his apartment and surrendered. Police found the gun and spent casings hidden behind a dresser in Appellant's bedroom.

Appellant was tried in the Fayette Circuit Court in May 2002. While Appellant admitted shooting the victim, he contended that he was acting under extreme emotional disturbance at the time. Nonetheless, the jury found him guilty of murder and tampering with physical evidence, and recommended a life sentence and a one-year sentence, respectively. Judgment was entered accordingly.

I.

Appellant first argues that the trial court failed to give an instruction on reasonable doubt as it applied to extreme emotional disturbance. Appellant contends that the trial court was required to instruct the jury that if it had a reasonable doubt as to whether he was acting under the influence of EED, it could not find him guilty of murder but would have to find him guilty of first-degree manslaughter.

Since the amendment of RCr 9.56 by this Court in 1978, "courts are no longer required to instruct upon reasonable doubt concerning the degree of the offense." Carwile v. Commonwealth, Ky., 656 S.W.2d 722, 724 (1983). In Butts v. Commonwealth, Ky., 953 S.W.2d 943, 946 (1997), we explained that, "[w]hile [Carwile, supra] does not suggest that a court may never instruct on reasonable doubt as to the degree of the offense, such an instruction is now viewed as unnecessary, particularly when the same concepts are dealt with in other instructions."

Recently, however, in Commonwealth v. Hager, Ky., 41 S.W.3d 828, 831-832 (2001), this Court found error in the failure to instruct the jury on reasonable doubt with respect to the issue of extreme emotional disturbance. “Although not mentioned in RCr 9.56, that instruction is required when there is evidence authorizing an instruction on extreme emotional disturbance. Holbrook v. Commonwealth, Ky., 813 S.W.2d 811, 815 (1991), overruled on other grounds, Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998); Edmonds v. Commonwealth, Ky., 586 S.W.2d 24, 27 (1979), overruled on other grounds, Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985).” According to Hager, supra, the proper instruction concerning reasonable doubt in cases where there is sufficient evidence to instruct on EED is now as follows:

A. The law presumes a defendant to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

B. If you believe from the evidence beyond a reasonable doubt that the Defendant would be guilty of intentional Murder under Instruction No. [], except that you have a reasonable doubt as to whether at the time he killed [the victim], he was or was not acting under the influence of extreme emotional disturbance, you shall not find the Defendant guilty of Murder under Instruction No. [], but shall find him guilty of First-Degree Manslaughter under Instruction No. [].

Id. at 847. While the trial court in this case included the first part of the above instruction, it did not instruct on part (B).

However, Appellant concedes that this issue is not preserved. He neither tendered a requested instruction nor objected to the instructions as given. RCr 9.54(2) provides:

No party may assign as error the giving or the failure to give an instruction unless the party’s position has been fairly and

adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

This Court has consistently held that failure to comply with subsection (2) of RCr 9.54 prohibits appellate review of claimed error in the instructions. In order to preserve an alleged error for appellate review, compliance with RCr 9.54 is mandatory. Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1995); Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988).

The reasonable doubt instruction that was given in this case comported with the language of RCr 9.56. Further, the jury was properly instructed on the definition of EED, as well as the elements of murder in the absence of EED and first-degree manslaughter. Accordingly, we do not find that the failure to instruct the jury on reasonable doubt as it applied to EED resulted in a manifest injustice or deprived Appellant of a fair trial so as to rise to the level of palpable error warranting reversal. RCr 10.26.

II.

Next, Appellant argues that the trial court erred by failing to grant a directed verdict on the tampering with physical evidence charge. The Commonwealth introduced evidence that police located the murder weapon, as well as a bag containing the spent casings, behind a dresser in Appellant's bedroom. Appellant contends that the act of placing his "legally-owned" gun behind the dresser was not concealment, but rather was the "normal act of a gun owner" placing it out of plain view. We disagree.

KRS 524.100 provides, in pertinent part:

- (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

- (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

In ruling on a motion for directed verdict, the trial court 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). While Appellant maintains that placing a gun and spent casings behind his dresser was the normal act of a gun owner, the jury could have also believed that Appellant was attempting to conceal the murder weapon. “The compelling logic . . . is that one who has committed a criminal act and then conceals or removes the evidence of the crime does so in contemplation that the evidence would be used in an official proceeding which might be instituted against him.” Burdell v. Commonwealth, Ky., 990 S.W.2d 628, 633 (1999). The weight and credibility of the evidence was a determination to be made by the jury. The Commonwealth certainly produced sufficient evidence to withstand a motion for directed verdict.

III.

Finally, Appellant contends that the trial court erred in allowing the testimony of Maritza Chavez Castro, the victim’s niece. Castro testified concerning a phone call the victim received from Appellant shortly after the relationship had ended. Castro stated she heard the victim tell Appellant to stay away from her because she did not want anything to do with him. Castro testified that although she did not recognize Appellant’s voice when she answered the phone, she overheard the conversation and, after the fact, the victim had confirmed it was Appellant. Castro further testified that not long after the phone conversation, she was present at the victim’s apartment one evening when Appellant showed up armed with a gun. The victim told Appellant she did not want

him there and went into a bathroom. Castro stated that Appellant forced his way into the bathroom and began hitting the victim. Castro admitted that she did not witness the confrontation (because the door was closed) but could hear the sounds of a physical altercation and heard the victim ask Appellant, "Why are you hitting me?" Castro commented that the victim received a black eye from the incident.

Appellant argues that Castro's testimony was not proper KRE 404(b) evidence as it had no purpose other than proving criminal disposition and inflaming the minds of the jurors. Further, Appellant claims that since he admitted shooting the victim, the evidence was irrelevant. Again, we disagree.

The trial court ruled that the evidence was admissible pursuant to KRE 404(b)(2), in that it was "inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." However, KRE 404(b)(1) also permits the introduction of prior bad acts if "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Here, Castro's testimony was certainly relevant to whether Appellant had the motive and intent to murder the victim or whether, as he maintained, he was acting under extreme emotional disturbance at the time of the shooting. No error occurred.

The judgment and sentence of the Fayette Circuit Court are affirmed.

All concur.

COUNSEL FOR APPELLANT

Karen Maurer
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE

A.B. Chandler III
Attorney General

Elizabeth A. Heilman
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204