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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 27, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000910-MR

SHANNON BURGHER — APPELLANT

V.

ON APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 06-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Shannon Burgher appeals as a matter of right[1] from an October 12, 2006 judgment of the Powell Circuit Court convicting him of the kidnapping and murder of his ex-wife, Donna Burgher. On appeal, Appellant contends that the trial court erred by: (1) not granting Appellant's motion for new trial when it was discovered that certain jurors had familial and personal relationships with the victim; (2) disallowing Appellant ample opportunity to conduct an adequate *voir dire* on his only defense of extreme emotional disturbance; (3) disallowing certain hearsay statements by Appellant to be repeated by the defense expert; (4) admitting evidence of Appellant's prior bad acts in absence of proper notice

[1] Ky. Const. § 110(2)(b)

provided to Appellant; and (5) cumulative error. For the reasons set forth herein, we affirm Appellant's convictions.

RELEVANT FACTS

Appellant and Donna Burgher were married on October 5, 1996. Their tumultuous and unstable marriage was characterized by numerous periods of separation and reconciliation lasting anywhere from one week to twenty-three months. The marriage ultimately ended in divorce on February 14, 2006, thirteen days before Donna Burgher's death. Prior to the divorce Donna also had a relationship with a co-worker, Eddie Ryan.

Donna and Appellant attempted another reconciliation the weekend of February 25, 2006. During this time together they visited several bars and adult entertainment establishments in Lexington, Kentucky. In the early hours of February 26, Donna and Appellant checked into a nearby Ramada Inn. During the night, Eddie Ryan called Donna's cell phone several times. Ryan testified that when he checked his voicemail sometime after 1:00 a.m., he had several messages from Appellant. One message stated he and his wife had reconciled and were back together. Another described how Appellant was kissing Donna. In the last message Ryan could hear Donna crying in the background but could not comprehend anything she was saying. Around 7:30 a.m. on the 26th, Ryan received a joint phone call from Appellant and Donna. During that call, Appellant apologized for calling him the night before and acknowledged that Donna cared for Ryan. About thirty minutes later, Donna called Ryan again and said that during the previous conversation, Appellant

had a gun to her head. She said Appellant was currently outside in the median looking for her cell phone because he had thrown it out the window on the drive home. On the following day, February 27, Donna Burgher called 911 and reported that Appellant had held her hostage all morning and he was chasing her fleeing vehicle with a gun and he was about to run her off the road. The escape attempt resulted in Donna's automobile crash. Though Donna survived the crash, Appellant crawled into her vehicle and shot Donna multiple times. Appellant then left the scene in his truck. The police also found Donna's home on fire.

At trial, the Commonwealth presented eyewitness testimony and the 911 recording of the incidents leading to Donna Burgher's death. A ballistic report matched spent .32 caliber casings found inside Donna Burgher's vehicle to Appellant's firearm. The victim's mother also testified, over Appellant's objection, that she previously overheard Appellant threaten to kill the victim and burn down her house should she ever divorce him.

Appellant did not testify at trial. Appellant's only defense was that he committed the crimes under extreme emotional disturbance, in that he became uncontrollably enraged over Donna's relationship with Eddie Ryan. In support, Appellant offered the testimony of a psychiatrist, Dr. Granacher.

The jury was instructed on murder, first-degree manslaughter under extreme emotional disturbance, kidnapping, and first-degree unlawful imprisonment. The jury found Appellant guilty of kidnapping and murdering Donna Burgher and recommended he serve 20 years and 40 years,

respectively, to run consecutively. At the sentencing hearing on November 7, 2007, Appellant brought a supplemental motion for a new trial based on previously undiscovered relationships between certain jurors and Donna's family. The trial court denied the motion, and entered a judgment consistent with the jury's findings of guilt and sentencing recommendations. Appellant appeals to this Court as a matter of right.

I. The Trial Court Did Not Err in Denying Motion for New Trial Based on Familial and Personal Relationships Between Jurors and Victim and Victim's Family

Appellant first contends that the trial court erred in denying his motion for a new trial. At the sentencing hearing on November 7, 2007, Appellant moved for a new trial based upon affidavits stating three members of the jury failed to disclose familial and personal relationships with the victim and the victim's family. A total of four affidavits were submitted. The first affidavit indicates that Juror Rose, by virtue of his marriage to V. Hall Rose, is related to the victim, Donna Burgher. V. Hall Rose and Donna Burgher are second cousins by a common great-grandparent. Therefore, Juror Rose is married to a second cousin of Donna Burgher. The second affidavit indicates Juror Lou Hall is related to Donna Burgher by virtue of her marriage to S. Hall who is a stepbrother to the common bloodline by marriage. S. Hall is a stepbrother to the spouse of Donna's great aunt. The third affidavit indicates Juror Cornett is related to Donna Burgher through the stepson of G. Hall, who is related to Donna Burgher. G. Hall is a second cousin to Donna Burgher. Juror Cornett is married to the stepson of G. Hall. The fourth affidavit stated that Juror Hall

also had a non-familial relationship with Donna Burgher's grandmother through visits to a senior citizens' building. Defense counsel requested a hearing to explore the relationships further. The Commonwealth informed the trial court that he had talked to certain members of the victim's family and that they did not know the jurors. The trial court stated that it was not going to conduct a hearing because defense counsel should have discovered the relationships during the trial. The trial court subsequently denied the motion.

Appellant contends that the trial court erred in denying his motion for a new trial and in not granting him a hearing on the motion to establish or explore the relationships between the jurors and the victim. The Commonwealth did not introduce or offer any evidence to contradict that furnished by the affidavits. Therefore, the degrees of relationship alleged therein must be taken by this Court as true. See Sizemore v. Commonwealth, 210 Ky. 637, 276 S.W. 524 (1925).

The affidavits alleged only distant relationships between the jurors and the victim's family.[2] There was no allegation of any other circumstances, such as personal contact, to reasonably raise an implication of bias or even knowledge of the relationships. Marsch v. Commonwealth, 743 S.W.2d 830 (Ky. 1987). Neither the Commonwealth nor the Appellant was aware of any

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[2] Juror Rose is married to the victim's second cousin, which is the sixth degree by affinity. Juror Lou Hall is married to the stepbrother of a spouse of the victim's great aunt. The spouse of the victim's great aunt would be the fourth degree by affinity. The stepbrother to the spouse is not related by consanguinity (blood) or affinity (marriage). Juror Cornett is married to the stepson of a second cousin to the victim. A second cousin's son's wife would be the seventh degree by affinity. A spouse of a stepson is not related by consanguinity or affinity.

relationships. After questioning by both Appellant and the Commonwealth on *voir dire*, none of these jurors claimed awareness of any familial relationship. It is the trial court's option to determine whether a post-trial hearing is necessary to determine juror bias. Smith v. Commonwealth, 734 S.W.2d 437, 445 (Ky. 1987), citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984). There was no showing of actual juror bias or prejudice, and the affidavits contained no indication that the jurors had knowledge of the distant relationships between themselves and the victim. Here all we have are affidavits stating that several jurors had a remote familial relationship to the victim. The trial court did not commit reversible error in not holding a hearing on this matter or denying the motion for a new trial.

Appellant also claims Juror Lou Hall had a non-familial relationship with Donna Burgher's grandmother, in that she worked at the senior citizens' building where Donna's grandmother visited. This matter, however, had been addressed on *voir dire*. Juror Hall had stated during *voir dire* that she knew the grandmother and worked with her. When questioned further by the court at that time, Juror Hall indicated that her acquaintance with the grandmother would not affect her decision, that she had not made up her mind about the case, and that it would not bother her to find against the Commonwealth. The only follow up questioning of the juror by Appellant's counsel was whether her name was Carlene Lou Hall, to which she replied it was Louverna Hall, but that she is called Lou. No request was made to strike for cause after full disclosure. We see no error.

II. The Trial Court Did Not Err by Excluding Questions Regarding Extreme Emotional Disturbance during *Voir Dire.*

Appellant's second contention of error is that the trial court abused its discretion in excluding questions regarding extreme emotional disturbance (EED) from the jury during *voir dire*. Specifically, Appellant argues he was not allowed ample time to question the jury and was therefore prohibited from inquiring about the jury's knowledge of EED—his only defense. Much of Appellant's claim concerns the trial court's desire to conduct *voir dire* in a timely manner and not grant Appellant the requested minimum of one hour of questioning. The trial court has broad discretion in the area of questioning on *voir dire*. Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985). Whether limiting questions during *voir dire* was an abuse of discretion is reviewed on the substance of the questions the party wanted to ask but was denied, and not on the time frame the court had in mind for those questions to take place. See generally Thompson v. Commonwealth, 147 S.W.3d 22, 52 (Ky. 2004); Winstead v. Commonwealth, 283 S.W.3d 678, 684-85 (Ky. 2009).

In relevant part, the trial court specifically asked counsel for Appellant what questions he had left to ask of the jury. Counsel replied that he wanted to ask (1) if the jury had heard of extreme emotional disturbance and (2) if they believed it could apply in certain situations between husband and wife. The court permitted the questions to be asked of the jury. However, counsel instead stated to the jury, "If you find that Shannon acted under the influence of extreme emotional disturbance, you must find him not guilty of murder. If

the law says that, do you agree to follow that law if you [are selected as a juror]?" The trial judge subsequently stopped *voir dire* because counsel had already been admonished that such information would be provided to the jury as jury instructions and conditioning of the jury would not be permitted.

"The extent of and scope of direct questioning during voir dire examination is a matter within the sound discretion of the trial court." Thompson, 147 S.W.3d at 53. We have recognized that denying a defendant the right to *voir dire* jurors on specific mitigating factors is not an abuse of discretion. Woodall v. Commonwealth, 63 S.W.3d 104, 116 (Ky. 2001).

The fact that extreme emotional disturbance was Appellant's only defense does not permit erroneous questioning during *voir dire* in an attempt to condition the jury to accept specific theories of mitigating circumstances. Counsel for Appellant was given more than sufficient opportunities to follow the court's directions and ask appropriate questions. It is not an abuse of discretion to terminate *voir dire* when counsel obtains permission to ask certain questions and then attempts to usurp the authority of the court by providing jury instructions during *voir dire*. Any substantive questions should have been asked when afforded the opportunity by the court. The trial court cannot be expected to continually excuse impermissible questioning. Therefore, the trial court did not err in terminating Appellant's *voir dire*.

III. Testimony by Dr. Granacher was Properly Excluded

Appellant's third claim of error is that the trial court improperly excluded the defense expert's testimony concerning the basis of his opinion that Appellant was under extreme emotional disturbance when the crimes at issue were committed. The expert, psychiatrist Dr. Granacher, based his opinion that Appellant acted under extreme emotional disturbance on factors reported to him by Appellant when he evaluated him on June 7, 2006. These factors included Appellant's drug and alcohol abuse, the ongoing situation between Appellant, Donna, and Ryan, and Appellant's version of events leading up to the murder, including statements Appellant alleged the victim had made to him about Ryan's sexual prowess. Dr. Granacher also diagnosed Appellant with "intermittent explosive disorder," which he testified is "just what it says. Intermittently a person becomes explosive."

The Commonwealth objected to any recounting by Dr. Granacher of Appellant's version of events leading up to the crime and any statements alleged to have been made by the victim, on hearsay and double hearsay grounds. Over the Commonwealth's repeated objection, the trial court permitted Dr. Granacher to recount some of what Appellant told him as to the events leading up to the murder, but precluded Dr. Granacher from repeating any statements allegedly made by the victim.

The defense of EED requires proof of a "triggering event." Foster v. Commonwealth, 827 S.W.2d 670, 678 (Ky. 1991). On appeal, Appellant claims the victim's statements, allegedly the "triggering event" for his EED, were admissible under KRE 803(4) and/or KRE 703(b) as the basis of Dr.

Granacher's opinion, and their exclusion deprived the jury of the opportunity to fairly evaluate his defense. We disagree.

First, the statements were not admissible under KRE 803(4). Extreme emotional disturbance is a legal concept, not a mental disease. See McClellan v. Commonwealth, 715 S.W.2d 464, 468-89 (Ky. 1986). Dr. Granacher acknowledged this as well. Accordingly, KRE 803(4) does not apply. Nor was the hearsay admissible under KRE 703(b), which allows evidence of the basis of an expert's opinion, even if otherwise inadmissible, so long as the evidence is "trustworthy, necessary to illuminate testimony, and unprivileged." Appellant's hearsay account cannot be deemed trustworthy. There is no evidence that the victim made the alleged statements other than the self-serving allegations of Appellant that she did so. See Sanborn v. Commonwealth, 892 S.W.2d 542, 551 (Ky. 1994); Stopher v. Commonwealth, 57 S.W.3d 787, 800 (Ky. 2001). Appellant did not testify, hence, there was no opportunity to test the truthfulness of Appellant's account through cross-examination. "To permit this type of evidence [allows] a defendant to testify by proxy without being subjected to the crucible of cross-examination." Talbott v. Commonwealth, 968 S.W.2d 76, 85 (Ky. 1998). Accordingly, the limitations placed by the trial court upon Dr. Granacher's testimony were not error.

IV. Appellant Received Actual Notice Reasonably Sufficient to Satisfy the Requirements of KRE 404(c).

Appellant's fourth claim of error is that the trial court improperly admitted prior bad acts under KRE 404(b) because the Commonwealth failed to

give proper notice pursuant to KRE 404(c).[3] Specifically, the trial court allowed the victim's mother to testify that she had heard Appellant threaten to kill and burn down the victim's home if she ever divorced him. The statement was contained in a police report and provided to Appellant in discovery. It is undisputed that written notice of intent to produce this evidence was not provided to Appellant. However, Appellant filed a motion *in limine* to exclude precisely that testimony. "[W]here the accused has received 'actual notice' of the intention to introduce KRE 404(b) evidence and the accused has suffered no prejudice, the notice requirement in KRE 404(c) is satisfied." Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005). Therefore, in lieu of physical, written notice, the issue is whether Appellant had actual notice of the Commonwealth's intent to produce prior bad acts evidence.

Appellant relies upon Daniel v. Commonwealth, 905 S.W.2d 76 (Ky. 1995) for a showing of error. In Daniel, the Commonwealth called a witness to testify to prior bad acts on the first day of trial. Id. at 77. The trial judge admitted the statements on the grounds "that Appellant had received a copy of the police report that listed [the witness] as having been interviewed." Id. No pretrial motion *in limine* was filed. We held that "[a] police report alone does not provide reasonable pretrial notice pursuant to KRE 404(c)." Id.

The purpose of the notice requirement is "to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in*

[3] KRE 404(c) requires the prosecution to "give reasonable pretrial notice to the defendant of its intention to offer" KRE 404(b) evidence.

limine and to deal with reliability and prejudice problems at trial." Bowling v. Commonwealth, 942 S.W.2d 293, 300 (Ky. 1997), quoting Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.25 (3rd Ed. 1993). Whether reasonable pre-trial notice has been given is decided on a case-by-case basis. Lawson, The Kentucky Evidence Law Handbook, at § 2.25. We have held that the notice requirement of KRE 404(c) is satisfied, despite a lack of written notice, if the defendant filed a motion *in limine* to challenge the KRE 404(b) evidence.[4]

In the present case, Appellant received a copy of the police report in discovery and had the opportunity to challenge the admissibility of the evidence when he filed his motion *in limine* to suppress the statements. Although receiving the police report in discovery would not be sufficient on its own to satisfy the reasonable notice requirement of KRE 404(c), Appellant's motion *in limine* shows he had actual notice as well as the opportunity to challenge the admissibility of the evidence, and therefore, no error occurred in the admission of this evidence.

V. No Cumulative Error

Appellant's final argument is that the cumulative effect of the aforementioned errors warrants the granting of a new trial. Having found no errors, there is no cumulative effect.

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[4] Walker v. Commonwealth, 52 S.W.3d 533, 538 (Ky. 2001); Tamme v. Commonwealth, 973 S.W.2d 13, 31 (Ky. 1998); Bowling, 942 S.W.2d at 300.

For the aforementioned reasons, the judgment of the Powell Circuit Court is affirmed.

All sitting. All concur.

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