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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 25, 2007
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2006-SC-000030-MR

DATE Feb 15, 07 Ella Grady, D.C.

STERLING J. RANEY — APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
INDICTMENT NO. 05-CR-00136

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On December 19, 2005, the Appellant, Sterling J. Raney, was convicted by the Bell Circuit Court of wanton murder. The jury recommended a sentence of thirty-five (35) years, and the trial court sentenced the Appellant accordingly. He now appeals his conviction to this Court pursuant to Ky. Const. §110(2)(b) asking this Court to reverse his conviction and afford him a new trial. After review of the record, we affirm his conviction.

FACTS

On May 29, 2005, the Appellant, Sterling Raney, was at his residence with Dana Hatfield when his son, Danny, and his friend, Mark Petrovich, arrived. The men were drunk and continued to drink and do cocaine. Carmella Torez arrived at the Appellant's residence a short time later, and at that time, the Appellant asked Danny and Mark to leave. He continued to do so two or three

times. Mark left but Danny stayed. The Appellant then went to his bedroom and got his shotgun. Based upon the testimony, he came back into the front room, raised the gun towards Danny, and as Danny put his arms up to block the gun, the Appellant fired.

Carmella stated that prior to the shooting, the victim had asked her if she wanted to do some cocaine and also claimed to have some morphine pills. However, no cocaine or morphine pills were found at the residence.

The Appellant stated that he had not seen his son for about 10 years. He stated that he had not actually raised his son, that they had a bad relationship and he was afraid of Danny. He also stated that they had two or three bad situations in the past and that Danny had robbed him before. He stated that on the night in question, Danny came to his house and asked for a plate for his cocaine. Mark and Danny did cocaine and did not like it when the Appellant starting criticizing their cocaine use. Danny started making sexual comments which caused Appellant to tell Danny to leave the residence. After Carmella came in, Danny asked if she wanted to do some cocaine. She said no and the Appellant again asked the men to leave. The Appellant stated that he counted to ten, and then counted to five two more times, causing Mark to leave, but Danny stayed in the house. He then went to get his gun and raised it at him to scare him, when it accidentally went off. He had not checked to see if the gun was loaded. He stated to police that he was "not going to lose any sleep over it."

John Hunsaker, a medical examiner, testified on behalf of the Commonwealth that he performed the examination on Danny and concluded that

the cause of death was a shotgun wound to the chest which was fired from a distance of ten feet or less. He testified that Danny's blood alcohol content was .179 and was positive for cocaine.

At the conclusion of the case, the jury was instructed on a full range of homicide offenses. After the jury was sent to deliberate, additional avowal testimony was taken from the Appellant concerning his relationship with the victim.

The Bell Circuit Court returned with a verdict finding the Appellant guilty of wanton murder. After the penalty phase was conducted, the jury recommended a sentence of thirty-five years incarceration. On December 19, 2005, the Appellant was sentenced accordingly. His appeal follows.

ARGUMENT

I. Jury was properly instructed

The Appellant first argues that palpable error occurred when the trial judge did not instruct the jury on protection of property. This error is unpreserved. If an Appellant "fail[s] to timely preserve his arguments for review as required by RCr 9.54," "*prior to the time the Court instructs the jury*," preservation is lacking and this Court will "decline to address his arguments any further [if] none of them warrant review pursuant to RCr 10.26." Pollini v. Commownealth 172 S.W.3d 418, 428 (Ky. 2005); Commonwealth v. Collins, 821 S.W.2d 488 (Ky.1991). RCr 10.26 allows review of an unpreserved error if the error affects the substantial rights of the Appellant. It affects the substantial rights of the Appellant if it "seriously affects the fairness, integrity or public reputation of judicial

proceedings." Commonwealth v. Rodefer, 189 S.W.3d 550 (Ky. 2006) (citations omitted).

KRS 503.080 states in pertinent part:

> 1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force Is immediately necessary to prevent
> (a) the commission of criminal trespass or burglary in a dwelling, building, or upon real property in his possession . . . [and]
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that the person against whom such force is used is: . . .
> (b) committing or attempting to commit a burglary of such dwelling.

Evidence that the Appellant admitted giving permission to Danny to enter his residence, although later revoked, and that Danny was unarmed goes against such an instruction. Furthermore, there was no indication that Danny used or was going to use assaultive behavior. The Appellant admitted that Danny had not hit or threatened him prior to the shooting. Testimony confirms that he was raising his hands in a blocking manner when the Appellant raised the shotgun in his direction. Moreover, the Appellant's explanation of the shooting was that it was accidental and KRS 503.080 concerns an intentional activity used to prevent the commission or attempted commission of burglary of his dwelling. Thus, the failure of the trial court to instruct the jury on protection of property did not affect the substantial rights of the Appellant, and therefore, there was no palpable error.

II. Prior violent acts were properly excluded

The Appellant next argues that the trial court erred when it did not allow evidence of Danny's prior acts of violence of which the Appellant was aware. Because the Appellant had introduced considerable testimony which indicated

Danny's drug and alcohol use, and pointed out his fear of Danny, this argument is without merit.

Prior to the Appellant's testimony, a bench conference was held at which time the Commonwealth requested that the court advise the Appellant not to testify about specific acts of Danny's misconduct. The Appellant's counsel wanted to bring out that Danny had robbed the Appellant in the past and had broken his nose. The trial judge admonished the Appellant to not comment on the fact that the victim had been convicted of a felony and further instructed the Appellant not to talk about the specific acts of conduct because these incidents were too remote in time and there had been no contact between them in years.

During the Appellant's testimony, he testified about the bad relationship between him and Danny and stated that he was afraid of Danny. He indicated to the jury that Danny had robbed him before, at which time he was admonished by the trial judge. At the end of his testimony, his counsel again asked the trial judge permission to present more testimony to show that Danny had been mean to the Appellant. The Commonwealth replied that those actions were too remote in time. The court ruled that character was not an issue, but gave the Appellant the opportunity to present the testimony by avowal.

The avowal testimony indicated that he was afraid of Danny because of the experiences he had with him when they had been drinking together several years ago. He also stated that Danny was involved in the death of a girl several years ago and that he had not seen Danny for at least 13 years because Danny

had been in prison. However, the jury already knew that Danny had been in prison because Mark testified that is where he and Danny had met.

It is widely recognized that the determination as to the relevance and admissibility of evidence are left to the discretion of the trial court. Simpson v. Commownealth, 889 S.W.2d 781, 783 (Ky. 1994). A trial judge's decision with respect to relevancy of evidence is reviewed under an abuse of discretion standard. Love v. Commonwealth 55 S.W.3d 816 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Woodard v. Commownealth, 147 S.W.3d 63 (Ky. 2004).

Here, the Appellant was able to testify that he was afraid of Danny and that Danny had robbed him before. The jury also knew that Danny had previously been in prison. Furthermore, the testimony does not fall into the exceptions found in Saylor v. Commonwealth, 144 S.W.3d 812 (Ky. 2004). In Saylor, the court held that a 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, and not specific acts of misconduct, under KRE 405(a), unless the specific acts evidence is offered where a victim's prior acts of violence are offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force in self-protection. Saylor, supra.. See also Parrish v. Commonwealth, 581 S.W.2d 560 (Ky. 1979); Amos v. Commonwealth, 516 S.W.2d 836 (Ky. 1974), and McGill v. Commownealth, 365

S.W.2d 470 (Ky. 1963). Since the Appellant did not argue self-defense, rather that it was an accident, this argument is without merit.

The Appellant was able to mention several times the acts upon which he based his fear of Danny. The Appellant was able to testify about Danny robbing him, that he feared Danny, and that they had a bad relationship. Not allowing the specific acts that were otherwise remote in time and irrelevant to this crime, was not arbitrary or unreasonable. Therefore, this argument is without merit.

CONCLUSION

Therefore, the conviction of the Appellant is affirmed.

All concur.

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