

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky **FINAL**

2003-SC-0670-MR

DATE 10-13-05 Ena Growth DC

MORTAVIUS LATA MITCHELL

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
02-CR-00196-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant was convicted by a Fayette County Circuit Court jury of wanton murder and robbery in the first-degree. Appellant was sentenced to life imprisonment without the possibility of parole for twenty-five years on the wanton murder conviction, and ten years for the first-degree robbery conviction. He appeals to this Court as a matter of right.

Appellant's convictions stem from an incident in which Appellant shot and killed Wilbert Adams in Lexington. In the early hours of November 9, 2001, Appellant, Adams, and two other individuals, Eric Gill and Michael Hocker, were together in a moving automobile. Appellant and Adams were in the backseat, and Adams was attempting to purchase crack-cocaine from Appellant. Appellant demanded money from Adams and Adams replied that he did not have any money. Appellant drew his gun

and pointed it at Adams, who began swatting at the gun. Appellant then shot Adams once. At that point, the car stopped, and Adams exited the car and ran.

Adams was killed by a single gunshot wound from a 9-mm bullet. The firearm used in the shooting was not recovered. The three individuals at the scene all testified at trial. Appellant testified that he shot Adams in self-defense after Adams pointed a gun at him. Additional facts will be set forth as necessary.

I.

Appellant first argues that the trial court denied his rights to due process and a fair and accurate determination of guilt by giving an instruction on wanton murder. He argues that the trial court gave this instruction in error because the evidence only supports intentional, not wanton, conduct.

Kentucky's murder statute, KRS 507.020, includes two categories of homicide with separate, but equally culpable, mental states. The first category pertains to intentional killings. KRS 507.020(1)(a). The second category addresses wanton murder. KRS 507.020(1)(b). An individual is guilty of wanton murder if, "under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." Id. By definition, "a person acts wantonly with respect to a result... when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur." KRS 501.020. "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id. Thus, wanton murder requires wanton conduct coupled with "extreme indifference to human life." Id.

A jury instruction on wanton murder was proper as there was evidence to support the conclusion that Appellant fired his gun at the victim without intent to kill. In Carwile v. Commonwealth, 656 S.W.2d 722 (Ky. 1983), this Court found that a trial court had not erred in giving a wanton murder instruction when the defendant fired a shotgun from the hip in the direction of three men, killing one of them. See also Soto v. Commonwealth, 139 S.W.3d 827, 867 (2004) (“An instruction on wanton murder has been held appropriate where there was evidence that the defendant fired a weapon at the victim but without an intent to kill.”) (citing Carwile, supra). The jury may have believed that Appellant pointed the gun at Adams in order to rob him, not with the intent to kill him, and that the gun went off as Adams swatted at it. Hocker testified that, moments after Adams was shot, Appellant stated that the trigger had slipped.

Appellant argues that intent must be inferred based upon the nature and extent of Adam's wounds, and cites to cases such as Halvorsen v. Commonwealth, 730 S.W.2d 921 (Ky. 1987), in which this Court held that a wanton murder instruction was precluded by the nature and extent of the victim's wounds. Under the facts of Halvorsen, the victim was shot a total of thirteen times, and a wanton murder instruction was clearly unreasonable. In contrast, Adams was killed by a single shot.

Appellant also argues that intent can be inferred from his conduct subsequent to the shooting. See e.g., Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997) (“A person's state of mind may be inferred from actions preceding and following the charged offense.”). Appellant claims that the fact that he did not attempt to summon help for the injured Adams indicates that the shooting was not accidental. This evidence does not compel a conclusion that a wanton murder instruction was unreasonable. In sum, there was sufficient evidence to support both intentional and

wanton conduct, and accordingly, the trial court properly submitted both instructions for the jury's consideration.

II.

Appellant's next argument is divided into three sub-arguments that center around jury instructions. Part A of Appellant's argument, that the wanton murder instruction was incorrect, was addressed and dismissed in Part I of this opinion. Part C of Appellant's argument contends that the trial court erred by giving the jury a single self-defense instruction rather than multiple self-defense instructions. We disagree, and do not believe that multiple self-defense instructions were necessary.

Part B of Appellant's argument relates to a motion made by defense counsel pertaining to the jury instructions. The jurors were given a self-defense instruction. In his closing argument, defense counsel wanted to argue to the jurors that, even if they believed that Appellant did not have a legal right to use self-defense due to the initial aggressor qualification for self-defense,¹ if he had the mindset that he had a right to use self-defense, then this mindset does not constitute "extreme indifference to human life" and the jury could not convict him of wanton murder. Rather, they should convict him of second-degree manslaughter. At trial, the defense counsel cited to Elliot v. Commonwealth, 976 S.W.2d 416, 420 n.3 (Ky. 1998) (If the jury believed that the

¹ KRS 503.060(3) provides:

[T]he use of physical force by a defendant upon another person is not justifiable when:

(3) The defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:

(a) His initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or

(b) He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.

appellant had an actual subjective belief in the need to act in self-protection, then they should not find him guilty of wanton murder but of second-degree manslaughter).

Appellant does not have a valid claim regarding this issue on appeal because the record reflects that defense counsel ultimately was allowed to make his argument. All parties agreed that he could make his point to the jury as a clarification to the murder instruction: if the jury believed that Appellant had the mindset that he could use self-protection, even if he had no legal authority to do so, then those circumstances do not constitute an "extreme indifference to human life." We believe that this solution was the appropriate one, and because all parties agreed to it, we find Appellant's argument to be unpreserved for appeal.

III.

Appellant alleges that the trial court erred when it permitted the Commonwealth to introduce photographs of a handgun, and to use a replica handgun as demonstrative evidence. Both of these issues are properly preserved.

The photographs at issue were recovered from Appellant's residence. One photograph shows Appellant holding a handgun. The other photograph depicts a handgun, money, and a package of cigarettes. These photographs were introduced as evidence by the officer who discovered them at Appellant's residence.

The demonstrative evidence was used by Detective Paul Williams, who was called to the stand by the Commonwealth. He displayed a handgun that he had recently purchased and testified that it was a .40 caliber Highpoint Pistol, and that this particular gun was not used in the offense and was not evidence. Detective Williams testified that the .40 caliber Highpoint Pistol is identical in appearance to the 9-mm Highpoint Pistol. He was shown the two photographs and identified the gun in the

photographs as a Highpoint Pistol. He then used the handgun that he brought with him to demonstrate the identifiable characteristics of the Highpoint Pistol. The handgun itself was not introduced as evidence.

Appellant argues that the photographs are irrelevant under KRE 401, and have no probative value under KRE 403, because there is no proof that the gun in the photographs was the same gun used in the charged offense. Likewise, Appellant argues that the use of the handgun as demonstrative evidence violated KRE 403. Appellant claims that the photographs and handgun were inflammatory and portrayed Appellant in an offensive light.

Relevance

KRE 401 defines relevant evidence as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” A fact that is “of consequence” need not be disputed to be relevant. Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.05[3], at 81 (4th ed. LexisNexis 2003). By this definition, the photographs and handgun were relevant. Id. (“Relevant evidence is and must be viewed as including evidentiary facts needed to portray the general nature and character of the litigation.”) Although neither party disputes that Appellant shot Adams, the evidence is relevant to help convey a full and accurate picture of the crime scene. The bullet that was removed from Adams’ body came from a 9-mm handgun. Firearms examiner Warren Mitchell testified that the bullet had those characteristics that would be found on a Highpoint Pistol. However, he could not state that the bullet came from a Highpoint Pistol, but only that it could have possibly come from a Highpoint Pistol. Detective Williams used the Highpoint Pistol to demonstrate why the handgun in the

photograph could be identified as a Highpoint Pistol. In sum, the photographs and handgun were relevant in that they had a tendency to show that Appellant possessed a Highpoint Pistol, which could not be ruled out as being the type of gun used to kill Adams. See Thurman v. Commonwealth, 975 S.W.2d 888 (Ky. 1998) (where victim was killed by a bullet from a .22 caliber pistol and defendant admitted that he shot victim and disposed of the weapon, evidence that defendant was in possession of a medium sized revolver before, after, and during the evening of murder was relevant).

The Photographs and KRE 403

Appellant argues that the photographs were admitted in violation of KRE 403 because their probative value was substantially outweighed by the danger of undue prejudice. This Court has held that the trial court has broad discretion to conduct the balancing test under KRE 403, and we will not disturb the trial court's judgment absent an abuse of discretion. Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999).

In this case, the photographs have little probative value. First, it is impossible to know whether the gun in the photographs was used during the crimes, or at what time the photographs were taken. Second, the fact that Appellant admitted to shooting Adams with his gun significantly diminishes the probative value of the photographs. The photographs were not useful to establish Appellant's possession of the fatal weapon because Appellant admitted as much during his testimony.²

Despite their limited probative value, we do not find that the trial court abused its discretion in admitting the photographs under KRE 403. One of two risks of "undue prejudice" is the danger that evidence will elicit an emotional response that inflames

² We do, however, acknowledge that, at the time the evidence was offered, the Commonwealth may not have known that Appellant would testify that he shot Adams with his own gun.

passions, generates sympathy, or arouses hostility. Dixon v. Commonwealth, 149 S.W.3d 426, 431 (Ky. 2004) (citing Lawson, supra, § 2.10[4][b], at 88).³ It is reasonable to conclude that the photographs of a gun and Appellant posing with a handgun would be likely to evoke some kind of emotional reaction. However, the risk associated with this reaction is not significant. The photograph did not provide jurors with any information that they did not already know: that Appellant owned a gun, and fired it at Adams. Aside from the sight of a gun, which some jurors may find to be startling, there is nothing shocking about these photographs. In light of the circumstances, we do not find an abuse of discretion in admitting the photographs.

The Replica Handgun and KRE 403

Appellant argues that the Commonwealth's use of a handgun as demonstrative evidence violated KRE 403. To resolve this issue, we must evaluate case law regarding the use of replicas, models, and other visual aids that witnesses may use to expound their testimony.⁴ Hellstrom v. Commonwealth, 825 S.W.2d 612 (Ky. 1992) ("Visual aids are a part of the witness' testimony but they are not a substitute for testimony, nor are they admitted as exhibits."); see also Stringer v. Commonwealth, 956 S.W.2d 883 (Ky.1997). As noted above, the handgun was not admitted into evidence.⁵ Here, we must only decide whether the use of the handgun (displaying and describing its shared

³ The other general type of risk, that the evidence will be used for an improper purpose, is inapplicable to the instant case. See Dixon, supra.

⁴ The handgun was itself not a replica handgun but was an actual firearm. Our usage of the term "replica" refers to the gun's function in court as a representation of the gun in the photograph.

⁵ With regard to replicas that are formally admitted into evidence, we have held that the object must be a "true replica." Hogan v. Cooke Pontiac Co., 346 S.W.2d 529 (Ky. 1961)(model wheel admitted into evidence was a true replica and a useful aid to the jury in understanding the evidence); Allen v. Commonwealth, 901 S.W.2d 881 (Ky. App. 1995)(replica of the wooden paddle that was used as a weapon was established to be a true replica and therefore admissible).

characteristics with the gun in the photograph) was a proper use of demonstrative evidence under KRE 403.

Although Kentucky courts have not addressed the precise issue of evaluating the use of replica weapons as demonstrative aids under KRE 403, a number of federal courts have done so under the identical Rule 403 of the Federal Rules of Evidence. See e.g., United States v. Aldaco, 201 F.3d 979 (7th Cir. 2000) (holding that the use of a replica shotgun was admissible as demonstrative evidence); United States v. McIntosh, 23 F.3d 1454 (8th Cir. 1994) (trial court did not abuse its discretion when it allowed the government to use a revolver as demonstrative evidence for the purpose of showing a similar gun).

The defendant in McIntosh, supra, was convicted of possession of a firearm during a drug trafficking crime. Two witnesses testified that he carried a .357 magnum under his jacket during the drug transactions. At trial, the government showed a .357 magnum to the jury as demonstrative evidence. The gun itself was never received into evidence. The Eighth Circuit Court of Appeals held that there was no abuse of discretion. The federal appellate court found that the gun allowed the jury to assess the credibility of the witnesses and whether they could actually see the gun, based on its size and shape, through the defendant's jacket. Id. at 1456; see also Aldaco, supra (replica shotgun was admissible as demonstrative evidence to illustrate what the testifying police officer observed so that the jury could assess whether the events occurred as the officer testified).

In comparing the instant case with cases that have allowed the use of replica weapons as demonstrative evidence, we find the link between the Highpoint Pistol and the gun used in the crime to be far more tenuous. In the above-cited cases, witnesses

testified to seeing a firearm at the crime scene, and the replica firearm that was used matched their descriptions. The only fact that we know about the gun that Appellant used is that it was a 9-mm handgun. The only legitimate purpose behind the demonstrative evidence was to establish that the gun in the photograph is a Highpoint Pistol. This revelation, however, is basically insignificant because there is no evidence that the gun used during the crime was a Highpoint Pistol. The only value in knowing that the gun in the photograph is a Highpoint Pistol is the fact that Highpoint makes a 9-mm handgun, so the gun in the photograph *could have possibly been* the gun used during the crime. Even the Commonwealth's attorney admitted at trial that a Highpoint Pistol is one of many guns that may have been used. The already minimal probative value of the Highpoint Pistol is compounded by the fact that the question of whether the gun in the photograph was the gun used during the crime is of little consequence because Appellant admitted to shooting Adams.

Appellant argues that the use of the Highpoint Pistol was unfairly prejudicial and portrayed him in an inflammatory and negative light. We acknowledge that the sight of a gun at trial could be alarming to jurors. The gun creates a real impression upon jurors who, in this case, knew that Appellant did, in fact, point a gun at Adams and kill him. While the prejudicial effect of using a gun as evidence is alone insufficient to render its use inadmissible, in this case, there was very little purpose behind bringing the gun to court. In light of the near trifling probative value of the demonstrative evidence, we find that the trial court abused its discretion in allowing the use of the Highpoint Pistol.

Despite the trial court's error, we find it to be harmless. RCr 9.24. The test for harmless error is whether there is any substantial possibility that the outcome of the

case would have been different without the presence of that error. Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983). We do not believe that the use of the gun prejudiced the jury in a substantial manner in light of the totality of the evidence, which included, among other evidence: Hocker's eyewitness testimony that Appellant pulled a gun on Adams intending to rob him, a taped conversation between Appellant and his mother where his mother suggested that Appellant testify the incident was an accident, and Appellant's police statement that contradicted his testimony at trial.

IV.

Appellant contends that the trial court erred by permitting the Commonwealth to introduce evidence of three separate incidents of prior bad acts in violation of KRE 404(b).⁶

The first instance of error alleged by Appellant is Hocker's testimony that he was in the "hole" (disciplinary custody) with Appellant for disciplinary problems after the crimes occurred.⁷ Defense counsel immediately moved for a mistrial, which the trial court denied. Hocker testified that he saw Appellant while they were both in jail. He described the appearance of the "hole," and testified that it is where prisoners go for disciplinary purposes. While they were together there, Hocker testified that Appellant passed him a note that instructed him on how to testify. The note, which was read to

⁶KRE 404(b) provides:

- (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
 - (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

⁷ KRE 404(b) applies to evidence of acts occurring subsequently to the charged crime. Lawson, supra, § 2.25[2], at 125.

the jury, includes instructions on what Hocker's story should be, such as the fact that Hocker did not know how the gun went off, did not see who had the gun, and that he had previously lied about the incident because he was afraid of being charged.

KRE 404(b) allows evidence of bad acts for purposes other than to prove the character of a person in order to show action in conformity therewith. KRE 404(b)(1) lists permissible purposes, such as proof of motive, opportunity, and intent, however this list is illustrative and not exhaustive. Tamme v. Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998) (citing Lawson, supra, § 2.25[2], at 87). While the evidence in dispute does not directly fall into any of the listed purposes, it is clear that the evidence was not offered as character evidence against Appellant. It was information that provided the jury with the relevant circumstances under which Appellant gave the note to Hocker. Hocker did not testify as to why either of them was in disciplinary custody, but only revealed information that was necessary for his testimony. The evidence was admissible under KRE 404(b). Further, there was no violation of KRE 403, as we do not believe that evidence that Appellant was in disciplinary custody for an unknown reason prejudiced the jury in any meaningful way.

Next, Appellant argues that evidence of his initial refusal of a court order to provide a DNA sample was admitted in violation of KRE 404(b). Detective Schoonover testified that he received a court order to collect hair and blood samples from Appellant, and Appellant refused to give the samples. The Commonwealth sought to introduce this testimony as evidence of attempted concealment, and the trial court allowed it. The trial court did not abuse its discretion in admitting this testimony. Wellborn v. Commonwealth, 157 S.W.3d 608, 615 (Ky. 2005) ("Flight and attempt at concealment are circumstantial evidence of guilt because they suggest a guilty state of mind.") (citing

Fugate v. Commonwealth, 445 S.W.2d 675 (Ky.1969)). This testimony was not used to demonstrate criminal propensity as contemplated by KRE 404(b).

Finally, Appellant argues that the admission of a prison letter from Appellant to a third party regarding a past drug deal with Gill violated KRE 404(b), KRE 401, and KRE 403. These issues were not properly preserved for review. The record reveals that the defense counsel objected to the admission of this letter, but his objection pertained to authentication of the letter and the best evidence rule. Appellant stated specific grounds for his objection to the trial court and may not raise different grounds on appeal. Harris v. Commonwealth, 342 S.W.2d 535, 539 (Ky. 1961) ("A party is confined to the specific grounds of objection to the admission of evidence and is deemed to waive any other ground. It is too late to present any other grounds on appeal.").

V.

Appellant asserts that the trial court erred by prohibiting the introduction of evidence rebutting the Commonwealth's claim that he recently fabricated his claim of self-defense. During its cross-examination of Appellant, the Commonwealth suggested that Appellant had fabricated his testimony before the trial court. The Commonwealth did so by questioning Appellant on whether he had heard Hocker's and Gill's police statements, their grand jury testimonies, and their testimonies at trial. The Commonwealth confirmed that Appellant was aware of the evidence against him for a period of over one year. The Commonwealth also confirmed that his claim of self-defense at trial contradicted his police statement, where he told the detectives that he had nothing to do with the shooting.

On redirect, defense counsel sought to question Appellant about a statement that he made to defense counsel while retaining her as counsel. This statement pertained to

his self-defense claim, and defense counsel wanted to introduce it as a prior consistent statement to rebut a charge of recent fabrication. KRE 801A(a)(2).

The trial court ruled that the statement was inadmissible because the statement was made after Appellant had a motive to fabricate. We agree with the trial court. In order to be admissible, prior consistent statements of witnesses must be made before a motive to fabricate exists. Slaven v. Commonwealth, 962 S.W.2d 845, 858 (Ky. 1997); Smith v. Commonwealth, 920 S.W.2d 514, 517 (Ky. 1995). Both at trial and in this appeal, Appellant had failed to demonstrate that he did not have a motive to fabricate at the time he made his statement to counsel, which was after his arrest and after he was aware of the evidence against him. See Smith supra (Appellant's motive to fabricate did not change from the time the investigation began and through his trial).

VI.

During his direct examination, Hocker testified that he had a conversation with Gill outside of the courtroom on the previous day. Hocker testified that Gill questioned him as to why he was testifying for the Commonwealth and not helping Appellant. Hocker also testified that Gill said that the Commonwealth had already given him a life sentence, and therefore, he was going to try to help Appellant. Appellant argues that this testimony was inadmissible hearsay. Appellant concedes that this issue is not preserved for review and requests relief as a possible palpable error. KRE 103(e).

Hocker's testimony was admissible as a prior inconsistent statement of a witness. KRE 801A(a). Gill's alleged statement to Hocker, that he intended to testify to aid Appellant, was not a statement regarding the actual facts of the case, but rather, it suggested that his in-court testimony was untruthful as to the facts. Nevertheless, the statement sufficiently called into question his in-court testimony to qualify as an

inconsistent statement under the exclusion. Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969) (“[W]hen a witness has testified about some of the facts of a case the jury should know what else he has said about it, so long as it is relevant to the merits of the case.”) Both Hocker and Gill testified at trial and were subject to cross-examination. As such, Gill’s prior inconsistent statement was admissible. Id.

VII.

Appellant claims that the trial court erred in permitting the Commonwealth to introduce a portion of his taped phone conversations from jail when it had not provided these statements to him in a timely manner. Appellant claims that this error violated RCr 7.26(1), and his due process rights.

There was no violation of RCr 7.26 because the tape was provided to Appellant within forty-eight hours of trial. To support his due process argument, Appellant cites to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, this case is not applicable. Brady pertains to the withholding of exculpatory evidence, and the taped phone conversation was not exculpatory in nature. In sum, we find no error.

VIII.

Finally, Appellant argues that the trial court erred in failing to grant a directed verdict on the charge of first-degree robbery. “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.” Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). “The trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.” Id. The evidence, which included Hocker’s testimony that Appellant

was robbing Adams with a weapon, was sufficient to support a first-degree robbery conviction.

The judgment and sentence of the Fayette Circuit Court are affirmed.

All concur. Johnstone, J., concurs in result only.

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