

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-000206-TG

DATE 7-7-05 *EWAC Group + P.C.*

LATIMUS JUAN WINGATE

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
INDICTMENT NO. 97-CR-01171-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Fayette Circuit Court jury convicted Appellant, Latimus Juan Wingate, of one count of first-degree manslaughter for the homicide of Anthony Taylor, and one count of tampering with physical evidence. Appellant was sentenced to twenty-one years to run concurrently with his federal sentence on an unrelated crime. He belatedly appealed to this Court as a matter of right,¹ asserting five claims of reversible error: (1) that the trial court erred when it excused a juror on the second day of trial for being late; (2) that the trial court erred in denying Appellant's pro se motion for "writ of error for equal protection of right to factual calculation of 'jail time credit' and/or time served upon date of arrest;" (3) that the jury instructions were so erroneous on homicide and the defense of self-protection as to constitute palpable error; (4) that there was insufficient

¹ KY. CONST. § 110(2)(b).

evidence that Appellant committed first-degree manslaughter; and (5) that there was insufficient evidence that Appellant tampered with physical evidence. Discovering no reversible error, we affirm.

Appellant and the victim, Anthony Taylor, were involved in an altercation in 1994. Due to the difference in the size of the two men, Taylor “got the best of” Appellant. Appellant and Taylor largely avoided contact until February 25, 1997, when Appellant ran into Taylor at a barbershop. The two did not exchange words. However, Appellant asserts that Taylor called him a profane name which upset Appellant tremendously. Appellant acknowledges that after Taylor had departed the barbershop, Appellant made a menacing comment to one of Taylor’s friends, but Appellant denies that the comment was intended to threaten Taylor’s life.

Appellant, upon leaving the barbershop, met his friend, Manual Patton, and his cousin, Quintin Wingate, and thereafter Quintin drove the three to get something to eat. Appellant and Quintin had three firearms (one shotgun, one .38 revolver, and one 9 mm handgun) in the vehicle for “protection,” in case they ran into Taylor. Patton, who was in the backseat, was not armed. During this time, it appears that Taylor was also obtaining his own firearm because he had heard of Appellant’s comment at the barbershop and had been informed that Appellant was carrying a firearm.

At the corner of Third and Midland Avenue, in Lexington, Appellant and Quintin Wingate noticed Taylor’s vehicle a few cars ahead. They decided to follow Taylor to try and discuss the situation. Taylor, upon observing Appellant and Quintin behind him, pulled to the side of the street. Quintin then pulled alongside Taylor.

Appellant asserts that Taylor brandished a handgun first. Quintin testified that he was unsure as to whether he or Taylor fired first, but that he was the first to fire from his vehicle. Appellant asserts that he began firing the shotgun in self-defense because Taylor had pointed his handgun at Appellant's head. Many shots were fired by Quintin, Taylor and Appellant. Following the exchange of gunfire, Quintin drove away despite Appellant's request to return to see if Taylor was dead.

Thereafter, Quintin drove to Arbor Grove. Evidence is in conflict as to what happened to the firearms at that point. Both men deny having any knowledge as to how the guns were disposed. An eyewitness, Rosalie Crutcher, testified that she saw Appellant and Quintin running near her house and that Appellant was carrying two firearms. She further testified that Appellant kicked the firearms under a parked vehicle and 10-15 minutes thereafter Appellant returned and retrieved the firearms and took them to another residence. The following day, Quintin's vehicle, while parked on Grinstead Avenue, was set on fire. The fire was started by a Molotov cocktail. Appellant denied any involvement in the fire.

On August 19, 1997, Appellant was charged with murder and tampering with physical evidence. Appellant was already in federal custody facing charges of possession and distribution of "cocaine base" when he was served with the murder and tampering with physical evidence charges. On November 12, 1997, Appellant was convicted of the federal drug charges and sentenced to two-hundred and eleven months incarceration followed by five years of supervised release. On November 19, 1997, Appellant was arraigned on the state murder and tampering charges. The trial began on December 7, 1998.

At trial, the jury was instructed on all degrees of homicide and a self-protection instruction was given. Appellant was convicted of first-degree manslaughter and tampering with physical evidence. The jury recommended a twenty year sentence for manslaughter and a one-year sentence for tampering with physical evidence, to run concurrently. At sentencing, the trial court ordered the sentences to run consecutively, for a total of twenty-one years, and the twenty-one year sentence was allowed to run concurrently with Appellant's federal sentence of two-hundred and eleven months.

Excusal of a Juror

On appeal, Appellant first argues that the trial court erred by dismissing a juror. On the second and final day of trial, Juror #655 had not appeared for court at 9:45 a.m., forty-five minutes after the trial was scheduled to resume. The trial court proposed that the juror be declared an alternate so the trial could proceed. Appellant, an African-American, objected to the court's proposal on grounds that the juror to be dismissed was the only African-American juror on the panel. Appellant argues that the juror's dismissal destroyed randomness. Appellant further argues that the trial court abused its discretion by excusing the juror without holding a hearing on why the juror was late and why the excusal was required.

Under CR 47.02,² if it becomes necessary to dismiss a juror for any reason, the trial is to continue unless the number of remaining jurors is less than that required by law.³ This rule contemplates that circumstances will arise when it becomes

² Pursuant to RCr 13.04, the Kentucky Rules of Civil Procedure are applicable to criminal proceedings to the extent they are not superseded by or inconsistent with the criminal procedural rules. See also, Commonwealth v. Burris, 590 S.W.2d 878, 879 (Ky. 1979), overruled on other grounds, Commonwealth v. Brindley, 724 S.W.2d 214 (Ky. 1986).

³ Hubbard v. Commonwealth, 932 S.W.2d 381, 382 (Ky. App. 1996).

necessary to dismiss a juror.⁴ We must consider whether the trial court's dismissal of the juror in question was an abuse of discretion.⁵

On the first day of trial ten potential jurors, including Juror #655, were absent when *voire dire* began. The trial judge relayed to the potential jurors the importance of their service. She commented to the court audience that she understood that it was raining; however, those that failed to appear without contacting the court administrator would have consequences. Juror #655 did appear eventually and was selected as a juror. On the second day of trial, the court waited forty-five minutes for Juror #655 and then held a bench conference with the attorneys. The judge revealed that both the sheriff and the court administrator had tried to contact Juror #655 at his residence but were unsuccessful. She also stated that she was aware of an automobile accident near Juror #655's residence that was delaying traffic. The trial judge proposed reassigning Juror #655 to alternate status in order to proceed with the trial. Appellant's counsel said that he and his client had discussed the situation and understood the Judge's position; however they wanted to note that Juror #655 was the only African-American on the jury. The trial judge held that the court had waited a reasonable amount of time and the trial proceeded.

Appellant's objection regarding the dismissal of Juror #655 does not establish purposeful discrimination by the trial judge.⁶ An African-American defendant alleging that members of his race have been impermissibly excluded may make a prima

⁴Davis v. Commonwealth, 795 S.W.2d 942, 949 (Ky. 1990).

⁵Sanders v. Commonwealth, 801 S.W.2d 665, 670 (Ky. 1990), *cert. denied*, 502 U.S. 831, 112 S.Ct. 107, 116 L.Ed.2d 76 (1991); McQueen v. Commonwealth, 669 S.W.2d 519, 521 (Ky. 1984), *cert. denied*, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984); Hubbard, 932 S.W.2d at 383.

⁶*Cf.*, Batson v. Kentucky, 476 U.S. 79, 94, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.⁷ The Appellant has not alleged any discriminatory purpose in this appeal.

The trial court's dismissal of the juror by designating him as an alternate was not improper and not clearly erroneous so as to amount to an abuse of discretion. The trial court waited a reasonable length of time and made sufficient inquiries into the juror's whereabouts to defeat any suggestion of abuse of discretion.

Jail Time Credit

Appellant next argues that the trial court erred in denying Appellant's pro se motion for "writ of error for equal protection of right to factual calculation of 'jail time credit' and/or time served upon date of arrest." Appellant asserts that an evidentiary hearing should be granted to determine his amount of jail credit for time spent in federal custody. This issue falls under CR 60.02,⁸ but due to the belated nature of Appellant's direct appeal, it is considered along with the other claims of reversible error.

On January 12, 1999, the trial court entered its final judgment, which included zero days of credit for time served. The judgment stated that the Appellant was given an opportunity to present information to mitigate his punishment, Appellant was informed of the Presentence Investigation Report's contents and conclusions and the Appellant was given an opportunity to controvert the report. He did not object to failure to award credit for time served. Not until August 22, 2002, did Appellant file his motion for "writ of error for equal protection of right to factual calculation of 'jail time

⁷ Id., at 94.

⁸ Duncan v. Commonwealth, 614 S.W.2d 701, 702 (Ky. App. 1981), (in requesting this Court to order the trial court to amend its original judgment, the Appellant is making a motion to be relieved from the trial court's final judgment on the basis of mistake).

credit' and/or time served upon date of arrest." The trial court denied Appellant's motion.

RCr 11.42 provides that a convicted defendant will not be permitted to employ the rule as a means of retrying issues that could and should have been raised in the original proceedings when the competency, adequacy, and effectiveness of counsel are not in good faith questioned, and where the grounds of the motion are matters that must have been known at the time of trial.⁹ Appellant's argument as to credit for time served in federal custody could and should have been raised at sentencing. The record is without any evidence that Appellant lacked knowledge of the matter at the time of sentencing or that Appellant questioned his counsel's effectiveness, competence or adequacy. Therefore, Appellant is bound by CR 60.02, meaning that his motion is subject to the one-year limitation.¹⁰

Appellant waited approximately three years and eight months to bring the motion. Therefore, he is estopped from raising this issue before this Court. In addition, Appellant did not set forth any extraordinary nature justifying the relief requested. Due to the untimely filing of Appellant's pro se motion, we affirm the trial court's denial.

⁹ See, Hoskins v. Commonwealth, 420 S.W.2d 560 (Ky. 1967); and Thacker v. Commonwealth, 476 S.W.2d 838 (Ky. 1972). Duncan, 614 S.W.2d at 702.

¹⁰ CR 60.02, "The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken."

Jury Instructions

Next, Appellant argues that the jury instructions were so erroneous that reversal for a new trial is required. Appellant concedes that the issue is unpreserved. However, he argues that there is palpable error in the instructions.

Appellant seeks review pursuant to the palpable error rule in RCr 10.26. Appellant argues that the instructions constitute palpable error because: (1) Instruction One failed to reference the various choices the jury could make with its corresponding instruction numbers and failed to instruct on reasonable doubt for extreme emotional disturbance; (2) Instruction Two incorrectly defined “wanton” and “reckless” by purporting to apply only to injury, whereas the result for this case was death, and failed to include definitions of “physical force” and “deadly physical force;” (3) Instructions Five and Six implied that Appellant would be eligible for conviction of second-degree manslaughter “if not guilty of one of the two previously described offenses, but guilty of the other”; and (4) Instruction Seven would have been more helpful to the jury had it been labeled “initial aggressor qualification” and “wanton or reckless belief qualification” and for the former to precede the latter.

Appellant’s counsel participated in crafting these instructions. Thus, not only were the alleged errors unpreserved, they were waived.¹¹ Appellant relies on Commonwealth v. Hager¹² as authority. However, unlike in Hager, since Appellant waived any unpreserved error, we must review the instructions only for palpable error.

RCr 10.26 deals with palpable error. However, it is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for

¹¹ Davis v. Commonwealth, 967 S.W.2d 574, 578 (Ky. 1998).

¹² 41 S.W.3d 828 (Ky. 2001).

review.¹³ The general rule is that a party must make a proper objection to the trial judge and request a ruling on that objection, or the issue is waived.¹⁴ An appellate court may consider an issue that was not preserved if it deems the error to be "palpable," one which affected the defendant's "substantial rights" and resulted in "manifest injustice."¹⁵ A finding of palpable error must involve prejudice more egregious than that occurring in reversible error,¹⁶ and the error must have resulted in "manifest injustice."¹⁷ Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when "a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding."¹⁸ A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case.¹⁹

The instructions, although differing from Hager, do not involve such egregious prejudice to justify reversal. The instructions were drafted from form-book instructions.²⁰ Nothing in the record indicates that any of the errors proposed by Appellant would have caused the jury to have decided differently. The errors, if any, did not result in manifest injustice so as to require a new trial.

¹³ RCr 9.22.

¹⁴ See, Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002). See also, Bell v. Commonwealth, 473 S.W.2d 826 (Ky. 1971).

¹⁵ RCr 10.26.

¹⁶ Robert G. Lawson, The Kentucky Evidence Law Handbook, § 1.10[8] [b], at 54 n.146 (4th ed. LexisNexis 2003).

¹⁷ KRE 103(e); Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997).

¹⁸ Lawson, *supra* n. 16, § 1.10[8][b], at 54 (quoting 1 McLaughlin, Weinstein's Federal Evidence, § 103.42[3] (2d ed.2003)).

¹⁹ United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985).

²⁰ See, William S. Cooper, Kentucky Instructions to Juries, §§ 11.07, 11.08B & 11.11 (West 1993 & Supp. 2003).

Sufficiency of the Evidence

Appellant's final argument is that there was insufficient evidence for the jury to find him guilty of first-degree manslaughter and/or tampering with physical evidence.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. "If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be granted. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true," and reserve "to the jury questions as to the credibility and weight to be given to [the] evidence."²¹

If reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go to the jury even though it is circumstantial.²² If the evidence cannot meet that test, it is insufficient.²³ There must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.²⁴ A review of the evidence presented in this case, including the facts laid out above, clearly indicates that the trial judge correctly determined that a reasonable juror could fairly find guilt beyond a reasonable doubt.

The Medical Examiner found that Taylor had died from a shotgun blast directly to the back of his head. The Commonwealth asserts that this, along with the

²¹ Commonwealth v. Benham, 816 S.W.2d 186, 187-188 (Ky. 1991).

²² Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983).

²³ Hodges v. Commonwealth, 473 S.W.2d 811, 814 (Ky. 1971).

²⁴ Benham, 816 S.W.2d at 187-88.

physical evidence that Taylor's back window had been shot out, indicated that Taylor had been killed from behind by Appellant since Appellant was using the shotgun.

Therefore with respect to the charge of first-degree manslaughter, the circumstances surrounding the events that occurred the day of the shooting along with the medical examiner's findings are sufficient to permit a reasonable juror to find Appellant guilty.

With respect to the charge of tampering with physical evidence, the events that occurred following the shooting, including the disappearance of the firearms, and the subsequent burning of Quintin's vehicle, coupled with the testimony of Rosalie Crutcher, are sufficient to permit a reasonable juror to find Appellant guilty.

The prosecution produced evidence that was considerably more than a mere scintilla and the case was properly submitted to the jury for its verdict. The judgment of the Fayette Circuit Court is affirmed.

Lambert, C.J., and Graves, Johnstone, Scott, and Wintersheimer, JJ., concur. Cooper, J., concurs in result only.

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