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RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

NO. 2005-SC-000994-MR DATE 5-10-07 E.A.Graves P.C.

DEREK FARRIS — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 04-CR-01232

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Derek Farris was convicted of murdering his neighbor, Lloyd Cumbers, and sentenced to thirty years' imprisonment. He appeals to this Court as a matter of right,[1] raising five issues. He contends that the trial court erred by (1) denying his motion for a directed verdict, (2) refusing to admonish the jury regarding the Commonwealth's questioning a defense witness about Farris's possible background as a gunsmith, (3) by permitting the investigating detective to testify about alleged misfires from the murder weapon, (4) by allowing the Commonwealth in closing argument to shift the burden of proof, and (5) by failing to include language regarding extreme emotional disturbance (EED) in the jury instruction regarding first-degree manslaughter. We find no merit in any of these arguments and affirm.

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[1] *See* Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

Farris lived in an apartment at the rear of a house where Cumbers lived. Farris and Cumbers, who were both 65 years old, were friends. But one day Farris called 911 and told the operator that he had just shot his neighbor. When the operator asked Farris why he had shot his neighbor, Farris simply replied that Cumbers had been lying about him and that he was "fed up" with it.

The police went immediately to the scene and arrested Farris without incident on the same front porch where he had shot Cumbers. Farris told the arresting officer that he had not meant to shoot Cumbers but that he guessed that he had. The arresting officer testified that Farris's demeanor was calm. Several weeks later, Farris was indicted for murder.

The case progressed to trial at which Detective David Day testified on behalf of the Commonwealth. Before Day testified, Farris's counsel asked the trial court to prohibit Day from stating an opinion that the murder weapon had misfired, arguing that Day was not a firearms expert. The Commonwealth acknowledged that Day was not a firearms expert, and the trial court ruled that Day should limit his testimony to the actions he undertook at the scene and the observations he made.

Day testified that he had collected the murder weapon, a revolver, from the crime scene and had examined it. Day testified that his examination of the revolver showed that it contained one empty chamber, two expended cartridges, and three live rounds. When asked if he made any observations about the live rounds he removed from the revolver, Day testified that the markings on the rounds indicated that they were misfires. Farris's counsel objected, and the Commonwealth stated that the misfire-

related testimony would be properly presented later through the testimony of its firearms expert. The Commonwealth offered to move on to other areas of inquiry unless Farris's counsel wanted the Commonwealth to elicit testimony from Day that he had not performed further testing on the revolver. Farris's counsel agreed to that proposal, so the Commonwealth established from Day that he did not perform further testing on the revolver. Farris's counsel did not further object or request an admonition or any additional relief.

The Commonwealth later called Warren Mitchell to testify. Mitchell was an expert firearms examiner who examined the murder weapon and testified that three rounds removed from it had marks on them showing that they had been misfired. The defense made no objection to Mitchell's testimony.

Farris did not testify in his own defense. The defense called several witnesses in an attempt to show that Farris had shot Cumbers under EED. Among those witnesses was James Atkerson, Sr., who had known Farris for over twenty years. On cross-examination, the Commonwealth asked Atkerson if he was aware that Farris had been a gunsmith in the Army. Atkerson responded in the negative. The Commonwealth further asked Atkerson if he had seen a diploma hanging on Farris's wall showing that Farris had been a gunsmith. Atkerson responded in the negative. Sometime later, defense counsel objected to the gunsmith-related questions because Farris had told defense counsel that he was not a gunsmith and did not have a gunsmith diploma. The Commonwealth responded by saying that it had asked the question based on what a detective had seen in Farris's home. The trial court found

that the Commonwealth had a good faith basis for asking the question and denied Farris's motion for a mistrial and declined to admonish the jury.

After a two-day trial, the jury found Farris guilty of murder and recommended a thirty-year sentence. The trial court sentenced Farris in accordance with the jury's recommendation and denied Farris's motion for a new trial, after which Farris filed this appeal.

II. ANALYSIS.

A. The Trial Court Did Not Err in Denying Farris's Motion for Directed Verdict.

Farris contends that the Commonwealth bore the burden of proving the absence of EED beyond a reasonable doubt. Because Farris further contends that the Commonwealth did not meet that burden, Farris contends that he was entitled to a directed verdict from the trial court on the murder charge.

We agree that the Commonwealth must prove every element of an offense beyond a reasonable doubt.[2] And in order to prove murder, the Commonwealth was required to prove beyond a reasonable doubt that Farris intentionally killed Cumbers.[3] But if Farris was acting under EED, then he may be guilty of manslaughter,

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[2] *See, e.g.,* Greene v. Commonwealth, 197 S.W.3d 76, 80 (Ky. 2006), *cert. denied* ___ U.S. ___, 127 S.Ct. 1157 (2007).

[3] *See* Kentucky Revised Statutes (KRS) 507.020(1)(a) ("(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person . . . ").

not murder.[4] Accordingly, though some of our decisions on this point may have been inconsistent,[5] we recently have clarified this area of the law by definitively stating that if evidence is introduced to prove the existence of EED, its absence becomes an element of the offense of murder.[6]

"Although the Commonwealth must prove every element of murder beyond a reasonable doubt, the Commonwealth need not affirmatively disprove EED unless the evidence of EED is so overwhelming that it necessitates acquittal on the charge of murder."[7] Stated another way, "where proof is presented that would support the finding of EED, and the absence of EED is then a statutory element, then the burden switches to the Commonwealth to disprove it beyond a reasonable doubt. But that does not mean that it has to affirmatively introduce proof of the non-existence of EED, if such proof is already present. The Commonwealth loses if no such proof is present, but where, as here, the proof, when taken in a light most favorable to the

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4 *Id.* ("except that in any prosecution [for murder] a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime[.]").

5 Greene, 197 S.W.3d at 80-81 ("Thus, the same act, or series of acts, may be murder or manslaughter in the first degree depending on a finding of EED. Admittedly, there have been some inconsistencies in our prior decisions concerning which party is properly encumbered with the burden of proof.").

6 Coffey v. Messer, 945 S.W.2d 944, 946 (Ky. 1997) ("Once evidence is introduced to prove the presence of EED, its absence becomes an element of the offense of murder."); Greene, 197 S.W.3d at 81 ("However, our more recent opinions have categorized EED, or more properly, the absence of it, as an element of the substantive offense, rather than as a defense.").

7 Spears v. Commonwealth, 30 S.W.3d 152, 154 (Ky. 2000).

Commonwealth, meets this burden, it is then a jury question."[8] As an appellate court, our task is to determine if, viewing the evidence in a light most favorable to the Commonwealth, there was sufficient evidence presented to meet all the elements of murder, including the absence of EED.[9]

Two factors in the evidence militate against EED. First, the record contains evidence that Farris was armed when he arrived onto Cumbers's front porch, which suggests Farris came to shoot Cumbers. Second, the record lacks evidence of the requisite triggering event, which is suggested by the fact that Farris did not remember any lie that Cumbers told or other action that Cumbers took that triggered EED.[10] So whatever evidence there was to support Farris's contention that he was impelled into action by EED when he killed Cumbers, it was not such compelling evidence to have resulted in a directed verdict of acquittal on the murder charge. The

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8 Greene, 197 S.W.3d at 81.

9 *Id.* at 82 ("It must be remembered it is not the court but a jury that must make a factual determination of whether a particular defendant acted under the influence of extreme emotional disturbance. The courts will test the sufficiency of the evidence, and we have to view it in a light most favorable to the prosecution; however, once found sufficient, it is for the jury to find the facts, and they are not bound to view it in a light most favorable to the prosecution.") (Internal quotation marks and citation omitted).

10 *Id.* at 81-82 ("Although EED is essentially a restructuring of the old common law concept of 'heat of passion,' the evidence needed to prove EED is different. There must be evidence that the defendant suffered 'a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.' McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986). '[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted. It is not a mental disease or illness. . . . Thus, it is wholly insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown.' Foster v. Commonwealth, 827 S.W.2d 670, 678 (Ky. 1991) (citations omitted). And the 'extreme emotional disturbance . . . [must have a] reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.' Spears, 30 S.W.3d at 155.").

question of EED was properly submitted to the jury. Or, as we stated under similar circumstances in Greene, "[a]lthough there certainly was evidence from which a jury could have found the presence of EED, in this instance—the same evidence also supported the contrary conclusion. Thus, we cannot say the jury was wrong when, after hearing all the evidence, it returned a verdict convicting Appellant of murder. Under the evidence presented, it was clearly not unreasonable for the jury to do so."[11]

B. The Trial Court Did Not Err by Refusing to Admonish the Jury Regarding Atkerson's Gunsmith-Related Testimony.

Normally, an admonition to the jury suffices to cure improper evidence.[12] But if the evidence was not improperly admitted, then no admonition is needed. Farris has offered nothing firm to show that the Commonwealth acted in bad faith when it asked Atkerson about Farris being a gunsmith. Indeed, there is nothing to contradict the Commonwealth's assertion that it asked these questions based on a detective's recollection. We have been cited to no authority, nor are we aware of any, requiring the Commonwealth to obtain sworn testimony from an officer regarding his recollection of the area surrounding a crime scene before asking questions of a witness based on that officer's recollection. So the fact that the basis for the Commonwealth's questions was the unsworn recollection of an officer does not show that the Commonwealth acted in bad faith by using that recollection to frame its cross-examination of a witness.

The Commonwealth did not dwell on this gunsmith issue during its closing argument, and Farris did not make his request for an admonition or mistrial until well after the completion of Atkerson's gunsmith-related testimony. So Farris seeks

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[11] *Id.* at 82.

[12] *See, e.g.,* Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005).

appellate relief on an issue for which he did not contemporaneously request any type of curative action from the trial court. And he has not shown there is a reasonable possibility that the brief gunsmith-related questioning by the Commonwealth affected the jury's verdict. The gunsmith-related testimony was tangential, at best, to the ultimate question of whether Farris was suffering from EED when he killed Cumbers. So even if we presumed for argument's sake that the gunsmith-related inquiry by the Commonwealth was erroneous, that error was certainly harmless.[13]

Taking into account all the facts and circumstances of this case, we hold that the trial court did not abuse its "broad discretion to regulate cross-examination"[14] when it refused to admonish the jury regarding the Commonwealth's gunsmith-related questions to Atkerson.

C. Farris Received All the Relief He Requested When Day Testified about Misfires.

As previously noted, Farris objected when Detective Day testified that his observations indicated that the revolver had misfired. That objection prompted the Commonwealth to offer to move on to other areas of inquiry unless Farris wanted the Commonwealth to establish that Day had not performed further testing on the revolver. Farris agreed to that proposed solution, and the Commonwealth elicited testimony from Day that he had not performed further testing on the revolver. Farris's counsel did not further object to this remedial action, nor did he request an admonition or other curative relief. But, on appeal, Farris now argues that the trial court should have admonished the jury to disregard Day's testimony regarding alleged misfires. And Farris asks us to

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[13] Kentucky Rules of Criminal Procedure (RCr) 9.24.

[14] Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997).

reverse his conviction because the trial court failed on its own volition to admonish the jury spontaneously. We reject this argument.

"The law is well settled that a defendant waives his right to an admonition or a discharge of the jury by not promptly asking for it."[15] So "[i]n the absence of a request for further relief, it must be assumed that appellant was satisfied with the relief granted [by the trial court], and he cannot now be heard to complain."[16] We hold that the trial court did not err in failing to admonish the jury sua sponte.

Additionally, even if we concluded for the sake of argument that Day's testimony regarding misfires was improper, we reject Farris's contention that the admission of Day's testimony and the concomitant lack of a spontaneous admonishment by the trial court is palpable error under RCr 10.26. Farris did not object to Mitchell's similar testimony that his examination revealed that the revolver had misfired. Thus, Day's testimony on this point was merely cumulative, meaning that its admission was, at most, harmless error, not palpable error.[17]

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[15] Clements v. Commonwealth, 384 S.W.2d 299, 301 (Ky. 1964).

[16] Baker v. Commonwealth, 973 S.W.2d 54, 56 (Ky. 1998).

[17] *See, e.g.,* Combs v. Commonwealth, 965 S.W.2d 161, 165 (Ky. 1998) ("It is the holding of this Court that the admission of the results of a blood test in a DUI case not involving death or physical injury is improper. However, due to the overwhelming evidence of Combs' intoxication at the time of his arrest, the blood test evidence was merely cumulative and, thus, harmless error in this case."); Patterson v. Commonwealth, 555 S.W.2d 607, 609 (Ky.App. 1977) ("A review of the evidence in this trial convinces us that Morrow's testimony was merely cumulative to the testimony of two other witnesses, Ronnie Bartleston and Allen Duncan. These two witnesses testified they saw Charles Gilmore driving down Morris Hill Road the afternoon of the rape. In light of this evidence, we hold the court's ruling not to be prejudicial. RCr 9.24.").

D. The Commonwealth's Closing Argument Did Not Impermissibly Shift the Burden of Proof.

Farris contended that he was suffering from EED because of Cumbers's lies allegedly told about him. In its closing argument, the Commonwealth argued that EED was inapplicable because there was no evidence that Cumbers had told lies about Farris. Farris contends that this statement shifted the burden of proof in the minds of the jury, offending the twin principles that (1) the Commonwealth bears the burden of proof on every element of the offense; and (2) that the absence of EED is an element of the offense.

When we review claims that the Commonwealth's closing argument was so improper as to require reversal, we must "focus on the overall fairness of the trial, and not the culpability of the prosecutor[,]" bearing in mind that counsel has "great leeway" in closing argument to "comment on [the] evidence, and . . . the falsity of a defense position."[18] Thus, we may reverse a conviction for prosecutorial misconduct only if "the misconduct of the prosecutor [was] . . . so serious as to render the entire trial fundamentally unfair."[19]

As previously stated, the Commonwealth bore the burden of showing the absence of EED in order to convict Farris of murder. Farris argued that some unspecified lie(s) told by Cumbers caused him to shoot Cumbers while overcome by EED. Thus, the Commonwealth's comment in closing argument that the jury had not seen specific evidence of what lies Cumbers told was a comment on the lack of evidence Farris mustered to support his EED claim. Since the Commonwealth was

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[18] Slaughter v. Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1987).

[19] Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

required to disprove the existence of EED, it had the leeway to argue that there was insufficient evidence to support Farris's EED claim. Accordingly, we reject Farris's argument that the Commonwealth's comment regarding the lack of specific evidence of the lies allegedly told by Cumbers was an attempt to cajole the jury into rendering a guilty verdict on the murder charge or was an impermissible comment on Farris's decision to not testify.

As previously stated, we have recently clarified the law regarding EED and have expressly held that EED is not a defense in a prosecution for murder.[20] Thus, the Commonwealth erred when it referred to EED in its closing argument as a defense. But this trial occurred before Greene was decided. In any event, we do not believe that an isolated reference to EED as being a defense in closing argument was an error so egregious as to cause Farris's entire trial to be fundamentally unfair. Thus, we caution the Commonwealth to avoid future references to EED as a defense in a murder prosecution, but, under the facts of the case at hand, find that an isolated reference in closing argument as to EED being a defense is insufficient to warrant reversal.

E. The Trial Court Did Not Err By Refusing to Include the Presence of EED in the First-Degree Manslaughter Instruction.

Farris contends that the trial court erred when it refused his request to include language in the first-degree manslaughter instruction that would have required the jury to find that he was acting under the presence of EED. Though Farris

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[20] Greene, 197 S.W.3d at 81 ("However, our more recent opinions have categorized EED, or more properly, the absence of it, as an element of the substantive offense, rather than as a defense.").

inexplicably does not mention it in his brief, we rejected the same argument in Sherroan v. Commonwealth.[21]

> In Sherroan, we explained as follows:
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> Appellant asserts error in the trial court's failure to include the presence of EED as an element of the lesser included offense of manslaughter in the first degree. We note at the outset that the murder instructions properly included the absence of EED as an element of that offense. . . . Appellant premises his argument on the following language in KRS 507.030(1):
>
> (1) A person is guilty of manslaughter in the first degree when:
>
> . . . .
>
> (b) With the intent to cause the death of another person, he causes the death of such person under circumstances which do not constitute murder *because he acted under the influence of extreme emotional disturbance, as defined in sub-section (1)(a) of KRS 507.020.*
>
> (Emphasis added.)
>
> Appellant's reliance on [Haight v. Commonwealth, 938 S.W.2d 243 (Ky. 1996)], is misplaced. Haight only held that giving an instruction that included the presence of EED as an element of manslaughter in the first degree was harmless at worst, because the jurors found the absence of EED beyond a reasonable doubt when they convicted the defendant of murder. *Id.* at 248. In [Baze v. Commonwealth, 965 S.W.2d 817 (Ky. 1997)], we held that it was error to require the Commonwealth to prove the presence of extreme emotional disturbance as an element of the offense of manslaughter in the first degree.
>
> The inclusion of this additional element required the Commonwealth to prove the absence of extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of murder . . . and to prove the presence of

[21] 142 S.W.3d 7 (Ky. 2004).

extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of first-degree manslaughter. *Theoretically, the jury could have found by a preponderance of evidence, but not beyond a reasonable doubt, that Baze was or was not acting under the influence of extreme emotional disturbance. If so, the jury would have been required to acquit Baze of both charges.*

Id. at 823 (emphasis added). Thus, the trial court's instructions on manslaughter in the first degree correctly stated the law.[22]

Finding no reason to abandon Sherroan, we reject Farris's argument.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of conviction and sentence imposed by the circuit court.

All sitting. All concur.

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[22] *Id.* at 142 S.W.3d 22.