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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 20, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE June 19 04 ELA Grant PC

2002-SC-0923-MR

RUSSELL B. HILL — APPELLANT

V.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEVEN L. BATES, JUDGE
02-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Russell (Rusty) Hill, was convicted of murder, burglary in the first degree, and wanton endangerment in the first degree. He was sentenced to life imprisonment without the benefit of parole and now appeals to this Court as a matter of right.[1]

Appellant and Cassandra (Tessy) Hill were married in 1982 and had two daughters. In May of 2001, Tessy renewed her friendship with the victim, Paul Sharon, with whom she worked at a local retail store. She began spending time with Sharon and often brought her children along during their visits. Over time a romantic relationship developed between Tessy and Sharon.

---

[1] Ky. Const. § 110(2)(b).

Appellant worked as a long-distance truck driver, and he learned of the relationship between his wife and Paul Sharon through his daughters. Appellant confronted Tessy about her relationship with Sharon several times and pleaded with her to stop seeing him.

Appellant met Sharon in a hospital parking lot in mid-January and said that he and Tessy had been getting along better and wanted to work things out. Sharon responded that he and she were just friends and told Appellant that he was not going to stop seeing her. Appellant informed Sheriff Hammond that he had run into Sharon and that they had had words, and that he thought things were heating up between them.

As a result of the verbal encounter with Appellant, Sharon telephoned Sheriff Hammond stating that he and Appellant had words in the hospital parking lot and that Appellant had left messages on his answering machine that he wanted the sheriff to hear. Sharon reported that he thought things between Appellant and he were getting serious. The sheriff listened to the phone messages, which referred to Appellant's knowledge of the Sharon and Tessy relationship. Sharon then filed criminal charges of terroristic threatening against Appellant over the events that occurred in the hospital parking lot. The sheriff's office contacted Appellant and requested that he turn in all his guns. Appellant purported to comply with the sheriff's request and his guns were locked up at the sheriff's office.

On February 23, 2001, Tessy arrived home from work about 5 p.m. Appellant was nervous and worried because he knew she played cards at Sharon's home every Saturday night. Appellant pleaded with her not to go to Sharon's to play cards, but she responded that she was going anyway. Appellant then drove his

younger daughter to her friend's house and dropped her off. He then drove to Sparta and purchased a 12-pack of beer and a pint of blackberry brandy. Returning to Owenton, he parked at Slumber Jay's and drank four or five beers while watching traffic.

About 6:15 p.m. Tessy went to Sharon's home where she found Sharon's wife, Teresa, and his two children present. Later that evening Brian Minch arrived and began to play cards with Tessy, Sharon, and Teresa in the kitchen. During a break in card play, Minch observed Sharon and Tessy smoking outside and kissing. After card play resumed, Appellant suddenly entered Sharon's home through a sliding glass door. He was carrying an AK-47 assault rifle. Appellant entered the kitchen and ordered Sharon to tell his wife what had been going on outside on the porch between himself and Tessy. Tessy then jumped up and attempted to grab the gun from Appellant. He told everyone to sit down and said that he had been outside watching for two hours.

One of Sharon's daughters, Mary Rose, ran into the bathroom with the phone and called the mother of a schoolmate for help. Sharon got up, picked up the kitchen phone, and told his daughter to get off the phone. At that point, Minch and Teresa ran from the room. Teresa entered the basement of the home, locked herself in, and telephoned 911 after hearing gunfire. Minch telephoned 911 while leaving in his car, but he never heard any shots fired.

At trial, slightly differing accounts of the events were presented by Sharon's daughter, Mary Rose Sharon, Tessy Hill, and Appellant's daughter, Curee Hill. Sharon's daughter testified that after she came out of the bathroom, Appellant shot her father while he was running toward her. She testified that Appellant stated, "the son-of-

bitch isn't dead," and then shot him in the head. She then said that she went into her brother's room, and that she and her brother left the home through the window.

Tessy testified that she and Appellant were struggling over the gun when it fired and hit Sharon. Appellant approached the wounded Sharon and nudged him with his foot. Tessy said that Appellant did not say anything, but the gun went off twice more. Appellant then attempted to shoot himself but Tessy moved the gun causing it to fire into the ceiling.

Appellant's daughter, Curee Hill, and her boyfriend came into Sharon's home after receiving a phone call from the mother of Sharon's daughter's schoolmate. Curee and her boyfriend entered Sharon's home to find the events transpiring and left almost immediately. Tessy and Appellant remained in the home as the police gathered outside and Appellant telephoned several people. The police pleaded with Appellant to give himself up. The next morning, Appellant left the house and was taken into custody.

At trial, the medical examiner testified that Sharon died of any of three gunshot wounds, each individually sufficient to be fatal. One was to the back, one was to the shoulder, and one was to the head. At trial, Appellant put on an intoxication defense and presented a claim of extreme emotional disturbance (EED). Further facts will be developed below as necessary.

Appellant alleges that the trial court committed the following reversible errors: (1) the verdict form was improper and impermissibly barred consideration of the entire authorized sentencing range; (2) the prosecutor improperly and prejudicially "testified" about facts not in evidence and personally vouched for the credibility of a key prosecution witness; and (3) Appellant was denied his due process right to a fair trial by

the introduction of unfairly prejudicial other crimes evidence. All issues are unpreserved and Appellant asks that we review them under RCr 10.26 for palpable error.

As all of Appellant's unpreserved arguments will be scrutinized under the palpable error standard, it is necessary to briefly describe the requirements of that standard. The often-cited standard for palpable error is as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.[2]

A palpable error is one that affects the substantial rights of a party and relief will only be granted if "a substantial possibility exists that the result would have been different" if the error had not occurred.[3]

Appellant's first argument is that at the conclusion of the penalty phase the trial court erred in giving instruction on the penalty range applicable for capital murder.[4] Appellant argues that the jury could not complete the verdict form that found

---

[2] RCr 10.26.

[3] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

[4] Verdict Form No. "1" is as follows:

Murder
No. 1

We, the jury, fix the Defendant Russell B. Hill's punishment for the Murder of Paul Sharon at:

Confinement in the penitentiary for a term of years of not less than twenty (20) years nor more than fifty (50) years.

_____ years.

_____
Foreperson

No. 2

We, the jury, fix the Defendant Russell B. Hill's punishment for the Murder of Paul Sharon at confinement in the penitentiary for life

an aggravating circumstance without fixing an aggravated penalty. He reasons that finding an aggravating circumstance using the verdict form in this case barred the imposition of a sentence of a term of years or life imprisonment. He asserts that even if an aggravator is found, the jury still has the discretion to decide whether an aggravated sentence is appropriate.

In response, the Commonwealth argues that while the language used in the form verdicts is disfavored, the use of such language is not prejudicial or reversible error. To support this proposition the Commonwealth offers Haight v. Commonwealth,[5] Foley v. Commonwealth[6] (Foley I), Foley v. Commonwealth[7] (Foley II), and Slaven v. Commonwealth.[8] The Commonwealth contends that since the same instruction has

---

Foreperson

No. 3

We, the jury, find beyond a reasonable doubt that the aggravating circumstance described in Instruction No. 3, "The offense of Murder was committed while Defendant was engaged in the commission of the First-Degree Burglary" (CLEARLY CIRCLE ONE OF THE FOLLOWING):

HAS
HAS NOT

been proven from the evidence beyond a reasonable doubt.

We, the jury, fix the Defendant Russell B. Hill's punishment for the Murder of Paul Sharon at (Clearly Circle A or B)

A. Confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence.

OR

B. Confinement in the penitentiary for life without benefit of probation or parole.

Foreperson

[5] Ky., 938 S.W.2d 243 (1996).
[6] Ky., 942 S.W.2d 876, 888-89 (1996).
[7] Ky., 953 S.W.2d 924, 942 (1997).
[8] Ky., 962 S.W.2d 845, 859-60 (1997).

been held to be neither prejudicial nor reversible error, it does not amount to palpable error resulting in manifest injustice.

Undoubtedly, the verdict forms provided to the jury are disfavored.[9] However, we have affirmed convictions using such a form and in any event there is a long line of precedent holding that unpreserved error in the verdict form does not amount to manifest injustice.[10] It is also clear from Instruction No. 4 "Authorized Sentences" that the jury may choose among the four authorized punishments, but that life without parole or LWOP/25 is permissible only if aggravating circumstances are found beyond a reasonable doubt.[11] The language of the Authorized Sentences

---

[9] Haight, 938 S.W.2d at 249 (holding that a modified verdict form would be a better practice, but there was no prejudice).

[10] Id.; Foley I, supra. at 888-89; Foley II, supra. at 942; Slaven, 962 S.W.2d 859-60 (holding "we do not deem use of Sec. 12.10 [1 Cooper Kentucky Instructions to Juries (Criminal)(1993 ed.)] forms to be reversible error"); Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992), *cert. denied*, 507 U.S.1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993), *overruled on other grounds*, St. Clair v. Roark, Ky., 10 S.W.3d 482 (1999).

[11] Instruction No. 4 is as follows:

AUTHORIZED SENTENCES

You may fix the Defendant's punishment for the Murder of Paul Sharon at:

(1) Confinement in the penitentiary for a term of not less than twenty (20) years nor more than fifty (50) years;
OR
(2) Confinement in the penitentiary for life;
OR
(3) Confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence;
OR
(4) Confinement in the penitentiary for life without benefit of probation or parole.

But you cannot fix his sentence at confinement in the penitentiary for life without benefit of probation or parole, or at confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence, unless you are satisfied from the evidence beyond a reasonable doubt that the statement listed in Instruction No. 3 (Aggravating Circumstance) is true in its entirety, in which event you must state in writing,

section permits a jury to choose and does not mandate a particular sentence. Moreover, considering the overwhelming evidence against Appellant there is no "substantial possibility" that the results would have been any different if the verdict forms had been perfect.

Appellant's second argument is that the Commonwealth's Attorney improperly "testified" to facts not in evidence and personally vouched for the credibility of a witness. Appellant claims that the Commonwealth's Attorney made several improper statements including one pertaining to the safety device on Appellant's rifle.

> Somebody knocked the safety off of it, and you are going to get it back there and you are going to find out that the safety on this thing takes some deliberate actions to take off. Now, I've got a shotgun, twenty-gauge, it's got a little old button when I'm rabbit hunting, I have to be concerned all of the time that I don't knock that thing off. You don't have that problem with this one. It takes a very deliberate act to take that safety off. TE 681-682.

The Commonwealth's Attorney also referred to his personal experiences with alcohol because of the considerable evidence of Appellant's drinking on the night in question. As previously noted, Appellant was given an instruction on the defense of intoxication. In his argument concerning Appellant's intoxication defense, the prosecutor commented as follows:

> Let me start with intoxication. First of all, common sense the defense counsel talking to you about, common sense. Well, thank God we've got it and thank God people apply it. Common sense. We've all drank, some of us, I'll plead I have, and I'll plead I've drank too much. I'm going to tell you that I have done some bad things drinking, but I have never drank so much that I didn't know what I was doing and I was completely and totally beyond knowing anything. TE 690.
>
> * * * *

---

signed by the foreman, that you find the aggravating circumstance to be true beyond a reasonable doubt.

> Because these officers are around him [Appellant] when he comes out of the house and they don't see any of that. They don't see any indication of it. So, the bottom line here is that this intoxication defense is a crock. TE 694.

The Commonwealth's Attorney's other comments were made during the penalty phase and concerned the impact of the murder on Sharon's family. The Commonwealth's Attorney made comments that Sharon's thirteen-year-old child, his eleven-year-old son, his sister, father, mother, and his wife's side of the family could not come to the stand and tell the jury the impact of his death upon them.

Appellant also contends that the prosecutor personally vouched for the credibility of a key witness and the victim's daughter, Mary Rose. His statements were as follows:

> You are going to be the ultimate judge of her credibility, but I have tried a lot of cases, I've called a lot of people to the stand, I've called a lot of people to the stand, I've crossed them, cross-examined a lot of people. I suggest to you that that little girl was credible. I suggest to you more than any grownup that testified in this case, that girl's testimony as she told it to you was one hundred percent accurate. And if you believe her testimony, then the Defendant is guilty of murder. . . . TE 697-698.

Upon a claim of improper prosecutorial comments during argument "we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law."[12]

> Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair.[13]

---

[12] Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1988) (*citing* Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).
[13] Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 805 (2001) *cert. den.* 535 U.S. 1059, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002).

This Court has noted:

> Great leeway is allowed to both counsel in a closing argument. It is just that—an argument. A prosecutor may comment on tactics, may comment on evidence, and may comment as to falsity of a defense position.[14]

A prosecutor has the leeway to "draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilty."[15]

The Commonwealth's Attorney's comments concerning the safety device on the rifle did not result in manifest injustice as he was describing the functioning of the murder weapon, an item in evidence. Similarly, there was no manifest injustice in the prosecutor's discussion of the effects of alcohol on Appellant as there was differing testimony as to whether he was or was not intoxicated. The comments of the prosecutor appear to be arguments upon contested issues. The prosecutor's comments relating to the credibility of Sharon's daughter concomitantly did not result in manifest injustice or render this trial so fundamentally unfair as to violate Appellant's due process rights. Considering the testimony of all witnesses who watched and reported in detail how Appellant committed the murder, there is no chance that these comments resulted in manifest injustice.

Appellant's final argument is that he was denied his rights to due process and a fair trial by the introduction of other crimes evidence. Appellant claims that despite the testimony of four eyewitnesses, improperly admitted other crimes evidence "comprised the bulk of the prosecution's case."

---

[14] Slaughter, 744 S.W.2d at 412 (holding that the remarks here were well within the proper bounds allowed by the prosecutor and did not affect the outcome of trial).
[15] Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 1998 (*citing* Bills v. Commonwealth, Ky., 851 S.W.2d 466 (1993)).

Appellant notes that there was considerable testimony concerning the incident between Appellant and Sharon in the hospital parking lot and the telephone messages that Appellant left on Sharon's answering machine. There was testimony about Sharon seeking legal advice from the sheriff and county attorney and the terroristic threatening complaint filed more than five weeks earlier. There was testimony about the removal of Appellant's guns from his home and car. Brian Minch testified that Appellant had followed him on two occasions prior to the shooting and that he had reported this to Sharon. Appellant's wife testified as to his lying about having cancer, an argument they had over their daughter's whereabouts, and about their marital problems generally. Finally, there was testimony about an ambulance run to Appellant's home five weeks prior to the shooting, due to Appellant's chest pains. The Commonwealth filed a pretrial motion with notice of its intent to introduce KRE 404(b) evidence and Appellant made no objection.

Evidence of other crimes, wrongs or acts under KRE 404(b) is inadmissible to prove "the character of a person in order to show action in conformity therewith." Such evidence may be admitted, however, "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[16] It is within the "sound discretion" of the trial judge to exclude such evidence if "its probative value is substantially outweighed by the danger of unfair prejudice."[17] Of course, in the present case due to lack of preservation, the evidence of prior acts must amount to manifest injustice necessary to

[16] KRE 404(b)(1).
[17] KRE 403; English v. Commonwealth, Ky., 993 S.W.2d 941, 945 (1999).

create a substantial possibility that the result would have been different had this evidence been excluded.

Upon the whole of the case, there is no doubt that Appellant received a fundamentally fair trial. A fundamentally fair trial does not necessarily mean a perfect trial.[18] Appellant has failed to demonstrate manifest injustice requisite for relief under the palpable error rule,[19] and we affirm his conviction and sentence in its entirety.

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

---

[18] Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).
[19] RCr 10.26.

COUNSEL FOR APPELLANT:

Donna L. Boyce
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
J. Gary Bale
Assistant Attorneys General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204