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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000547-MR

DARRYL D. BURRELL — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 04-CR-01362

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Darryl D. Burrell appeals as a matter of right from a June 28, 2006 Judgment of the Fayette Circuit Court convicting him of wanton murder, three counts of robbery in the first degree, two counts of attempted murder, and tampering with physical evidence. The Commonwealth alleged that on September 14, 2004, in the course of robbing a Dairy Mart on East New Circle Road in Lexington, Burrell shot and killed Ashley Cason, the store's cashier, and robbed and attempted to kill two other people. In accord with the jury's recommendation, the trial court sentenced Burrell to life in prison without benefit of parole. On appeal, Burrell contends that the trial court erred (1) by refusing to grant his motion for a mistrial after a violent outburst from the murder victim's brother; (2) by failing to instruct the jury on the lesser included offenses of second-degree manslaughter and reckless homicide; and (3) by allowing Clinton Comley, one of the

robbery victims, to make an in-court identification based on an impermissibly suggestive photographic lineup. Convinced that Burrell was not entitled to a mistrial or to lesser-included-offense instructions and that Comley's identification testimony was proper, we affirm.

RELEVANT FACTS

At approximately noon on September 14, 2004, an African-American man wearing wire-rimmed glasses entered a Dairy Mart on East New Circle Road in Lexington carrying a bolt action, sawed-off shot gun. Two employees were working that day: twenty-two-year-old Ashley Cason and Assistant District Manager James Wiechart. A tobacco company representative, Clinton Comley, was also present. The robber ordered Wiechart and Comley to the floor and demanded the money from their wallets and the store's cash register. During this exchange, the robber fired a round in the direction of the two men. Neither of the men was hit, and the shell casing landed somewhere between them. The robber picked up the shell casing, and once he had collected the money from the cash register (about $180), he marched all three captives toward the store's cooler. On the way to the cooler, he demanded that they discard their cell phones into a sink near the cooler entrance.

Weichart testified that when they had proceeded several feet into the cooler, he heard another shot fired followed by a scream. Weichart turned to see Cason clutching her chest before she collapsed to the ground. As the robber loaded another shell into the chamber of the shotgun, Weichart and Comley fled to another room behind the cooler. As they were running, the man fired a third round that hit the door through which they were exiting. The men hid in the back room for several more minutes.

When they emerged, they immediately checked on Cason and discovered that she was not breathing. Comley called 911, and the police arrived moments later. Tragically, Cason did not survive the gunshot wound to her back and chest which pierced her left lung and her heart. She was pronounced dead at the scene. Comley described the robber to the police as a black man, about 6'1" in height with an athletic build; he wore silver wire-rimmed glasses, a black baseball cap, gray sweatshirt, dark blue jeans, and dark work boots.

The Dairy Mart had a surveillance system that recorded both the audio and video of the robbery. Local television stations broadcast still photos from the surveillance video on the evening news. As a result, the police received a tip that helped them locate and arrest Burrell on the evening of the robbery. Following this arrest, the police conducted searches of Burrell's automobile and residence, during which they found a loaded sawed-off shotgun (later determined to be the murder weapon), spent shotgun shells, a black baseball hat, a gray sweatshirt, and a white plastic bag containing the wallets of Weichart and Comley. On November 15, 2004, the Fayette County Grand Jury indicted Burrell for the murder of Ashley Cason, three counts of robbery, two counts of attempted murder, second-degree assault, possession of a firearm by a convicted felon, tampering with physical evidence, first-degree promoting contraband, and being a second-degree persistent felony offender (PFO). Prior to Burrell's trial, the Commonwealth severed the possession of a firearm and first-degree promoting contraband charges and dismissed the second-degree assault charge. The firearm and contraband charges, as well as the PFO charge, were subsequently dismissed without prejudice.

Burrell's trial began on May 9, 2006. At trial, Comley testified that he "got a good look" at the assailant and that Burrell was the man who had robbed the Dairy Mart and shot Cason. Comley also testified regarding his pre-trial identification of Burrell from a photographic line-up conducted the morning after the robbery. Weichart testified that since he had been trained by Dairy Mart not to look at robbers but rather to focus on their weapon, he did not get a good look at the robber. During Weichart's testimony, the Commonwealth also played the Dairy Mart's surveillance video and audio for the jury. On May 18, 2006, the jury returned with guilty verdicts of wanton murder, three counts of first-degree robbery, two counts of attempted murder, and tampering with physical evidence. On June 28, 2006, the Fayette Circuit Court sentenced Burrell to life in prison without parole for the murder conviction and to a concurrent sentence of 105 years' imprisonment for his other convictions. This appeal followed.

ANALYSIS

I. The Trial Court Did Not Err When It Denied The Defense's Motion For A Mistrial After An Outburst From the Victim's Brother.

During Weichart's testimony, the Commonwealth played both the audio and video recording of the robbery from the Dairy Mart's surveillance camera. At one point in the audio recording, listeners hear a shotgun blast followed by Cason's screams. When this portion was played for the jury, Cason's brother, Michael Cason, who was sitting in the court's gallery, jumped up from his seat and moved towards the bar separating the gallery from the parties. Before he got close to the bar, however, a woman sitting next to him and two bailiffs restrained him and began moving him out of the courtroom. During this commotion, Mr. Cason slapped his hand down on a wooden bench and yelled that he was going to kill Burrell, specifically stating "I'll kill you,

motherfucker." The bailiffs quickly removed Mr. Cason from the courtroom. The entire incident lasted approximately 10 seconds.

In response, the trial court turned off the audio recording and ordered the jury to recess. Burrell then moved for a mistrial claiming that the outburst would certainly have a prejudicial impact on his defense. The trial judge denied Burrell's motion. The judge then spoke with Mr. Cason privately and barred him from any further proceedings concerning the case. He also addressed the audience in the gallery, asking those who could not maintain courtroom decorum during the remainder of the proceeding to excuse themselves. Upon the jury's return, the trial judge gave them a lengthy admonition, requesting that they "forget" about what they had seen and assuring them that he had taken steps to prevent another such outburst. The Commonwealth then replayed the portion of the audio that had been interrupted. Burrell now argues on appeal that the brother's outburst tainted the proceedings and that the trial court erred when it refused to declare a mistrial. Due to this Court's long-standing rule that a proper admonishment can cure any prejudice arising from outbursts such as this one, we disagree.

Trials pertaining to the death of individuals are fraught with emotion for both the victim's and the accused's relatives and loved ones. This Court has observed that

> [i]t is a frequent occurrence in homicide cases that the next of kin or other close relatives . . . become emotionally upset, cry, and lose their composure. These are matters that cannot be anticipated and cannot be prevented by denying such persons the right to be present in the courtroom during the trial.

Jackson v. Commonwealth, 275 S.W.2d 788, 789 (Ky. 1955). When outbursts from spectators in the court do occur, the judge must act quickly to preserve order and the

appropriate decorum.

While the behavior of bystanders may under some circumstances be grounds for a mistrial, Sharp v. Commonwealth, 849 S.W.2d 542 (Ky. 1993) (granting a mistrial where a bystander made hand signals and gestures to a child witness), emotional outbursts by members of the audience and by witnesses are "effectively remedied by the court's admonition." Belt v. Commonwealth, 2 S.W.3d. 790, 793. (Ky. App. 1999). This Court recently reiterated that "[w]hen there is some kind of emotional display . . . an admonition to the jury to disregard the display is more than sufficient to cure any possible prejudice that might occur from the situation." Coulthard v. Commonwealth, 230 S.W.3d 572, 577 (Ky. 2007).

Burrell claims that the severity of the outburst and the denial of the mistrial resulted in manifest injustice by prejudicing the jury against him. We disagree. First, the outburst, though unfortunate, was quickly and professionally quelled by the law enforcement officers in the court room. Burrell does not dispute that the incident lasted no more than a few seconds. Second, there is nothing to support Burrell's assertion that the outburst gave the jurors cause to fear for their safety should they return a not-guilty verdict. The record gives no indication that the jurors knew the identity of the bystander or his connection to the trial. Furthermore, the trial judge's actions in ejecting the bystander, barring him from the courtroom, and explaining as much to the jury were sufficient precautions to guard against whatever anxiety the jury may have felt.

Finally, the admonition by the trial court was sufficient to ensure the fairness of the proceeding. In this case, the trial court judge directed the jury to disregard the outburst by the spectator. In particular, the trial court's lengthy admonition included the

following:

> I therefore direct you to simply forget about it; do not consider it, the outburst or any statements or anything that you may have heard or may have thought you heard . . . . Simply strike that from your mind and do not consider it in any way, shape or form as anything to do with the issues to be decided in this case. There will be no repercussions or nothing coming back as far as you all are concerned and I simply direct you to forget about it. It was an unfortunate incident and it has been dealt with and should now be forgotten by you as far as any consideration as it regards this trial or this case in any way, shape or form.

This Court has stated that when inadmissible evidence is mistakenly presented to a jury, there is a presumption the jury will follow the trial judge's admonition to exclude such evidence from their consideration. Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002); Alexander v. Commonwealth, 862 S.W.2d 856, 859 (Ky. 1993). This rule translates well to this situation. The outburst, though obviously inappropriate, was rendered harmless by the judge's detailed admonition. There was no manifest necessity for a mistrial, therefore, and the trial court did not abuse its discretion when it denied the defense's motion for one. *See* Belt, 2 S.W.3d at 793.

Burrell also appeals the trial court's decision to allow the Commonwealth to replay the audio recording of the robbery. The recording was prematurely stopped when the outburst occurred, so it was replayed for the jury over Burrell's objection. Burrell now asserts that replaying the tape unduly biased the jury against him and demonstrated the trial court's bias. Prior to the replaying the tape, the trial judge indicated to the parties that he simply wanted the jury to be able to hear the evidence in full. Although the jury heard a particularly emotional part of the recording twice, the judge explained to the jury that replaying the tape did not signify a bias toward either

party but was simply done to make sure the panel had heard the evidence. We find this conduct to be reasonable in light of the situation and conclude that the trial court did not abuse its discretion in allowing the Commonwealth to replay the portion of the audiotape that had been interrupted. *See* Anderson v. Commonwealth, 231 S.W.3d 117, 119 (Ky. 2007).

II. The Trial Court Did Not Err When It Refused To Instruct the Jury on the Offenses Of Second-Degree Manslaughter And Reckless Homicide as Lesser Included Offenses of Wanton Murder.

At the close of his trial, Burrell requested that the jury be instructed on second-degree manslaughter and reckless homicide as lesser included offenses of the wanton murder charge. The trial court denied this request and instead instructed the jury only on intentional murder and wanton murder. Burrell now argues that the trial court's failure to instruct the jury on second-degree manslaughter and reckless homicide entitles him to a new trial because those instructions were reasonably supported by the evidence. Although Burrell did not testify at trial, he argues that the jury could have believed that the discharge of his gun was accidental, that it was meant as a warning shot, or that Cason accidentally got into the way of his gunfire. We disagree.

It is well established that a trial court has a duty to instruct the jury on the whole law of a case. Thomas v. Commonwealth, 170 S.W.3d 343, 349 (Ky. 2005). An instruction is proper, however, only if reasonably deducible from or supported by the evidence. *Id.* If the evidence does not support the instruction, the trial court is not required to include it and does not err by refusing to do so. Crane v. Commonwealth, 833 S.W.2d 813, 818 (Ky. 1992). In Baker v. Commonwealth, this Court held that

> An instruction on a lesser-included offense is required only if, considering the totality of the evidence the jury could have a reasonable doubt as to the defendant's guilt of the greater

> offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.

103 S.W.3d 90, 94 (Ky. 2003). The Baker holding recognizes a two step analysis before an instruction on a lesser offense is required: it must be possible for a juror to (1) have a reasonable doubt as to the defendant's guilt of the greater offense and yet (2) believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.

The murder statute, KRS 507.020, provides that a person is guilty of murder when:

> (1)(a) with intent to cause the death of another person, he causes the death of such person or of a third person . . . or
>
> (b) including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

Second-degree manslaughter differs from wanton murder by the removal of the "extreme indifference to human life" element, what is sometimes referred to as aggravated wantonness. KRS 507.040. Reckless homicide requires a finding that the killing was caused not wantonly but recklessly. KRS 507.050. Kentucky's Penal Code defines "recklessly" by stating that a person acts recklessly "when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(4). A person acts wantonly, on the other hand, "when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(3). As noted, for a defendant's wanton conduct to justify an instruction on wanton murder, in addition to

consciously disregarding a substantial risk, he must also demonstrate an extreme indifference to human life.

Relying on comments in Cetrulo and Cooper, *Kentucky Instructions to Juries,* § 3.28 (5th ed. 2006), Burrell argues that second-degree manslaughter and reckless homicide instructions were required in this case because second-degree manslaughter is

> always a lesser included offense of wanton Murder. . . . [And] [i]n most cases, evidence that the defendant was acting wantonly will also afford an inference that he was acting recklessly, requiring that the jury also be instructed on Reckless Homicide as a lesser included offense.

Id. at 3-46. *See also id.* at § 1.05 p. 1-19 (noting that second-degree manslaughter is "automatically a lesser included offense of wanton murder, the only distinction between the two being that in the latter offense, the degree of wantonness is more severe.") This is true, of course, and no doubt in most cases where wanton murder is alleged there will be grounds for asking the jury to determine the defendant's state of mind. We have held in the murder context, however, that lesser-included-offense instructions are not required where

> the evidence was virtually undisputed not only that the defendant killed the victim, but also with respect to the defendant's state of mind when he or she did so.

Commonwealth v. Wolford, 4 S.W.3d 534, 538 (Ky. 1999) (citing Crane v. Commonwealth, supra). In Crane v. Commonwealth, the defendant robbed a liquor store, and in the process, shot and killed the store clerk. At trial, Crane testified that he fired the fatal shot into the air rather than at the clerk directly. There was incontrovertible forensic proof, however, that the bullet entered the clerk in a straight-

line trajectory from approximately six feet above the floor. Because the evidence in Crane did not support the defendant's theory that he shot into the air and merely acted recklessly, the trial court refused to instruct the jury on the lesser included offenses of wanton murder and we affirmed. We explained that

> [a]s a matter of law, the shot [by Crane] had to have been fired into the victim intentionally or, at the very least, under circumstances indicating extreme indifference to the value of human life. This shot was undisputedly fired during the commission of an armed robbery of a store clerk. The circumstances belie and preclude any inference of mere wanton or reckless conduct on the part of the robber killer.

Id. at 817.

In this case, while robbing the Dairy Mart and the three individuals present, Burrell shot in the direction of the two men at close range, moved the captives to the store's cooler, shot directly at and killed Cason, reloaded his weapon, and shot directly at Weichart and Comley as they fled, injuring Weichart with one of the shell-fragments. Because Burrell fired *at* the employees on three separate occasions, the facts of this case evince an indifference to human life on a par with that involved in Crane. Furthermore, although Burrell argues in his brief that the jury could have believed that his gunshots were accidental, there was simply no evidence whatsoever supporting that theory, and indeed Burrell's collecting the spent casings and reloading the weapon belie it. Even more so than in Crane, where the defendant testified as to his state of mind, the evidence here was undisputed that Burrell killed and did so at least wantonly in circumstances demonstrating an extreme indifference to human life.

Based on the evidence presented, the jury could not reasonably have doubted Burrell's guilt of the greater offense, wanton murder while believing him guilty of either

of the lesser offenses, second-degree manslaughter or reckless homicide. In other words, the record does not indicate that any juror could rationally find that Burrell acted merely wantonly or recklessly when he killed Ms. Cason with a gunshot wound to her left lung and heart. For these reasons, the trial court properly instructed the court on intentional and wanton murder and did not err by excluding instructions on the lesser offenses of second-degree manslaughter and reckless homicide.

III. The Trial Court Acted Within Its Discretion In Determining That The Photo Array Was Not Unduly Suggestive, And Therefore, Did Not Err When It Allowed A Witness To Make An In-Court Identification And Give Testimony About An Out-Of-Court Identification.

As noted above, following the robbery, Comley provided a description of the assailant to a Lexington Police Officer, noting that he was a black man, about 6'1" in height with an athletic build and that he wore silver wire-rimmed glasses, a black baseball cap, gray sweatshirt, dark blue jeans, and dark work boots. Later that night, Lexington Police Detective Matthew Brotherton compiled a photo array of six pictures, including a picture of Burrell, to show to Comley. Detective Brotherton gathered five of the photographs by utilizing a database and computer software maintained by the Division of Community Corrections. The photograph of Burrell used in the photo line-up had been taken earlier that evening at his booking and was not yet in the database. Detective Brotherton testified that he entered certain parameters into the database software that corresponded to Comley's previous description of the robber, such as height, race, age, hair color, and weight. Since Comley had also described the robber as wearing glasses, Brotherton then chose five photographs where the individual was wearing glasses. Although Detective Brotherton compiled the line-up, Detective Robert Sarantonio of the Lexington Police Department actually presented the photo array to

Comley the day after the robbery.

Detective Sarantonio testified that prior to showing Comley the line-up, he informed him that an arrest had already been made in the case. Sarantonio also stated that he instructed Comley that the person being investigated may or may not be in the line-up; that the photographs were not all taken at the same time; that he should not consider the hair styles, facial hair, clothing, or jewelry of the suspects; and that the photographs may not accurately display the complexion of an individual. Detective Sarantonio also instructed Comley to take his time, to give the number of the photograph he identified, and to explain his level of certainty to the officer. After viewing the photos, Comley immediately selected photograph #3, Burrell, as the man who robbed the Dairy Mart. Comley testified at trial regarding this pre-trial identification, noting that he was able to provide a description of the robber to the officers soon after the incident, that he picked Burrell out of a photo array the day after the robbery, and that he was "110% positive" that Burrell had robbed him.

Burrell made a pre-trial motion to suppress Comley's testimony about the photo line-up identification and to prevent any in-court identification, claiming that the identification procedure was suggestive. Following a suppression hearing, the trial court found that the identification procedure was not impermissibly suggestive and overruled Burrell's motion. Burrell now argues that the unduly suggestive photo array resulted in an improper identification procedure, caused a likelihood of an irreparable misidentification, and consequently denied him due process. Upon appellate review, this Court reviews a trial court's decision on the admissibility of identification evidence under the abuse of discretion standard. King v. Commonwealth, 142 S.W.3d 645, 649

(Ky. 2004). An abuse of discretion occurs when the trial court's decision is "[a]rbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* After reviewing the evidence presented at the suppression hearing, we find that the trial court did not abuse its discretion by allowing the Commonwealth to introduce evidence from the photographic line-up.

It is well settled that identification evidence will be suppressed if a "photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968). In this case, Burrell contends that the photographic array shown to Comley on September 15, 2004, was impermissibly suggestive because Comley had watched the Dairy Mart's surveillance video the day before, the officer conducting the procedure had told him that an arrest had been made, the officers included only six photographs in the array, and the photographs differed in ways that tended to single out Burrell. We disagree with all of these contentions.

First, nothing in the surveillance video can be considered suggestive since it merely replayed what Comley had just witnessed. The police, moreover, did not ask Comley to view the video-tape; he merely stood over their shoulders as they viewed it. Second, even though only six photographs were used, we have previously upheld arrays of that size. King v. Commonwealth, supra. We have reviewed the array in this case and agree with the trial court that it contained no suggestive irregularities. All of the men pictured in the array are African-American and are wearing glasses, several have short hair, some are darker-complected than others, and none of the pictures

contains any writing on it. Burrell argues that differences among the photographs, such as the subject's hair and complexion make the array unduly suggestive. In particular, he complains that he had the shortest hair of anyone pictured. These differences, however, do not constitute an unduly suggestive photographic line-up because Detective Sarrantonio told Comley that hairstyles should not be considered and that complexions were not always accurately depicted. Even though Burrell had the shortest hair of anyone in the lineup, all of the men had generally short hair, and Comley picked Burrell out immediately as the suspect. Finally, the officer's informing Comley that an arrest had been made was not suggestive because none of the photographs indicated that the individual pictured had been placed under arrest. There is no indication, in sum, that the photographic line-up was unduly suggestive and consequently created a likelihood of an irreparable misidentification.

Even if this line-up were considered unduly suggestive, moreover, Comley's testimony regarding his pre-trial identification would still be admissible because under the totality of the circumstances, his identification was reliable. This court has held that a witness's "identification may still be admissible if under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive." King v. Commonwealth, 142 S.W.3d at 649. This determination depends upon the consideration of five factors: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Savage v. Commonwealth, 920 S.W.2d 512, 513 (Ky. 1995) (citing Neil

v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972)). In this case, Comley stated that he got a good look at the defendant during the robbery, described him fairly accurately on the 911 call and to the investigating officers, claimed to be 110% positive that the man in the photograph was the robber, and picked Burrell out of the photographic line-up only twenty-four hours after the robbery occurred. Even if the photographic array had been found to be unduly suggestive, Comley's testimony would still be admissible because the totality of the circumstances indicates that his identification of Burrell was reliable. For the aforementioned reasons, the trial court did not abuse its discretion by allowing the admission of the identification evidence.

CONCLUSION

Having reviewed the applicable law and the facts of this case, we conclude that Burrell's allegations of error do not entitle him to relief. Since the trial court properly admonished the jury following Mr. Cason's outburst, it did not err by denying Burrell's motion for a mistrial. Because the evidence did not support a second-degree manslaughter or a reckless homicide instruction, the trial court did not err in denying Burrell's request for such instructions. Finally, because the photo array was not unduly suggestive and Comley's identification was reliable, the trial court did not abuse its discretion when it allowed Comley to testify regarding his pre-trial identification. Accordingly, we affirm Burrell's convictions as set forth in the June 28, 2006 Judgment of the Fayette Circuit Court.

All concur, except Venters, J., not sitting.

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