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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0368-MR

GARY R. WOOLBRIGHT — APPELLANT

V.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
2001-CR-0414

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Gary R. Woolbright, was convicted of wanton murder, receiving stolen property (anhydrous ammonia) with intent to manufacture methamphetamine, first-degree trafficking in a controlled substance (methamphetamine), and first-degree possession of a controlled substance (methamphetamine) following a jury trial. He was sentenced to 30, 10, 10, and 5 years' imprisonment, respectively. All terms of years were ordered to run consecutively for a total of 55 years' imprisonment. He enters this appeal as a matter of right, raising eight issues. For the reasons set forth herein, we affirm.

Factual Background

On November 14, 2001, Joseph Tibbs visited Appellant's house with Michael Parker. At some point, Parker stepped outside the house to look at some cars on the property. What transpired inside the house during this period is disputed. According to

Appellant, while Parker was outside, Tibbs pulled a gun from his jacket and demanded that Appellant give him money. Appellant testified that he went to his bedroom, got Five Hundred Dollars ($500) in cash, and presented it to Tibbs. Tibbs indicated the amount was insufficient, so Appellant again went to the back of the home to retrieve more money, but also armed himself with a gun. When he returned, he threw his wallet to distract Tibbs' attention. The ploy worked and when Tibbs looked away, Appellant placed the handgun at the back of Tibbs' head. According to Appellant, Tibbs flinched, causing the gun to discharge. Appellant stated several times at trial that the gun fired accidentally; that is to say, he only meant to scare Tibbs with the firearm but did not intend to shoot him. Nonetheless, a single bullet passed from the back of Tibbs' head through the front, though it did not kill Tibbs immediately. Tibbs lay on the floor bleeding and making a gurgling noise, which, according to Appellant, distressed him greatly. Appellant then stuffed a plastic bag down Tibbs' throat, completely occluding his airway. Tibbs died thereafter. Dr. Tracy Corey, Chief Medical Examiner for the Commonwealth, testified that it was possible Tibbs could have survived the gunshot wound if immediate treatment had been sought, but that the plastic bag in his throat removed that possibility. In other words, the gunshot wound to Tibbs' head was the primary cause of death, though the occlusion of his airway was a significant contributing factor.

Appellant later called 911 and Kentucky State Police Trooper Terry Alexander responded to the scene. As he pulled up to Appellant's residence, he observed Appellant emptying his pockets onto the hood of a truck. One of the items was a baggie containing what was later confirmed to be a quantity of methamphetamine. A smaller quantity was found in Appellant's pocket. As Trooper Alexander approached the residence, he detected the strong smell of ammonia; an underground bunker near the

house revealed eleven tanks of anhydrous ammonia. Appellant thereafter was arrested. Further facts will be developed later in the opinion as necessary.

Jury Instructions

Appellant argues that reversible error occurred when the trial court refused to instruct the jury on protection against burglary; we disagree. The trial court in this matter instructed the jury on murder (intentional and wanton), second-degree manslaughter, and reckless homicide. The trial court also instructed the jury on the defense of self-protection, but refused to instruct on the defense of protection against burglary. We conclude that an instruction on the defense of protection against burglary was precluded by Appellant's testimony that he fired the gun accidentally, and therefore no error resulted.

In reviewing whether a requested jury instruction was improperly denied, the primary concern is whether any evidence supporting the desired instruction was presented, as the trial court is under no duty to instruct the jury on matters wholly unsupported by the evidence. "A defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999); Hayes v. Commonwealth, 870 S.W.2d 786 (Ky. 1993).

We find the case of Grimes v. McAnulty to be factually analogous to the present matter. 957 S.W.2d 223 (Ky. 1997). In Grimes, an instruction on the defense of self-protection was not warranted where the defendant testified that she shot the victim accidentally. We thus encounter the question of whether the logic of Grimes extends to a protection against burglary defense as well. Grimes reasoned that a defendant cannot at once claim that a killing was intentionally committed in protection of her

person and also that the killing was an unintended accident. The principle of Grimes would logically extend to the defense of protection of property, as it likewise seeks to defend an intentional act with legal justification negating not intent, but culpability. To be sure, Grimes cannot be read as a blanket prohibition against a self-protection instruction in any case where the defendant pleads accident; rather, the self-protection instruction in Grimes was properly denied because no evidence other than accident was presented to the jury: "A defendant cannot assert accident yet alternatively claim an intentional act done in self-defense, without affirmatively presenting evidence of self-defense." Id. at 227.

Here, though, insufficient evidence was presented to create an issue as to whether Appellant acted in protection of his property. During both direct and cross-examination, Appellant stated that he did not "mean" to shoot Tibbs, that he shot Tibbs "accidentally," and that Tibbs "flinched" his neck and that is why the gun fired. While admitting that he intentionally placed the gun at Tibbs' neck, Appellant repeated on numerous occasions – both during trial and interviews with investigating officers – that the actual firing of the gun was an accident. Defense counsel repeated that the gunshot was an accident during closing arguments. No other explanation for the actual firing of the gun was provided to the jury. Therefore, Appellant's repeated and uncontroverted assertion that the firing of the gun was an unintended accident precludes instruction on a theory that would legally justify an intentional act. We also note that, because we have held that the principle espoused in Grimes applies to the present matter, it is unnecessary to delve into the issue of whether a burglary was occurring at the time Tibbs was shot. No error occurred.

Severing Charges

Appellant next asserts that the trial court erred in refusing to sever the charges. Before the jury was sworn, defense counsel twice moved the trial court to sever the offenses and set separate trials in accordance with RCr 9.16. The trial court denied this motion in part and granted in part. Appellant was originally charged with eleven counts of receiving stolen property (anhydrous ammonia) with intent to manufacture methamphetamine; the trial court agreed to consolidate these counts into one charge.[1] However, Appellant's request to sever this charge from the murder, tampering with physical evidence, trafficking, and possession charges was denied. On appeal, Appellant argues that the trial court abused its discretion and committed reversible error by denying his motion for severance. We find no error in the trial court's ruling.

Severance of counts is within the sound discretion of the trial court and its decision will be reversed only upon a showing of prejudice and clear abuse of discretion. Sherley v. Commonwealth, 889 S.W.2d 794, 800 (Ky. 1994); Harris v. Commonwealth, 556 S.W.2d 669, 670 (Ky. 1977). Offenses closely related in character, circumstances, and time need not be severed. Sherley, 889 S.W.2d at 800. A significant factor in determining whether joinder of offenses for trial is unduly prejudicial is whether evidence of one of the offenses would be admissible in a separate trial for the other offense. Spencer v. Commonwealth, 554 S.W.2d 355 (Ky. 1977).

Here, the evidence concerning all of the drug offenses were so related to one another, and to the murder charge, as to preclude severance. Of course, the evidence supporting the drug charges was found at Appellant's home, also the site of Tibbs' death. Appellant admitted removing a quantity of methamphetamine from Tibbs' after

[1] The tampering with physical evidence charge was ultimately dismissed upon motion by the Commonwealth before presentation to the jury.

his death; Tibbs died with a significant amount of the drug in his system, which was the defense's explanation for his irrational behavior; Tibbs was also in serious debt when he died, potentially another explanation for his attempt to rob Appellant or, at the least, his belief that Appellant would have a large amount of cash at his home. In sum, it was clearly the Commonwealth's theory of the case that Tibbs' death was the result of either a drug-related argument or intoxication. In light of this evidence, the trial court did not abuse its discretion in denying the severance request.

Moreover, Appellant has failed to demonstrate sufficient prejudice to warrant reversal. Appellant does not allege that the trafficking and possession charges should have been severed from the receiving stolen property charge. Thus, the jury was already aware that Appellant manufactured methamphetamine, which would naturally require possession of anhydrous ammonia tanks. We are not convinced that Appellant suffered any undue prejudice by the trial court's refusal to sever the receiving stolen property charge and therefore, reversal is not warranted.

Judge's Refusal to Recuse Himself

Appellant next claims that the trial judge was required to disqualify himself from the case pursuant to KRS 26A.015(2). Barren Circuit Court Judge Phillip R. Patton was Commonwealth's Attorney on November 14, 2001, when Appellant was charged with the offenses herein. Judge Patton was sworn in as circuit judge on December 1, 2001. Appellant was arraigned on January 7, 2002. At the arraignment, both attorneys and Judge Patton acknowledged the above information and Judge Patton stated that he had deliberately remained out of the case in anticipation of his appointment as circuit judge. At the end of the discussion, Appellant's attorney expressed his satisfaction with this explanation. No further motion for disqualification was made. On appeal, Appellant

argues that Judge Patton's disqualification was mandatory under KRS 26A.015(2). We disagree.

Waiver of disqualification may be made "under proper circumstances, either in writing or on the record." Small v. Commonwealth, 617 S.W.2d 61, 62 (Ky. App. 1981). See also Commonwealth v. Carter, 701 S.W.2d 409, 410 (Ky. 1985). Here, after Judge Patton explained that he had no knowledge of the case whatsoever, defense counsel stated: "All right, that satisfies Mr. Woolbright." There is simply no logical conclusion that can be drawn from this statement other than Appellant waived the issue. In light of the fact that no written motion had been entered, such an oral waiver on the record was wholly adequate under the circumstances.

Furthermore, KRS 26A.015(2)(b) would not require Judge Patton's recusal in this matter. This Court has previously noted that "numerous trial and appellate judges and justices have roots which are embedded in the soil of the offices of Commonwealth Attorney and County Attorney." Carter, 701 S.W.2d at 410. Here, Judge Patton remained Commonwealth's Attorney for only seventeen days after Appellant was charged. Anticipating his appointment as circuit judge, Judge Patton purposely had no involvement with the case whatsoever and rendered no legal opinion in the matter. Furthermore, there has been no allegation or evidence of any prejudice to Appellant. Under the circumstances, we do not believe that disqualification pursuant to KRS 26A.015 was warranted.

Extreme Emotional Disturbance

Appellant claims that he was improperly denied an instruction on extreme emotional disturbance ("EED"). In response to defense counsel's motion, the trial court denied the request, determining that there was insufficient evidence to warrant the

instruction. On appeal, Appellant argues that failing to instruct the jury on EED was reversible error. We disagree.

> Extreme emotional disturbance is a
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> > temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986), cert. denied, 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 986 (1987). There must exist evidence of an event which triggers the explosion of violence on the part of the defendant, and the triggering event itself must be sudden and uninterrupted. Foster v. Commonwealth, 827 S.W.2d 670, 678 (Ky. 1992), cert. denied, 506 U.S. 921, 113 S. Ct. 337, 121 L. Ed. 2d 254 (1992). The law has uniformly required that the evidence in support of an EED instruction be definitive and non-speculative. Morgan v. Commonwealth, 878 S.W.2d 18, 20 (Ky. 1994). Evidence of defendant being "upset" or "uneasy" does not constitute extreme emotional disturbance. Thompson v. Commonwealth, 862 S.W.2d 871, 877 (Ky. 1993).

Appellant claims that Tibbs began making a gurgling noise as he lay on the floor following the gunshot; this noise is sometimes referred to as a "death rattle." Appellant testified that Tibbs sounded like Appellant's own son, who had died some years earlier from a brain aneurysm. Appellant argues that this gurgling noise was the triggering event of his alleged extreme emotional disturbance. Two scenarios must be

considered, as it is not clear whether the gunshot wound to Tibbs' head or the occlusion of his airway by the plastic bag killed him.

If the shot to Tibbs' head is to be considered the homicidal act then the "death rattle" could not have been the triggering event because it occurred after Appellant had already shot Tibbs. Furthermore, Appellant himself explains that Tibbs flinched causing him to shoot Tibbs, not a "triggering event" that sent him into EED. Rather, Appellant urges that we consider the homicidal act as the moment when Appellant shoved the bag down Tibbs' throat. Still, there is insufficient evidence to show that Appellant's reaction to the death rattle was anything more than being upset or uneasy, which is not enough to meet the standard for EED. Assuming arguendo that Tibbs' "death rattle" was sufficient to overcome Appellant's judgment, it is simply not plausible that this noise, in and of itself, established from Appellant's point of view a "reasonable explanation or excuse" to shove a bag down a dying man's throat. See also Hudson v. Commonwealth, 979 S.W.2d 106, 108-09 (Ky. 1998) (rejecting claim that triggering event was the sight of blood coming from victim's head, to whom defendant had administered a severe blow to the head minutes before, causing him to thereafter strangle victim).

The only evidence of EED presented by Appellant was his own testimony that the "death rattle" enraged him. Simply put, this evidence is speculative and vague, and fails to establish the requisite triggering event required by law. Therefore, Appellant was not entitled to an instruction on extreme emotional disturbance. There was no error.

Directed Verdict

Appellant avers that the trial court erred in denying his motion for a directed verdict as to the charge of receiving stolen property (anhydrous ammonia) with intent to

manufacture methamphetamine. "A trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id. at 187.

> In ruling on a directed verdict motion, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume the Commonwealth's evidence is true, leaving questions of weight and credibility to the jury. If the evidence would induce a reasonable juror to believe that the defendant is guilty, the directed verdict motion should be denied.

Slaughter v. Commonwealth, 45 S.W.3d 873, 875 (Ky. App. 2001). Under KRS 514.110, a person is guilty of receiving stolen property when he "receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner." Appellant was indicted pursuant to subsection (3)(b) of this statute, relating to anhydrous ammonia. The Commonwealth presented the following evidence to support the charge: (1) Appellant's admission at trial that he used the anhydrous ammonia to manufacture methamphetamine one month prior; (2) eleven unapproved container tanks of anhydrous ammonia hidden in an underground bunker next to Appellant's house; (3) a plastic bag containing 6.78 grams of methamphetamine found on Appellant's person at the time of his arrest; and (4) Appellant's testimony that he purchased the anhydrous ammonia on the "black market."

The jury may draw inferences as to whether or not the defendant knew the property to be stolen based on the "character of the property involved, its quality and kind." Teague v. Commonwealth, 215 S.W.2d 130, 132 (Ky. 1948). Considering this

evidence in a light most favorable to the Commonwealth, and with due regard to the reasonable inferences that may be drawn therefrom, it would not be clearly unreasonable for the jury to find guilt. Therefore the trial court did not err by denying Appellant a directed verdict of acquittal.

Other Issues

Appellant next claims that the trial court erred by failing to direct a mistrial or, in the alternative, admonish the jury when a juror allegedly saw Appellant in handcuffs as he entered the courthouse. Defense counsel brought the matter to the attention of the trial judge, who indicated that the sheriff's deputy had already advised him of Appellant's concerns. The deputy was present at the time of the alleged incident, and indicated that Appellant had mistaken a circuit court clerk for a member of the jury. Defense counsel made no request for a jury admonition, nor did counsel move for a mistrial. When relief has not been requested of the trial court, an issue is not preserved for appellate review. Hunter v. Commonwealth, 560 S.W.2d 808, 809 (Ky. 1977). Appellant has not provided any evidence of manifest injustice that would warrant review pursuant to RCr 10.26.

Appellant also claims that reversible error occurred when the trial court failed to admonish the jury after certain testimony was admitted. Appellant argues that the testimony of Commonwealth's witness, Les Paul Gaddis, amounted to improper character evidence in violation of KRE 404(b). During direct examination, Mr. Gaddis testified that he and Appellant were "in the methamphetamine business together." Defense counsel objected. A bench conference was held during which the Commonwealth responded that defense counsel had been provided with three recorded interviews; in these taped conversations with detectives, Mr. Gaddis states that he knew

Appellant through their mutual involvement in manufacturing methamphetamine. The issue was again discussed later, in chambers.

Mr. Gaddis' testimony was not improper under KRS 404(b) because it was admitted to demonstrate Appellant's motive to kill Tibbs; according to the Commonwealth, the killing was committed over drug money and evidence of Appellant's involvement in drug manufacturing is relevant to this theory. Additionally, as related to the drug charges, Mr. Gaddis' testimony was relevant to demonstrate Appellant's knowledge of manufacturing methamphetamine and his motive to possess eleven anhydrous ammonia tanks with intent to manufacture. See Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996). Noting that Appellant had already admitted he had manufactured methamphetamine in the prior month, albeit not specifically with Mr. Gaddis, the trial court properly determined that the probative value of this testimony was not substantially outweighed by any prejudicial effect. KRE 404(b)(1); KRE 403. Nonetheless, the trial court offered, without objection from the Commonwealth, to admonish the jury and defense counsel declined, noting an admonition might only serve to highlight the testimony for the jury. When trial counsel fails to request appropriate relief, the issue will not be considered for reversal on appeal. West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989). It is axiomatic that the result remains the same when relief has been offered and refused.

Furthermore, Appellant's claim that this testimony was admitted without notice pursuant to KRE 404(c) is without merit. Taped recordings of Mr. Gaddis' conversations with detectives wherein he made statements implicating Appellant in a joint manufacturing operation were made available to defense counsel through discovery.

Regardless, the issue of proper KRE 404(c) notification was never presented to the trial court and therefore is not properly preserved for appellate review.

Appellant finally alleges that the trial court committed reversible error in allowing the Commonwealth to introduce into evidence certain firearms. The Commonwealth introduced a total of thirteen firearms obtained during a search of Appellant's home following his arrest. Appellant implicated two of these guns in the killing of Tibbs – the gun he used to shoot Tibbs and the gun Appellant alleged Tibbs brought into his house. Appellant now objects to the introduction of the remaining eleven, arguing that the Commonwealth failed to demonstrate a sufficient nexus between the guns and the crimes charged. At trial, defense counsel's objection to their introduction was overruled on the basis that the firearms were relevant to the weapons enhancement provisions attached to both the trafficking and possession charges pursuant to KRS 218A.992.

We conclude that the trial court did not err in admitting these firearms. In admitting weapons for purposes of a weapons enhancement provision, if it is established that a defendant was in actual or constructive possession of the firearm upon arrest, the "Commonwealth should not have to prove any connection between the offense and the possession for the sentence enhancement to be applicable." Commonwealth v. Montague, 23 S.W.3d 629, 633 (Ky. 2000). Appellant was arrested at his home, where the guns, drugs, anhydrous ammonia tanks and Tibbs' corpse were found; constructive possession was clearly established.

Appellant's additional claim that these firearms were inadmissible as unduly prejudicial pursuant to KRE 403 is not preserved. Appellant did not object to the introduction of the weapon used to kill Tibbs on the basis of undue prejudice; rather, defense counsel argued only that the weapons were not sufficiently related to the crime

for purposes of a weapons enhancement provision. Thus, this issue is not properly preserved for appellate review, as this theory of exclusion was never presented to the trial court for determination.

Conclusion

For the reasons set forth above, we affirm the judgment of the Barren Circuit Court.

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

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