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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0802-MR

DATE 7-8-04 Ella Grau D.C.

BETTY ANN FOPMA APPELLANT

V.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR.
01-CR-00089

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

FACTS

Appellant, Betty Ann Fopma, was convicted in the Perry Circuit Court of First-Degree Manslaughter. The trial court fixed her sentence in accordance with the jury recommendation, at a maximum term of 20 years imprisonment. Appellant appeals to this Court as a matter of right, alleging a number of claimed errors involving (1) the jury instructions on self-defense, (2) the competency of a key witness, (3) venue, and (4) the admissibility of videotape narration.

The events leading to the trial and conviction of Appellant occurred on March 9, 2001, at a Hazard saloon called "The Broke Spoke Tavern." Appellant and Cheryl Baker quarreled intermittently inside the bar, until Appellant suggested that they settle

their differences outside. Once outside, several witnesses observed Appellant kicking the victim in the head, face and neck. The medical examiner later determined that the victim died from a blunt-force injury to her neck.

I. Jury Instructions

The jury was instructed on Murder, First and Second-Degree Manslaughter, and Reckless Homicide. Each instruction required the Commonwealth to prove beyond a reasonable doubt that Appellant was not privileged to act in self-protection, and the trial court submitted a separate instruction which properly explained the basis of this privilege. However, at the request of both parties, the trial court omitted any reference to the erroneous belief qualifications provided by KRS 503.120(1). Appellant now claims that the trial court's decision to delete this instruction denied her the right to a fair trial.

The erroneous belief qualification, colloquially known as the "imperfect self-defense," does not provide for complete exoneration, but instead allows a jury to convict a defendant for a lesser offense, one for which wantonness or recklessness is the culpable mental state. Elliott v. Commonwealth, Ky., 976 S.W.2d 416, 420 (1998). Appellant complains that the self-protection instruction given in this case was not stated within the proper statutory framework because it did not include directions for the jurors should they have concluded that Appellant believed in the need for self-protection.

A trial court has a duty to instruct the jury on the whole law of the case. See, e.g., Garland v. Commonwealth, Ky., 127 S.W.3d 529 (2003). Here though, Appellant intentionally waived her right to the erroneous belief qualification and the omission of this instruction could only have worked in her favor. If the jury had determined that Appellant held *any* subjective belief in the need for self-protection, the omission of the

wanton and reckless belief qualifications would have compelled the jury to *acquit* Appellant, rather than convict her of a lesser-included offense.

Appellant gained an advantage at trial that was not contemplated by statute. The Commonwealth inexplicably agreed to waive these instructions. Any error by the trial court in striking the wanton and reckless belief qualifications from the instructions submitted to the jury is therefore harmless. RCr 9.24.

II. Witness Competency

Appellant argues that the trial court erred by failing to strike the testimony of Bert Stacy, a witness who testified that Appellant made threatening statements regarding the victim. Shortly before the homicide occurred, Appellant allegedly told Mr. Stacy that she planned to "kill that f___ing bitch." Appellant claims that Mr. Stacy was incompetent to testify because he could not properly recollect events and that he was a "noted fabricator of stories."

Competency determinations are governed by KRE 601, which begins with the presumption that all witnesses are competent to testify. The rule then sets forth several exceptions. KRE 601(b)(2) states that a person shall be disqualified to testify if the court determines that the witness "[l]acks the capacity to recollect facts." Likewise, a person may be disqualified who "[l]acks the capacity to understand the obligation of a witness to tell the truth." KRE 601(b)(4).

Only rarely will witnesses be declared incompetent to testify. As the Commentary to KRE 601 explains:

> This provision serves to establish a minimum standard of testimonial competency for witnesses. It is designed to empower the trial judge to exclude the testimony of a witness who is so mentally incapacitated or so

> mentally immature that no testimony of probative worth could be expected from the witness. It should be applied grudgingly, only against the "incapable" witness and never against the "incredible" witness, since the triers of fact are particularly adept at judging credibility.

Our review of the record reveals attempts by defense counsel to discredit the accuracy and veracity of Mr. Stacy's testimony, primarily by juxtaposing his in-court testimony with statements he made shortly after the victim's death. Such evidentiary inconsistencies go to the credibility of the witness, rather than to the witness' competence to testify. Price v. Commonwealth, Ky., 31 S.W.3d 885, 891 (2000). Furthermore, whether Mr. Stacy's version of the events at the Broke Spoke reflects an utter inability to remember real events, or to truthfully relate them, is a question best left to the sound discretion of the trial judge. Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 525 (2002); Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978). Accordingly, we find no abuse of discretion in this matter.

III. Venue

The circumstances surrounding Appellant's pending trial received substantial media publicity in and around Perry County, heightened in this case because of the death of the victim's brother, which occurred only two days before the victim met her own untimely demise. Appellant claims this pretrial publicity permeated the entire proceedings, denying her an impartial jury and creating bias in favor of her conviction.

A defendant is entitled to a change in venue when "public opinion is so aroused as to preclude a fair trial." Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384, 387 (1985), cert. denied, 476 U.S. 1153 (1986). However, "'the mere fact that jurors may have heard, talked, or read about a case' does not require a change of venue, 'absent a

showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant.'" Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 716 (1991), quoting Brewster v. Commonwealth, Ky., 568 S.W.2d 232, 235 (1978).

In the case *sub judice*, the trial court conducted individual voir dire with each of the potential jurors in order to discern the effects of pre-trial publicity. Although nearly every juror professed some familiarity with the case, only two jurors, who were struck for cause, expressed any hesitancy when questioned about their ability to serve as impartial arbiters. Voir dire revealed no hint of the pervasive animosity or prejudgment of the facts which would necessitate a change in venue. See Jacobs v. Commonwealth, Ky., 870 S.W.2d 412 (1994).

The decision of whether to grant a change of venue is within the discretion of the trial court. Gill v. Commonwealth, Ky., 7 S.W.3d 365, 369, cert. denied, 531 U.S. 830 (2000). We will not disturb the trial court's decision on appeal absent a clear abuse of this discretion. Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 298, cert. denied, 522 U.S. 986 (1997). The record demonstrates that Appellant was not denied a fair and impartial jury. We therefore find no abuse of discretion in the trial court's denial of Appellant's motion to change venue.

IV. Videotape Narration

Finally, Appellant argues that the trial court should not have allowed several witnesses to narrate a security videotape of the Broke Spoke, recorded on the night of the incident. The tape was originally played for the jury without narration. Later, the trial court allowed witnesses to identify individuals seen on the video. Appellant now

claims the witnesses were given excessive leeway in their testimony, some witnesses going so far as to give their impressions of what they viewed on tape, rather than letting the jurors interpret this evidence for themselves.

KRE 701 permits opinion testimony by lay witnesses if the witness' testimony "is limited to those opinions or inferences which are: (a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999), cert. denied, 528 U.S. 1164 (2000), this Court concluded that a police officer's narration of a crime scene video was appropriate lay testimony under KRE 701, where the officer's testimony helped the jury to evaluate the images displayed on the videotape. Id. at 489.

In the present matter, witnesses identified both Appellant and the victim in the videotape. As lay opinion, this testimony helped the jury to analyze the video in order to assess the events shown which preceded the victim's death. See generally Brent G. Filbert, Annotation, Admissibility of Lay Witness Interpretation of Surveillance Photograph or Videotape, 74 A.L.R. 5th 643 (2004) (stating that "the current trend is to admit lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape").

Although the prosecutor at times asked witnesses to more fully describe the events seen on the videotape, our review shows that the objections by defense counsel were promptly sustained. These brief comments were not so excessive as to invade the province of the jury in the interpretation of the surveillance video. We therefore find any error in this matter harmless. RCr 9.24.

For the reasons set forth in this opinion, the judgment and sentence are hereby affirmed.

All concur.

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