

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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 16, 2005  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0915-MR

DATE 7-7-05 E. W. G. G. P. C.

TAMICA BEARD

APPELLANT

V.

APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
2002-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Beard of murder and being a second-degree persistent felony offender. She was sentenced to forty years in prison.

The questions presented are whether prior bad acts were improperly admitted into evidence; whether the failure to designate the defendant as eligible for the domestic violence exemption and the presentation of both parole eligibility guidelines to the jury was reversible error; and whether reversible error occurred when a witness testified to an incident despite a lack of personal knowledge.

Beard admitted that she shot and killed the victim, who was her former boyfriend and the father of her third child. She claimed that she acted in self defense. To support that justification, Beard offered evidence that the victim had committed acts of

domestic violence against her in the past. The Commonwealth's theory was that Beard, who shot the victim multiple times, killed him intentionally. In support of that position, it offered evidence that the defendant had previously threatened and attacked the victim.

The jury convicted Beard of murder and being a second-degree persistent felony offender. She was sentenced to forty years in prison. This appeal followed.

### I. Bad Act Evidence

Beard argues that the admission of prior bad acts is reversible error. She lists the following alleged occurrences in her brief:

1) January 1999, an argument ensued between Beard and the victim, which apparently culminated in Beard firing a gun and hitting the victim's vehicle. The victim did not press charges. The evidence of this incident consists of an out-of-court affidavit.

2) July 21, 1999, following an argument between the couple, Beard pulled out a gun and pointed it at the victim. The victim was able to disarm her. Beard damaged his motorcycle and spat on him. A DVO was entered against the victim from facts stemming from this incident and Beard plead guilty to second-degree wanton endangerment.

3) July 14, 2000, Beard threatened to kill the victim if he took her back to court over child custody. This alleged threat was based on an affidavit for an EPO/DVO filed by the victim. The case was dismissed.

4) September 30, 2000, Beard allegedly cut the victim's tires after an argument. This evidence was also based on the affidavit for an EPO/DVO.

5) October 9, 2000, Beard was convicted of two counts of third-degree assault for fighting with two deputies following an incident in Family Court. She also spat on the victim during that incident.

6) November 27, 2000, Beard was caught in the victim's truck and cut his ear. Those charges were still pending at the time of this trial.

Contrary to CR 76.12(4)(c)(v), Beard fails to indicate in the record where much of this bad act evidence was introduced. Our review of the record demonstrates that she significantly overstates the amount of evidence that was admitted.

There was no evidence admitted regarding the January 1999 incident. It appears that this event was only referenced in the pre-trial motions.

The Commonwealth did introduce evidence that the victim filed a criminal complaint charging Beard with second-degree wanton endangerment relating to the July 21, 1999 episode, and that she pled guilty to the charge. The affidavit of the victim supporting that charge was not introduced into evidence.

The Commonwealth notes a tire slashing incident that occurred on September 28, 2000, but it does not appear to be the same incident alleged to have occurred on September 30, 2000. In any event, the Commonwealth did introduce evidence through a witness suggesting that Beard slashed the victim's tires. There was no affidavit admitted.

There was no evidence introduced during the guilt phase regarding the conviction for two counts of third-degree assault on October 9, 2000. The Commonwealth did introduce evidence through a family court support worker that Beard spat on the victim during that same incident.

Finally, the Commonwealth did introduce evidence through a detective about an act of domestic violence on November 7, 2000, wherein Beard cut the victim's ear with a knife. A taped statement Beard gave to the detective after that incident was played for the jury and several photographs of that injury were introduced.

Evidence of prior threats and animosity of the defendant against the victim are generally admissible to prove motive, intent or identity. Davis v. Commonwealth, 147

S.W.3d 709 (Ky. 2004). See also KRE 404(b)(1). Additionally, evidence of collateral criminal conduct is admissible for purposes of rebutting a defendant's material contention. Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1988).

Here, Beard claimed that she killed the victim in self defense. The bad act evidence that was introduced was admissible to rebut that defense and to prove that she had the motive and intent to kill the victim. The prior crimes and bad acts were relevant, probative and the potential for prejudice did not outweigh their probative value. See Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997). The trial judge did not err in permitting the evidence to be introduced.

## II. Domestic Violence Exemption/Parole Guidelines

Beard contends that the failure to designate her as eligible for the domestic violence exemption and the presentation to the jury of both parole eligibility guidelines is reversible error. We disagree.

At a bench conference just prior to the start of the penalty phase, defense counsel raised the issue of whether the jury would be informed that Beard was eligible for parole after serving twenty percent of her sentence, KRS 439.3402, or eighty-five percent, KRS 439.3401. In order to be eligible under the former, the trial judge was required to make a finding that Beard was a victim of domestic violence and abuse. Defense counsel, however, had not yet filed a motion as required by KRS 439.3402.

The trial judge determined that without a proper motion, she could not make the determination if Beard was a victim of domestic violence and abuse and thus exempt from KRS 439.3401. Consequently, she permitted the probation and parole officer to testify to both sentencing guidelines--twenty percent and eighty-five percent. The jury was told that a decision would be made after the trial as to which applied.

Defense counsel filed a motion a month after the penalty phase seeking to designate Beard as eligible for the domestic violence exemption to KRS 439.3401. The Commonwealth opposed that motion. Following a hearing, the trial judge entered an order finding by a preponderance of the evidence that Beard was not a victim of domestic violence or abuse with regard to the offenses involving the death of the victim.

The trial judge did not err in allowing the jury to be informed of both sentencing guidelines. Defense counsel had not complied with the procedural requirements of the statute and it was not certain at that time which percentage applied. The trial judge allowed the jury to be informed about both and instructed them that a decision would be made later. Under these circumstances, that decision was proper.

Beard has failed to show that the trial judge's determination that she was not a victim of domestic violence was clearly erroneous. The trial judge recognized that the family court had entered a domestic violence order against the victim on August 2, 1999. She also noted that Beard pled guilty to second-degree wanton endangerment in district court based on the same incident. Although the victim may have been a victim of domestic violence in the past, the trial judge correctly observed that the real issue was whether there was a connection between the murder and the domestic violence. See Springer v. Commonwealth, 998 S.W.2d 439 (Ky. 1999).

The trial judge, who is not required to accept the defendant's version of the events surrounding the offense, found no connection between the murder and the domestic violence. She noted the multiple, impulsive and violent acts that Beard perpetrated against the victim. These included slashing his tires, slicing his ear with a knife and spitting on him during a hearing in family court. The trial judge also recognized that Beard never stated during questioning that the victim was violent the

night of the shooting and that there was evidence that the murder was planned. Having carefully reviewed the record, we conclude that the trial judge's finding on this issue was not clearly erroneous.

### III. Witness without Personal Knowledge

Beard asserts that reversible error occurred when a family court support worker testified to the spitting incident in family court even though she had not been present. We disagree.

The Commonwealth made a pre-trial motion to introduce a videotape of a hearing in Jefferson Family Court on October 9, 2000, during which Beard spat on the victim. The trial judge ruled that the videotape was inadmissible because of other improper conduct exhibited by Beard on that occasion.

Precluded from playing the videotape, the Commonwealth asked one of its witnesses, a family court support worker, to testify about the spitting episode. She had not been present during the incident, but had reviewed the videotape on which it was recorded. Defense counsel objected because the witness had no personal knowledge of the event. The Commonwealth responded that the videotape was an official court record which this witness was qualified to testify about and alternatively, it sought permission to show the relevant portion of the videotape.

The trial judge overruled the objection by Beard, stating that the witness was an employee of the court system who was involved with these parties even after this incident. She recognized the witness was not personally present when the event occurred.

The witness lacked personal knowledge of the matter. KRE 602. This was not a situation where a witness testified about a certified copy of a court record--because

none was presented here. The witness should not have been permitted to testify about the spitting episode.

However, as was previously decided in this opinion, the spitting incident was properly admissible as a prior bad act. The Commonwealth should have been entitled to show that portion of the videotape containing the same. Nevertheless, the means it chose to get in the evidence was still improper. Considering the fact that the evidence was admissible, but the means of introducing it was improper, we can conclude that the error was harmless beyond a reasonable doubt. RCr 9.24.

Beard received a fundamentally fair trial. She was not denied any due process under either the state or federal constitutions.

The judgment of conviction is affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., sitting. All concur.

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