

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2005-SC-0037-MR

DATE 9-14-06 EJA/GS/MP.C.

TREMAINE DEJUAN WASHINGTON

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
2003-CR-0084

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Washington of murder and sentenced him to twenty years in prison.

The three issues raised on appeal are whether the introduction into evidence of two knives was error because there was no evidence to link them to the murder; whether a single instruction combining both intentional and wanton murder resulted in a jury verdict that was not unanimous, and whether the introduction of a witness's prior consistent statement through the testimony of a police officer was a due process violation.

Washington was involved in a fight with his cousin about 3:30 a.m. The cousin was stabbed to death. The victim and the accused had been arguing and the accused chased the victim after some pushing and shoving. The victim fell to the ground and swung his body around to get off of the ground. The defendant had a knife in his hand

and claims that the victim swung right into the knife. The police did not immediately locate the weapon that cut the victim. Approximately one month later, the police returned to Washington's apartment and found two knives outside the apartment in or near the bushes.

At trial, the deputy state medical examiner testified that the cause of death was a stab wound to the chest with loss of blood and shock resulting from the loss of blood. The medical examiner determined that the weapon inflicting the stab wound was a single edge as distinguished from a double-edged blade. He testified that it would have required a significant thrust inward dependent upon the sharpness of the weapon. He indicated that the stab wound was not consistent with a knife that was being held by someone and the victim rising off the ground into the knife blade. The jury found Washington guilty and sentenced him to twenty years in prison. This appeal followed.

I. THE INTRODUCTION OF THE KNIVES INTO EVIDENCE

Washington brings this arguably preserved issue forward on appeal. After fighting with his cousin, Washington left for about fifteen minutes and returned to the scene with at least one and possibly two knives. Witnesses conflicted regarding the exact number but Washington himself admitted to bringing two knives to the fight. One witness described the knives as either steak or butter knives. A police search of Washington's vehicle and apartment did not turn up any knives and in particular, no knife that could be directly linked to the stabbing was found. Approximately a month after the death, police were notified by a manager that two knives had been located in the bushes directly outside Washington's apartment.

The prosecutor presented the knives to a witness who described their discovery and collection. During a conference at the bench, Washington objected to allowing the

knives to be taken into the jury deliberations. One question of fact before the jury included the sharpness of the knife that caused the fatal wound. The knives were introduced into evidence without any further objection. The trial judge agreed with Washington and withheld the knives from the jury deliberations to insure that no experimentation with that evidence could influence the jury decision. The jury was not allowed to use the knives to in any way determine how sharp they were. Washington received the relief he requested. See Price v. Commonwealth, 31 S.W.3d 885 (Ky. 2000).

The trial judge determined that the knives were relevant and allowed their introduction. We can find no reason to believe otherwise. The knives were a link in the chain of proof and were properly admitted into evidence. See Mullins v. Commonwealth, 956 S.W.2d 210 (Ky. 1997). There was no error.

II. INSTRUCTIONS AND A UNANIMOUS VERDICT

Jury instruction number three included a section allowing the jury to find Washington guilty of either intentional or wanton murder. We have previously examined such instructions and found no fault because of combined instructions. Commonwealth v. Hager, 41 S.W.3d 828 (Ky. 2001). Although a separate instruction for each option would have been better practice and reduced some juror questions, there was no error.

Every defendant is entitled to a unanimous verdict. Hayes v. Commonwealth, 625 S.W.2d 583 (Ky. 1981); Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978). This jury unanimously found Washington guilty of murder. KRS 507.020 provides different manners where a “person is guilty of murder”. The subsections of the statute define the differing manners where a person may be convicted of murder.

When a jury is presented options in the instructions some members of that jury might find guilt under one theory and some under the other. See Davis v. Commonwealth, 967 S.W.2d 574 (Ky. 1998). If the evidence supports a conviction under either option the requirements of a unanimous verdict are satisfied. Barbour v. Commonwealth, 824 S.W.2d 861 (Ky. 1992). These instructions allowed for a finding of either intentional or wanton murder. There was sufficient evidence to support either of the two options. There was no error.

III. ADMISSION OF PRIOR CONSISTENT STATEMENT

An aunt of both Washington and the victim testified about a statement she heard Washington make shortly after the stabbing. She testified that she had told both a police officer and a detective about the statement. During the officer's testimony, he denied having been told about the statement by the aunt. This testimony obviously cast some doubt on the veracity of the aunt. It brought into question whether or not her testimony about Washington's statement was true or whether it was a recent fabrication. See KRE 801. The detective was then asked if he had been told about Washington's statement, and he indicated the aunt had indeed told him about it.

The repetition of the aunt's testimony about Washington's statement was the admission of a prior consistent statement. Admissibility of such testimony is confined to those offered to rebut a charge of recent fabrication. Tome v. United States, 513 U.S. 150 (1995). A prior consistent statement may be admitted if it is used to rebut something other than the fact that it was made. Noel v. Commonwealth, 76 S.W.2d 923 (Ky. 2002). The testimony of the detective was clearly intended to rehabilitate the credibility of the aunt. After the police officer denied being told by the aunt about Washington's statement the jury would have certainly had some doubt about her

credibility. The testimony of the detective merely provided the jury some additional information to potentially improve their view of her testimony. There was no error.

The judgment of conviction is affirmed.

All concur.

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