IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

FINAL
DATE 5/14/09 Kelly Klaber D.C.

Supreme Court of Kentucky

2008-SC-000099-MR

TROY HARRIS — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 06-CR-00554

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Troy Harris, was convicted by a Kenton Circuit Court jury of first-degree assault and of being a second-degree persistent felony offender. For these crimes, Appellant received a total sentence of twenty-four years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts three arguments on appeal: 1) that the trial court had a duty to *sua sponte* inquire whether Appellant voluntarily waived his right to testify and choose his own defense; 2) that the trial court erred in not holding a competency hearing for Appellant; and 3) that unduly prejudicial hearsay testimony was improperly admitted at trial. For the reasons set forth herein, we now affirm Appellant's convictions and sentence.

On September 14, 2006, Appellant impaled his girlfriend, Karen S., with a broom handle. The broom handle tore through Karen's blue jeans, injured

her vagina and bladder, and ended up being forced two feet into her abdomen. Upon calling 911, Appellant stated that the impaling was an accident. He claimed that while he was sweeping up broken glass on the floor, he noticed a spider on Karen and used the broom handle to kill it. He stated that the broom handle accidentally slipped inside her. Karen testified at trial that Appellant's actions were a result of an altercation they were having due to her staying out all night drinking. Further facts will be developed below as necessary.

I. The trial court had no duty to *sua sponte* inquire whether Appellant had voluntarily waived his right to testify or control his defense

Appellant first argues that the trial court should have inquired *sua sponte* into whether he voluntarily waived his right to testify and to control his own defense at trial. Prior to trial, it became clear that Appellant and his counsel disagreed over what defense should be presented. Appellant wanted to argue that the impaling was accidental and he wanted to testify at trial. Appellant's counsel preferred an extreme emotional disturbance defense and filed a motion with the trial court to determine which party should control the defense. The trial court held a hearing and determined that Appellant was competent to control the defense presented and to testify.

Despite the trial court's ruling, Appellant and his counsel continued to disagree on what defense should be presented. Appellant's counsel believed that Appellant's "accident" defense was "impossible, delusional, and ridiculous." The day before trial the court entered a second order finding

Appellant to be competent to direct his counsel in regard to the defense.

During trial Appellant's counsel presented an extreme emotional disturbance defense for Appellant. Appellant's theory that the impaling was accidental was not presented, and he did not testify. The trial court never asked Appellant if he abandoned his preferred "accident" defense or if he wanted to testify. Appellant never indicated during trial that he disagreed with the defense being presented or if he was being prevented by his counsel from testifying.

Appellant now argues that the trial court had a duty to make a *sua sponte* inquiry into whether he voluntarily gave up his right to testify and the right to control his defense. See U.S. Const. amend. V (giving a defendant the right to testify); U.S. Const. amend. VI (giving a defendant the right to control his defense at trial). Appellant cites to Crawley v. Commonwealth, 107 S.W.3d 197, 199 (Ky. 2003), and Quarels v. Commonwealth, 142 S.W.3d 73, 78 (Ky. 2004), for the proposition that the "trial court has a duty to inquire into a disagreement between a defendant and defense counsel regarding the defendant's right to testify if it has reason to believe that a defendant's rights have been wrongly suppressed." Further, Appellant argues that his Sixth Amendment rights are violated if his counsel presents a defense in contravention of his wishes. Jacobs v. Commonwealth, 870 S.W.2d 412, 417-418 (Ky. 1994). However, a trial court has no duty to inquire into a defendant's choice not to testify if there is no evidence that the defendant's counsel

prevented the defendant from testifying. Riley v. Commonwealth, 91 S.W.3d 560, 562 (Ky. 2002); See also United States v. Pennycooke, 65 F.3d 9, 13 (3d Cir. 1995) ("Where the trial court has no reason to believe that the defendant's own attorney is frustrating his or her desire to testify, a trial court has no affirmative duty to advise the defendant of the right to testify or to obtain an on-the-record waiver of such right.")

In this matter, the trial court had no indication that Appellant's counsel kept him from presenting the defense he preferred or from testifying. While it is clear from the record that Appellant and his counsel disagreed before trial on how his defense should proceed, Appellant made no attempt to indicate displeasure with his defense at trial. While Appellant argues that his body posture during trial indicates he was unhappy with his counsel or was being prevented from controlling his defense, such evidence is unpersuasive. This matter is distinguishable from Crawley, supra, and Quarels, supra, because in those cases the trial court actually had knowledge that someone prevented the defendant from testifying. However, without any substantive evidence indicating that Appellant was prevented from controlling his defense or testifying, we cannot find that the trial court should have *sua sponte* inquired whether Appellant's rights were being infringed upon. See Riley, 91 S.W.3d at 562. Additionally, the trial court's order finding that Appellant was competent to control his own defense did not order that his preferred defense be presented. There is no error here.

II. Appellant was not entitled to a competency hearing

Appellant next argues that the trial court should have held a hearing to determine if he was competent to stand trial. Appellant argues that there were numerous reasons to question his competency. An expert determined that Appellant has low intellectual functioning and that he could be suffering from a dissociative state or post-traumatic stress disorder due to witnessing family violence at a young age. However, Appellant's expert determined that Appellant was competent to stand trial and his counsel admitted that Appellant was able to understand the criminal proceedings. Appellant's counsel filed a motion pursuant to RCr 8.06 and KRS 504.100 requesting an evaluation and evidentiary hearing on Appellant's mental state. The basis for the motion was their belief that Appellant's defense that the impaling was accidental was "impossible, delusional, and ridiculous" and was an indicator of his inability to participate rationally in his defense. Appellant's counsel argued that Appellant was unable to rationally understand the truth. The trial court ruled that there were insufficient grounds to order a mental evaluation because Appellant's disagreement with counsel was not necessarily irrational and that poor judgment was not a mental illness.

RCr 8.06 states that if "during the proceedings there are reasonable grounds to believe" a defendant is not competent, the judge has a duty to hold a competency hearing. However, the decision on whether to hold a competency hearing is up to the trial court's discretion. Dye v. Commonwealth, 477 S.W.2d

805, 806 (Ky. 1972). The judge's decision to deny a competency hearing should be reviewed to see if "a reasonable judge, situated as was the trial court judge . . . should have experienced doubt with respect to [defendant's] competency to stand trial." Turner v. Commonwealth, 153 S.W.3d 823, 832 (Ky. 2005).

In this matter, the trial court's denial of Appellant's motion for a competency hearing was proper. Inadequate evidence was provided that Appellant was incompetent to stand trial. While Appellant did disagree before trial with his counsel over what defense should be presented, we cannot say that the disagreement was the byproduct of an incompetent mind. Importantly, Appellant's own expert believed him to be competent to stand trial and his counsel admitted that Appellant could understand the legal proceedings. While Appellant may have suffered from some mental disorders due to witnessing family violence, these disorders did not overcome the presumption of competence we give all defendants. Gabbard v. Commonwealth, 887 S.W.2d 547, 551 (Ky. 1994). The trial court was within its discretion to deny the motion for a competency hearing, and there is no error here.

III. The introduction of improper hearsay evidence was harmless error

Appellant's last argument is that hearsay testimony was improperly admitted into evidence. Mary Jo Hundley, a sexual assault nurse examiner, testified at trial that she interviewed Karen S. regarding the injuries she

sustained. The interview occurred hours after Karen S. had been admitted into the hospital and treatments for her injuries had begun. Hundley testified that Karen S. told her that "[Appellant] had locked her out of the house and she broke the window and [Appellant] let her in and [Appellant] took a broomstick and rammed into her vaginal area. '[Appellant] made a hole in my jeans and rammed the broomstick up my vagina.'" Appellant initially objected to this testimony, but ultimately did not object to Hundley testifying that Appellant impaled Karen S. with a broomstick.

KRE 803(4) provides that "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis" can be admitted as an exception to the hearsay rule. A statement is "reasonably pertinent" to a patient's medical treatment if it is information that aids the doctor or medical staff in providing the treatment sought. Lawson, The Kentucky Evidence Law Handbook, § 8.55 (4th ed. 2003). If the statement was not pertinent to the treatment, then it is inadmissible under KRE 803(4).

The statements made by Karen S. to Hundley regarding who impaled her with a broomstick were inadmissible under KRE 803(4). The identity of the person who caused Karen S.'s injury was unnecessary for her medical treatment. Additionally, Karen S. was already receiving treatment from doctors when Hundley conducted the interview and so it cannot be said that her

statements were made for medical treatment. Thus, the admission of Hundley's testimony was error. However, the error is harmless. Karen S. testified at trial that Appellant was the one who impaled her with the broomstick. Karen S.'s testimony also provided a description of how the impaling occurred.

Thus, for the foregoing reasons, the conviction and sentence of the Kenton Circuit Court is hereby affirmed.

All sitting. All concur.

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