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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0680-MR

CARLOS FREEMAN — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
2001-CR-1034

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Carlos Freeman, was convicted of one count of Wanton Murder and one count of First-Degree Burglary, and was sentenced to thirty years. Appellant appeals to this court as a matter-of right,[1] and asserts the following claims of error: (1) the trial court abused its discretion when it dismissed Juror 437 as an alternate; (2) the trial court improperly permitted the introduction of 404(b) evidence; and (3) the Wanton Murder instruction issued to the jury was improper as it did not require a determination of whether Appellant was the principal or the accomplice. After a thorough review of the record, we find Appellant's contentions meritless and affirm his conviction.

II. FACTUAL BACKGROUND

On June 30, 1997, three men robbed the Swifty Gas Station on North Broadway in Lexington, Kentucky, and in the course of the robbery, employee Jessie Romans was

[1] Ky. Const.§ 110(2)(b).

shot and killed. The investigation of the robbery and murder took over three years and eventually implicated Appellant, Dedric Brown (hereinafter "Brown"), and Ronald Bolden (hereinafter "Bolden"). Brown and Bolden were apprehended quickly, and Appellant was arrested in early 2000 based on information provided by Brown and Bolden. The investigation period was so lengthy, in part, because Brown's initial statement to police implicated Bolden as the shooter. Brown later changed his story to implicate Appellant as the shooter.

The jury convicted Appellant on charges of Wanton Murder and First-Degree Burglary. The jury recommended sentences of twenty years and ten years respectively to run consecutively for a total of thirty years, and the trial court entered a judgment and sentence accordingly

III. ANALYSIS

A. Excusing Juror 437 as an Alternate

During the testimony of Johnny Freeman, Juror 437 informed the court that she had "an issue" in that she had been his childhood friend. Juror 437 stated that this relationship would not affect her ability to be fair and impartial, but she also later indicated that her cousin was attending the trial in support of Appellant's family and was actually seated with Appellant's family in the courtroom. The Commonwealth raised concerns about the relationship between the witness and Freeman and requested her dismissal as an alternate juror. After the trial court issued jury instructions and the defense attorney gave his closing argument, the Commonwealth moved the trial court to remove Juror 437 from the jury as an alternate and the trial court granted the motion, based on the belief that if Appellant were found guilty, although Juror 437 maintained

that she could remain unbiased, she would have a very difficult time remaining unbiased if she had to consider the death penalty during the penalty phase.

Appellant contends that the trial court's decision to dismiss Juror 437 was improper because designating her as the alternate juror violated the principle of random jury selection and because a sufficient reason to excuse her for cause was not presented.

"[T]he law is clear that a trial court may remove a juror for cause at the conclusion of the evidence as an alternate juror without violating the rule [of randomness]."[2] As this Court stated in Hodge v. Commonwealth,[3] the primary purpose for seating alternate jurors is to ensure that at least 12 qualified jurors will be available to deliberate a verdict at the conclusion of the trial, despite the inevitable, yet unforeseen, circumstances that attend lengthy trials. This aids judicial economy and avoids the expense of beginning the entire trial process anew.[4]

In this case, several circumstances came to light and favored dismissing the juror for cause: (1) she had been a childhood friend of a key prosecution witness; (2) her cousin was sitting with Appellant's family during the trial as a "supporting friend"; (3) Appellant's mother was also a childhood friend; and (4) a bailiff reported to the Commonwealth's Attorney that during a break, he witnessed Juror 437 conversing with an individual he believed to be a member of the Freeman family. Although Juror 437 provided assurances otherwise, these circumstances were enough to cast doubt on her

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[2] Lester v. Commonwealth, Ky., 132 S.W.3d 857, 863 (2004) (citing Hubbard v. Commonwealth, Ky.App., 932 S.W.2d 381, 382 (1996)).

[3] Ky., 17 S.W.3d 824 (2000), cert. denied 531 U.S. 1018, 121 S.Ct. 581, 148 L.Ed.2d 498 (2000).

[4] CR 47.02.

ability to remain unbiased since bias may be implied "from any close relationship, familial, financial or situational, with any party, counsel, victim, or witness."[5] Although Appellant argues that the potential bias arising from the past relationship with the witness should not be enough to prompt Juror 437's dismissal, since Freeman was a witness for the prosecution, this argument is non sequitur as any bias "transgresses the concept of a fair and impartial jury."[6] Further, the relationship between the juror's family and Appellant is an additional factor to be considered in examining the witness's potential bias. Whether a juror should be excused for cause is a matter that lies within the sound discretion of the trial court, and such a decision will only be reversed upon a showing that the trial court abused its discretion.[7] The trial court had ample reason to remove the juror for cause, and it did not abuse its discretion.

As the circumstances which led to Juror 437's dismissal did not arise until the trial was underway, the trial court appropriately determined that excusing Juror 437 as the alternate juror was the most effective method of remedying the situation. Trial courts have properly exercised this discretion in the past in order to rectify potential juror issues that arise after the conclusion of voir dire. For example, in Hubbard v. Commonwealth,[8] a trial court excused a juror due to strong religious bias discovered at the close of evidence. The Court of Appeals held that excusing the juror as an alternate did not interfere with the randomness of the jury selection process. In McQueen v.

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[5] Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985).

[6] Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991).

[7] Foley v. Commonwealth, Ky., 953 S.W.2d 924, 931 (1997).

[8] Ky. App., 932 S.W. 2d 381 (1996).

Commonwealth,[9] a juror violated an admonition not to discuss the trial with outside parties and she was then dismissed as an alternate. In these instances, the judge became aware of information about, or actions taken by, a juror after the trial had commenced that would render the individual unsuitable for jury duty.[10] It was appropriate for these courts to utilize the alternate juror system to remedy the situation in this way, rather than incur the costs of impaneling another jury or risk the possibility of allowing an unfair or biased juror to remain in the jury box.

We disagree with Appellant's contention that the trial court violated the principle of randomness and that the juror was not properly removed for cause, and as such the trial court did not abuse its discretion. As the revelations that Juror 437 was acquainted with Freeman and that her cousin was seated with Appellant's family was unexpected and occurred during the course of the trial, the trial court's dismissal of Juror 437 as an alternate was in keeping with the primary purpose of the alternate juror system. Although Appellant makes much of the fact that Juror 437's dismissal removed the only black juror on the panel, this argument is the proverbial red herring as it is clear from the discussion above that the basis for her removal was entirely proper.

B. The Note

One of the principal witnesses at trial was Appellant's uncle, Johnny Freeman. Johnny Freeman testified that while he and Appellant shared a cell at the jail in Grayson County, Appellant admitted to committing the murder. At trial, Freeman testified that

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[9] Ky., 669 S.W.2d 519 (1984), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L.Ed.2d 205 (1984).

[10] See also Johnson v. Commonwealth, Ky., 892 S.W.2d 558 (1994) (holding insistence by a juror that he be excused to be been sufficient reason to depart from the normal rule of randomness); Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990) (holding illness to be sufficient reason to remove a juror).

while he and Appellant were incarcerated, Appellant gave him a short note, which directed Freeman to speak with Brown in order to inform Brown that Appellant was facing the death penalty and to implore him to maintain the first story that he had given to police, which named Bolden as the shooter. Though Appellant did not object to the reading of the letter at trial, he now claims that the trial court committed palpable error in permitting the prosecutor to have certain portions of the note read into evidence because, Appellant contends, the note "included the phrasing that [Brown] better 'tell the same story' or he would be 'in worse trouble,'" with the clear implication being that Appellant would harm Brown if he did not testify appropriately according to Appellant's wishes. Appellant claims that the introduction of the note violated KRE 404(b) and was more prejudicial than probative.

The note does not appear to be included in the record on appeal, but it was read to the jury during Johnny Freeman's testimony. Based on the tape recording of the trial, which was included in the record, the note appears to read:

> Just talk to him [Brown]. Don't give this paper to him because he might trip on . . . the death penalty because he don't, he done made two or three different statements. The first statement, I [Appellant] got the gun, and the other one, Spoony [Bolden] got the gun. He know which one he's supposed to use. He better use the right one coming Monday or else I'm finished. You come out, I need you to talk to D.J.[Brown]. Tell him all he got to say is that he was in the car and Spoony had the gun when he came back to the car. Don't let these people trick you, I'm facing the death penalty.[11]

The letter includes no threat that Brown would be "worse off" if he changes his testimony. Just before he read the note into evidence, however, Johnny Freeman recounted a conversation during which he was present and where Appellant told Bolden that Brown should stick with his first statement or he would be "worse off." We will chalk

[11] The text omitted in the quotation, as indicated by the ellipsis, consists of several words that are unintelligible.

this up to carelessness on the part of Appellant in reviewing the record, especially since the Commonwealth's brief fails to inform us that Appellant mischaracterized the contents of the note, or mistook the testimony about the conversation for the contents of the note, leading us to believe that the Commonwealth did not engage in even a cursory review of the record.

Because Appellant's trial counsel did not object to the introduction of the letter into evidence, he now requests review under RCr 10.26. In order for an appellate court to reverse on an unpreserved error pursuant to this rule, an appellant must demonstrate that the claimed error is both palpable and that the failure to reverse on that basis will result in a manifest injustice. Thus, the error must be one that affects the substantial rights of the party and it must be likely that the outcome of the trial court have been different but for the unpreserved error. We find this not to be the case, but because the merits of Appellant's claim are readily addressed, we go ahead and do so.

It remains a mystery that any individual could reasonably construe Appellant's statement or the contents of the note as 404(b) evidence. Neither consists of previous bad acts or evidence of character used to show conformity therewith. Thus, it is readily apparent why Appellant's lawyer chose not to object at trial. The statement and the note were clearly admissible pursuant to KRE 801A(b) as both were Appellant's own statement and were being used against him. As to Appellant's claim that the only purpose served by introduction of the letter was to inflame the jury against him and it was more prejudicial than probative, we would simply note that this was a determination made by the trial court that we will not disturb absent an abuse of discretion. Appellant has failed to show such an abuse. As Appellant has failed to demonstrate any error, we

find the trial court's actions in this instance to be proper and Appellant's claim to be without merit.

C. Jury Instructions

Appellant's final claim of error is with respect to the trial court's instruction on Wanton Murder because it failed to distinguish between accomplice and principal criminal liability, whereas in its instructions on Intentional Murder, the court provided three separate instructions, principal, accomplice, and a combination instruction. As to the charge of Wanton Murder, the trial court provided only one instruction, as follows:

> INSTRUCTION NO. 5
> COUNT 1
> WANTON MURDER
>
> If you do not find the Defendant guilty under Instructions No. 2, 3 or 4, you will find the Defendant guilty of Wanton Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about June 30, 1997 and before the finding of the Indictment herein, he voluntarily participated in Robbery;
> B. That during the course of that Robbery and as a consequence thereof, Jessie Romans was shot and killed; AND
> C. That by so participating in that Robbery the Defendant was wantonly engaging in conduct which created a grave risk of death to another and that he thereby caused Jessie Roman's death under circumstances manifesting extreme indifference to human life.
>
> If you find the Defendant guilty under this Instruction, you shall not fix his punishment at this time, but shall return your verdict to the Court without deliberating on the question of punishment.

Appellant claims that the trial court erroneously permitted the jury to convict him of Wanton Murder without requiring the jury to decide which theory of the case it believed: either that Appellant was the shooter, or he was simply a participant in the robbery and some other individual was the actual shooter. Appellant claims that, since

Tharp v. Commonwealth[12] states that an individual can be an accomplice to an unintentional murder, it follows that the trial court should have instructed the jury on accomplice liability with respect to wanton murder as that theory was supported by sufficient evidence.[13] This error is unpreserved and Appellant requests review pursuant to RCr. 10.26.

Appellant's claim of error, however, is once again unfounded. As set forth above, the trial court's instruction to the jury is essentially an accomplice instruction—it requires only that the jury determine that Appellant's participation in the Robbery led to the death of Jessie Romans and, whether or not he actually shot Romans, he could be found guilty of Wanton Murder if his participation in the robbery was wanton conduct that created a grave risk of death to another and that by this participation he caused the death of Jessie Roman under circumstances manifesting extreme indifference to human life. As we stated in Caudill v. Commonwealth,[14] although the common law felony murder charge was abandoned with the adoption of the penal code, under KRS 502.020,[15] an individual's participation in certain dangerous felonies can still serve as

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[12] Ky., 40 S.W.3d 356 (2000).

[13] "However, a defendant can be found guilty of complicity to an unintentional homicide under KRS 502.020(2) if there is evidence that he/she either actively participated in the actions of the principal, or failed in a legal duty to prevent those actions, *without the intent* that those actions would result in the victim's death, but with recklessness... *i.e.,* wantonness creating a grave risk of death under circumstances manifesting an extreme indifference to human life, supporting a conviction of wanton murder by complicity, KRS 507.020(1)(b)." Id. at 361.

[14] Ky., 120 S.W.3d 635 (2003).

[15] Id. at 668-69 ("Formerly, an accomplice to a dangerous felony could be convicted of an intentional murder committed by another participant in the felony on the theory that the intent to commit the dangerous felony provided the element of intent necessary to convict of murder. This 'felony murder' concept was abandoned in Kentucky with the adoption of the penal code. However, participation in a dangerous felony, e.g., armed robbery, may supply the element of aggravated wantonness, i.e.,

the basis for conviction. Further, the commentary to KRS 507.020 states: "If a felony participant other than the defendant commits an act of killing, and if a jury should determine from all the circumstances surrounding the felony that the defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b)."[16]

Thus, Appellant's Wanton Murder conviction is essentially a conviction for acting at least as an accomplice and there is simply no support for the contention that there is a unanimous jury problem.[17] The trial court's instruction on Wanton Murder was entirely proper and accordingly, we find Appellant's claim without merit.

IV. CONCLUSION

Because Appellant has raised no viable claim of error, his conviction is hereby affirmed.

All concur.

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extreme indifference to human life, necessary to convict of wanton murder. " (citations omitted)).

[16] KRS 507.020, Official Commentary (Banks/Baldwin 1974).

[17] Davis v. Commonwealth, Ky., 967 S.W.2d 574, 582 (1998) ("Nothing less than a unanimous verdict is permitted in a criminal case. Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another. If the evidence would support conviction under both theories, the requirement of unanimity is satisfied. However, if the evidence would support a conviction under only one of two alternative theories, the requirement of unanimity is violated. ") (citations omitted)).

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