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RENDERED: JANUARY 25, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

NO. 2005-SC-000516-MR

COURTNEY TROWELL — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
INDICTMENT NO. 04-CR-02358

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Courtney Trowell of murder and fixed his punishment at fifty years' imprisonment. The circuit court entered judgment accordingly. Trowell argues in this direct appeal[1] that the trial court erred by (1) denying his motion for a mistrial for an unfairly damaging statement by the prosecutor in closing, (2) denying his motion for a mistrial after a witness' statement to the jury that implied Trowell had committed other crimes, and (3) denying his motion for a directed verdict. Finding no error, we affirm.

I. FACTUAL BACKGROUND.

During an all-night drunken revel around his neighborhood, Louis Alvis argued and scuffled with Courtney Trowell on an apartment porch.

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[1] Ky. Const. § 110 (2) (b).

According to the Commonwealth's key trial witness, Raymond Jefferies, as the altercation broke up, Trowell told Alvis and his companions, "I'll be back, I'll be back." Trowell and Jefferies moved inside the apartment where Trowell told Jeffries, "I'm going to get him." Jefferies urged Trowell to give up the fight because Alvis was very drunk.

Later, Jefferies and Trowell and others played dice inside the apartment. Jefferies recalled in trial testimony that Trowell left the apartment building and returned wearing a black hooded jacket, called a "hoodie," and carrying a handgun and bullets. As Trowell and Jefferies later stood together on the porch, they saw Alvis making his way through a nearby grassy area. According to Jefferies, Alvis again became the topic of discussion, and he again urged Trowell not to retaliate against the drunken Alvis. But Trowell told Jefferies that Alvis was going to die. Jefferies went back inside the apartment, leaving Trowell on the porch. Jefferies testified that "five seconds later" he heard gunshots, and Trowell burst into the apartment and locked the door. Jefferies also testified that Trowell stated, "I got him, I killed him." According to Jefferies, Trowell removed the hoodie and hid the gun under the television.

Alvis was shot dead outside the apartment building. Katrina French saw the shooting from a short distance away. She testified at trial that a man wearing a dark hoodie and dark pants stepped out from the apartment and shot Alvis once in the chest and then three more times. French said that the shooter had the hood pulled over his head, partially concealing his face. French immediately ran to Alvis's side, and she assumed the shooter entered the same apartment where the altercation between Alvis and Trowell had taken place

earlier in the night. Trowell, Jefferies, and an unidentified man were in the apartment at the time of the shooting; and French assumed one of the three to be the shooter.

Investigators later showed French a photo identification pack from which she identified a man other than Trowell as the shooter. As the investigation began to focus on Trowell, this other man was apparently never investigated or further implicated. According to Trowell, French stated that the man she chose from the photo identification did not look like Trowell. She told police that the shooter appeared to be about the same height as Alvis; but she eliminated Jefferies as a suspect because he was much taller, and his skin was a darker tone than the light-skinned shooter. Trowell contends on appeal that he is even taller than Jefferies, but he failed to point to any evidence of that fact in the record.

Alvis's autopsy revealed that he died from multiple gunshot wounds. The medical examiner found that Alvis had been shot in the chest, upper back, and back of the head. The medical examiner also determined that one wound was produced by a bullet traveling along a horizontal plane. Contrary to Trowell's statements in his brief, however, the medical examiner did not testify that the shooter must have been the same height as Alvis.

II. ANALYSIS.

A. The Trial Court Did Not Err in Denying the Motion for Mistrial for Alleged Prosecutorial Misconduct.

Trowell contends that the following statement made by the prosecutor in closing argument warrants reversal:

> Remember how one of the witnesses called Iroquois the "hill," or that area out here in the grass area the hill? Ladies and gentlemen, if you ignore this evidence, if you take up the presumption that everybody testifying is a liar from the beginning then and you let this guy go, meet the new "King of the Hill."

Trowell argues that this statement was unfairly damaging to his defense because it implied without an evidentiary hearing that he was involved in gang activity or in drug trafficking. But having thoroughly reviewed the record of both this statement and the bench conference that immediately followed, we conclude that the trial court did not err in denying the motion for mistrial. We focus here on the "overall fairness of the trial," and we would reverse the trial court only if prosecutorial misconduct was "so serious as to render the entire trial fundamentally unfair."[2]

The prosecutor's "King of the Hill" reference, on its face, was not sufficiently egregious to merit reversal. The statement made no direct reference to gangs or drug trafficking nor did it seem to imply such activity. The prosecutor simply argued that Trowell would be "King of the Hill" if, by ignoring the evidence against Trowell, the jury were to acquit him of murder. And contrary to Trowell's argument in his brief, the Commonwealth never referred to Trowell in the jury's hearing as a "king pin drug trafficker." The prosecutor stated at the bench that defense counsel appeared to be leaping to a conclusion that his client was being branded a "king pin drug trafficker" and explained that the "King of the Hill" argument was intended by him to suggest that if acquitted, Trowell would

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[2] Soto v. Commonwealth, 139 S.W.3d 827, 873 (Ky. 2004) (*citing* Stopher v. Commonwealth, 57 S.W.3d 787, 805 (Ky. 2001)).

establish himself in the community and achieve power if he got away with murder.

When placed in context within the trial, the prosecutor's "King of the Hill" argument in closing is not unfairly prejudicial because it directly responded to defense counsel's closing argument.[3] Defense counsel—obviously intending to cast doubt on the credibility of the Commonwealth's witnesses—characterized the people who were out all night in the urban housing project where this incident occurred as "dopers, dealers, and robbers." In particular, defense counsel asserted that Jefferies killed Alvis because Alvis's drunken behavior alerted police, which adversely affected Jefferies's illicit drug business. The trial court gave equal latitude to defense and prosecution in closing their cases.[4]

We are not persuaded that the statement cajoled or coerced the jury into reaching a guilty verdict to meet public favor.[5] Although the statement was not explicitly premised on the jury finding that the evidence showed guilt, the language, "if you ignore the evidence," results in the statement as a whole communicating that letting someone go free despite the evidence showing their guilt would make this person "King of the Hill." Presumably, if the jury did not find the evidence to show guilt beyond a reasonable doubt, there should be no intimidating effect on the community of an innocent person going free.

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[3] Commonwealth v. Mitchell, 165 S.W.3d 129, 132 (Ky. 2005) (*citing* Young v. Commonwealth, 25 S.W.3d 66 (Ky. 2000)).

[4] Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987) (stating that counsel are allowed "wide latitude" in closing arguments.).

[5] Mitchell, 165 S.W.3d at 132, *citing* Jackson v. Commonwealth, 301 Ky. 562, 192 S.W.2d 480 (1946).

B. The Trial Court Properly Denied the Motion for Mistrial Based on Jefferies's Statement that Trowell was About to Return to Prison.

Trowell asserts that the trial court erroneously denied his motion for a mistrial made following certain comments made by Jefferies during trial testimony. Jefferies commented that Trowell deflected Jefferies's pleas against retaliation by stating that he was not concerned about the consequences because he (Trowell) was going to prison anyway. As the trial court stated in denying the mistrial, Jefferies made this statement spontaneously—not in response to a question by the Commonwealth. The Commonwealth had simply asked Jefferies why Trowell was so upset with Alvis. Jefferies did not answer that question but volunteered that Trowell stated he was going to prison anyway so he did not care.

The trial court observed that this statement was probably inadmissible as evidence and offered to admonish the jury to disregard it. But defense counsel declined an admonition, fearing it would draw undue attention to the statement.

The situation here closely resembles Matthews v. Commonwealth[6] in which the defendant refused an admonition but requested a mistrial when the victim volunteered that the defendant "had not been out of prison that long" in response to the Commonwealth's question about how long the victim had lived at her residence.[7] We stated in that opinion that "an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the

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[6] 163 S.W.3d 11 (Ky. 2005).

[7] *Id.* at 17.

jury will heed such an admonition."[8] And we held that "an isolated, non-responsive reference to prior crimes was insufficient to create a manifest necessity for a mistrial";[9] and, thus, the trial court did not err in denying the motion for mistrial. The holding in Matthews fits nicely here because

> the proper remedy in this case was an admonition. And indeed, the trial court offered to give an admonition, but Appellant refused the offer. The trial court was not required to give Appellant extraordinary relief simply because he refused the offer of another legally sufficient remedy. The trial court's refusal to grant a mistrial was not an abuse of discretion.[10]

So we affirm the trial court on this issue.[11]

C. The Trial Court Did Not Err in Denying the Motion for Directed Verdict.

Trowell contends that the trial court erred in denying his motion for a directed verdict on two grounds: (1) the course of events that Jefferies testified to is "so physically impossible that it could not have occurred"; and (2) due to his height, he could not have been the perpetrator in light of purported testimony from Katrina French and the medical examiner that the shooter was the same height as Alvis. Trowell did not specifically raise these grounds in the trial court where he simply argued that Jefferies was not a credible witness. So these issues are not adequately preserved for appellate review. And, as the trial court

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8 *Id.* (citation omitted).

9 *Id.* at 18.

10 *Id.*

11 Our conclusion renders moot the issue of whether proper notice of intent to offer evidence of other crimes, as required by KRE 404(c), was provided.

correctly ruled, the credibility of the witnesses is a matter for the jury to determine.[12]

Trowell's discussion of these issues in his brief contains significant mischaracterizations of the evidence. In regard to Jefferies' testimony, Trowell argues that Jefferies implausibly testified that within a span of five seconds gunshots were fired, Trowell entered the apartment, and Trowell locked the door—a physical impossibility. But having reviewed Jefferies's testimony, we find that Trowell testified to hearing gunshots within five seconds of locking the door. Even if Jefferies had testified exactly as Trowell contends, the jury was free to accept or reject all or part of his testimony. It could have reasonably concluded, for example, that Jefferies correctly recited the sequence of events, while not necessarily accepting that all of the events happened within a five-second time frame.

As to Katrina French, her testimony about the shooter's height was not as definitive as Trowell claims. She stated that she was "thinking" that the shooter was "about" the same height as Alvis. Similarly, her testimony concerning her photo identification of a man other than Trowell was not as definitive as he claims. She did not state that this man bore no resemblance to Trowell, as he claims; rather, she stated that this man did not look "exactly" like Trowell, although he "resembled" him in his facial features.

An even more troubling mischaracterization of the evidence is Trowell's assertion that the medical examiner testified that the shooter was the same height as Alvis. We find no such statement by the medical examiner in all

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[12] Ratliff v. Commonwealth, 194 S.W.3d 258, 269 (Ky. 2006).

of her trial testimony. The medical examiner did state that one wound showed that the bullet had traveled "almost" along a horizontal plane, but she never testified about the relative height of the perpetrator and the victim.

Even if French and the medical examiner had testified as Trowell contends, he cannot succeed on the height issue since he fails to cite to any evidence concerning his height in general or his height in relation to that of Jefferies or Alvis. He cites only to his counsel's opening statements to support his contention that he is taller than Jefferies and Alvis. Opening statements and closing arguments are not evidence.[13]

But even if Trowell had successfully shown that French and the medical examiner testified with certainty that the shooter was exactly the same height as the victim and that Trowell was much taller than the victim, the jury was free to accept or reject this testimony.

When a trial court rules on a motion for directed verdict, it must assume that the evidence for the Commonwealth is true, reserving to the jury questions as to the credibility and weight to be given to the evidence.[14] In the case at hand, the jury heard evidence that (1) Trowell fought with Alvis the night of the murder and left vowing to return and kill Alvis, (2) Trowell wore a black hoodie on the same night and in the same area where an eyewitness saw a man wearing a black hoodie shoot Alvis, (3) Trowell stated to Jefferies that he had shot and killed Alvis, and (4) Trowell hid the gun. We conclude that under the evidence as a whole,

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[13] Stopher, 85 S.W.3d at 805.

[14] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

it was not unreasonable for the jury to find guilt, meaning that the trial court did not err in denying the motion for directed verdict.[15]

III. CONCLUSION.

For the foregoing reasons, we affirm the trial court's judgment.

All concur.

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
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

Kenneth Wayne Riggs
Assistant Attorney General
Office of Criminal Appeals
Office of Attorney General
1024 Capital Center Drive
Frankfort, KY 40601

[15] *Id.*