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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 6.14.2010 F Bourne

2009-SC-000278-MR

BRANDON CHRISTOPHER ROBINSON — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 07-CR-01228

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Brandon Robinson appeals as a matter of right from a Judgment of the Fayette Circuit Court convicting him of murder, in violation of KRS 507.020, and of tampering with physical evidence, in violation of KRS 524.100. In accord with the jury's sentencing determination, the Judgment fixes Robinson's sentences at forty and five years' imprisonment, respectively, to be served consecutively, for a total sentence of forty-five years. The Commonwealth alleged, and the jury found, that Robinson murdered David Smith in the parking lot of the Fairington Apartments, in Lexington, as Smith was attempting to repossess Robinson's automobile. Robinson then fled the scene and attempted to dispose of the murder weapon, a nine-millimeter handgun. Robinson did not deny the killing, which several people witnessed,

but through his cross-examination of the Commonwealth's witnesses he attempted to show that the shooting was prompted by an extreme emotional disturbance and thus constituted at most first-degree manslaughter and not murder. On appeal, Robinson raises four allegations of error. He contends, (1) that his right to a unanimous verdict was infringed by a faulty murder instruction; (2) that his right against compelled self-incrimination was infringed when the prosecutor referred adversely during her closing argument to his decision not to testify; (3) that the court erred during the penalty phase of trial by not allowing Robinson's mother to testify that in her opinion Robinson's display of emotion during an interview with detectives was genuine; and (4) that also during the penalty phase, the court erred by permitting evidence of which the Commonwealth had not given timely notice, *i.e.*, evidence that as a juvenile Robinson had been found guilty of second-degree assault. Finding no reversible error, we affirm.

RELEVANT FACTS

The proof at trial established beyond dispute that at about 7:30 pm on June 28, 2007, David Smith, on behalf of a used-car dealership, Cars 'R' Us, of Lexington, located in the parking lot of the Fairington Apartments the white, 1986 Oldsmobile which Robinson had purchased from the dealership about three weeks previously. Smith started it with a key provided by the dealer, and was driving it out of the parking lot to return it to the dealer, when Robinson ran yelling from his apartment, chased the car a short distance, and then fired seven shots from a nine-millimeter handgun into the car. Three of the shots

struck Smith. According to the medical examiner any one of them—two to the upper back and one to the head—could have been fatal. The principal issue at trial was Robinson's state of mind at the time of the shooting and hence his degree of culpability.

The Commonwealth argued that because Robinson armed himself before giving chase and fired seven times into the retreating vehicle it was apparent that he intended to kill the person, who, he believed, was stealing his car. The defense, too, conceded that the killing may have been intentional, but argued that the repossession was the culmination of an aggravating three weeks of problems with the car and arguments with the dealer, all of which resulted in an extreme emotional disturbance when Robinson heard his car start and believed that someone was stealing it. The jury was instructed in accord with those theories, namely intentional murder and first-degree manslaughter, and was also instructed with respect to wanton murder, second-degree manslaughter, and reckless homicide. Robinson's first contention on appeal is that the murder instruction, by combining the intent theory, which was supported by the evidence, with the wantonness theory, which, he maintains, was not supported, deprived him of a unanimous verdict. We begin our analysis with this contention.

ANALYSIS

I. The Alternative Murder Instruction Did Not Infringe Robinson's Right To A Unanimous Verdict.

Following the pattern instruction given in section 3.24 of *Cooper, Kentucky Instructions to Juries,* p. 3-30 (2010), the trial court instructed the jurors in this case as follows:

> You will find Defendant Brandon Robinson guilty of Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (A) That in Fayette County on or about June 28, 2007,and before the finding of the Indictment herein, the Defendant killed David Smith by shooting him with a gun:
>
> AND
>
> (B) That in so doing:
>
> (1) He caused the death of David Smith intentionally and not while acting under the influence of extreme emotional disturbance, as that term is defined under Instruction No. 2;
>
> OR
>
> (2) He was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of David Smith under circumstances manifesting an extreme indifference to human life.

Because the jury returned a general verdict simply finding Robinson guilty of murder, it is impossible to know whether the jury believed the intent theory in (B)(1) or the wantonness theory in (B)(2), or whether some jurors believed one theory and some the other. At trial, Robinson objected to this instruction on the ground that this last scenario—some jurors believing intent, some wantonness—violated his right under Section 7 of the Kentucky Constitution to a unanimous verdict; he requested a verdict form which would require the jury to specify its unanimous agreement as to one theory or the other. The trial court denied that request as inconsistent with our case law, and Robinson does

not dispute that ruling on appeal. Instead, he has changed tack and now argues that the instruction violated the unanimity requirement because the evidence did not support a wantonness finding and thus it was error to instruct on wanton murder. Because this issue was not preserved, our review is limited to the palpable error standard of RCr 10.26. Under that rule, we may grant relief for an unpreserved error only if the error was palpable, affected the complaining party's substantial rights, and if uncorrected would result in a manifest injustice. *Commonwealth v. Jones,* 283 S.W.3d 665 (Ky. 2009).

It is true, as Robinson observes, that instructions not supported by the evidence should not be given, *Houston v. Commonwealth,* 975 S.W.2d 925 (Ky. 1998), and that alternative instructions, such as the murder instruction here, violate the unanimous verdict requirement if any of the alternative theories of the crime lack evidentiary support. In *Hayes v. Commonwealth,* 625 S.W.2d 583 (Ky. 1981), for example, we held that an alternative murder instruction violated the unanimous verdict requirement because the only evidence of the defendant's state of mind came from his confession, which indicated an intentional rather than a wanton killing.

If the evidence supports both the intentional and wanton theories, however, an alternative instruction does not implicate unanimous verdict concerns. *Benjamin v. Commonwealth,* 266 S.W.3d 775 (Ky. 2008); *Johnson v. Commonwealth,* 12 S.W.3d 258 (Ky. 1999). Where direct evidence of the defendant's state of mind is lacking, or is unclear, or is at odds with other evidence that can be deemed substantial, we have held that intent to kill can

be inferred from the extent and character of the victim's injuries and from the defendant's actions preceding and following the charged offense, but "whether a defendant actually has an intent to kill remains a subjective matter," *Hudson v. Commonwealth*, 979 S.W.2d 106, 110 (Ky. 1998), and other inferences are not ruled out. Thus, in *Hudson*, this Court stated: "The state of [the defendant's] mind at the time of the killing is almost never clear, not even to the defendant himself. . . . To say that the method and means of [the victim's] death only support an instruction on intentional murder [would be] to make the inference of intent mandatory." *Id.* at 110. Accordingly, we have upheld alternative murder instructions where the evidence supported an inference of intent, but also included substantial indications that the defendant "went crazy" or otherwise may have killed wantonly in an emotionally wrought state. *Johnson, supra; Hudson, supra.*

Those cases are controlling here, for while, as the Commonwealth argued at trial, Robinson's arming himself and shooting Smith repeatedly support an inference that he intended to kill, there was also evidence that Robinson ran to the parking lot in a highly emotional state. One witness testified that she heard Robinson's girlfriend yelling, "You're crazy; you're crazy." Several witnesses testified that they heard Robinson yelling and that he was obviously upset. The fact that he fired seven shots in rapid succession, some into the trunk of the car, some into the passenger side of the rear windshield, as well as those that struck Smith, could be thought to imply not that Robinson was determined to kill Smith, but that indifferent to Smith's life and ignoring the

obviously grave risk he was creating, he shot in a frenzy so as to prevent the loss of his car. Robinson's statement to the investigating detectives, unlike the statement in *Hayes,* in no way settled the ambiguity, for he told the investigators that at the time of the shooting he did not know what he was doing, he only remembered raising the gun and pulling the trigger. Because the evidence thus supported both the intentional and wantonness theories of murder, the trial court did not err, much less palpably so, by giving an alternative murder instruction.

II. The Prosecutor Did Not Violate Robinson's Right Not To Testify.

Robinson next contends that the prosecutor infringed his Fifth Amendment right against self-incrimination when she invited the jury to infer guilt from his decision not to testify and that the trial court erred by failing to remedy the prosecutor's breach by suitably admonishing the jury. Toward the end of her closing argument, after she had detailed why, in her view, the evidence implied that the killing had been intentional, including several references to Robinson's statement to the detectives, the video recording of which had been played for the jury, the prosecutor turned to the issue of extreme emotional disturbance and argued that the evidence did not support such a finding. Specifically, she stated, "You have heard absolutely no proof that this defendant got so enraged or inflamed that he could not control his actions. No statement that he snapped and he lost it. No statement that his actions were not for malicious or evil purposes." At that point Robinson objected, and without more the court sustained the objection. The prosecutor

then rephrased her remarks by stating, "there is nothing that you have heard from the testimony today to show that this defendant's actions were for anything other than evil or malicious purposes. . . . There has been absolutely no proof that he was acting under any kind of extreme emotional disturbance." She finished her remarks a few minutes later without additional objection and was thanking the jury for its attention when Robinson asked for a bench conference and moved that the jury be admonished to the effect that the prosecutor had improperly referred to Robinson's silence and that his decision not to testify was not to be used against him. The trial judge explained that he did not agree that the prosecutor had commented on Robinson's silence, but he had sustained the objection to ensure that she would not. The judge considered an admonition, but when the parties could not agree on one and the trial judge could not fashion one that did not seem to endorse one side or the other he decided against giving one.

Robinson contends that by referring to "no statement that he snapped . . . no statement that his actions were not . . . malicious or evil" the prosecutor drew the jury's attention to the fact that he had not testified and invited it to treat his silence as evidence of his guilt. We disagree.

We will reverse for prosecutorial misconduct where it was objected to if proof of the defendant's guilt was not such as to render the misconduct harmless, and if the trial court failed to cure the error with a sufficient admonishment to the jury. Where there was no objection, we will reverse only where the misconduct was flagrant and was such as to render the trial

fundamentally unfair. *Barnes v. Commonwealth,* 91 S.W.3d 564 (Ky. 2002); *Partin v. Commonwealth,* 918 S.W.2d 219 (Ky. 1996). This case presents a hybrid situation, for although Robinson objected in a timely manner to the remarks he contends were improper, his request for an admonition, more than five minutes later, was not timely and so not properly preserved. *Winstead v. Commonwealth,* 283 S.W.3d 678 (Ky. 2009) (timeliness required in part to give the trial court a meaningful opportunity to fashion a remedy.) Robinson's delay here in seeking an admonition clearly frustrated the trial court's opportunity to fashion a remedy. *See also Lanham v. Commonwealth,* 171 S.W.3d 14, 29 (Ky. 2005) (characterizing objection without request for an admonition as "incomplete," and noting that a defendant must "ask for a remedy in order to get the remedy.") We need not belabor this point, however, for we agree with the trial court that the prosecutor's remarks did not amount to misconduct.

As Robinson correctly notes, the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, forbids comment by the prosecution on the defendant's silence at trial. *Griffin v. California,* 380 U.S. 609 (1965). That rule is violated by statements that invite the jury to infer guilt from the defendant's decision not to testify. *Ragland v. Commonwealth,* 191 S.W.3d 569 (Ky. 2006); *United States v. Snook,* 366 F.3d 439 (7th Cir. 2004). On the other hand, it is generally not improper for the prosecutor to comment on defense tactics, to comment on the quantity or quality of evidence, or to comment as to the falsity of a defense position.

Davis v. Commonwealth, 967 S.W.2d 574 (Ky. 1998) (citing *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky. 1987)). A prosecutor crosses the boundary between permissible comment on the evidence and impermissible reference to the defendant's silence if the prosecutor manifestly intended to refer to the defendant's silence or, alternatively, if a jury would naturally and necessarily understand the comments to refer to that silence. *Ragland, supra; Webb v. Mitchell,* 586 F.3d 383 (6th Cir. 2009). Thus, comments to the effect that a prosecution position is "uncontradicted" or "uncontested," or that "no evidence" supports a defense position, generally do not cross the line unless the defendant is the only person who could have supplied the evidence the prosecutor asserts is lacking. *Weaver v. Commonwealth,* 955 S.W.2d 722 (Ky. 1997); *Webb, supra; Snook, supra.* Context is important, moreover, and the court may take into consideration such factors as whether the comment was an isolated occurrence or part of a pattern, as well as whether it was a fair response to comments by the defense. *Ragland, supra; Webb, supra.*

Here, the prosecutor's "no statement that he snapped . . . no statement that his actions were not for evil or malicious purposes" comments were not manifestly intended to refer to Robinson's silence, nor would the jury necessarily have understood them to do so. They were isolated assertions following a lengthy discussion of Robinson's statement to the detectives and were thus likely to be understood as references to the fact that in that statement to police Robinson did not expressly claim to have been overcome by emotion. Following Robinson's objection, moreover, the prosecutor clarified her

point by asserting that nothing in the testimony the jury had heard leant credence to Robinson's EED defense.

Robinson contends that he was the only person who could have supplied such testimony and thus that the prosecutor's comments necessarily referred to his silence. This contention is clearly belied, however, by Robinson's own trial strategy in which he sought to establish his EED defense by eliciting testimony from other witnesses to the effect that his experience with the car and the car dealer went from bad to worse until it culminated in his "losing it" over the repossession. The prosecutor's assertion that none of that testimony justified an EED conclusion did not refer the jury to Robinson's silence nor would the jury have a strong tendency to perceive it as a reference to his silence. Because the prosecutor's assertions did not cross the line between permissible comment on the evidence and comment on Robinson's silence, they did not infringe Robinson's constitutional rights or entitle him to the admonition he requested.

III. The Trial Court Did Not Abuse Its Discretion By Excluding Testimony Vouching For Robinson's Sincerity.

Next, Robinson maintains that the trial court erred when, during the trial's penalty phase, it would not allow his mother to testify that in her opinion the emotions he displayed during his interview with the detectives were sincere. The DVD recording of the interview was played in its entirety for the jury and was introduced as one of the Commonwealth's exhibits. Unfortunately, it was recorded in a manner incompatible with this Court's ability to replay it. From the audio portion captured on the trial recording, however, it is apparent that

during the interview Robinson seemed, at least, to become very emotional, wailing and apparently sobbing. One of the detectives testified, however, that at no point during Robinson's interview did his eyes become red or produce any tears. During her guilt phase closing argument, the prosecutor relied on that testimony to assert that Robinson had feigned his emotional reaction.

During the penalty phase Robinson sought to dispel that impression by asking his mother, who had watched the recording of the interview, whether he "appear[ed] to be sincere in his emotion?" The trial court sustained the Commonwealth's objection to that question on the ground that it asked her to speculate about Robinson's state of mind. The court made it clear, however, that Mrs. Robinson was not precluded from testifying that she had seen Robinson behave similarly on other occasions. Nevertheless, she was then asked only whether she had seen Robinson cry before, and she stated that she had. Later, by avowal, Mrs. Robinson testified that she was familiar with her son when he was upset and she had no doubt that his display of emotion during the interview was genuine.

Robinson contends that the exclusion of his mother's opinion impaired his right, under KRS 532.055(2)(b) to "introduce evidence in mitigation or in support of leniency," and that the trial court's ruling was thus an abuse of its discretion. We disagree.

Robinson's right under the statute to introduce mitigating evidence is subject, of course, to the rules of evidence. KRE 701 limits opinion testimony by lay witnesses to opinions "helpful to a clear understanding of the witness'

testimony or the determination of a fact in issue." One of our most firmly settled corollaries to this rule is that one witness may not express an opinion about the truthfulness or sincerity of another witness, because the jury does not need help making credibility determinations. *Moss v. Commonwealth,* 949 S.W.2d 579 (Ky. 1997). In *Lanham, supra,* we indicated that this corollary extends to characterizations of a defendant's responses to interrogation as presented to the jury on an interrogation tape. Speculative opinions likewise provide no assistance to the jury. Such opinions are also properly excluded under the rule. *Mondie v. Commonwealth,* 158 S.W.3d 203 (Ky. 2005). Here, Robinson asked his mother both to vouch for the sincerity of his emotional display and to speculate as to his state of mind during his interrogation. The trial court did not abuse its discretion by disallowing that testimony.

It is true, of course, as Robinson insists, that lay witnesses who observe the defendant in the aftermath of a crime are permitted to testify regarding the defendant's demeanor, describing it and characterizing it as, say, "very calm and collected," *Garland v. Commonwealth,* 127 S.W.3d 529, 542 (Ky. 2003), or "mocking," *Caudill v. Commonwealth,* 120 S.W.3d 635, 663 (Ky. 2003), or "calm . . . normal . . . non-emotional," *McKinney v. Commonwealth,* 60 S.W.3d 499, 503 (Ky. 2001). Testimony merely describing one's observations of the defendant immediately following the crime, however, is not the same as testimony purporting to read the defendant's state of mind nor is it the same as testimony characterizing as genuine and sincere a person's behavior on an interrogation tape, the genuineness of which the jury may assess for itself. The

trial court made clear that only these latter types of evidence were precluded. Mrs. Robinson was free to testify regarding her observations of her son in the past, and to compare his prior behavior with that displayed on the interrogation video. The exclusion of her "genuineness" opinion did not deprive Robinson of proper demeanor evidence.

IV. The Admission Of Evidence Not Properly Disclosed During Discovery Was A Harmless Error.

Finally, Robinson contends that the trial court erred by permitting the Commonwealth to introduce during the penalty phase proof that when Robinson was seventeen years old he was adjudicated guilty of second-degree assault for having used brass knuckles in a fight on a school bus. Generally, of course, KRS 532.055 permits the introduction for sentencing purposes of a defendant's more serious juvenile record, but Robinson maintains that the record should have been excluded here because the Commonwealth did not provide timely discovery.

Apparently, the Commonwealth initially acquired the juvenile record of a different Brandon Robinson, provided that record to Robinson's counsel, and did not correct the mistake until guilt phase closing arguments had been concluded. Robinson moved to exclude penalty-phase evidence of his juvenile record—two fourth-degree assaults when Robinson was quite young in addition to the later brass-knuckle offense—on the ground that he had not been given a reasonable opportunity to prepare a response. The trial court agreed to exclude the two fourth-degree assaults, primarily because of their remoteness, but denied Robinson's motion with respect to the more recent second-degree

assault, explaining that in its view Robinson was not dependent on the Commonwealth for notice of his own juvenile record.

Robinson does not address the trial court's point, but does reassert that he was denied a fair opportunity to respond to the second-degree assault evidence. We are inclined to agree. Pursuant to RCr 7.24, the parties had agreed to reciprocal discovery and under that rule the Commonwealth was to provide notice of items in its possession that "may be material to the preparation of the defense." The purpose of the rule is not to inform Robinson of his own record, but to give Robinson and his counsel notice of what the Commonwealth possesses and is preparing to employ at trial. *Chestnut v. Commonwealth,* 250 S.W.3d 288 (Ky. 2008). Clearly the Commonwealth understood its obligation and meant to meet it when it gave Robinson notice of the juvenile record for what turned out to be the wrong Brandon Robinson. The Commonwealth's last minute attempt to correct the mistake did not satisfy its discovery obligation, and that fact is not altered by the Commonwealth's good faith. *Anderson v. Commonwealth,* 864 S.W.2d 909 (Ky. 1993) (discovery violation is a violation, the prosecutor's good faith notwithstanding.)

As the Commonwealth correctly notes, however, unless the violation somehow prejudiced Robinson's ability to present his penalty-phase case and appears reasonably likely to have borne on the jury's decision, it must be deemed harmless. *Chestnut, supra.* We are convinced the discovery violation was harmless here. Robinson's counsel complains that he was not afforded an opportunity to look into the juvenile incident and perhaps discover mitigating

circumstances he could have presented to the jury. He has failed to indicate, however, that there is any reason to think that mitigating circumstances actually exist, much less that they were such as might have made a difference with the jury. Mere speculation is not enough.

Again, for the violation to entitle Robinson to relief, it must appear reasonably likely that it bore on the jury's decision. Robinson was only twenty years old at the time of the murder. In addition to the juvenile assault, the Commonwealth presented evidence of three adult assault convictions, one stemming from an incident during Robinson's custody pending trial. Given this other evidence of Robinson's recent assaultive behavior as well as the guilt-phase evidence of a senselessly and egregiously violent crime, there is little likelihood that the exclusion of the juvenile assault would have altered the jury's decision. The Commonwealth's discovery violation does not, therefore, entitle Robinson to relief.

CONCLUSION

In sum, the jury instruction allowing a finding of murder under alternative theories did not implicate Robinson's right to a unanimous verdict because both theories were amply supported by the evidence. The prosecutor did not exceed her right to comment on the evidence or infringe Robinson's right not to testify when she stated that none of the statements or testimony the jury had heard indicated that Robinson had acted under an extreme emotional disturbance. Robinson's sentencing, finally, was not prejudiced either by the proper exclusion of his mother's opinion regarding the sincerity of

the emotion he displayed during his police interrogation or by the introduction of the belatedly produced evidence of his juvenile adjudication for assault. Accordingly, we affirm the April 14, 2009 Judgment of the Fayette Circuit Court.

All sitting. All concur.

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