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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

FINAL
DATE 9-13-07 E.A. Brown D.C.

Supreme Court of Kentucky

2005-SC-000132-MR

DAVID O. ADKINS — APPELLANT

V.

ON APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
NO. 02-CR-000210

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Greenup Circuit Court where Appellant, David O. Adkins, was convicted of intentional murder and sentenced to fifty years' imprisonment.

Appellant appeals as a matter of right, arguing four errors committed by the trial court: (1) the trial court's amendment of the grand jury indictment; (2) prosecutorial misconduct in closing arguments; (3) failure to give instructions on the lesser-included offenses of first-degree manslaughter under both extreme emotional disturbance (EED) and intent to cause serious physical injury; and (4) introduction of KRE 404(b) evidence that he had previously threatened to kill his wife "in front of many people," and that he was "drugged up" two days before the shooting.

Finding no reversible error, this Court affirms.

I. Facts

Around 9:00 p.m. on September 2, 2002, Wanda Adkins, Appellant's wife, died instantly from a shotgun wound to her cheek. A short time later, Appellant called Phyllis Vanhoose, his wife's mother, and told her, "Wanda's been shot, and I need some help." Mrs. Vanhoose sent her husband and her brother to help Appellant. She then called 911.

Detectives interviewed Appellant at the hospital. He said that his wife had been upset and was shot and killed when she banged the butt of the shotgun on the floor. Detectives tested the shotgun but could not replicate Appellant's story. After the shooting, Appellant stayed with Rick Craft for about a week. During this time, Appellant gave several accounts of the shooting, all of which had him holding the gun when it went off. In a second interview with detectives, Appellant stated that the gun jammed and it went off accidentally while he was trying to fix it, shooting Ms. Adkins.

On November 6, 2002, a Greenup County Grand Jury indicted Appellant for one count of murder. The indictment originally charged Appellant with "intentionally shooting [his] wife with a shotgun." However, "intentionally" was hand-marked through, and "wantonly" was written above it. Both the trial court and the Commonwealth's Attorney later noted on the first morning of trial that they did not alter the indictment.

At a pretrial conference held on February 20, 2003, the Commonwealth moved to amend the indictment to provide for a mens rea of "intentionally or wantonly." When asked if there was any objection, counsel for Appellant answered, "No." An order was subsequently entered on March 11, 2003, stating in relevant part: "It is hereby ordered that the above-styled indictment be amended to state that David Adkins committed

murder by shooting Wanda Adkins with a shotgun, leaving the mental state of the defendant for the jury to decide."

Trial began on January 18, 2005. On the first morning, counsel for Appellant objected to the amendment to the indictment that had been made in the order of March 11, 2003. Counsel for Appellant argued that the jury should be limited by the original indictment and should not be allowed to consider an intentional state of mind because the grand jury had returned an indictment of charging only wanton murder. The trial court overruled this motion. The trial court then instructed the jury on intentional murder and wanton murder, and the lesser-included offenses of second-degree manslaughter and reckless homicide. The trial court further refused Appellant's jury instructions on first-degree manslaughter under an extreme emotional disturbance theory or intent to cause serious physical injury theory.

Additionally, at the close of trial, counsel for Appellant objected to the prosecutor's closing argument. He claimed that the prosecutor was urging the jury to convict Appellant to set an example and for the sake of the community. Appellant was found guilty of murdering his wife and was sentenced to a term of fifty years' imprisonment. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Amended Indictment

Appellant argues that the amendment of the indictment by the trial court unfairly prejudiced him. It is questionable whether this claimed error was preserved for review,

as Appellant's attorney raised no objection when the trial court amended the indictment on February 20, 2003.

At the pretrial conference on February 20, 2003, the Commonwealth filed a motion to amend the murder indictment to include both wanton and intentional. When the judge inquired about the motion for amending the indictment, the prosecutor informed the judge he wanted to amend to "intentionally or wantonly." The judge then asked whether there was an objection to the motion. Defense counsel responded, "No." It was not until two years later on the first morning of trial that an objection was entered.

Regardless of the preservation issue, however, the trial court's amendment two years before trial, to reflect a mental state of wanton or intentional murder, was proper. RCr 6.16 provides: "The court may permit an indictment...to be amended any time before a verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." Appellant argues that the trial court's amendment was improper because intentional murder is a different offense than wanton murder. This is incorrect. Our legislature has chosen to define intentional and wanton murder as the same offense. Evans v. Commonwealth, 45 S.W.3d 445, 447 (Ky. 2001); KRS 507.020. In Schambon v. Commonwealth, 821 S.W.2d 804 (Ky. 1991), this Court addressed the amendment of an indictment that altered the designation of the subsection of the murder statute under which Appellant was charged. The Court concluded that the amendment was proper:

> The amendment allowed did not result in appellants being charged with a different offense. To the contrary, the amendment merely altered the designation of the subsection of the statute under which appellants were charged. The offense was the same. No additional evidence was required

> to prove the amended offense and appellants have not shown that they were prejudiced by the amendment. There was no error.

Id. at 809.

In this case, Appellant was indicted for murder under KRS 507.020. After the trial court's proper amendment, Appellant was still charged under KRS 507.020, thus no different or additional offense was charged. As always it is up to the jury to determine the state of mind that drove the defendant. Under either state of mind, intentional or wanton, the charge is still murder.

Appellant also fails to state how he was prejudiced by this amendment. "[T]he essential question when examining [any] variance between the indictment and the proof is whether the defendant in fact had fair notice and a fair trial." Johnson v. Commonwealth, 864 S.W.2d 266, 272 (Ky. 1993). The indictment was amended two years before the trial began. This lead time was more than ample to provide Appellant with fair notice of the changes and a fair trial. Thus, this Court finds no error.

B. Prosecutorial Misconduct in Closing Argument

Appellant also argues that the prosecutor committed misconduct during the guilt-phase closing argument. The prosecutor argued:

> This verdict is going to be used not only in this case, but it'll be used in other cases because when we work out plea agreements, we look at what juries do in similar cases. So what you do here today will be the law here in Greenup County.

Defense counsel objected. The trial court overruled the objection agreeing with the prosecutor that the argument was a proper "deterrence" argument. The prosecutor continued:

> What you do in this case will deter future crimes or it will tell people that they can get away with future crimes. You know, if David Adkins is able to convince you that this was a self-inflicted gunshot wound and he gets away with this, what's to keep anybody from doing the same thing and coming up with any hare-brained story they want as long as there's no other witnesses around, and saying take your pick. It was accidental. She shot herself. I did it; it was an accident. What's to keep anybody from doing that? Tell me, please tell me, that it's not that easy to take a 12-gauge shotgun and blow somebody's head off and come up here with all these hare-brained stories and walk out of here without a conviction for murder. Tell me that's not possible.

There was no further objection by defense counsel.

Appellant argues that the prosecutor's comments, both before and after the objection, prejudiced him at trial. To constitute reversible error, a prosecutor's comments must be serious enough to render the whole trial fundamentally unfair. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). Appellant cites United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991), to support his argument that the prosecutor's comments were improper and reversal is merited. But Solivan is distinguishable from this case for the very same reasons that the Solivan court distinguished that case from United States v. Alloway, 397 F.2d 105 (6th Cir.1968). In Solivan, a suspected drug dealer was tried at the height of national attention to the "War on Drugs." Defense counsel objected to the following prosecutor's statement during closing argument:

> I'm asking you to tell her and all of the other drug dealers like her [t]hat we don't want that stuff in Northern Kentucky and that anybody who brings that stuff in Northern Kentucky...."

Solivan, 937 F.2d 1146, 1148 (alteration in original). In Alloway, the court found the following statement to be proper:

> You, the jurors, are called upon in this case to be the world conscience of the community. And I'm calling on this jury to speak out for the community and let the John Alloways know that this type of conduct will not be tolerated, that we're not going to tolerate [armed robbery].

Alloway, 397 F.2d 105,113 (alteration in original).

The Solivan court distinguished the two cases because of the "nature of the case and the wider social context in which the case was prosecuted...there was no comparable specific wider context of national attention and concern present." Solivan, 937 F.2d 1146, 1154. The court also stated that the defendant in Alloway was not compared to a "feared and highly publicized group, such as drug dealers" nor did the prosecutor "bring to bear upon the jury's deliberations the attendant social consequences of defendant's criminal conduct or urge the jury to convict an individual defendant in an effort to ameliorate society's woes." Id. The holding in Solivan is not applicable in this case for those same reasons.

In two cases more analogous to the instant case, Lymen v. Commonwealth, 565 S.W.2d 141 (Ky. 1971), and Meyer v. Commonwealth, 472 S.W.2d 479 (Ky. 1971), this Court addressed deterrence arguments. In Lymen, the prosecutor in closing arguments argued the following:

> Punishment is for punishment's sake. Punishment and sentence in a penitentiary is more than that. It's to say to the man that did it: Don't do it again. But more than that, it's to say to all of these people in our community that are out there picking locks and rob and steal and make money easy and saying: I don't have to work for it. It's saying to those your sentence here today is saying to those: Don't do it; we won't tolerate it. We're going to make this place a safe place, and we're going to stomp out people that rob at gun point.

565 S.W.2d at 144. In Meyer, the prosecutor similarly argued:

> It's now up to you. This heavy burden is going off of my shoulders. I haven't slept for the last three nights. It's yours now. What are you going to tell the decent people of this community? In all that's right and fair and just, go to your jury room and, by your verdict, tell the people of this community. I plead with you, do your duty and do it promptly. It is not pleasant, but do it. And may God, in His infinite wisdom, be with you in your deliberations. Thank you.

472 S.W.2d at 486. In both cases, the Court approved the argument. In Wallen v. Commonwealth, 657 S.W.2d 232, 234 (Ky.1983), this Court again acknowledged that during closing arguments prosecutors can base arguments on deterrence or reasons reasonably inferred from the evidence.

In this case, the prosecutor in closing arguments explained to the jury the deterrent effect on future crimes their decision would have. Then the prosecutor attacked Appellant's conflicting stories, which the prosecutor believed to be merely fabrications to help provide doubt. The prosecutor's closing argument in this case was not egregious nor did it make the trial fundamentally unfair. This Court finds no error, but if it were, it would be harmless.

C. Instructions to the Jury

1. First Degree Manslaughter—Intent to Cause Serious Physical Injury

Appellant argues the jury could have believed that he committed first-degree manslaughter because of his statement that he and the victim were in an argument, and that when he shot her, he had been firing at the stereo to scare her. KRS 507.030 (1)(a) provides in pertinent part that "[a] person is guilty of manslaughter in the first degree when...[w]ith intent to cause serious physical injury to another person, he causes the death of such a person...." (Emphasis added.)

It is the trial court's duty to instruct the jury on the law of the case. RCr 9.54(1). The court must instruct the jury on every state of the case deducible from or supported by the evidence. Commonwealth v. Duke, 750 S.W.2d 432, 433 (Ky. 1988). However, the instructions may only be derived from evidence that is actually presented and no instruction is warranted where the theory of the case is unsupported by the evidence. Butler v. Commonwealth, 560 S.W.2d 814, 816 (Ky. 1978).

Appellant gave many versions of what happened in the trailer on September 2, 2002. There were two major differences in his recounting of that night. In one version his wife had the gun and it went off while she was banging it on the floor. In all of the other versions, he was holding the gun. But in every version his wife was always shot accidentally. In Appellant's many versions, the gun went off while he was trying to unjam it; he tripped and the gun fired; his wife pulled him by the collar and it went off; and finally, he fired at the stereo to scare his wife, and she was shot and killed. In none of the many accounts that the Appellant gave did he ever intend to shoot his wife with the intent to seriously injure her. Even when Appellant intentionally fired the gun, it was to shoot the stereo, and he stated that he only intended to scare the victim.

Furthermore, forensic evidence showed that the gun was within one inch of the victim's face when fired. A shot to the head at such close range from a shotgun does not show intent to cause only serious physical injury. Intent to kill is inferred from the logical consequences of the defendant's actions. Stopher v. Commonwealth, 57 S.W.3d 787, 802 (Ky. 2001). There was no evidence at trial from which a jury could have inferred that Appellant intended only to injure his wife. All the evidence indicates either that the shooting was accidental or was done with intent to kill. Lacking

evidentiary support, the trial court correctly declined to instruct the jury on first-degree manslaughter under KRS 507.030(1)(a). Thus, this Court finds no error.

2. First Degree Manslaughter—Extreme Emotional Disturbance

Appellant also argues that the jury could have believed one of his versions of the shooting in which he was in an argument with the victim and therefore convicted him of manslaughter under extreme emotional disturbance. In support of this argument, Appellant points to evidence of a bag of clothes outside the trailer, which he cites to insinuate that the victim and the children had packed to leave. Appellant argues that these two pieces of testimony allowed a jury to believe that he killed the victim in the heat of the moment.

KRS 507.030(1)(b) provides that a person is guilty of first-degree manslaughter, rather than murder, when "[w]ith the intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance...." "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 rather than from evil or malicious purposes." Cecil v. Commonwealth, 888 S.W.2d 669, 673 (Ky. 1994). There must be evidence of a triggering event causing an explosion of violence from the defendant. Tamme v. Commonwealth, 973 S.W.2d 13, 37 (Ky. 1998). In order to receive an EED instruction it must be proven by definitive and non-speculative evidence. Morgan v. Commonwealth, 878 S.W.2d 18, 21 (Ky. 1994).

Appellant provided multiple accounts of the shooting, but he never produced any testimony or evidence that he was enraged, inflamed or disturbed to the point that he acted uncontrollably. In each of the versions, Appellant states that it was an accident. To justify an EED instruction Appellant must have acted intentionally. Appellant's alternate versions of what happened depict only accidental acts on his part. Appellant in most versions does not support that there was an argument or any situation that would cause one to be enraged or inflamed. In the majority of his stories, the gun went off because of him tripping, trying to unjam the gun, or the banging of the gun on the floor. When Appellant said that he and the victim were arguing, it was the victim who was allegedly angry. The only evidence about Appellant's emotional state—his own testimony—was that he was always calm and collected. Furthermore, the testimony concerning the bag of clothes indicates that it was most likely only men's clothes, not a woman's and children's clothes as Appellant would suggest. These facts do not support even speculation that the victim and her children were leaving, which in turn caused Appellant to become so enraged as to lose control.

There was also testimony that two days before the victim was killed, Appellant, in a fight with the victim, said, "You go on. You go ahead and leave, but you're not taking those girls. I'll blow your...brains out." This statement is also cited to show how volatile the situation was for Appellant. This statement occurred two days before the victim was shot and is consistent with intent and calculated planning, not a temporarily enraged mental state. There is no independent evidence that supports Appellant's contention that they were having an argument the day of the shooting and this argument was because the victim was leaving with the children. No further evidence, even from

Appellant's versions, supports that he was enraged or inflamed and lost control of his actions. Lacking any independent evidence, this Court finds that the trial court did not err in not giving an EED instruction.

D. KRE 404(b) Evidentiary Issues

Appellant argues that multiple instances of evidence of other bad acts were improperly admitted at trial. Specifically, Appellant claims as error the admission of testimony that he was "drugged up" two days before trial, and that he threatened to kill the victim "in front of many people."

1. Testimony that Appellant was "Drugged Up"

The trial court granted Appellant's motion in limine pursuant to KRE 404(b) asking that testimony concerning his alleged drug usage be suppressed. Nevertheless, such evidence was admitted inadvertently. Phyllis Vanhoose testified at trial that two days prior to the murder, the victim and Appellant were arguing. When asked what the argument was about, Mrs. Vanhoose stated, "It started off about him being drugged up." Appellant objected, and the trial court offered to admonish the jury. Appellant declined the offer.

An admonishment is usually sufficient to cure an unsolicited reference to prior bad acts. Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). The proper remedy in this case was to admonish the jury. The trial court offered an amonishment, but Appellant refused it. Appellant will not be granted extraordinary relief on appeal when he refused an offer of legally sufficient relief at trial. Matthews v. Commonwealth, 163 S.W.3d 11, 18 (Ky. 2005). As such, Appellant's allegation of error is not grounds for reversal.

2. Detective's Statement That Appellant Told the Victim "In Front of Many People" He Would Kill Her

Defense Counsel also filed a motion in limine asking the court to suppress any testimony that Appellant had on two occasions previously threatened to kill the victim if she ever left. The trial court allowed Ms. Vanhoose's testimony concerning the incident two days before the shooting where Appellant had threatened to kill the victim by blowing her head off. However, the court held that testimony that Appellant threatened to kill the victim two years before trial was too remote and therefore inadmissible.

Appellant claims as error the prosecution's playing of a tape of Appellant's third police interview during closing arguments.[1] In the recording, the detective told Appellant that he had threatened to kill his wife if she ever left. On the tape, Appellant denied having made this threat. The detective then said that Appellant made this statement "in front of many people." Appellant claims the statement on the tape by the detective that it was "in front of many people" could have been a reference to the incident two years before the shooting. However, it is simply unclear if it was a reference to the incident two years before trial. The jury had heard testimony about the incident two days before the shooting and likely would have associated that statement with that incident. At best the reference was ambiguous.

This Court has previously addressed such references in Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). In that case, a witness made the

[1] It is unclear from the record whether the tape of Appellant's third interview with the police was entered into evidence at trial. Appellant's only discussion of the tape points to closing arguments and does not cite whether it was played at trial. Nevertheless, Appellant's objection is not whether it was entered into evidence, but if the testimony was suppressed.

ambiguous statement, "I knew he wasn't supposed to have a gun" in reference to the defendant's prior criminal conviction. This Court held that even if the statement was unambiguous, the proper remedy was an admonition. Id. at 865. The vague statement made by the detective in this case is more likely an overstatement of the facts to which there was no objection, than an admission of suppressed testimony. Nevertheless, this Court does not find that Appellant was substantially prejudiced in light of the other evidence. As such, we find no reversible error.

For the foregoing reasons, this Court affirms the Greenup Circuit Court.

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, Schroder and Scott, JJ., concur.

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