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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000119-MR

DATE 5-11-06 ELM GROVE, P.C.

MICHAEL LEWIS TAYLOR — APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
03-CR-00315

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Michael Lewis Taylor, was convicted by jury in the McCracken Circuit Court for the murder of Connie Morgan and was sentenced to twenty-five years imprisonment. Appellant now appeals his conviction and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b), alleging the trial court committed several errors, *viz*: (1) that the trial court improperly refused to consider Appellant a victim of domestic violence and thus erred in refusing to exempt Appellant from the requirement that he serve at least 85% of his sentence pursuant to KRS 439.3401; (2) that the trial court erred when it limited Appellant's direct examination of a witness when it excluded testimonial evidence as irrelevant; (3) that Appellant was entitled to a directed verdict due to insufficiency of the evidence; and (4) that Appellant was denied the right to a fair

and impartial jury due to allegations that two jurors were sleeping during the trial. For the reasons set forth herein, we affirm Appellant's conviction and sentence.

II. FACTS

Appellant, Michael Lewis Taylor, and the victim, Connie Morgan, had a very tumultuous relationship. Appellant had been married for twenty-five years to his now ex-wife, Sharon Taylor, and had several affairs throughout their marriage. One of these affairs involved Morgan. Appellant, a truck driver, met Morgan while on a trip in May 2002, when her then boyfriend tried to talk Appellant into having sex with her for $40. Appellant declined, but offered Morgan a ride with him to Florida as she wanted to get away from her boyfriend. Several weeks later, Appellant and Morgan began seeing each other exclusively until her death.

Appellant characterizes Morgan's behavior as bizarre and has noted in his brief that Morgan had mental problems. A medical examiner who testified at the trial described "hesitation marks" on her arms, the product of attempted suicide. Appellant also described the troubled childhood led by Morgan. She was raised in foster care where she claims she killed her foster father. Morgan also allegedly killed a woman in South Carolina.

Appellant's relationship with Morgan appears to have gone sour when she prevented him from contacting his children. Morgan screened Appellant's phone calls and hid his phone from him on occasion. Morgan also told Appellant that if he left her, she would kill him and his family. Further, Appellant tells of one particular event in which he awoke to find that Morgan had bound his hands together and cut off his hair. She then proceeded to stab him in the chest and

buttocks, causing Appellant to pass out from the blood loss. Appellant, however, says he still was very much in love with her, and even tried to get her to see a psychologist. It was after this suggestion that Morgan appears to have overdosed on pills. Appellant called 9-1-1, and Morgan recovered. A doctor wanted to institutionalize Morgan, but she was released to Appellant's care instead.

On several occasions, others witnessed Morgan's bizarre behavior. For example, after the couple returned from North Carolina where Morgan procured the CDL license of another female truck driver, Eva Chappell, Morgan became intoxicated and ran around naked in an RV park. That evening ended when Morgan attempted to hit a police officer with a metal rod and was subsequently arrested for disorderly conduct. Appellant attempted to leave Morgan after this episode, but when Morgan injured her leg, Appellant decided to stay. Appellant testified that Morgan only exhibited this bizarre behavior when she was intoxicated.

On August 3, 2003, several witnesses, who later testified at trial, observed Morgan run screaming from an RV in which she and Appellant were living at the time. The witnesses described Morgan as wearing only a bathrobe. The witnesses recount that Morgan fell on the ground once outside the RV and that she was bleeding from a wound on her face. Morgan screamed to the witnesses: "Please help me, don't let him kill me!" One witness, Doris Gillam, called 9-1-1. Appellant then emerged from the RV and slowly picked up Morgan and carried her into the RV as Morgan screamed again "Please don't let him kill me." Gillam testified that she asked Appellant what he doing and where he was taking

Morgan. Appellant did not respond. The witnesses then described the RV as rocking back and forth. Another witness, Eddie Grueber, saw the door of the RV open and described what appeared to be Morgan's arm or hand hanging out of the open doorway, with Appellant squatting over her. Appellant then exited the RV, but went back inside when he heard the sirens of approaching police.

When police arrived, they found Appellant out of breath with blood on his arms and ears. He told McCracken County Sheriff's Deputy Jessie Riddle that Morgan was dead. Morgan had no pulse and her face was covered with a bloody towel. Appellant confessed to Deputy David Knight that he stabbed Morgan in the throat, but that he did so out of self-defense. According to Appellant, he awoke to find Morgan on top of him with a knife to his chest. A struggle ensued. Appellant was stabbed in the sternum and abdomen, and Morgan sustained a stab wound to the eye, which is when she ran out of the RV. Appellant testified that he did not remember anything after this point.

Dr. Deirdre Schluckebier testified that the knife used to kill Morgan went through her lower jaw and into the base of her brain, and that Morgan lost a significant amount of blood. Dr. Schluckebier also testified that Morgan had defensive wounds on her hands as well as several other knife wounds on her neck and face. Further, the doctor testified that on the day she was killed, Morgan had no alcohol or drugs in her system

Appellant was indicted by the McCracken County Grand Jury on September 5, 2003, and was subsequently convicted of murder and sentenced to twenty-five years imprisonment on January 21, 2005.

III. ANALYSIS

A. Domestic Violence Exemption

In Appellant's first assignment of error, he alleges the trial court's ruling that he was not a victim of domestic violence was in error. KRS 439.3401(3) provides that violent offenders, defined in KRS 439.3401(1), "convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." KRS 439.3401(5) in turn provides that "[t]his section shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim." Thus a trial court must make a factual determination that the Appellant was a victim of domestic abuse before the exemption is effective.

In Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996), we held that KRS 439.3401(4)[1] "requires that the evidence believed by the fact-finder be sufficient that the defendant was more likely than not to have been a victim of domestic violence." In applying the preponderance of the evidence standard to evidentiary determinations under this statute, we noted as follows:

> KRS 533.060(1) specifies that the trial judge shall conduct a hearing and make findings. It has long been held that the trier of fact has the right to believe the evidence presented by one litigant in preference to another. King v. McMillan, 293 Ky. 399, 169 S.W.2d 10 (1943). The trier of fact may believe any witness in whole or in part. Webb Transfer Lines, Inc. v. Taylor, 439 S.W.2d 88, 95 (Ky. 1968). The trier of fact may take into consideration all

[1] Now KRS 439.3401(5).

> the circumstances of the case, including the credibility of the witness. Hayes v. Hayes, 357 S.W.2d 863, 866 (Ky. 1962).

Anderson, 934 S.W.2d at 278. Under the clearly erroneous standard of review, we upheld the trial court's ruling that Anderson was not a victim of domestic violence.

In Springer v. Commonwealth, 998 S.W.2d 439, 457 (Ky. 1999), we held that

> the exemption from the probation or conditional discharge restrictions in KRS 533.060(1) applies whether the domestic violence and abuse occurred previous to the offense or at the time the offense was committed; but the exemption from the parole restrictions in KRS 439 .3401 applies only if the domestic violence and abuse was "involved" in the offense.

Thus, we interpreted KRS 439.3401 to require a connection between the underlying offense and the domestic violence.

We reaffirmed this position in Commonwealth v. Vincent, 70 S.W.3d 422, 425 (Ky. 2002), wherein we noted that the General Assembly amended KRS 439.3401(2) and (3) after our decision in Springer, supra, so that the stricter "involved" requirement applies to probation as well as parole eligibility for violent offenders. We opined that in doing so, it appeared the General Assembly adopted our interpretation that the domestic violence must be "involved" in the underlying offense regarding the probation requirement as well as parole eligibility found in the statute. In that case, we ultimately held that "a prior history of domestic violence between a violent crime victim and the criminal defendant who perpetrated the violent offense does not, in and of itself, make the defendant eligible for the parole exemption of KRS 439.3401(5)." Id. The defendant in Vincent offered no evidence to connect the shooting death of her husband to the

history of domestic violence between her and her husband. We read the phrase "with regard to the offenses involving death of the victim or serious physical injury to the victim," contained in KRS 439.3401(5), to require "some connection or relationship between the domestic violence suffered by the defendant and the underlying offense committed by the defendant." Id. at 424.

At his sentencing, Appellant played various portions of a videotape of the trial testimony back to the court in an effort to meet his burden of proving by a preponderance of the evidence that he was a victim of domestic violence. Appellant first played the testimony of Dr. David West, a general surgeon who treated Appellant the day of the murder, who testified that Appellant received two stab wounds, one to the chest and one to the abdomen. Next, Appellant played the testimony of Don Vessels, owner of the Fern Creek Campground where Morgan and Appellant stayed several weeks before the murder. His testimony tended to show that Morgan was violent and aggressive and that she had a tendency to use knives in a threatening manner. Appellant then played the testimony of Deborah Hodges. Hodges had accompanied Morgan and Appellant on a "team drive" in which she spent several days with the couple as they made a trucking trip. Hodges testified that on one occasion Morgan, who had been drinking, pulled a knife on Appellant, who was lying on his back. From her testimony, it appears that Morgan was fighting with Appellant and kept him on his back for forty-five minutes while brandishing a knife the entire time. Hodges also stated that Morgan threatened her with the knife that same evening. Appellant then played the testimony of Dr. Henry Davis, a psychologist who was hired by the Appellant days before his original trial date to conduct a psychological

interview. Dr. Davis opined that Appellant was a victim of domestic violence based on the results of several personality tests and from the interview with Appellant. Appellant also told Dr. Davis that Morgan only became violent after they had been drinking. Finally, Appellant played portions of his trial testimony in which he talked about Morgan's violent nature and prior attacks.

The trial judge declined to find that the exemption of KRS 439.3401(5) applied to Appellant and found that, while the relationship between Morgan and Appellant involved violence, he "had a problem" with the connection of that violence to the crime. The trial judge based his decision on the fact that Appellant, being much larger than Morgan, could not have feared Morgan and could not have been a victim of domestic violence during the incidents Appellant described. The court thus chose to disbelieve the testimony offered by Appellant, instead finding other testimony more persuasive, especially that of the witnesses at the campground on the day of the murder. The court stated that "[Morgan] is out there crying, saying you're going to kill her and you . . . remember a lot of the other violence, but you don't seem to remember that." The court found that Appellant killed Morgan in a "blind passionate rage of anger over whatever." Thus the trial court did not find a connection between the domestic violence and the murder.

In applying the rationale of Springer and Vincent to the case at bar, we are not persuaded to find that the trial court's ruling was clearly erroneous. As fact finder in this situation, the trial judge could believe any witness over another and could consider the credibility of each witness on whether or not domestic violence was "involved" in Morgan's death. Ample evidence showed that Morgan

sustained several defensive wounds to her hands and that immediately prior to her death, several witnesses observed Morgan pleading for help and screaming that Appellant would kill her. Dr. Tracey Corey, Chief Medical Examiner, testifying on behalf of the Commonwealth, stated that it was not unusual for an assailant in sharp-force injury situations to have some wounds due to the nature of such an attack. Appellant presented evidence, his own testimony and that of two other witnesses, to show that Morgan was violent and that Appellant was a victim of domestic violence at her hands. The trial court, however, determined from all of the evidence that Appellant was not a victim of domestic violence at the time of Morgan's murder.

Furthermore, we are not inclined to reconsider our previous holding in Vincent, to wit that there must be some connection between the underlying offense and the domestic violence. Appellant has presented no compelling reasons for the reversal of our decision in Vincent. The ruling of the trial court is thus affirmed.

B. Exclusion of Witness Testimony

In his second assignment of error, Appellant alleges that the trial court abused its discretion in limiting his direct examination of a witness. Specifically, Appellant called Sharon Taylor, his ex-wife, to testify. During direct examination, defense counsel asked Ms. Taylor about an incident in which she confronted Appellant and Morgan in a local Wal-Mart. According to her testimony, when she approached Appellant, he pretended not to know her.[2] Ms. Taylor had been

[2] Appellant explained during his testimony that he acted this way in order to protect his ex-wife from Morgan because he was afraid of what Morgan would do to her.

attempting to locate Appellant for some time in order to serve divorce papers on him, and her confrontation of Appellant in the store was the first contact she had had with him in several months. Ms. Taylor stated that four weeks after this confrontation, she received a phone call from Morgan. Taylor testified that she could not understand Morgan very well, and when defense counsel asked her what Morgan said to her, the Commonwealth objected on ground that what Morgan told Ms. Taylor was not admissible unless relevant to an issue in the case. Defense counsel countered that the statement was relevant to show Morgan's violent nature.

The trial court subsequently called Ms. Taylor to the bench to determine the relevancy of her testimony concerning Morgan's statements. According to Ms. Taylor, Morgan wanted to meet her some place, but when it became apparent Ms. Taylor was not going to meet with her, Morgan made a derogatory statement and hung up. Ms. Taylor told the trial judge she did not feel threatened by Morgan's statements and that Morgan did not make any threats during the phone call. The trial judge sustained the objection.

The admissibility of such evidence is initially governed by KRE 401 and KRE 403. KRE 401 defines relevant evidence as "evidence 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." "Relevance is established by any showing of probativeness, however slight." Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999). Federal Rule of Evidence 401, identical to KRE 401, has been described as follows: "Implicit in [the definition for rule 401] are two distinct requirements: (1) the evidence must

tend to prove the matter sought to be proved; and (2) the matter sought to be proved must be one that is of consequence to the determination of the action." United States v. Waldrip, 981 F.2d 799, 806 (5th Cir. 1993). Despite the rule's inclusionary thrust, if these two requirements are not met by the introduction of the evidence, exclusion of the evidence is the only logical result.

KRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Professor Lawson instructs that determinations of admissibility made under KRE 403 are comprised of three essential components:

> (1) an assessment of the probative value of the evidence whose admission is being challenged; (2) an assessment of the impact of the specified undesirable consequences likely to flow from its admission ("undue prejudice, confusion of the issues, or misleading the jury, . . . undue delay, or needless presentation of cumulative evidence"); and (3) a determination of whether the product of the second component (undesirable effects from admission) substantially outweighs the product of the first component (probative worth of the evidence).

Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.10[3] (4th ed. 2003) (citing Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996)).

This Court's review of a trial court's ruling excluding evidence under KRE 401 and 403 is limited to determining whether the ruling was an abuse of discretion. See Partin v. Commownealth, 918 S.W.2d 219, 222 (Ky. 1996); Sanborn v. Commonwealth, 754 S.W.2d 534 (KY. 1988). Important to this inquiry is Ms. Taylor's concession that she *did not feel threatened* by Morgan during the phone conversation and the fact that Morgan made *no* threats to her

over the phone. It is thus unclear how this particular part of Ms. Taylor's testimony could be relevant to show that Morgan was abusive toward Appellant. Even if relevant, this portion of Ms. Taylor's testimony was merely cumulative of other testimony offered to show that Morgan was not only abusive, but also hostile in certain situations. In terms of the components described by Professor Lawson, the second prong (undesirable effect of the admission of the evidence) has substantially outweighed the first prong (probative value). The trial court did not abuse its discretion in excluding this portion of the testimony. Thus the trial court's ruling in finding the evidence inadmissible will not be disturbed and is affirmed.

C. Denial of Appellant's Motion for Directed Verdict of Acquittal

In his third assignment of error, Appellant alleges that the trial court's denial of his motion for directed verdict of acquittal for the murder charge was in error. Appellant urges this Court to find that he was entitled to a directed verdict of acquittal on the murder charge because he was privileged to act in self-protection, or, in the alternative, he was entitled to conviction under second degree manslaughter "because his belief was wanton" or conviction under reckless homicide "because his belief was reckless."

The standard of review of these matters on direct appeal 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). Stated differently, the standard "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The trial court, in ruling on motions for directed verdict, is required to assume that all the evidence presented by the Commonwealth is, in fact, true, "leaving questions of weight and credibility to the jury." Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998) (citation omitted). Furthermore, the trial court must "consider not only the actual evidence, but also 'must draw all *fair and reasonable inferences* from the evidence in favor of the Commonwealth.'" Lawson v. Commonwealth, 53 S.W.3d 534, 548 (Ky. 2001) (emphasis in original) (citation omitted).

The Commonwealth argues, and we agree, that the evidence of Appellant's guilt in the murder of Morgan, when taken in the light most favorable to the Commonwealth and drawing all fair and reasonable inferences, was overwhelming. Several witnesses observed Morgan flee from the RV, wearing nothing but a bathrobe, bleeding from a wound on her face, and screaming for help. These same witnesses then observed the Appellant calmly exit the RV, pick Morgan up, and, without muttering a word, carry her back into the RV, which then began to rock violently. The next time these witnesses saw Morgan, she lay in front of the RV door with Appellant hovering over her.

Further, medical evidence presented at trial described the brutal death suffered by Morgan at the hands of Appellant. Dr. Schluckebier testified that the knife used to kill Morgan was still lodged deep into her vertebrae as the handle protruded from beneath her jaw. Dr. Corey, Chief Medical Examiner, also testified for the Commonwealth that the evidence she examined was consistent

with a struggle occurring and was consistent with the victim never having sole possession of the knife.

We find that it was not clearly unreasonable for the jury to have found Appellant guilty of murder. Ample evidence, taken in the light most favorable to the Commonwealth, was presented such that a reasonable jury could have found guilt on the charge of murder. Thus we affirm the trial court's denial of Appellant's motion for a directed verdict of acquittal on the charge of murder.

D. Alleged Denial of a Fair Trial

In his final assignment of error, Appellant alleges that he was denied a fair trial because two jurors were alleged to have been sleeping during the trial. Appellant did not raise this issue to the trial court's attention until the reading of the instructions to the jury. When brought to the court's attention, Appellant requested that the judge either excuse the two jurors or call them into his chambers and question them. The trial judge did the latter. One juror stated she had a skin condition, which caused her eyes to hurt so she closed them often. The other juror said he was not asleep and had heard all the evidence. Because the jurors had been sworn, the judge took them at their word. Appellant accepted that ruling and asked for no further relief.

Appellant now urges this Court to find that, despite having his request fulfilled by the trial court, he was nonetheless denied his right to a fair trial. The Commonwealth contends that Appellant has affirmatively waived his right to address this issue on appeal since the trial court did as Appellant requested. We note that Appellant concedes he "technically" received the relief he requested; however, Appellant states the issue is partially preserved. We know of no rule

which allows an issue to be partially preserved – an issue is either preserved or it is not. Appellant asked the trial court to either excuse the jurors or question them. The trial court questioned them, and, taking them at their word, allowed them to continue to sit throughout the remainder of the trial. We can find no error in this ruling. Furthermore, Appellant has waived any right to appeal this issue as he received the relief requested. However, we point out that Appellant's defense counsel in this case waited until the jury instructions had been read before bringing the issue to the attention of the trial judge. Although the issue is unpreserved, we note several cases involving sleeping jurors.

In Shrout v. Commonwealth, 226 Ky. 660, 11 S.W.2d 726, 727 (Ky. 1928), this Court stated that "[t]he appellant could not sit by and see the juror sleeping, without asking the court to arouse him from his slumbers, and then complain about it after the trial was over. Besides, the juror stated that he listened with his eyes closed." We found no error in that case.

Similarly, in Young v. Commonwealth, 50 S.W.3d 148 (Ky. 2001), we found no error where the court questioned a juror who had allegedly been sleeping in the defendant's murder trial. The juror stated she had a medical condition, which caused her to close her eyes, but she insisted she had heard everything that happened during the trial. The defendant motioned for a mistrial, which the court overruled. We held it was not error to overrule the motion for a mistrial.

IV. CONCLUSION

Finding no error in the trial court's ruling with respect to Appellant's alleged errors, we affirm Appellant's conviction and sentence for the murder of Connie Morgan.

All concur.

COUNSEL FOR APPELLANT:

Shannon Dupree
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Ste. 302.
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601

Kenneth W. Riggs
Assistant Attorney General
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, Kentucky 40601