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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-14-04 ENAGrowith, D.C.

2003-SC-0356-MR

JERRY COLLINS HUNN — APPELLANT

V.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN PECKLER, JUDGE
CASE NO. 01-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This matter-of-right criminal appeal arises from a judgment of the Boyle Circuit Court, which imposed a twenty-five year sentence against Jerry C. Hunn, the appellant herein, following his conviction for the murder of Ralph Coulter, Jr. For the reasons set forth below, we reverse and remand for a new trial.

On March 30, 2001, the appellant and Coulter were both in attendance at a small gathering in an apartment in Danville. While there, it is alleged that the appellant and Coulter became embroiled in an argument over a previous wager made on a college basketball game. The two men purportedly reconciled their differences soon thereafter. At approximately 1:45 a.m. the next morning, on March 31, 2001, the appellant left the apartment accompanied by Coulter and two other individuals, Marti Bradshaw and

Richard Elmore, and drove to another apartment complex in Danville in order to procure some drugs.

After arriving at the apartment complex, Coulter went inside one of the apartments and purchased crack cocaine. Once Coulter returned to the vehicle, Bradshaw apparently retrieved the drugs from Coulter and informed him that he had purchased the wrong type of drugs. A verbal dispute then ensued between Coulter and Bradshaw after Bradshaw refused to share any of the crack cocaine with Coulter.

A short time later, the appellant dropped off Coulter at another apartment complex. The appellant then proceeded to drive away, but elected to stop the vehicle at Bradshaw's request. The appellant, Bradshaw, and Elmore exited the car and confronted Coulter. At first, Coulter and Bradshaw continued the dispute they were having in the car regarding the drugs. However, Coulter began arguing with the appellant instead and supposedly threatened to take the appellant's money from him. The dispute then came to a disastrous end when the appellant shot Coulter dead with his .22 caliber handgun.

On May 30, 2001, the Boyle County Grand Jury returned a true bill charging the appellant with Coulter's murder. On March 19, 2003, a Boyle Circuit Court jury convicted the appellant on the murder charge and recommended that he be sentenced to a prison term of twenty-five years. The trial court subsequently adopted the recommendation of the jury and sentenced the appellant accordingly. This appeal followed as a matter of right. Ky. Const. § 110(2)(b).

The appellant alleges three points of error in this appeal. We shall address each in turn.

I.

At trial, the appellant wished to give testimony regarding his personal knowledge of the victim's reputation for violence. However, the trial court sustained the Commonwealth's objection to this testimony because it was too remote in time. It is the appellant's position that the trial court's ruling on this issue was erroneous. Essentially, the appellant contends that this testimony should have been put to the jury in order for it to decide if he had a justifiable fear of Coulter, thus believing he had to use deadly force to protect himself from harm.

> 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 or threats, provided that the defendant knew of such acts, threats, or statements at the time of the encounter.

Robert G. Lawson, The Kentucky Evidence Law Handbook, Sec.2.15, at 105-106 (4th ed. 2003).

On avowal, the appellant testified that he witnessed Coulter engage in numerous fights during and after high school, which Coulter attended in the mid to late eighties.

The trial court's ruling was based on a finding that this evidence was simply too remote in time. We note that "[r]emoteness is a matter of degree, a relative concept with no fixed standard, the determination of which is usually a discretionary matter for the trial court." Mason v. Stengell, Ky., 441 S.W.2d 412, 415 (1969). The trial court here did not abuse its discretion by excluding the evidence as too remote in time. This is especially true considering that the evidence dates to Coulter's high school years which were as much as fifteen years prior to the events which led to these criminal charges. Therefore, under the circumstances, we find no error in the court's ruling with respect to this issue.

II.

During voir dire, two members of the venire conveyed that they had previously hired the prosecuting attorneys to perform legal work. One member of the jury panel, Juror No. 16, informed the trial court that the assistant prosecutor, William L. Stevens, had performed the deed work on a real estate transaction for him seven months earlier. Juror No. 16 stated that he would return to Stevens for legal work in the future. Another member of the jury panel, Juror No. 9, indicated that the lead prosecutor, Commonwealth's Attorney Richard L. Bottoms, had prepared a will for her five or six years ago. She further indicated that she would return to Bottoms for future legal work. Juror No. 16 did not sit on the jury that convicted the appellant, as he was removed via a peremptory challenge by the appellant's trial counsel. Juror No. 9, on the other hand, was not removed from the panel, and sat on the jury that convicted the appellant.

"[A] trial court is required to disqualify for cause prospective jurors who had a prior professional relationship with a prosecuting attorney and who profess that they would seek such a relationship in the future." Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 938 (1999) (citing Riddle v. Commonwealth, Ky. App., 864 S.W.2d 308 (1993)).

In Fugate, supra, we determined that a juror who had a living will prepared by the prosecuting attorney four to five years earlier, and stated that he might use the attorney again, should have been disqualified for cause. Id. at 938. Here, both Juror No. 16 and Juror No. 9 stated that they had hired one of the prosecuting attorneys to perform legal work in the past. Moreover, both jurors indicated that they would seek legal services from the prosecuting attorneys in the future. Consequently, it was erroneous on the part of the trial court to refuse to disqualify Juror No. 16 and Juror No. 9 from the jury panel.

Additionally, with regard to the appellant's use of one of his peremptory challenges to remove Juror No. 16 from the venire, we observe that "it has always been the law in Kentucky 'that prejudice is presumed, and the defendant is entitled to a reversal in those cases where a defendant is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause.'" Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 374 (2002) (quoting Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 259 (1993)).

We also observe that the Commonwealth cites this Court to our opinion in Cochran v. Commonwealth, Ky., 114 S.W.3d 837 (2003), and basically attempts to analogize that case with the one at bar. However, the Commonwealth's comparison of the Cochran opinion with this case is misplaced. In Cochran, we determined that the trial court did not abuse its discretion in failing to strike a juror for cause. However, unlike the jurors here, the juror in Cochran did not have an attorney-client relationship with the prosecuting attorney. Rather, the juror in Cochran was a crime victim who worked with the Commonwealth's Attorney's office in preparing a case to be submitted to the Rowan County Grand Jury. Id. at 840. Further, the juror in Cochran "worked primarily with the Commonwealth's Attorney victim advocate, rather than with the Commonwealth's Attorney himself." Id. Accordingly, it is clear that Cochran is not on point.

Applying our decision in Fugate, supra, we hold that the trial court's failure to strike the jurors for cause was reversible error. In view of that, this case must be reversed and remanded for a new trial.

III.

Lastly, the appellant posits that the trial court should have declared a mistrial due to the emotional outbursts of the victim's family during trial. In one instance, during the appellant's testimony, a comment by the victim's mother regarding the appellant's veracity was uttered within the audible range of the jury.

In order for a trial court to grant a party's motion for a mistrial, a "manifest necessity" or an "urgent and real necessity" must appear in the record. See Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166, 168 (1978). We have scrutinized the record, and we find no "manifest necessity" therein supporting the appellant's position that a mistrial should have been declared in this case. Although we are troubled by the outbursts -- the comment made by the victim's mother in particular -- we do not believe such outbursts were overly prejudicial to the appellant's case, nor do we believe that the jury was unduly influenced. Consequently, we conclude that the trial court did not abuse its discretion in denying the appellant's motion for a mistrial.

For the reasons stated, the judgment of conviction is reversed and this case is remanded to the Boyle Circuit Court for a new trial.

Lambert, C.J.; Cooper, Johnstone, and Stumbo concur. Graves, Keller, and Wintersheimer, JJ., dissent without opinion.

COUNSEL FOR APPELLANT:

Misty Dugger
Department of Public Advocacy
Assistant Public Advocate
100 Fair Oaks Lane Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General
Room 118, Capitol Building
Frankfort, KY 40601

John R. Tarter
Office of the Attorney General
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601