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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JANUARY 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0085-MR DATE 2-9-06 ElAGrantP.C.

YAQOB TAFAN THOMAS — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
03-CR-00460

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Yaqob Tafan Thomas, was convicted in the Fayette Circuit Court for murder and tampering with physical evidence. He was sentenced to forty years imprisonment and appeals to this Court as a matter of right.

Appellant was convicted for the murder of Dionte Burdette. On December 29, 2002, Appellant met with Gregory Baltimore regarding a cocaine purchase. Baltimore arranged for Appellant to purchase seven ounces of cocaine from Burdette for $7,000. Appellant was to pay Baltimore $2,000 for this arrangement.

Appellant and Baltimore met Burdette at a Waffle House in Lexington. After they ate, the three men entered Burdette's SUV. According to Baltimore, Appellant was in the backseat. After circling the parking lot several times, Appellant grabbed Burdette from behind and held a handgun to Burdette's head, demanding the cocaine. With the

handgun pointed in a downward direction, Appellant shot Burdette once in the leg. Appellant once again demanded the cocaine, and Burdette replied that it was located with his partner across the street. Appellant shot Burdette three more times, and Burdette rolled out of the driver's side door. Appellant and Baltimore then left the vehicle and ran. According to Baltimore, when they stopped running for a moment, Appellant threatened to kill him if he said anything. Baltimore noticed Appellant throw the gun into some bushes. Additional facts will be set forth as necessary.

I.

Appellant first argues that he was substantially prejudiced and denied a fair and impartial jury when the trial court denied his motion to strike a juror for cause from the jury panel.

During *voir dire*, the trial judge asked the jury panel whether they had knowledge of any facts pertaining to the case. Juror 426 responded in the affirmative. He stated that he could set aside what he had read or heard about in the media and be fair to both sides. Upon further questioning, Juror 426 stated that he had read in the Lexington *Herald-Leader* that the police had "picked up" a suspect who was from Louisville and had a prior criminal history. Defense counsel moved to strike Juror 426 because he was aware of Appellant's prior criminal history. The trial judge overruled the objection.

The decision to grant a motion to strike a juror for cause is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. Foley v. Commonwealth, 953 S.W.2d 924, 932 (Ky. 1997); Moss v. Commonwealth, 949 S.W.2d 579, 581 (Ky. 1997). Furthermore, the fact that a juror may have acquired some knowledge about a case from the news media does not establish objective bias. Foley, supra, at 932. Juror 426 disclosed only a vague recollection that the police had

picked up a suspect with a prior criminal background. Juror 426 did not know the details of this criminal history, and had stated that he could disregard what he had read in the newspaper.[1] We do not find an abuse of discretion.

II.

Appellant argues that the trial court erred by failing to grant a mistrial based upon an alleged improper bolstering of witness Donna Brooks' testimony. In particular, Appellant claims that references to the fact that she was a Christian constitutes improper evidence of her good character introduced before her character was attacked.

A witness' character may not be bolstered before it is impeached. Brown v. Commonwealth, 983 S.W.2d 513, 515 (Ky. 1999); Pickard Chrysler, Inc. v Sizemore, 918 S.W.2d 736, 740 (Ky. App. 1995). Ms. Brooks, the victim's mother, testified about visiting Appellant in jail. During her testimony, she twice mentioned that she was a Christian. The first time, she was repeating a statement that she had made to Appellant ("I said [to Appellant] 'I am a Christian.'"). There was no objection. The second time, she was making a reference to the reason why she was visiting Appellant. She stated, "so I could be able to forgive him... [because]... I'm a Christian." Defense counsel objected and moved for a mistrial. The trial judge offered to give an admonition, but the defense counsel refused, stating that any admonition would make the defense appear to be "anti-Christian."

A decision to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of discretion. Bray v. Commonwealth, 68 S.W.3d 375, 383

[1] Appellant claims that Juror 426 was asked whether he could set aside what he had read in the media before he disclosed what he had read. As such, Appellant takes issue with the timing of the trial judge's questions. We do not believe it was necessary for the trial judge to repeat his questions. The juror had already stated that he could disregard what he had read in the newspaper, and it was proper for the trial judge to rely on this statement.

(Ky. 2002). "An admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition." Matthews v. Commonwealth, 163 S.W.3d 11, 18 (Ky. 2005). As an extreme remedy, a mistrial should only be granted when there is a fundamental defect in the proceedings and "a manifest necessity for such an action or an urgent or real necessity." Id. We believe that the offer of an admonition was a more than sufficient remedy in this instance. In sum, these brief references to the fact that the witness is a Christian do not demand a mistrial.

III.

Appellant claims that he was entitled to an instruction on voluntary intoxication. We disagree. "[T]he entitlement to an affirmative instruction is dependant upon the introduction of some evidence justifying a reasonable inference of the existence of a defense." Wheeler v. Commonwealth, 121 S.W.3d 173, 184 (Ky. 2003); Grimes v. McAnulty, 957 S.W.2d 223, 226 (Ky. 1997). "In order to justify an instruction on intoxication, there must be evidence that not only was the defendant drunk, but that he was so drunk that he did not know what he was doing." Lickliter v. Commonwealth, 142 S.W.3d 65, 68 (Ky. 2004) (citing Springer v. Commonwealth, 998 S.W.2d 439 (Ky. 1999)). The only evidence that Appellant was intoxicated was a passing reference during Ms. Brooks' testimony. Appellant did not present evidence that he was intoxicated, and there was certainly no evidence that he was intoxicated to the degree required to justify such an instruction.

IV.

Lastly, Appellant claims that the trial court erred by failing to suppress his incriminating statement to Ms. Brooks. Ms. Brooks visited Appellant in jail after

Appellant had asserted his Fifth Amendment right to counsel. As such, Appellant claims that his statement to Ms. Brooks should be suppressed because she was acting as an agent of the state and her questioning constituted a custodial interrogation. Appellant's argument is without merit, as there is no evidence to suggest that Ms. Brooks was acting under either the direction or coercion of the government. See Adkins v. Commonwealth, 96 S.W.3d 779, 791 (Ky. 2003) (questioning by a private party may constitute a custodial interrogation if the private party is acting under a court order or government regulation, or if the government exercises "such coercive power or such significant encouragement" to necessitate its responsibility for the party's conduct).

Appellant also claims that the statement should have been suppressed under KRS 422.110 because the Fayette County Detention Center (FCDC) should not have permitted Ms. Brooks to visit him, and in doing so, it permitted Ms. Brooks to "sweat" out a confession. KRS 422.110, the "Anti-Sweating" statute, prohibits law enforcement officers from obtaining confessions by using "threats or other wrongful means," and prohibits those who have custody of an accused from allowing any other person to do so. See also Karl v. Commonwealth, 288 S.W.2d 628 (Ky. 1956) (detailing the history and purpose behind KRS 422.110). The trial court found that there was no evidence presented to show that anyone at the FCDC was aware of the purpose behind Ms. Brooks' visit or that Ms. Brooks' conduct constituted the kind of conduct prohibited by the statute. We find no reason to disturb the trial court's ruling.

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

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

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