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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000193-MR

DATE 3-15-07 ELA, Grauth, D.C.

PAUL DAVID GOINS — APPELLANT

V.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
NO. 05-CR-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Paul David Goins, was convicted by a Pendleton Circuit Court jury in February 2006, of first degree assault and sentenced to twenty years in prison. Goins now appeals to this Court as a matter of right, Ky. Const. §110(2)(b), asserting three arguments in his appeal: 1) that the trial court's failure to excuse sua sponte a juror who was also the assistant county attorney for cause was palpable error; 2) that the trial court's failure to give an instruction on lesser-included offenses was palpable error; and 3) that the defense counsel's failure to put on mitigating evidence during the sentencing phase of defendant's trial amounted to palpable error. For the reasons set forth herein, we affirm Goins's conviction.

In the early morning hours of December 24, 2004, Goins shot and stabbed his daughter's boyfriend, Mark Grieg, numerous times. Goins argues that he "freaked out" when he thought he saw Grieg with a knife and acted out of self-defense while Grieg contends that the attack was unprovoked. After the attack, Goins drove Grieg to a hospital. Goins was subsequently arrested and charged with assault.

During the voir dire phase of Goins's trial, a potential juror was identified as an assistant county attorney for Pendleton County. The court, however, determined that the juror was qualified to sit on the jury. Goins's counsel made no objection but used one of his peremptory strikes to remove him from the panel.

Following the trial, the jury was instructed on assault in the first degree, self-defense, and presumption of innocence. Goins's counsel made no objection to the instructions as offered and suggested no instructions on lesser-included offenses. Goins was convicted of assault in the first degree.

During the sentencing phase Goins's counsel presented no mitigating evidence in his favor, despite the presence of several family members. However, no record exists as to what evidence could have been presented in mitigation. Goins was sentenced to twenty years incarceration.

I. The trial court's failure to sua sponte excuse for cause the assistant county attorney from the jury was not palpable error

Goins first alleges that the trial judge's failure to excuse the assistant county attorney for cause was palpable error. It is generally accepted that a

party must request a juror be removed for cause before the beginning of trial. Pelfey v. Commonwealth, 842 S.W.2d 524, 526 (Ky. 1993). Since Goins's counsel failed to make such a request, he technically waived his right to challenge the composition of the jury. Id. Therefore, the error, if any, may only be considered under the palpable error standard. A palpable error is one which affects the substantial rights of a party and may be considered by an appellate court despite improper preservation. RCr 10.26. Upon a showing that the error created manifest injustice, relief may be granted to the party. Id.

In this case, we find no palpable error because Goins used one of his peremptory strikes to remove the assistant county attorney from the jury. Since the disputed juror didn't sit on the final jury, Goins's right to a fair trial was not violated. Morgan v. Commonwealth, 189 S.W.3d 99, 104 (Ky. 2006). Goins used his peremptory strikes in a manner in which they were supposed to be used -- to remove at his discretion jurors that he doesn't want sitting on the jury. Id. While Goins contends that being forced to use one of his peremptory strikes to remove the assistant county attorney prevented him from removing two other jurors[1], he fails to show that these jurors had actual bias toward him or that they could not decide the case in a fair manner. Watson v. Commonwealth, 433 S.W.2d 884 (Ky. 1968) (holding that the existence of jury bias is a matter of fact and is not to be presumed). See also Key v. Commonwealth, 840 S.W.2d 827, 830 (Ky. Ct. App.1992) (stating that there is no proof of juror bias when

[1] The two jurors that Goins believed could have been removed had he not used his peremptory strike for the assistant county attorney are the aunt by marriage to the mother of Grieg's only child and a former neighbor whose spouse had a conflict once with Goins.

defendant failed to elicit testimony from juror in question and only evidence offered showed nothing more than speculation that juror was biased); Polk v. Commonwealth, 574 S.W.2d 335, 337 (Ky. App. 1978) (holding that the party claiming juror bias or prejudice must actually prove the point).

Finding no manifest injustice, we find no palpable error.

II. The trial court's failure to instruct the jury on lesser-included offenses was not palpable error

Goins's next allegation is that the trial court committed palpable error in not instructing the jury on lesser-included offenses such as assault in the second degree or assault in the first degree under extreme emotional disturbance. Since Goins's trial counsel failed to object to the jury instructions given and no evidence exists on the record that he suggested, or tendered, alternative jury instructions, this issue is unpreserved. Lynem v. Commonwealth, 565 S.W.2d 141, 144 (Ky. 1978). Thus, for Goins to prevail on this issue he must show that the failure to provide an instruction on lesser-included offenses is palpable error under RCr 10.26.

There is no authority in Kentucky to indicate that a trial court's failure to instruct on a lesser-included offense is palpable error, when no objection is made, or instruction offered. Clifford v. Commonwealth, 7 S.W.3d 371, 376 (Ky. 2000). Regardless, "an instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain beyond a reasonable doubt that the defendant is guilty of the lesser offense." Skinner v.

Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993). In which case, the lesser-included offense instruction should be given.

Here, Goins argues that a jury could have found him guilty of assault in the second degree because it would have been reasonable for the jury to believe that Goins wantonly disregarded a substantial and unjustifiable risk that the victim would be seriously injured by his actions. KRS 508.020(1)(c). We disagree. Not only was Grieg shot and stabbed multiple times, but Goins argued at trial that he attacked him out of self defense.[2] Goins's only real argument that a jury could have reasonably found him guilty of assault in the second degree is that he "freaked out" when he thought Grieg was going to attack him and began to shoot Grieg at a range of three to four feet. Claiming that he "freaked out" and then testifying that he performed the act out of self-defense does not show that Goins wantonly disregarded a substantial and unjustifiable risk. Plus the fact that Goins took Grieg to the hospital after the assault shows remorse, not lack of intent. Accordingly, it was not reasonable to believe that the assault in the case was anything but intentional.

Goins further argues that it is possible that he could have been convicted of first degree assault under an extreme emotional disturbance standard because he was upset that his daughter wanted to move with Grieg to Florida. An extreme emotional disturbance is "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance,

[2] During the trial Goins testified that "[Grieg] was going to kill me" and "I was not taking any chances." This testimony implies that Goins intentionally shot and stabbed Grieg.

rather than from evil or malicious purposes." McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986). Extreme emotional disturbance is only shown by some dramatic event which creates a temporary emotional disturbance. Schrimsher v. Commonwealth, 190 S.W.3d 318, 332 (Ky. 2006). Here, Goins failed to present evidence sufficient to support an instruction on extreme emotional disturbance. While it is true that the night before the assault Goins and Grieg argued about the planned move to Florida, there is no evidence that the argument was contentious enough to create extreme emotional disturbance. Goins presents no evidence that he was so enraged by the news of his daughter moving away that he was uncontrollably compelled to commit assault *a day later.* In fact, according to the trial record, Goins was not against allowing his daughter to move to Florida with Grieg as soon as he had found a job. Grieg even testified that Goins had offered to help him with the move and to find employment. The events surrounding the argument about Grieg's impending move to Florida simply did not support an instruction on first degree assault under an extreme emotional disturbance standard. In addition, the fact that Goins believed Grieg was high and was going to attack him goes more to his argument that he acted in self-defense than blind rage, especially in light of his testimony. Therefore, we find no palpable error from the court's failure to instruct on lesser-included offenses.

III. The trial court is not guilty of palpable error when defense counsel fails to present mitigating evidence

Goins's final allegation is that his trial counsel's failure to present mitigating evidence during the sentencing phase of his trial was palpable error. However, Goins's allegations fail to competently state anything that the trial court actually did incorrectly. The trial court cannot force Goins's counsel to present mitigating evidence. See generally Hodge v. Commonwealth, 68 S.W.3d 338, 344-45 (Ky. 2001) (stating that the determination of what mitigating evidence to present is the responsibility of the trial counsel). Failing to present mitigating evidence is not palpable error on behalf of the trial court.

Goins is essentially alleging that he received ineffective assistance of counsel. "As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment because there is usually no record or trial court ruling on which such a claim can be properly considered." Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998). This is the case here. Accordingly, we will not consider this issue other than to note we find no palpable error committed on behalf of the trial court from the existing record.

For the reasons set forth herein, the judgment and sentence of the Pendleton Circuit Court is affirmed.

All concur.

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