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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-9-06 ElliaGrowitt, D.C.

NO. 2005-SC-000475-MR

JOHN HENRY LEWIS — APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
INDICTMENT NO. 03-CR-00323

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

John Henry Lewis appeals from his conviction in the McCracken Circuit Court for murder and possession of a handgun by a convicted felon. His sole argument on appeal is that the trial court infringed upon his right to present a self-protection defense when it prohibited him from testifying about prior specific acts of violence known to him to have been committed by the murder victim. Because the trial court did not, in fact, limit Lewis's testimony on that point, we find no error and affirm.

FACTS

Lewis and two women went to see a movie. Lewis parked his vehicle next to the vehicle of Richard Hill. The vehicles were parked such that their driver-side doors were adjacent. When Lewis and his companions returned to their vehicle after the movie, Lewis accused Hill of bumping his car door and demanded that Hill apologize. Hill's response did not satisfy Lewis, and he and Hill argued. When Hill allegedly dipped his right shoulder as if reaching for something, one of the women in Lewis's car exclaimed that Hill was reaching for a gun. Lewis then grabbed a pistol he had in his vehicle and fired three or four shots toward Hill. Lewis then sped away.

Hill died from his gunshot wounds, and Lewis was charged with murder. When he was arrested on these charges in Illinois a few weeks after the shooting, Lewis told the arresting officer that he had shot Hill in self-defense. Toward that end, Lewis filed a motion in limine seeking to be allowed to introduce at trial, among other matters, evidence of Hill's prior violent acts that were known to Lewis at the time of the shooting to explain Lewis's belief in the need to use force to protect himself. Lewis's motion stated that he would introduce evidence of:

> prior acts of violence, threats and hearsay evidence of such acts and threats, in order to prove that [Lewis] so feared [Hill] that he believed it was necessary to use physical force (or deadly physical force) in self[-]protection. Further, Defendant will provide evidence that he actually knew of such acts, threats, or statements at the time of the encounter. Saylor v. Commonwealth, [144 S.W.3d 812, 815-816 (Ky. 2004)].

During a brief hearing on the motion, the Commonwealth stated its agreement that, assuming the proper foundation were laid, Lewis could testify as to specific prior violent acts by Hill. However, the Commonwealth pointed out that any

witness besides Lewis would be limited to testifying only that Hill had a general reputation for violence. At the conclusion of the hearing, the trial court stated that it was in agreement with the Commonwealth's position. It appears that the trial court essentially granted Lewis's motion.

The case proceeded to trial on the following day. During opening statement, Lewis's counsel told the jurors that they would be hearing evidence in the trial that Hill had a reputation for "pulling guns on people, routinely." At that point, the Commonwealth objected; and while counsel was stating the objection, defense counsel added, "John Lewis knew it." At the bench conference that followed, the Commonwealth argued that defense counsel's statement regarding Hill's reputation for pulling guns on people was outside the bounds of the trial court's ruling in limine. The trial court sustained the objection and admonished the jury to disregard defense counsel's statement.

Lewis later testified in his own behalf and, when asked by his counsel if he had an opinion as to Hill's reputation for peacefulness, responded that Hill was a "pretty violent guy." Counsel did not ask Lewis about his knowledge of any specific instances of alleged prior violent acts committed by Hill.

The jury found Lewis guilty of wanton murder and being a felon in possession of a handgun. In accordance with the jury's recommendation, Lewis was sentenced to fifty years' imprisonment for the murder conviction and ten years' imprisonment for the possession of a handgun charge, to be served consecutively, for a total maximum sentence of sixty years' imprisonment. This appeal followed.

ANALYSIS

It is unquestioned that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[1] And we certainly agree with Lewis's contention that he had a constitutional right to present evidence to the jury to support his self-defense theory. But we do not find that Lewis's right to present evidence in his behalf was abridged. In essence, we hold that Lewis cannot object to not being allowed to introduce evidence that he did not attempt to introduce.

We clarified in Saylor, the case Lewis cited in his motion, precisely the type of evidence a defendant claiming self-defense to a homicide may assert. Under our ruling:

> Generally, a homicide defendant may introduce evidence of the victim's character for violence in support of a claim that he acted in self-defense or that the victim was the initial aggressor. . . . However, such evidence may only be in the form of reputation or opinion, not specific acts of misconduct. . . .
>
> An exception exists, however, when evidence of the victim's prior acts of violence, threats, and even hearsay evidence of such acts and threats, is offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force (or deadly physical force) in self-protection, provided that the defendant knew of such acts, threats, or statements at the time of the encounter. . . . In that scenario, the evidence is not offered to prove the victim's character to show action in conformity therewith but to prove the defendant's state of mind (fear of the victim) at the time he acted in self-defense.[2]

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[1] Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

[2] Saylor, 144 S.W.3d at 815-816 (internal citations and quotation marks omitted).

But from our review of the record, Lewis did not attempt to testify about specific acts of violence allegedly committed by Hill, despite being entitled to do so.

We have reservations about the adequacy of Lewis's in limine motion itself. As we recently held, in order to preserve an alleged error for appellate review, a motion in limine must "specify the evidence objected to[.]"[3] In the case at hand, Lewis's motion in limine tracked language from our holding in Saylor, citing the case. But the motion did not disclose with any specificity the evidence sought to be admitted. A motion in limine should be specific enough to inform the trial court, opposing counsel, and the reviewing appellate court the specific grounds for any objection being made by the motion or the substance of any evidence being offered by the motion. Since the Commonwealth has not questioned the adequacy of Lewis's motion in limine, we will not issue what would amount to an advisory opinion on whether Lewis's motion in limine met the specificity requirement discussed in Lanham.

Assuming that the trial court's comments at the hearing on the motion in limine granted Lewis's motion, we must determine if sustaining the Commonwealth's objection during opening statement and admonishing the jury meant that the trial court had changed its mind. After examining the record closely, we find that the ruling in limine is consistent with the ruling on the Commonwealth's objection during opening statement.

Lewis's counsel's opening statement informed the jurors that they would hear testimony that Lewis knew of Hill's alleged propensity to point a firearm at people. Clearly, under Saylor, the only person who would have been permitted to testify about

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[3] Lanham v. Commonwealth, 171 S.W.3d 14, 22 (Ky. 2005).

those specific prior acts would have been Lewis. However, defense counsel's statement at issue did not specify that Lewis alone would be testifying about Hill's specific prior acts of violence. So the objection was well-taken, based upon the trial court's comments at the hearing on the motion in limine. The trial court's sustaining the objection cannot reasonably be construed as a decision to prevent Lewis himself from testifying in accordance with Saylor, as the trial court had ruled in limine that he could.

Despite receiving permission of the trial court to do so, Lewis's counsel did not ask Lewis if he was aware of any specific prior acts of violence by Hill. As we view the record, the trial court did not prohibit Lewis from answering a question that, due to either oversight or trial strategy, was never asked. Therefore, we have no way of knowing what Lewis's answer to an unasked question would have been, nor do we know if the Commonwealth would have objected to the question, nor whether the trial court would have sustained that hypothetical objection. Since we clearly cannot predicate reversible error on the hypothetical denial of a hypothetical answer to a hypothetical question, Lewis's conviction must be affirmed.[4]

CONCLUSION

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

All concur.

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[4] Commonwealth v. Ferrell, 17 S.W.3d 520, 525, n.10 (Ky. 2000) ("[w]ithout . . . a crystal ball, reviewing courts can never know with any certainty what a given witness's response to a question would have been if the trial court had allowed them to answer. Appellate courts review records; they do not have crystal balls.").

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