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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 3-11-04 ELIA GRAVITT, D.C.

2001-SC-0273-MR

FRANKLIN GOMAR — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
99-CR-02719

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

I. INTRODUCTION

After a jury trial, Appellant was found guilty of Wanton Murder and his sentence was fixed at twenty (20) years imprisonment. He appeals to this Court as a matter-of-right,[1] raising several issues, one of which requires reversal of his conviction: the trial court's refusal to admit testimony of past violent acts by the victim. We thus reverse and remand to the Jefferson Circuit Court for a new trial.

II. BACKGROUND

In the late hours of October 28, 1999, and in the presence of several witnesses, Appellant, Franklin Gomar, shot and killed Cesar Puente (hereinafter Puente). The shooting occurred after approximately five hours of hostility and violence in the Deerbrook apartment complex in Louisville, Kentucky.

On the afternoon prior to the shooting, Appellant discovered that his truck had been vandalized and its stereo stolen. Through various sources, Appellant came to

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[1] KY. CONST. § 110(2)(b).

believe that Puente was the perpetrator. Additionally, Appellant and Jose David Gomar (hereinafter David),[2] Appellant's cousin, roommate, and codefendant, believed that Puente was responsible for burglarizing their shared apartment only weeks prior to this incident. Appellant and David confronted Puente, and the confrontation led to a verbal and physical altercation. Apparently, this was the first of two such confrontations in which Appellant and Puente would engage prior to the shooting.

Shortly after the initial confrontation involving Appellant, David, and Puente, a fight broke out in the courtyard of the complex between Appellant's neighbor, Shawn Smith (hereinafter Smith), and another man. During this fight, a large crowd of approximately 20-30 individuals, including Puente, gathered in the courtyard of the complex to witness the fighting. According to testimony, at some point, members of the crowd began to participate in the fight, leaving Smith to defend himself against several men. David and Appellant attempted to intervene on Smith's behalf, creating a situation in which the three men became the targets of threats and insults from the crowd and the atmosphere became increasingly volatile. Following the courtyard fight, Appellant and Puente engaged in their second confrontation. Although it may have begun with one or both of the men attempting to apologize for the earlier confrontation, the conversation once again degenerated into a verbal and physical altercation.

The timeline of events that followed is not entirely clear, however, at some point David left the complex in his truck, purportedly to get help from some of his family members that lived nearby. However, instead of returning with individuals to aid him, he returned with a gun. Appellant ran to David's truck as it approached, demanded the gun, and returned to the courtyard. After a brief shouting match, Appellant leveled the gun and fired at the victim from a few feet away. Puente fell, arose, and ran behind a bush. Appellant approached the bush and fired at Puente once again, and Puente then ran toward a vacant lot, where he fell and died. Appellant discarded the gun in a

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[2] Jose David Gomar was acquitted of all charges by a Jefferson County jury.

nearby dumpster and both he and David moved out of their apartment the next day. Appellant departed the Commonwealth for his former home in Lebanon, Tennessee, where he was eventually apprehended for his involvement in this case. Additional facts relevant to the opinion will be set out as necessary.

III. ANALYSIS

A. TESTIMONY OF VICTIM'S PAST VIOLENT BEHAVIOR

Among Appellant's defenses was a claim that he acted in self-defense,[3] and in support of this claim, David attempted to testify about prior violent acts of Puente to establish his and Appellant's fear of Puente. The trial court, however, sustained the Commonwealth's objection to David's proposed testimony on hearsay grounds. David's testimony regarding this issue was then placed in the record by avowal. David testified on avowal that Puente told his (David's) roommate, Ricardo, that he (Puente) had stabbed a man. David further testified that Puente's girlfriend had informed him that Puente had been violent, that she was afraid of Puente sometimes, and that Puente had stabbed and killed a man. David stated that this information was communicated to Appellant approximately 5-6 weeks prior to the homicide. He maintained that he told Appellant, along with the rest of his family and coworkers, what he had heard about Puente because he had concern for their safety and wanted them to "watch out" for Puente. Appellant claims that the trial court's exclusion of this evidence was reversible error. We agree.

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[3] Although Appellant did not testify, his tape recorded statement to the police was played during the trial. In his statement, Appellant stated that Puente walked really fast towards him and said, "It's your turn." Appellant claimed that he told Puente to stop and get away. Appellant also stated that although he did not see anything in Puente's hands, Puente had a hand behind his back that Appellant could not see.

David's excluded testimony was not properly characterized as hearsay because it was not offered to prove that Puente had committed prior violent acts,[4] instead it was offered for a nonhearsay purpose, i.e., to show Appellant's state of mind when he shot Puente. "[W]here self-defense is claimed by [a] defendant[ ], . . . [t]he defendant in such a case (or defense witnesses) may seek to testify about . . . out-of-court statements to the defendant about violent acts or tendencies of the victim . . . ."[5] "It is well-settled that any out-of-court statement heard by the defendant that would induce him or her to harbor such a belief (even if the statement happens to be untrue) is admissible as nonhearsay."[6] "In self-defense cases, fear by the defendant of the victim is an element of the defense and can be proved by evidence of violent acts of the victim, threats by the victim, and even hearsay statements about such acts and threats, provided that the defendant knew of such acts, threats, or statements at the time of the encounter."[7]

In the present case, the trial court, concluding that the evidence justified an instruction on self-protection, included the absence of self-protection as an element of the Murder instructions, and the trial court, by separate instruction, instructed the jury that Appellant had the right to use "deadly physical force only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands

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[4] KRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

[5] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.05[3], at 564 (4th ed. Michie 2003) [hereinafter LAWSON, KENTUCKY EVIDENCE LAW].

[6] Id. citing Cessna v. Commonwealth, Ky., 465 S.W.2d 283 (1971); Fannon v. Commonwealth, Ky., 175 S.W.2d 531 (1943); Carnes v. Commonwealth, Ky., 453 S.W.2d 595 (1970).

of Cesar Puente." Accordingly, evidence showing Appellant's fear of Puente was clearly relevant and admissible, and therefore, the trial court committed reversible error when it precluded David from testifying as to his own and Appellant's knowledge of the victim's past violent behavior.

B. JURY INSTRUCTIONS

Appellant claims that the trial court committed reversible error by ruling that it would instruct the jury that it could find Appellant guilty of Second-Degree Manslaughter only if the jury found imperfect self-defense. We disagree. Regardless of whether it was the intention of the trial court to offer Second-Degree Manslaughter only in the event of a jury determination that Appellant acted in imperfect self-defense, an examination of the jury instructions shows otherwise. Although the trial court gave an imperfect self-protection instruction, it also gave separate instructions on both Second-Degree Manslaughter and Reckless Homicide. And, even though the imperfect self-protection instruction directed the jury to the separate Second-Degree Manslaughter and Reckless Homicide instructions if the jury believed that Appellant's belief was wanton or reckless, the language of both instructions clearly showed that they were also presented as lesser offenses of the Murder instructions. For example, the Second-Degree Manslaughter instruction provided: "If you do not find the defendant, Franklin Gomar, guilty under Instructions No. 1 [Intentional Murder] or 2 [Wanton Murder], you will find him guilty under this Instruction . . . ." And, the Reckless Homicide instruction provided: "If you do not find the defendant, Franklin Gomar, guilty under Instructions No. 1, 2, or 4 [Second-Degree Manslaughter], you will find him guilty under this Instruction . . . ."

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[7] LAWSON, KENTUCKY EVIDENCE LAW, supra note 5, § 2.15[4][d], at 105-106.

We note, however, that both the Second-Degree Manslaughter and the Reckless Homicide instructions failed to include the absence of self-protection as an element of the offenses. On retrial, the instructions should conform to the standards set forth in Elliott v. Commonwealth[8] and Commonwealth v. Hager.[9]

C. STRIKING OF JUROR FOR RELIGIOUS BELIEFS

Although Juror #127's answers are not clear from the video record, the trial court found that he responded that his religious beliefs prevented him from "sitting in judgment" of another person. The trial court then excused this juror for cause. Appellant argues that, even assuming the juror "actually said that his religious beliefs absolutely prevented him from rendering a judgment against another human being," the juror was still not automatically disqualified to be a juror.

The standard for determining "when a prospective juror may be excluded for cause . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[10] Accordingly, a juror may not be excluded because of his or her religious beliefs unless such beliefs render the juror unable to "impartially try the case between the parties and give a true verdict according to the evidence and the law."[11] It was established to the

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[8] Ky., 976 S.W.2d 416 (1998).

[9] Ky., 41 S.W.3d 828 (2001).

[10] Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851-52 (1985), quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581, 589 (1980).

[11] KRS 29A.300 ("The court shall swear the petit jurors using substantially the following oath: 'Do you swear or affirm that you will impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court?'"); Administrative Procedures of the Court of Justice, Part II § 30 ("The court, or the clerk if the court so orders, shall swear the petit jurors, using substantially

trial court's satisfaction that the juror's religious beliefs prevented him from sitting in judgment of others, and therefore, his response sufficiently demonstrated to the trial court that Juror #127's beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[12] Although it is possible that even a juror whose religion prohibits him from otherwise sitting in judgment of others could, notwithstanding his religious beliefs, abide by his oath as a juror,[13] the trial court here did not abuse its discretion in finding that Juror #127's religious beliefs prevented him from discharging his responsibilities as a juror.

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the following oath: 'Do you swear or affirm that you will impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court?'").

[12] Cf. State v. Tucker, 512 S.E.2d 99, 104 (S.C. 1999)("On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. The trial court properly excluded Juror Williams because his religious beliefs which prohibit judging another person would have prevented or substantially impaired the performance of his duties as a juror." (citations omitted)).

[13] Cf. Witherspoon v. Illinois, 391 U.S. 510, 515 n.7, 88 S.Ct. 1770, 1773 n.7, 20 L.Ed.2d 776, 781 n.7 (1968) ("It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State."); Id. at 515 n.9, 88 S.Ct. at 1773 n.9, 20 L.Ed.2d at 781 n.9 ("As the voir dire examination of this venireman illustrates, it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' thereby affirmed that he could never vote in favor of it or that he would not consider doing so in the case before him. Obviously many jurors 'could, notwithstanding their conscientious scruples (against capital punishment), return * * * (a) verdict (of death) and * * * make their scruples subservient to their duty as jurors.'" (citations omitted)); Id. at 522-23, 88 S.Ct. at 1776 – 77, 20 L.Ed.2d at 784-85 ("[W]e hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (footnotes omitted)).

Accordingly, we find that the trial court did not err in excluding Juror #127 for cause based on the juror's limited response.

D. OTHER ALLEGATIONS OF ERROR

In his brief, Appellant sets forth several other allegations of error; however, those allegations are rendered moot by our conclusion that the exclusion of David's testimony requires reversal and a new trial. In argument #2, Appellant asserts that he was entitled to an instruction on First-Degree Manslaughter under the theory that he only intended to cause serious physical injury, and in argument #4, Appellant claims that the trial court erred in not instructing the jury "on extreme emotional disturbance as a mitigating factor under KRS 507.020." These arguments are moot because Appellant was found not guilty of intentional Murder,[14] and therefore, a retrial on the theory of intentional Murder is precluded.[15] First-Degree Manslaughter is not a lesser offense of wanton Murder, and extreme emotional disturbance does not mitigate wanton Murder. The allegation in Argument #6 that the prosecutor improperly asserted that a key witness had been warned not to come to court is not likely to reoccur upon retrial.

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[14] The jury was required under the instructions to find Appellant not guilty of intentional Murder as a condition precedent, i.e., "If you do not find the defendant, Franklin Gomar, guilty under Instruction No. 1 [Intentional Murder], you shall find him guilty of Murder (Wanton) under this instruction," to finding him guilty of wanton Murder. And, in fact, the jury first signed a verdict that it found Appellant "not guilty under Instruction No. 1 [Intentional Murder]" before signing a verdict that it found Appellant "guilty under Instruction No. 2 [Wanton Murder]."

[15] Terry v. Potter, 111 F.3d 454, 455-60 (6th Cir. 1997). See also Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); Livingston v. Murdaugh, 183 F.3d 300, 301-02 (4th Cir. 1999).

IV. CONCLUSION

For the foregoing reasons, we reverse the judgment of the Jefferson Circuit Court and remand this case for further proceedings consistent with this opinion.

Lambert, C.J.; Cooper, Graves, Johnstone, Keller and Stumbo, JJ., concur.

Wintersheimer, J., dissents without separate opinion.

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