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CORRECTED: SEPTEMBER 24, 2008
MODIFIED: JUNE 19, 2008
RENDERED: MARCH 20, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000061-MR

DARIUS FRYE — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 05-CR-00533

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

A Fayette County jury convicted Darius Frye of wanton murder.[1] In accordance with the jury's recommendation, he was sentenced to forty (40) years in prison. Appealing to this Court as a matter of right,[2] Frye argues the circuit court erred by: (1) refusing to instruct on first-degree manslaughter based on extreme emotional disturbance; (2) allowing the Commonwealth to impeach a witness using a transcript rather than recorded portions of the prior statement; and (3) denying a motion for a mistrial based on the Commonwealth's closing argument. Finding no error, we affirm.

II. Factual Background

Darius Frye obtained three to four grams of crack cocaine for one hundred dollars. He expected to profit up to four hundred dollars on resale. On the morning of

[1] Kentucky Revised Statute (KRS) 507.020(1)(b).
[2] Kentucky Constitution §110(2)(b).

February 26, 2005, Frye had the drugs in his possession and was armed with a loaded 22-caliber semiautomatic pistol. He was open for business.

On this same day, Billy Allen Parker was loaned twenty dollars by his father so that he could go fishing with his girlfriend. Parker, the father of six children, was a drug addict. Driving his girlfriend's 1994 Pontiac Firebird, Parker instead ended up on the street. Frye, who was fifteen years old at the time, and John Benton, sixteen years old, approached the car Parker was driving. In response to Parker's request, Frye broke off and handed Parker a twenty-dollar piece of crack cocaine. Parker, after tasting the crack, attempted to return it to Frye. Frye refused to take the crack back and demanded his money. When Parker refused to give him twenty dollars, Frye pulled his pistol and shot him twice. Parker drove a short distance away before striking a utility pole.

When police arrived, Parker was slumped in the driver's seat. He was bleeding from wounds to his left upper chest and the left side of his neck. He had no pulse and was not breathing. He was transported to the hospital where he subsequently died. An autopsy determined that either gunshot wound was sufficient alone to have caused Parker's death within a few moments. The autopsy also revealed that Parker had a blood alcohol content of .08, and that cocaine was in his system.

Two days later, Lexington Police Detective Rob Wilson interviewed Benton and Marvin Sawyer at school. Sawyer, who had witnessed the incident, confirmed events as set out above. Benton, in a taped interview, stated that he and Frye had been drinking and taking pills, both the night before and the morning of the shooting. Benton said that Parker drove up, asked for crack, and then attempted to drive off without paying. At trial, Benton denied telling police Parker had tried to give the crack back.

While he admitted Frye pulled his pistol, Benton also gave conflicting testimony as to the number of shots fired and the distance Frye was from the car when he fired.

Detective Wilson arrested Frye on February 28th. In his initial statement to police, Frye denied owning the pistol. Frye also indicated that Parker tried to hit him with his car when Frye told him he did not have any drugs. Frye then claimed he had drawn the pistol when Parker tried to steal money from him, and that the gun had discharged accidentally.

Following his statement, Frye led police to the pistol. Ballistics tests showed that one of the bullets recovered from Parker's body had been fired from the pistol. The second bullet taken from Parker's body was too deformed to make a positive match.

At trial, Frye took the stand in his own defense. Once again his story changed. He admitted he had obtained three to four grams of crack cocaine for one hundred dollars for the purpose of resale. Frye testified that he expected to make a profit of up to four hundred dollars. Frye also admitted he had the pistol in his possession on the day of the shooting. However, Frye claimed that after Parker tasted the crack it appeared he was about to pay, but that he then suddenly drove away. Frye testified that, acting in a rage, he pulled his pistol and shot Parker. Frye then admitted that he had hidden the pistol in the trash.

III. Analysis

A. Extreme Emotional Disturbance

Frye argues the circuit court erred in failing to instruct the jury on first-degree manslaughter based on extreme emotional disturbance. Citing to KRS 507.020(1)(a), Frye points out that the murder statute does not apply when a person is acting under extreme emotional disturbance. To support his claim that evidence existed to support

an instruction on manslaughter, Frye argues that the triggering event was Parker's attempt to rip him off during the transaction. Frye contends that his actions, when considered in light of his age at the time, and the fact that he was under the influence of alcohol and drugs, amount to extreme emotional disturbance.

The trial court rejected Frye's claim. In doing so, the court noted that intoxication, or the state of being under the influence of drugs, would be a separate defense. However, the court noted that Frye had not sought an instruction on intoxication, nor did the court believe the evidence supported such an instruction. Further, the court concluded the evidence did not warrant an instruction on extreme emotional disturbance. We agree.

Frye points to three factors to support his claim: (1) Parker's attempt to rip him off during the drug transaction; (2) his age at the time of the incident; and (3) being under the influence of alcohol and drugs. This Court has rejected the claim that drug dependency or the effects of substance abuse, standing alone, authorize an instruction on extreme emotional disturbance. See Caudill v. Commonwealth, 120 S.W.3d 635, 668 (Ky. 2003) citing Stopher v. Commonwealth, 57 S.W.3d 787, 803 (Ky. 2001) and Bowling v. Commonwealth, 873 S.W.2d 175, 179 (Ky. 1993). In addition, we have held that resistance of the victim to a demand for money does not amount to a reasonable explanation or excuse for extreme emotional disturbance. See Caudill, 120 S.W.3d at 668, citing Hodge v. Commonwealth, 17 S.W.3d 824, 850 (Ky. 2000).

In this case, Frye was on the street for the purpose of selling drugs. He was also in possession of a loaded gun. By his own admission, he possessed drugs with a street value of up to four hundred dollars. We agree with the trial court that a refusal to pay for a twenty-dollar piece of crack cocaine does not provide a reasonable excuse or

explanation for Frye to have become enraged, inflamed, or disturbed so as to entitle him to a defense based on extreme emotional disturbance, even taking into account Frye's age and looking at the situation from the viewpoint of a person in Frye's situation. KRS 507.020(1)(a). At most, it supports Frye's testimony that he became angry. Under these circumstances, we cannot say the court erred in denying Frye's request for an instruction on first-degree manslaughter based on extreme emotional disturbance.

B. Impeachment of John Benton

Frye's second argument concerns the Commonwealth's impeachment of John Benton. Benton, who had participated with Frye in the drug transaction, was impeached at trial with a prior statement he had made to police. Rather than using the recorded statement, the Commonwealth had Detective Wilson use a transcript of Benton's statement. Frye's argument can be analyzed in two parts. First, Frye argues it was error to allow Detective Wilson to use a transcript in lieu of portions of the recorded statement. Second, Frye argues the Commonwealth's impeachment exceeded the scope of the questions it had asked Benton at trial.

As to Frye's argument over the method of impeachment, we find it was waived. A review of the first bench conference indicates Frye agreed prior to trial that the Commonwealth could use the transcript, rather then play portions of Benton's actual statement. In a subsequent bench conference, Frye suggested that the Commonwealth, by using the transcript, was taking Benton's answers out of context. The court offered to grant a recess and allow the parties the opportunity to review and select the portions of the recorded statement that would be required. Frye, in taking no

action, did not accept this offer. Thus, we conclude Frye's objection to the use of the transcript over portions of the recorded statement was waived.[3]

The second part of Frye's argument deals with the scope of the Commonwealth's impeachment. Frye contends the Commonwealth, when questioning Benton, improperly went into issues for which no ground work had been laid. The topics which Frye complains of include the number of shots fired, whether Parker backed the car up when leaving, the length of time Frye and Parker were talking, and whether Parker said anything to Frye prior to the shooting. Frye suggests these questions were either answered during the Commonwealth's examination of Benton, or were never addressed to Benton.

When Frye's objection was raised before the trial court, the Commonwealth responded that Benton's answers had been deliberately vague and evasive. The Commonwealth noted that when asked if two shots were fired, Benton replied, "I guess." However, Benton then said, "I don't know." On the issue of whether Parker had backed up the car, Frye's attorney agreed the answer was vague. In response to questions concerning whether Parker had said anything to Frye prior to the shooting, Benton reiterated that he had asked for a twenty-dollar piece of crack. Benton simply shrugged when asked if Parker had said anything else.

Benton's answers to the Commonwealth's questions amounted to a contradiction of his earlier statement to police. At best, Benton gave contradictory and vague responses. Under these circumstances, we find no error in the scope of the

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[3] Frye now argues Kentucky Rule of Evidence (KRE) 1002 and KRE 1003 mandate the use of the recording itself. As this basis was not raised before the trial court, we will not address it here. See Grundy v. Commonwealth, 25 S.W.3d 76, 84 (Ky. 2000) ("[W]e will not allow appellants ... 'to feed one can of worms to the trial judge and another to the appellate court.'") citing Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977).

Commonwealth's questions. Further, we find the Commonwealth laid a proper foundation prior to impeaching Benton's evasive testimony at trial. See KRE 613(a); Noel v. Commonwealth, 76 S.W.3d 923, 929-30 (Ky. 2002). For these reasons, we reject Frye's argument that the circuit court improperly allowed the Commonwealth to impeach Benton.

C. Mistrial Motion

Frye's final argument concerns the court's decision to deny his motion for a mistrial during the Commonwealth's closing argument. The Commonwealth, in response to Frye's statement during closing that he was the victim of a drug deal that had gone bad, recited the facts surrounding the incident. In summarizing these facts and pointing to inferences that can be drawn from them, Frye argues the Commonwealth improperly implied he had sold drugs before. This formed the basis of Frye's motion for a mistrial.

In closing, Frye's lawyer argued the jury should view him as the victim of the incident. He suggested that Parker intended to rip off a drug dealer, and that Frye was the perfect target. After all, Frye's lawyer pointed out, he was just a kid. At 5'7" tall, 130 pounds, and only fifteen years old, he suggested Parker saw Frye as an easy mark.

In response, the Commonwealth questioned how Frye could be the victim under the evidence presented. The Commonwealth Attorney stated:

> The defense actually used the word "victim" in describing Darius Frye today. Darius Frye was a victim in their mind because somebody was trying to rip him off for his twenty dollars in crack. I think that's offensive. I think that's offensive to the fact that Billy Allen Parker is not here today. And this defendant has already admitted that he killed him, that he shot him twice. He's not the victim. He knew the street value of the three-to-four ounces, three-to-four grams of cocaine that he said he had with him. He knew it right off as soon as she asked. Four hundred dollars, that's what it was. And he had given one hundred dollars for it or was going to when he traded this deal out. Now it's your call whether you think that that maybe means that he

> has done this before or that he knew what he was doing. He also had a loaded weapon and to imply that he would be the victim of anything – (at that point, Frye's lawyer interrupted the Commonwealth and objected).

Frye's lawyer argued the Commonwealth had improperly referred to prior bad acts. In response, the Commonwealth again recited the facts and argued the jury could infer that Frye knew what he was doing. Further, the Commonwealth argued it was responding to Frye's argument that he was the victim, that he did not know what was going on, and that he was new to this type of situation.

We agree with the circuit court's conclusion that the Commonwealth's closing argument was proper. As this Court has recognized in the past, the prosecution "is entitled to draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make reasonable argument in response to matters brought up by the defendant[.]" Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971). Given the facts in evidence, we cannot say the inference that "[Frye] has done this before or that he knew what he was doing" was unreasonable. Certainly, the defense's portrayal of Frye as a young "easy mark" for Parker made Frye's familiarity with the drug trade something worthy of comment in closing argument. Further, the Commonwealth's argument did not identify any specific prior drug transactions. Rather, it was a comment on Frye's apparent familiarity with the drug trade. This is within the broad leeway given the prosecution to comment on the evidence, tactics of the defense, and arguments made by Frye in closing. See Hunt, 466 S.W.2d at 959. Under these circumstances, we cannot say the court abused its discretion in denying Frye's motion for a mistrial. See Turner v. Commonwealth, 153 S.W.3d 823, 829 (Ky. 2005) citing Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky.App. 1993) (the decision of a trial court

concerning a motion for a mistrial should only be disturbed where there is an abuse of discretion).

IV. Conclusion

Frye has raised three arguments on appeal. Having considered and rejected each in turn, we conclude the Fayette Circuit Court did not commit reversible error and we affirm Frye's conviction.

All sitting. Lambert, C.J., Abramson, Cunningham, Minton, Schroder, Scott, JJ., concur. Noble, J. concurs but believes Appellant was entitled to an extreme emotional disturbance instruction because the error was rendered harmless by the jury's specific finding that he committed wanton murder, to which the extreme emotional disturbance mitigator does not apply.

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ORDER OF CORRECTION

The Memorandum Opinion of the Court, rendered March 20, 2008, and modified June 19, 2008, is CORRECTED on its face; and the attached opinion is substituted therefor. The correction does not affect the holding of the case.

ENTERED: September 24, 2008.

CHIEF JUSTICE