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RENDERED: MARCH 22, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000792-MR

DANIEL GRUBB APPELLANT

V.

ON APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 09-CR-00071

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Daniel Grubb appeals as of right from a Judgment of the Knox Circuit Court convicting him of murder (KRS 507.020) and of two counts of tampering with physical evidence (KRS 524.100). In accord with the jury's recommendations, the trial court sentenced Grubb to life imprisonment for the murder and to concurrent five year sentences for the other two offenses. Grubb was charged with the June 2008 slaying of Jeremy Johnson in Woodbine, Kentucky, not far from Corbin, and with attempts in the days following the murder to conceal it. He raises four issues on appeal: (1) that the trial court erred when it refused to strike for cause two venire-persons; (2) that the court erred when it failed to declare a mistrial after the prosecutor commented on Grubb's post-arrest silence; (3) that the court gave erroneous jury instructions with respect to the tampering charges; and (4) that the court erred when it ordered him to pay court costs because Grubb is indigent. The

Commonwealth concedes that Grubb ought not to have been assessed costs. We reverse, therefore, that portion of the Judgment imposing costs, but having concluded that Grubb is not otherwise entitled to relief, we affirm the Judgment in all other respects.

RELEVANT FACTS

The Commonwealth's theory of the case was that after having been out drinking with each other on the evening of June 10, 2008, Grubb and Johnson, both in their early twenties, wound up at Grubb's trailer at about 10:00 or 10:30. There a fight broke out between the two men over items Grubb believed Johnson had stolen from a lockbox in Grubb's bedroom. According to a witness who lived across the highway and up the hill but within earshot of Grubb's trailer, the fight turned into a beating, as though with a baseball bat or some other heavy instrument. The sounds of beating continued intermittently for as long as four or five hours, from before midnight until 3:00 or 4:00 the next morning. During that time the witness, who knew Grubb and knew his voice, heard Grubb a couple of times cursing Johnson by name and threatening to kill him and once heard Johnson pleading for help. The witness did not call police because she was afraid.

Ultimately, Grubb did indeed kill Johnson and over the next couple of days took steps to cover up the crime. Early in the morning of June 11, he placed Johnson's body in the back seat of his, Johnson's, car and then left the car at a secluded spot off Route 459. Grubb's girlfriend testified that shortly after noon that day she helped Grubb clean blood spots from inside Grubb's

trailer and from its front steps. Another friend testified that in the wee hours of June 12, he helped Grubb move Johnson's body from Johnson's car to the back of Grubb's pickup truck, watched Grubb wipe down the interior of the car, drove with him in the truck to a site off Old Indian Creek Road near an old gas well, and there helped Grubb bury Johnson's body. It was this friend who, in May 2009, led police investigators to the body and told them that Grubb had confessed to the killing, but had claimed that it was an accident. Medical examiners testified that Johnson had suffered blows to his face which had fractured numerous bones around his eyes and his nose, and that his skull had been extensively cracked by another severe and almost certainly fatal blow to his head.

Grubb testified and admitted that he and Johnson fought. According to Grubb, he and Johnson were in Grubb's kitchen when he confronted Johnson about the emptied lock box. Initially Johnson denied the pilfering, but when Grubb persisted, Johnson removed a revolver from his pocket and fired it at Grubb, but missed. Grubb rushed Johnson to disarm him, and the two fought for a long time in Grubb's kitchen. At last they wore themselves out, according to Grubb, and Johnson left the trailer. As he was going down the front steps, however, he picked up a cinderblock and threw it at Grubb, striking his shin. Grubb threw the block back at Johnson and hit him. The blow knocked Johnson down, but he immediately got back up, Grubb testified, and resumed cursing. Grubb then told him to leave, locked the door, and went to bed. Johnson continued to rage and to beat on the trailer for a long time, but

eventually he ceased, and Grubb fell asleep. When he woke later that morning, he found Johnson's body lying in his driveway. Not sure what to do, he went to a friend's house, and the friend, according to Grubb, dissuaded him from contacting the police lest he wind up "going to prison forever and never seeing his little boy again." Instead, he sought to hide the killing as described above.

At the conclusion of the case, the jury was instructed that it could find Grubb not guilty, guilty of murder, guilty of second-degree manslaughter, or guilty of reckless homicide. It found him guilty of murder.

ANALYSIS

I. Grubb Was Not Denied the Effective Use of His Peremptory Juror Strikes.

Grubb first contends that his trial was rendered unfair when the trial court failed to excuse two biased venire persons. As Grubb correctly observes, under the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution, a criminal defendant is entitled to an impartial jury. To help protect that right, Kentucky Rule of Criminal Procedure (RCr) 9.36 mandates that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." In making this determination, the trial court is to consider the prospective juror's *voir dire* responses as well as his or her demeanor during the course of *voir dire,* and is to keep in mind that generally it is the totality of those circumstances and not the response to any single question that reveals impartiality or the lack of it. *Shane v. Commonwealth,* 243 S.W.3d 336 (Ky. 2007).

> Reasonable grounds to excuse a prospective juror may exist where the prospective juror's relationship with some aspect of the litigation, "be it familial, financial or situational, with any of the parties, counsel, victims or witnesses," is such that it is highly unlikely that the average person could remain impartial under the circumstances. *Marsch v. Commonwealth,* 743 S.W.2d 830, 833 (Ky. 1988) (citation and internal quotation marks omitted). We have held, for example, that a prospective juror with an ongoing relationship with counsel should have been excused, as should a prospective juror whose brother was to be an important witness. *Ratliff v. Commonwealth,* 194 S.W.3d 258 (Ky. 2006) (collecting examples of implied bias). Although we review the trial court's rulings on motions to strike for abuse of discretion, *Adkins v. Commonwealth,* 96 S.W.3d 779 (Ky. 2003), substantial doubts about a prospective juror's impartiality should be decided against the juror, and where such doubts are patent on the record we will not hesitate to find that discretion has been abused. *Shane, supra.*

Rankin v. Commonwealth, 327 S.W.3d 492, 496-97 (Ky. 2010).

The prospective jurors in this case included one of Grubb's elementary school teachers and a woman who had once worked with the lead detective's brother. Grubb maintains that those relationships are such as to imply bias against him and that therefore the court should have excused for cause those two prospective jurors. Since Grubb used two of his peremptory strikes to remove those jurors, his claim is not that his jury was actually tainted by a biased juror. His claim, rather, is that he was denied the full use of his peremptory strikes by having to use two of them on jurors who should have been removed for cause. We recognized this sort of preserved claim in *Shane.*

In *Gabbard v. Commonwealth,* 297 S.W.3d 844 (Ky. 2009), however, we refined the holding in *Shane* by requiring parties to indicate on their strike sheets the juror(s) they would have removed instead of the challenged juror(s) had the motion to remove the challenged juror(s) for cause been granted. Only

if the juror(s) the party wished to remove sat on the jury is relief justified, for only then can it be said that the trial court's purported error resulted in any prejudice to the party. *Gabbard* became effective in October 2009, well before Grubb's October 2010 trial.

Grubb concedes that he did not challenge either of these jurors for cause in the trial court. Consequently, he also did not comply with *Gabbard* by indicating the prospective jurors he wished to remove instead of the two jurors about which he now complains. He contends nevertheless, implicitly at least, that the trial court should have, *sua sponte,* struck these two jurors for cause and that its failure to do so amounted either to a palpable error or to a denial of due process. To be entitled to relief on either of those grounds, Grubb is required to show that the alleged error resulted in a fundamentally unfair proceeding, and this he has failed to do. Since neither juror actually sat on the jury, Grubb's due process right to an unbiased jury was not violated, regardless of the alleged error. Indeed, the United States Supreme Court has held that a defendant's use of a peremptory strike to remove a prospective juror who should have been removed for cause does not, by itself, amount to a due process violation. *Shane*, 243 S.W.3d at 340 (citing *United States v. Martinez-Salazar,* 528 U.S. 304 (2000)). Moreover, since Grubb cannot show that a prospective juror he wished to strike, but could not, was actually seated on the jury, it is impossible to say under *Gabbard* that the alleged error denied him the effective use of his peremptory strikes. Because Grubb is not entitled to

relief in any event, we need not consider whether these belatedly challenged jurors should have been removed for cause.

II. The Prosecutor's Vague Allusion to Grubb's Post-*Miranda*-Warning Silence Did Not Necessitate a Mistrial.

Grubb next contends that the prosecutor's allusion to his, Grubb's, post-*Miranda*-warning silence should have resulted in a mistrial. During Grubb's direct examination he expressed regret at not having immediately reported Johnson's death to the police, but he asserted that a friend had advised him not to do so and that he had been afraid that if he did he would spend his life in prison removed from his young son. Challenging that version of Grubb's motivation, the prosecutor called attention during cross-examination to the fact that Grubb had had several months to reconsider and to come forward but had not done so. "Did you ever call the State Police," the prosecutor asked. "You talked to Detective York [the lead investigator] twice and you never told him about this, did you?" At that point Grubb objected. During the ensuing bench conference the prosecutor explained that both times Detective York had tried to interview Grubb, Grubb had "lawyered up," had invoked, that is, his right under *Miranda v. Arizona,* 384 U.S. 436 (1966), to remain silent. When the court indicated that that was an area they "should stay away from," the prosecutor agreed to withdraw the question. The court then sustained Grubb's objection, and when questioning resumed, the prosecutor moved on to a completely different subject. Grubb did not ask for a mistrial nor did he ask that the jury be admonished to disregard the oblique reference to his refusal to be interviewed by Detective York. Nevertheless, he now contends that that

reference was erroneous and in light of the life sentence the jury meted out should be deemed so prejudicial as to have required a mistrial. We disagree.

A mistrial, of course, is an extreme remedy resort to which is appropriate only in the face of errors "of such character and magnitude that a litigant will be denied a fair and impartial trial and *the prejudicial effect can be removed in no other way*." *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009) (citation and internal quotation marks omitted). Evidentiary errors, such as the one Grubb complains of here, rarely meet that standard, because in the vast majority of cases a suitable admonition will cure the error's prejudicial effect. *Major v. Commonwealth*, 275 S.W.3d 706 (Ky. 2009). For such errors, a mistrial might be warranted only if "an overwhelming probability exists that the jury is incapable of following the admonition and a strong likelihood exists that the impermissible evidence would be devastating to the defendant; or . . . the [improper] question was not premised on a factual basis and was inflammatory or highly prejudicial." *Id.* at 716.

As Grubb correctly notes, under *Doyle v. Ohio*, 426 U.S. 610 (1976), a defendant's post-*Miranda*-warning silence may not be used against him for any purpose, including impeachment. *See also, Wainright v. Greenfield*, 474 U.S. 284 (1986) (post-*Miranda*-warning silence not admissible as proof of sanity). Even assuming that the prosecutor's reference to Grubb's refusal to speak to Detective York violated that rule, however, the error comes nowhere near the mistrial standard. There was a factual basis for the question and suggesting that Grubb had not been forthcoming with the police is hardly apt to have

surprised the jury, much less inflamed it. Moreover, the suggestion was not calculated to devastate Grubb's defense, since his claim was not that he had had no opportunity to speak to the police but rather that he had not trusted them to understand the truth of the matter, a claim completely consistent with the invocation of one's *Miranda* rights. Finally, there is no reason to believe that the jury could not have followed an admonition to disregard the improper question, the sort of admonition juries are routinely expected to understand and to abide by. As we have said many times, if an admonition did cure, or, had one been requested, could have cured a defect in questioning or in testimony, the defect does not provide grounds for a mistrial. *Bray v. Commonwealth,* 177 S.W.3d 741 (Ky. 2005). That is the case here, and so Grubb is not entitled to relief.

Against this result, Grubb contends that the jury's life sentence verdict implies that the prosecutor's improper question inflamed the jury against him. While the prosecutor's question may have been improper, for the reasons just stated we are not persuaded that it was inflammatory, and Grubb's sentence does not alter that conclusion. As noted, there was evidence from which the jury could find that Grubb committed a particularly brutal murder. It apparently did so find and sentenced accordingly.

III. Slightly Flawed Jury Instructions Do Not Entitle Grubb to Relief From His Tampering With Physical Evidence Convictions.

Next, Grubb maintains that the jury instructions with respect to the alleged tampering offenses were insufficiently specific and that he is therefore

entitled to relief from the two tampering convictions. The first tampering instruction provided as follows:

> You will find the Defendant guilty of Tampering With Physical Evidence under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about June 11, 2008, and before the finding of the Indictment herein, he destroyed, mutilated, concealed, removed, or altered evidence which he believed was about to be produced or used in an official proceeding;
>
> AND
>
> B. That he did so with the intent to impair its availability in the proceeding.

The second tampering instruction was identical to this except it required a finding that the tampering occurred on June 12 rather than June 11. Grubb faults these instructions on two grounds. He complains first that neither instruction specifies the item or items of evidence he allegedly tampered with, a deficiency we recently held to be erroneous in *Owens v. Commonwealth,* 329 S.W.3d 307 (Ky. 2011). He also contends that the instructions run afoul of our holding in *Harp v. Commonwealth,* 266 S.W.3d 813 (Ky. 2008), to the effect that instructions pertaining to multiple counts of the same offense must "factually . . . differentiate between the separate offenses." *Id.* at 817 (citation and internal quotation marks omitted).

Arguably, by specifying different offense dates the instructions did adequately "differentiate between the separate offenses." We need not belabor that point, however, for these instructions are indistinguishable from the tampering instruction we found erroneous in *Owens.* The instructions should have specified the particular item or items tampered with and the manner in

which the tampering occurred. The error does not entitle Grubb to relief, however, because, as in *Owens,* it was not preserved at trial and does not amount to a palpable error under RCr 10.26.

Under that rule, of course, relief may be had from an error that was insufficiently raised or preserved for review only if the error affected the defendant's substantial rights and resulted in a manifest injustice. *Owens,* 329 S.W.3d at 317. Grubb asserts that he preserved this error for review when he moved for a directed verdict and argued that the Commonwealth had failed to prove the tampering charges. We rejected a like assertion in *Owens.* Under RCr 9.54, to preserve one's objection to the giving of an instruction, a party must object specifically and with particularity to the instruction and explain to the court the grounds for the objection. A directed verdict motion asserting that no instruction should be given because the evidence was insufficient does not apprise the court that a proposed instruction is deficient because it fails to specify all the facts the jury must believe to reach a guilty verdict. Since Grubb did not object to the tampering instructions on this latter ground, the error he now raises was not preserved for review.

Notwithstanding the lack of preservation, Grubb refers us to cases in which we have stated that erroneous jury instructions "are presumed to be prejudicial." *Mason v. Commonwealth,* 331 S.W.3d 610, 623 (Ky. 2011) (citing *Harp v. Commonwealth,* 266 S.W.3d 813 (Ky. 2008)). As our cases make clear, however, the presumption of prejudice arises only if the error was properly preserved, for only by calling the error to the trial court's attention does a party

entitle himself to the benefit of the doubt in close cases. RCr 10.26 applies as much to unpreserved jury instruction errors as to any other unpreserved errors.

The unpreserved errors here did not affect Grubb's substantial rights, such as his right to a unanimous verdict, or result in a manifest injustice. They do not, therefore, entitle Grubb to relief. On the contrary, here, as in *Owens,* the evidence that Grubb tampered with physical evidence was overwhelming. By Grubb's own admission he concealed Johnson's body and car in a secluded place on June 10, and then on June 11 moved the body again and buried it. On June 10, he and his girlfriend cleaned blood spots from his trailer, and on June 11, having removed Johnson's body from Johnson's car, he wiped down the car so as to remove evidence that he had been in it. There was ample evidence, therefore, that on both days, as distinguished by the instructions, Grubb tampered with physical evidence. The instructions should have specified the items Grubb tampered with, but the fact that they did not had no effect on the outcome, did not create the possibility of a non-unanimous verdict, and cannot be said to have subjected Grubb to a manifest injustice. Despite the error, therefore, Grubb is not entitled to relief.

IV. Grubb Should Not Have Been Assessed Court Costs.

Finally, Grubb contends that the trial court erred by ordering him to pay court costs of $130.00 while at the same time finding him indigent. We recently held that in circumstances like those here, *i.e.*, an indigent defendant

sentenced to a lengthy prison term, the imposition of court costs is a palpable error subject to correction on appeal even if not properly raised in the trial court. *Wiley v. Commonwealth,* 348 S.W.3d 570 (Ky. 2011). The Commonwealth concedes the error and does not contest Grubb's entitlement to relief on this ground. Accordingly, that portion of the Judgment ordering Grubb to pay costs is reversed.

CONCLUSION

In sum, despite some minor imperfections, Grubb received a fundamentally fair trial, the outcome of which must be upheld. Grubb did not identify at trial those jurors that he wished to remove and none of the jurors he now challenges actually heard his case. Thus there is no ground for his assertion that he was denied the effective use of his peremptory strikes. Any slight prejudicial effect stemming from the prosecutor's oblique reference to Grubb's assertion of his *Miranda* rights could have been cured by an admonition, had Grubb asked for one, and so the reference did not call for a mistrial. Although the jury instructions with respect to Grubb's tampering offenses failed to specify the items with which Grubb was alleged to have tampered, given the essentially uncontested evidence of Grubb's tampering on each of the two days specified that failure did not result in a manifest injustice. As an indigent defendant sentenced to life in prison, Grubb should not have been ordered to pay court costs. Accordingly, we reverse that portion of the Knox Circuit Court's Judgment assessing costs, but affirm the Judgment in all

other respects.

All sitting. All concur.

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