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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0702-MR

JAMES F. SIMPSON — APPELLANT

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
03-CR-00116

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Simpson, was convicted in the Greenup Circuit Court on two counts of first-degree assault and one count of first-degree burglary. He was sentenced to a total of thirty years' imprisonment and appeals to this Court as a matter of right.

Around midnight on July 26, 2003, Appellant entered a trailer at the Aqualand campground in Greenup County. Cheryl Nelson, who owned the trailer, was in her bedroom when she heard her sixteen-year-old niece Jessica scream. When Nelson entered the kitchen, Appellant had Jessica around the neck and was striking her with a hammer. Appellant then turned on Nelson and Jessica was able to escape to a bedroom where she called 911. Meanwhile, Appellant pulled out a pocket knife and began stabbing Nelson in the arms and in the side. When Nelson screamed "Why?"

Appellant responded "I am in love with Jessica." Eventually, Nelson was able to get the knife away from Appellant.

The evidence at trial established that Nelson had met Appellant, who also lived at the campground, during the spring of 2000. Appellant often ate dinner with Nelson and apparently had free reign of her trailer. Nelson told the jury that she was shocked at Appellant's behavior since she considered him a friend, and that she never realized he had any fixation on Jessica. Nelson stated that at the time of the incident, Appellant did not seem intoxicated and was not slurring his words.

Appellant testified in his own defense and admitted to assaulting Nelson and Jessica. However, his defense was that he was under the influence of a combination of OxyContin and Xanax to such extent that he had no recollection of the incident. Appellant explained to the jury that he had become suicidal after the death of his mother and had been taking drugs daily. Appellant insisted that he did not have any prurient interest in Jessica.

At the close of trial, the jury found Appellant guilty of all charges and recommended thirty years' imprisonment. The trial court entered judgment accordingly and this appeal followed. Additional facts are set forth as necessary.

I.

Appellant first argues that he was prejudiced by the introduction of irrelevant testimony and uncharged prior bad acts. Specifically, Appellant complains about testimony from Commonwealth witnesses Alma Nelson and Tina Debo.

Alma Nelson, Nelson's mother and Jessica's grandmother, testified that about three days before the attacks, she had played Yahtzee with Appellant, while Jessica was outside swimming in the pool. Alma stated that several times during the game

Appellant went to the window to watch Jessica. Alma testified:

> I just never saw him do that before and I thought it was kind of strange that you're sitting there playing Yahtzee and then you get up and look out the window towards a swimming pool with two people in it and you're not out there in the pool. I just thought it was very unusual. And when Cheryl came back in the kitchen, I believe my words were, "You should watch . . ."

At that point, the trial court interrupted Alma's testimony and would not permit her to tell the jury what she had said to Cheryl. However, the Commonwealth was permitted to ask Alma if she was aware of any other occasions when Appellant paid an inordinate amount of attention to Jessica.

Tina Debo, Nelson's neighbor, testified that she had told Appellant to stay away from her daughter after she had observed him lying in the weeds watching her kids and Jessica. Debo explained that Appellant had been hiding in the weeds across from her camp and when she approached him he got up and left. Debo further testified that Appellant told her if her son didn't stay out of his business Appellant would hurt him. Over defense objection, Debo opined that Appellant's "business" was following her daughter and Jessica.

Appellant argues that Alma and Debo's testimony was not relevant to the attacks and served only to create the inference that he was a child predator. He further claims that Debo's recitation of Appellant's threat against her son was improper KRE 404(b) prior bad acts testimony.

KRE 404(b) prohibits evidence of other crimes, wrongs or acts to prove action in conformity therewith. Such evidence is admissible, however, if "probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Billings v.

Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). Other admissible purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). Further, the question of whether the probative value of the evidence outweighs its prejudicial effect is a decision within the sound discretion of the trial court. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994).

Here, Appellant's defense was that he was intoxicated to such an extent that he did not know what he was doing when he assaulted Cheryl and Jessica. As such, we are of the opinion that evidence Appellant had been watching Jessica in the days leading up to the attacks was certainly probative of his motive and intent when he entered the trailer, and rebutted his claim that his actions were the result of a mistake or accident. Accordingly, there was no error in the admission of the testimony.

II.

Appellant next contends that he was denied a fair and impartial jury when the trial court refused to remove for cause a venire person who admitted he would have difficulty considering intoxication as a mitigating factor. Appellant alleges that this was prejudicial to him under Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993) as he was required to use a peremptory strike to remove the prospective juror.

In fact, the juror in question, while noting his reservation about intoxication as a defense, stated that he could follow any instructions given to him, including one on intoxication. Notwithstanding, the issue is essentially moot in light of this Court's recent decision in Morgan v. Commonwealth, 189 S.W.3d 99, 107 (Ky. 2006), wherein we held:

> A defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision. Rigsby v. Commonwealth, 495 S.W.2d 795 (Ky. 1973); Randolph v. Commonwealth, 716 S.W.2d 253 (Ky. 1986); Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). As long as the jury that actually hears and decides the case is impartial, there is no constitutional violation. Even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury. Cf. Turpin v. Commonwealth, 780 S.W.2d 619 (Ky.1989); Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).

Thus, as the juror in question herein did not participate in the trial, Appellant cannot claim that he was denied a fair and impartial jury.

III.

Appellant next complains that he was prejudiced by improper expert testimony by Greenup County EMT Robert Land. Land was called by the Commonwealth to rebut Appellant's claim that he was under the influence of drugs at the time of the assaults.

Land testified that upon arriving at the scene, he observed Appellant lying face down in the yard. Land then performed a sternum rub to wake Appellant. Land stated that after complaining of chest pains, Appellant remained still and kept his eyes closed. However, Land noticed that Appellant periodically looked out of the corner of his eye to see if anyone was watching him. As a result, Land performed a test on Appellant that EMT's utilize when they suspect a patient is faking unresponsiveness. Land explained that the test involves holding a patient's hand over his or her face and then dropping it. If the hand avoids hitting the face, it is an indication that the patient is not, in fact unconscious. Appellant did not let his hand hit his face, thus indicating to Land that he was conscious and aware of what was happening. Land testified that he believed Appellant was faking unconsciousness to avoid talking to police.

Land stated that Appellant was then placed into an ambulance for transport to the local hospital. During the trip, Appellant was responsive, talked to EMTs, and even attempted to remove the gurney straps. Land testified, however, that when the ambulance arrived at the hospital Appellant again became "unresponsive," although he did react to pain from the insertion of an IV needle and a catheter. Land stated that based upon his experience and training, when a patient is truly unconsciousness as a result of drugs, there is no response to pain. Land again opined that Appellant was faking unconsciousness to avoid talking to police or going to jail.

It was not until the conclusion of Land's testimony that defense counsel approached the bench and objected to Land's speculation as to why Appellant was faking unconsciousness. Although the trial court noted that the objection was rather late, it did offer to admonish the jury to disregard Land's speculation. However, a discussion ensued wherein defense counsel specifically noted that he was not objecting to Land's opinion that Appellant was faking, but only to his speculation as to why Appellant was doing so. The trial court ruled that Land was qualified to give an opinion as to whether or not Appellant was faking unconsciousness. No ruling was made as to Land's speculative opinion and defense counsel did not request that the jury be admonished.

On appeal, Appellant now argues not only that the jury should have been admonished to disregard Land's opinion that Appellant was faking unconsciousness to avoid police, but further that the trial court should have held a Daubert hearing to determine whether or not the test Land performed was scientifically reliable. Daubert v.

Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). We disagree.

First, Appellant did not present his Daubert argument to the trial court and, as such, cannot raise it herein. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). In fact, defense counsel specifically stated that he did not object to the basis of Land's test or even to his opinion that Appellant was faking unconsciousness. And we agree with the trial court that Land's experience and training qualified him to offer such expert testimony.

With regard to Land's speculation that Appellant was faking unconsciousness to avoid the police, the Commonwealth concedes such probably should not have been admitted. Nevertheless, Appellant failed to request an admonition despite the trial court's willingness to give one. Thus, it is reasonable to conclude that Appellant did not believe an admonition was advantageous. Regardless, the absence of a request for an admonishment certainly operates as a waiver. Brock v. Commonwealth, 391 S.W.2d 690, 692 (Ky. 1965).

In any event, given the testimony concerning Appellant's behavior in the ambulance versus that at the hospital, the jury could have reasonably inferred Appellant's motive without Land's speculation. Thus, we cannot conclude that Land's opinion carried much weight or improperly invaded the province of the jury. Error, if any, was harmless. RCr 9.24.

IV.

Finally, Appellant argues that the trial court erred in refusing to given an instruction on assault under extreme emotional disturbance. Citing to Springer v.

Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999), Appellant claims that the jury could have found that the death of his mother three months before the assault was the triggering event for an emotional disturbance that continued uninterrupted and was exacerbated by his heavy drug usage. We disagree.

KRS 507.020(1)(a) provides, in relevant part:

> [A] person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

Appellant's defense at trial was that he had no recollection of the events in question because he was under the influence of drugs at that time. As a result, there was simply no evidence that Appellant was acting under extreme emotional disturbance.

Nor do we find any correlation between Appellant's alleged emotional disturbance and the crimes which he committed. We must agree with the Commonwealth that there is no reasonable explanation or excuse under the circumstances as Appellant believed them to be which would connect his mother's death and his consumption of drugs to the unprovoked assaults upon Cheryl and Jessica. Compare Fields v. Commonwealth, 44 S.W.3d 355 (Ky. 2001). Therefore, the trial court properly denied the instruction.

The judgment of the Greenup Circuit Court is affirmed.

All concur.

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