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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JANUARY 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000660-MR

JONATHAN D. STARK — APPELLANT

V.

ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES CLAUD BRANTLEY, JUDGE
NO. 03-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In March 2005, Appellant, Jonathan D. Stark, was convicted in the Hopkins Circuit Court of two counts of murder and sentenced to life imprisonment. In an unpublished opinion by this Court, Appellant's convictions were affirmed, but his sentence was reversed and the case remanded for a new penalty phase trial and sentencing.[1] A new penalty phase was conducted in July 2008, and Appellant was again sentenced to life without the possibility of parole or probation for each count of murder. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

The facts of the case, as stated by this Court in its previous opinion, are as follows:

---

[1] Stark v. Commonwealth, No. 2005-SC-000332-MR, 2007 WL 2404453 (Ky. August 23, 2007).

On June 30, 2002, the nude body of Norrell Major and partially nude body of Tim Hibbs were discovered inside of Major's trailer. Both men had been shot to death. Approximately six months earlier, Major ended a homosexual relationship with Appellant, who was Major's employee. The relationship ended because Major had reportedly been cheating on Appellant. By all accounts, Appellant did not react well to the end of the relationship. Evidence presented at trial suggested that Appellant was obsessed with Major. He continued to initiate contact with Major and eventually, filed a sexual harassment complaint against Major. However, his complaint was found to be unsubstantiated and he was removed from Major's department at work.

Sometime between February and June of 2002, Appellant saw Major with Hibbs and became jealous. He followed the men and became involved in a heated argument with Major. Appellant admitted assaulting Major at that time. Afterwards, Appellant called Major's son to report that he still loved Major and was sorry about the physical confrontation. Approximately two or three weeks prior to the murders, Appellant sent Major a card describing his feelings for him, but Major once again rebuked Appellant's sentiments.

On the day prior to the murders, Appellant claimed that he discovered some lawn furniture missing from his front porch. He assumed the "thief" was Major. That night Appellant went to a party, but then left around midnight. One of Appellant's friends tried to call him soon after he left the party since it was not Appellant's habit to leave gatherings without saying goodbye. Later that night, Appellant returned his friend's call, reporting that he went to Major's trailer to ask about the lawn furniture but found no one home. He reported taking some lanterns in retaliation.

No signs of forced entry were found when Major and Hibbs's bodies were discovered that morning. Major's son reported that a key kept on the ledge above Major's front door was missing. Appellant immediately became a suspect and investigators went to his residence in the early hours of July 1, 2002.

> During their conversation with Appellant, the investigators noted that Appellant spoke of Major in the past tense even though he had only been told that Major was in an accident. Appellant denied having a handgun, but upon a search of his residence, shells for two different pistols and a gun cleaning kit were found. Appellant acknowledged that he had owned a handgun, but sold it approximately three weeks prior to the murder. He said he sold it to a man named David Blades, but police were unable to locate him. Clothes and shoes worn by Appellant on the night Major and Hibbs were murdered were never located despite a search of Appellant's possessions. Phone records also showed a call from Appellant to Major at 1:14 a.m. on the night of the murders. Eventually, Appellant's DNA was linked to the scene of the crime via a cigarette butt found inside Major's trailer.
>
> Based on this evidence, Appellant was charged with and convicted of the murders of Major and Hibbs.

Stark, 2007 WL 2404453, at *1-2.

On appeal, Appellant raises multiple issues: (1) the trial court erred by failing to find that double jeopardy barred a potential death sentence on retrial; (2) the trial court abused its discretion in allowing Dr. LeVaughn's demonstration of the positioning of Hibbs's body; (3) the trial court's failure to strike a juror who could not consider a minimum sentence denied Appellant a fair and impartial jury; (4) the trial court erred in refusing to allow defense witnesses to testify as to "lingering doubt" of Appellant's guilt; (5) the trial court erred in allowing jurors to take cell phones into the deliberation room; and (6) an improper comment by the prosecutor during closing argument denied Appellant a fair trial.

Each shall be discussed in turn.

Double jeopardy

At the conclusion of the July 2005 trial, the jury found the aggravating circumstance that Appellant had committed intentional, multiple murders. Additionally, Appellant was sentenced to life without the possibility of parole or probation for each count of murder. After this Court reversed and remanded that sentence, but prior to the beginning of the second sentencing phase, the Commonwealth gave notice of its intent to seek the death penalty, citing the aggravator that Appellant had committed intentional and multiple murders. Appellant's counsel objected, and in his brief to this Court, Appellant cites Bullington v. Missouri, 451 U.S. 430 (1981), for the proposition that the 2005 sentence of life without parole constitutes an acquittal of the death penalty, thereby precluding the Commonwealth from seeking it as a possible sentence at retrial on double jeopardy grounds.

Because Appellant received a sentence less than death and was merely subject to a death-qualified jury, we believe this issue is moot. We, therefore, decline to address it in this opinion.

Dr. LeVaughn's testimony

During the 2005 trial, Dr. Mark LeVaughn gave a physical demonstration of the approximate positioning of the body of Timothy Hibbs at the time he was shot. Dr. LeVaughn based this demonstration upon his notes, photographs, bullet paths, and the autopsy; however, no courtroom camera captured the

demonstration. At the 2008 retrial, the Commonwealth sought to have Dr. LeVaughn recreate the demonstration alongside the videotape of his earlier testimony.[2] Appellant objected to the testimony, stating that Dr. LeVaughn had, prior to testifying, discussed the trajectory of the bullets and the position of Hibbs's body with the prosecutor and KSP Detective Walcott. This, and not Dr. LeVaughn's own recollection, according to Appellant, provided the basis for the physical demonstration because the doctor could not remember his testimony. As such, Appellant maintains that the trial court erred and violated his right to a fair trial and the right to effectively cross-examine the witnesses against him. We disagree.

A brief hearing was conducted in the judge's chambers at Appellant's request to determine the basis for Dr. LeVaughn's physical demonstration. Dr. LeVaughn was placed under oath and, in response to repeated questioning by the trial judge and Appellant's own counsel, stressed that the physical demonstration would be based upon a review of the records and his own personal recollection, and not from information supplied by either the Commonwealth or the KSP Detective. Dr. LeVaughn stated that, although he could not remember exactly what he had demonstrated in the 2005 trial, the basis for his physical demonstration in the current trial stemmed from his earlier review of the records, gunshot wounds, bullet paths, and the autopsy.

---

[2] Dr. LeVaughn offered no new testimony in the 2008 trial. Instead, his videotaped testimony from the 2005 trial was played for the jury after he recreated the positioning of Hibbs's body.

This was the same information upon which Dr. LeVaughn relied when testifying in the 2005 trial.

Based upon the foregoing, it is clear that Dr. LeVaughn's testimony was not shaped in any part by his earlier discussions outside the courtroom. Dr. LeVaughn reviewed his notes and records prior to testifying in order to refresh his memory, and his demonstration was based upon that information and his recollection of his earlier testimony from the 2005 trial. Accordingly, the trial court did not abuse its discretion in allowing Dr. LeVaughn to demonstrate the positioning of the body of Timothy Hibbs.

Failure to strike juror

C.M., a prospective juror, was questioned during individual voir dire about whether or not he would be able to consider the full range of penalties for the offenses committed. In response to questioning by Appellant's counsel, C.M. stated that he believed that a 20-year sentence for double murder was "not near enough." In light of this, Appellant sought to strike C.M. for cause, which was ultimately denied by the trial court. Appellant now claims that the trial court's failure to strike C.M. denied him his right to an impartial jury, as protected by Section 11 of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

RCr 9.36 requires a judge to excuse a juror if there is a reasonable basis to believe the juror cannot be fair and impartial. The law recognizes that the trial court is vested with broad discretion in determining whether a prospective

juror should be excused for cause. See McQueen v. Commonwealth, 669 S.W.2d 519 (Ky. 1984); Pennington v. Commonwealth, 455 S.W.2d 530 (Ky. 1970); Tarrence v. Commonwealth, 265 S.W.2d 40 (Ky. 1954). If it is later determined that a juror should have been excused and was not, such would be reversible error because the defendant had to use a peremptory challenge and was thereby deprived its use otherwise. Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993). A trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion. Shane v. Commonwealth, 243 S.W.3d 336, 338 (Ky. 2007).

Individual voir dire was conducted in an effort to ensure that each prospective juror was able to consider the entire range of penalties applicable to the crimes charged. The trial judge, in accordance with Morris v. Commonwealth, 766 S.W.2d 58 (Ky. 1989), informed each prospective juror of the penalty range for all homicide crimes and inquired if they would automatically exclude any authorized penalty. After initially stating that he thought 20 years was "not near enough," and that the person should receive either the death penalty or life without parole, C.M. clarified his remarks. C.M. stated that he would return a verdict based solely upon the evidence presented and the jury instructions.

On multiple occasions, C.M. expressly indicated that he was willing and able to consider the full range of authorized penalties, and that he did not mean to imply that he would not consider a 20-year sentence under any set of

circumstances. To the contrary, C.M. clearly expressed reservations about committing to a sentence based on a "hypothetical" without hearing any other evidence. The trial court also expressed concerns about defense counsel's attempts to get C.M. to make a commitment to a sentence without hearing the evidence. As this Court has made clear, jurors are not required to "sentence in a vacuum without any knowledge of . . . other matters that might be pertinent to consider in the assessment of the appropriate penalty." Maxie v. Commonwealth, 82 S.W.3d 860, 865-66 (Ky. 2002) (citing Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987)). Furthermore, as Appellant used no peremptory challenge on C.M., his reliance on Shane is misplaced. ("[W]hen a defendant is forced to use a peremptory strike on a juror who has not been properly excused for cause, the court has actually taken away from the number of peremptories given to the defendant by rule of this Court."). Shane, 243 S.W.3d at 339. Appellant's failure to use a peremptory strike on C.M. undermines his claim that he was denied a fair trial.

"A trial court's decision whether a juror possessed '[a] mental attitude of appropriate indifference' must be reviewed in the totality of the circumstances. It is not limited to the juror's response to a 'magic question.'" Montgomery v. Commonwealth, 819 S.W.2d 713, 718 (Ky. 1991) (quoting United States v. Wood, 299 U.S. 123, 146 (1936)). See also Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006) (overruled on other grounds by Shane v. Commonwealth, 243 S.W.3d 336 Ky. 2007)). As such, given C.M.'s repeated statements

indicating that he would be willing and able to consider the full range of penalties after hearing all of the evidence, we cannot say that the trial court abused its discretion in failing to strike this juror for cause.

Testimony concerning "lingering doubts"

Appellant next contends that the trial court erred when it did not allow testimony from Vanessa Miller, Joan Rogers, and Melissa Reed concerning "lingering doubts" as to Appellant's guilt. The Commonwealth objected, and the trial court sustained that objection, stating that the issue of guilt would not be retried. Appellant contends that the denial of this testimony was prejudicial because it would make it impossible for the jury to consider lingering doubts of guilt as a possible mitigating factor.

The U.S. Supreme Court and this Court have held that residual doubt is not a mitigating circumstance for the death penalty. See Franklin v. Lynaugh, 487 U.S. 164 (1988) (accord Tamme v. Commonwealth, 973 S.W.2d 13 (Ky. 1998)). Even though the penalty phase jury was composed of entirely different jurors than the guilt phase jury, a lingering doubt over Appellant's guilt is still not an aspect of his character, record, or a circumstance of the offense. Franklin, 487 U.S. at 174. A finding of guilt as to aggravating circumstances in a death penalty case is considered under the reasonable doubt standard. Epperson v. Commonwealth, 197 S.W.3d 46, 65 (Ky. 2006). Here, there was sufficient evidence to establish guilt beyond a reasonable doubt so as to meet the legal standards and constitutional requirements. Accordingly, to the extent

that Appellant argues that the testimony described above casts doubt on his guilt, we conclude that it was both irrelevant in the penalty hearing and inadmissible lay opinion evidence. KRE 701. See also Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982) ("The issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even through a route which is, at best, 'back door' in nature.").

Possession of cell phones by the jurors in the deliberation room

Before the jurors retired to deliberate Appellant's sentence, the trial court instructed them to "take out [their cell phone] and turn it off right now." Appellant concedes that this admonition was given to the jury before every break or recess in the trial. The trial court also told the jurors that they were not "to speak to or communicate with" anyone outside of the jury. Despite these admonitions, Appellant claims that the trial court committed error by failing to require that the individual jurors leave their cell phones outside the deliberation room. However, Appellant did not preserve this alleged error at trial.

Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26, unless such a request is made and briefed by Appellant. See Thomas v. Commonwealth, 153 S.W.3d 772, 782 (Ky. 2004); Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005). Appellant concedes that

there is nothing in the record to suggest any communication by a juror with a cell phone. Since Appellant did not request palpable error review on appeal, we decline to address it in this opinion.

Improper comment by the prosecutor

Appellant argues that several statements made by the prosecutor violated his right to a fair trial. However, these arguments are unpreserved, and Appellant does not request palpable error review. Instead, Appellant asks this Court to "exercise its supervisory function to address these instances of prosecutorial improprieties." Such a general request is not adequate to invoke palpable error review under RCr 10.26. Shepherd v. Commonwealth, 251 S.W.3d 309, 316 (Ky. 2008).

The judgment of the Hopkins Circuit Court is hereby affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Susan Roncarti Lenz
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204