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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 25, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE Feb 15, 07 E.D.C.

2006-SC-000397-MR
&
2005-SC-000342-MR

OLIVER HINKLE — APPELLANT

APPEAL FROM KNOX CIRCUIT COURT
HON. WILLIAM T. CAIN, SPECIAL JUDGE
V. INDICTMENT NO. 2003-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the Knox Circuit Court convicted Appellant, Oliver Hinkle, of the intentional murder of his estranged wife. For this crime, Appellant was sentenced to twenty years' imprisonment. Appellant appealed as a matter of right, and on February 23, 2006, this Court remanded Appellant's case to the Knox Circuit Court for a determination as to whether a retrospective competency hearing was constitutionally permissible. Hinkle v. Commonwealth, 2005-SC-342 (rendered February 23, 2006). On April 21, 2006, the Knox Circuit Court issued an Opinion and Order finding that a retrospective competency hearing was constitutionally permissible and that Appellant was competent at the time of his February 2005 trial. Appellant now appeals this order; and for the reasons set forth herein, we affirm.

Appellant contends the trial court erred to his substantial prejudice when it determined that a retrospective competency hearing was constitutionally permissible. In Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004), we stated that "[t]he test to be applied in determining whether a retrospective competency hearing is permissible is whether the quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation." Id. at 32 (quoting Thompson v. Commonwealth, 56 S.W.3d 406, 409 (2001)). "[F]actors bearing on the constitutional permissibility of a retrospective hearing include: (1) the length of time between the retrospective hearing and the trial; (2) the availability of transcript or video record of the relevant proceedings; (3) the existence of mental examinations conducted close in time to the trial date; and (4) the availability of the recollections of non-experts-including counsel and the trial judge-who had the ability to observe and interact with the defendant during trial." Id.

In this case, Appellant was evaluated in February 2004 by Dr. Steven Simon, a psychologist at the Kentucky Correctional Psychiatric Center ("KCPC"). Dr. Simon opined that Appellant was competent to stand trial at that time, and that Appellant's condition did not present a "close call" on the issue of competency. Dr. Simon also testified that absent any substantial changes or problems, he would expect Appellant to have remained competent at the time of his February 2005 trial. Appellant's trial counsel also expressed an opinion that Appellant was competent to stand trial and further offered to stipulate the findings in Dr. Simon's report. Finally, a video record exists of all relevant proceedings in

this case and nothing in the record suggests or infers that Appellant may be incompetent.

Upon review, we agree with the trial court that sufficient evidence was available to conduct a meaningful competency hearing on remand. Appellant principally complains that Dr. Simon's report is irrelevant and unreliable since it was based on Appellant's condition approximately one year prior to trial. While we agree that the weight of Dr. Simon's report is diminished due to this considerable delay, we do not find such a delay to render the report completely useless. Dr. Simon testified that Appellant's competency status was unlikely to have changed between the time of his evaluation and Appellant's trial, especially in light of the fact that Appellant's competency status was not a "close call." Moreover, the trial court was able to review other evidence, such as opinions made by Appellant's trial counsel and the video record. In light of the quantity and quality of this substantial evidence, we find no error on the part of the trial court.

We also reject Appellant's argument that there was not substantial evidence to support a finding that Appellant was competent to stand trial in February 2005. The standard for competency is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Thompson, supra at 32 (citation omitted). In this case, the evidence is more than sufficient to support a finding of competency at the time of Appellant's February 2005 trial.

For the reasons set forth herein, the April 21, 2006 order of the Knox Circuit Court is affirmed.

All concur.

ATTORNEY FOR APPELLANT

Emily Holt Rhorer
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

ATTORNEY FOR APPELLEE

Gregory D. Stumbo
Attorney General

George G. Seelig
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601

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Supreme Court of Kentucky

FINAL
DATE Feb 15, 07 ENA Grow, D.C.

2005-SC-0342-MR

OLIVER HINKLE — APPELLANT

V.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
2003-CR-0025

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REMANDING IN PART

This appeal is from a judgment based on a jury verdict that convicted Hinkle of murder. He was sentenced to twenty years in prison.

The questions presented are whether the trial judge properly denied a requested instruction on first-degree manslaughter under extreme emotional disturbance; whether Hinkle was entitled to a directed verdict of acquittal; whether the failure to hold a competency hearing denied Hinkle his right to due process; and, whether improper opinion testimony was admitted.

Hinkle was indicted for the murder of his estranged wife by intentionally shooting and killing her with a shotgun. At trial, the Knox County Sheriff at the time and two of his deputies testified that Hinkle admitted to them that he killed the victim. One of those deputies recalled seeing a fresh cut in the webbing of the defendant's hand. When he

asked Hinkle how he received the injury, Hinkle replied that it happened when he fired the gun.

DNA analysis confirmed that blood found on the gun was the defendant's. Moreover, a forensic pathologist testified that Hinkle's injury was consistent with weapon recoil. He also determined that the shotgun was fired from close range.

Hinkle confessed to a detective of the Kentucky State Police that he and the victim had been arguing over "silly or stupid stuff." A Christmas tree was knocked over a couple of times during their quarrel. Hinkle claimed that at some point he blacked out and when he came to his senses, he was sitting on the couch holding the shotgun and his estranged wife was dead. He then got up off the couch, placed his then ten-year-old daughter in the bathroom and called the Sheriff.

A state trooper testified that he interviewed the daughter at the scene. The daughter indicated to the trooper that she was in another room of the house when she heard a gunshot. Immediately afterwards, Hinkle told her that he shot the victim, but that he did not mean to.

At trial, the daughter altered her previous account to indicate that she had accidentally shot her mother. She claimed that her mother had attempted to sexually assault her, so she had gotten the gun to scare the mother away. The daughter testified that her father had awakened during this time and tried to grab the gun from her possession, but the gun went off, striking her mother.

The jury convicted Hinkle of murder. He was sentenced to twenty years in prison. This appeal followed.

I. Extreme Emotional Distress

The trial judge did not err when he denied a requested instruction on first-degree manslaughter under extreme emotional disturbance as a lesser included offense of murder. McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986), *cert. denied*, 479 U.S. 1057, 107 S.Ct. 935, 93 L.Ed.2d 986 (1987), defined extreme emotional disturbance as follows:

> Extreme emotional disturbance is a 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 the defendant believed them to be.

Id. at 468.

Essential to a finding of EED is the presence of a triggering event which remains uninterrupted until the time of the criminal act. Fields v. Commonwealth, 44 S.W.3d 355 (Ky. 2001). Mere "hurt" or "anger" is insufficient to prove extreme emotional disturbance. Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998). It must be proven by some definitive, non-speculative evidence. Morgan v. Commonwealth, 878 S.W.2d 18 (Ky. 1994).

Here, there was no evidence to support the granting of an EED instruction. Statements by Hinkle to the Sheriff after he had shot his wife do not reflect upon his mental state at the time of the shooting. Although there was some evidence of marijuana and amphetamines in the victim's system, the claim that she could have

been uncommonly irrational and angry is speculative. The acknowledgment by Hinkle that the argument he had with the victim had been over "silly or stupid stuff" demonstrates that his judgment was not distorted; he could accurately assess that the quarrel had not justified his actions. The knocking down of the Christmas tree by both the victim and Hinkle during their argument was not sufficient evidence of a triggering event. The trial judge properly denied the requested instruction.

II. Directed Verdict

Hinkle was not entitled to a directed verdict on the murder charge because there was sufficient evidence that the crime was committed intentionally. Our standard of review of a denial of a directed verdict of acquittal is well-settled and is stated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991) as follows: "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.

Intent may be inferred from the act itself or from the circumstances surrounding it. Talbott, supra. An inference is permitted because a person is presumed to intend the logical and probable consequences of his conduct. See Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997). Intent may also be inferred from the character and extent of the victim's injuries. Pollini v. Commonwealth, 172 S.W.3d 418 (Ky. 2005).

Here, the numerous admissions and confession by Hinkle, corroborated by the autopsy results and the physical evidence, were sufficient to support his conviction for murder. The alternate theory raised by Hinkle that his daughter shot the victim was an issue strictly for the jury. The trial judge properly denied the motion for a directed verdict.

III. Competency Hearing

Hinkle contends that the trial judge denied him due process of law when he failed to hold a competency hearing as required by KRS 504.100(3). He concedes that this issue is unpreserved, but asks this Court to review the matter for manifest injustice pursuant to RCr 10.26.

Defense counsel advised the trial court at a pre-trial conference that he had used expert funds to hire a psychologist to evaluate Hinkle. According to defense counsel, the psychologist conducted some preliminary tests which detected some strong indicators of neurological damage. He stated that the defendant had a closed head injury in his early twenties, some seizures and other indicators. Defense counsel expressed the opinion that the defendant "definitely" needed to be evaluated at KCPC. No reports or documentation were offered to support his assertions. The trial court ordered Hinkle to be evaluated for competency and criminal responsibility. It did not include any facts in support of the order.

At a later pre-trial hearing conducted while Hinkle was at KCPC, defense counsel stated, "Judge what I'll do if I get the report early, if we need a contested hearing, I'll advise [the prosecutor] and you in writing. If as usual we don't, then (counsel nods his head)." Ultimately, it was determined by the examining psychologist from KCPC that Hinkle was competent and did not meet the criteria for being insane. No request was made for a competency hearing and the trial commenced without one. It should be noted that the circuit judge who ordered the competency evaluation was not the same circuit judge who tried the case.

The standard of review in this matter is whether a reasonable judge, situated as was the trial judge whose failure to conduct an evidentiary hearing is being reviewed,

should have experienced doubt with respect to competency to stand trial. Thompson v. Commonwealth, 56 S.W.3d 406 (Ky. 2001) *citing* Mills v. Commonwealth, 996 S.W.2d 473 (Ky.1999). If the reasonable judge would not have experienced doubt, the lack of a hearing may be considered harmless error. Id.

In Thompson, supra, the trial judge ordered a defendant evaluated to determine his competency to stand trial, but did not hold a competency hearing following the mental evaluation. This Court held that the order of the trial judge established the sufficiency of his level of doubt as to Thompson's competence to plead guilty. That order stated that the trial judge had been informed of issues of mental illnesses and neurological problems which might affect the defendant's ability to perceive and interpret information provided by counsel. This Court concluded that because of the concerns expressed by the trial judge, the failure to hold the mandatory hearing pursuant to KRS 504.100(3) violated the defendant's due process rights.

Pursuant to Thompson, we remand this case to the Knox Circuit Court for it to determine whether a retrospective competency hearing is constitutionally permissible under due process and, if necessary, to conduct such a hearing within 60 days from the entry of this Opinion and Order. If the trial court rules that a competency hearing is not constitutionally permissible, or if it determines that Hinkle was not competent to stand trial, it shall enter an order granting a new trial pursuant to RCr 10.02. Hinkle shall not be retried until the trial court finds him competent to stand trial. If the trial court determines that a retrospective competency hearing is warranted and constitutionally permissible, and further finds that Hinkle was competent to stand trial, then it shall make findings of fact in support of this conclusion in its order, which shall be appealable by Hinkle.

Any appeal taken by either party from an adverse decision of the Knox Circuit Court shall be consolidated with this appeal, which we abate pending the resolution of the evidentiary hearing. Further, briefing on the matter shall be limited to ten pages by each side and, like the hearing on remand, shall be limited to only those issues addressed in this Opinion and Order. Finally, the Knox Circuit Court shall notify this Court of its final disposition of this matter within ten days of the entry of its final order.

IV. Opinion Testimony

Hinkle complains that the trial judge erred when he allowed the detective and the state trooper to offer an opinion that the daughter could not have handled the 12-gauge shotgun. Defense counsel objected to the detective's opinion testimony, but did not object to the state trooper's testimony. To the extent this issue is unpreserved, he asks that it be reviewed for palpable error pursuant to RCr 10.26.

The detective testified that he was familiar with 12-gauge shotguns and had a similar weapon himself. He also stated that he was acquainted with the fact that a 12-gauge shotgun had a very hard kick to it. The shotgun itself was then introduced as an exhibit. The detective indicated that when the child was interviewed, she was a fairly small 10-year-old. When asked if he had an opinion as to whether she could even handle or operate such a weapon, a general objection was made and overruled. The detective then stated that the daughter would not be able to handle the gun because of the amount of recoil.

Similar testimony was introduced during the examination of the state trooper. He stated that at the time of the incident, the daughter was not much bigger than the shotgun itself. He did not think she could have lifted the weapon up to a firing position. Defense counsel did not object to this testimony.

A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony or the determination of a fact in issue. KRE 701. Here, the detective and the state trooper saw the daughter at the time of the crime and both indicated that she was a small child. The state trooper specifically noted that she had grown a lot since the time he saw her. Under these circumstances, the opinion of the witnesses concerning whether the daughter could have fired the gun was admissible.

In regard to the assignments of error, other than the competency hearing questions, Hinkle received a fundamentally fair trial. He was not denied any of his due process rights under either the federal or state constitutions.

The judgment of conviction is affirmed in part and remanded in part for a retrospective competency hearing.

All concur.

COUNSEL FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George D. Seelig
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204