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NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000830-MR

LATARRA NICOLE MARTIN — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 09-CR-01169

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Latarra Martin, lived with her four children in an apartment in Lexington, Kentucky. Her apartment was located across the hall from Jeff Wilburn's. Wilburn was a maintenance man for the apartment complex. On March 11, 2009, she knocked on his door and told him that her toilet and bathtub had dirt in them and asked that he fix them. Wilburn then went across the hall to Appellant's apartment where she shot and killed him.

When police arrived, Appellant gave several irrational explanations for her actions. When asked by a detective why she shot Wilburn, Appellant said, "dirty water." She offered several other bizarre explanations throughout the investigation as well.

Appellant was indicted by a Fayette County grand jury on August 11, 2009, for one count of murder and three counts of first-degree wanton endangerment. On September 13, 2010, a jury found her guilty, but mentally ill, of murder; two counts of first-degree wanton endangerment; and one count of second-degree wanton endangerment. On November 24, 2010, the trial court sentenced her to a total of twenty-four years imprisonment. She now appeals the judgment and convictions as a matter of right. Ky. Const. § 110(2)(b).

Appellant raises the following grounds for this Court's consideration.

Denial of Motion for Directed Verdict

Dr. Greg Perry, a forensic psychologist for the Commonwealth, evaluated Appellant. He stated that while Appellant did have a personality disorder, she was not mentally retarded, had no cognitive impairment, and was not psychotic. He also opined that Appellant had the ability to conform her conduct to the requirements of the law. He said he was unsure whether she could appreciate the criminality of her conduct, but he tended to believe that she could. He explained that she may have been operating under extreme emotional disturbance (EED) at the time of the shooting, but that EED was a legal concept, not a psychotic condition.

Dr. Peter Schilling, also a forensic psychologist, testified for the defense. He recalled his observations of Appellant. Appellant gave him several bizarre and illogical reasons for killing Wilburn. Dr. Schilling testified that Appellant

was delusional and paranoid, and that the shooting was precipitated by her belief that she and her family were in danger.

At the conclusion of the evidence, Appellant moved for a directed verdict on the murder charge, arguing that the Commonwealth had failed to establish that she was not acting under EED. The trial court denied the motion. Appellant argues that the trial court abused its discretion by denying her motion.

Appellant is correct that, when EED is raised as an issue, it becomes an element of the crime which the Commonwealth bears the burden of disproving. We explained in *Greene v. Commonwealth*:

> (1) if EED is made an issue by the evidence, an instruction including it as an element of the crime should be given; (2) in the same instance (being a statutory element in the case), it then becomes an element of the crime, and the burden of proof lies with the Commonwealth; (3) the courts will then test the sufficiency of the proof, if properly presented and preserved, both at trial, upon a motion for directed verdict, and "insufficiency of the evidence" on appeal; but, (4) if the evidence passes the test, the question is one for the jury . . . .

197 S.W.3d 76, 82 (Ky. 2006).

Accordingly, the question presented by Appellant's motion for a directed verdict was whether the Commonwealth had presented any evidence that she was *not* acting under EED, thus creating a question for the jury's determination. That burden was satisfied.

First, the Commonwealth's evidence called into doubt the existence of a triggering event. In order for a jury to find EED, it must first find that there was a triggering event which caused an explosion of violence in the defendant

that was sudden and uninterrupted. *Foster v. Commonwealth,* 827 S.W.2d 670, 678 (Ky. 1991). The only evidence of a triggering event was Appellant's statement that she heard sirens in her head after Wilburn's cell phone rang outside his apartment door. While there was expert testimony that the sirens *could* have been a triggering event, the jury could have found that not to be the case. Further, even if hearing the sirens in her head was considered a triggering event, Appellant did not shoot Wilburn until after the two had talked outside his door and then walked into Appellant's apartment. The time lapse may have been sufficient to constitute an interruption between the sirens and the actual shooting.

In addition, the jury heard Dr. Perry testify that Appellant was not mentally retarded, had no cognitive impairment, and was not psychotic. Dr. Perry further opined that Appellant had the ability to conform her behavior to the requirements of law. When taken in the light most favorable to the Commonwealth, the expert testimony was sufficient for a reasonable juror to find that Appellant was not acting under EED. Further, the Commonwealth created considerable doubt that a triggering event had occurred. As a result, the trial court did not abuse its discretion when it denied Appellant's motion for a directed verdict. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (directed verdict is warranted only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]").

Commonwealth's Remarks During Closing Argument

During closing argument, the Commonwealth stated: "What [the defense] really wants you to believe is that [Appellant] didn't know what she was doing, that she couldn't control her actions and, therefore, you should find her not guilty by reason of insanity (NGI) and allow her to walk out the door; that's scary." Appellant's objection to the statement was overruled by the trial court without discussion.

During a bench conference following the Commonwealth's closing argument, Appellant objected again because the trial court did not allow the prior objection to be put on the record during the Commonwealth's closing argument. The trial court explained that it understood the rationale for the objection, but overruled it because the Commonwealth's statement was argument. Based on this explanation, Appellant then made a motion for a mistrial. The trial court denied the motion and no admonition was requested.

Appellant argues that the trial court erred in denying the motion for a mistrial. She claims that the Commonwealth's remarks to the jury substantially prejudiced her and denied her a fair trial. She further argues the trial court allowed the Commonwealth to misstate the law without admonishing the jury. We disagree.

In *Matheney v. Commonwealth*, we stated:

> A claim that the prosecutor misstated the law in closing argument is a claim of prosecutorial misconduct. . . . thus we reverse for prosecutorial misconduct in a closing argument only if the misconduct is "flagrant" *or* if each of the following three conditions is satisfied:

(1) Proof of defendant's guilt is not overwhelming;
(2) Defense counsel objected; and
(3) The trial court failed to cure the error with a sufficient admonishment to the jury.

191 S.W.3d 599, 606 (Ky. 2006) (emphasis in original)). "A mistrial is unwarranted absent a 'manifest' or 'real necessity' for such an extraordinary remedy." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 17 (Ky. 2004) (quoting *Grundy v. Commonwealth*, 25 S.W.3d 76, 82 (Ky. 2000)).

Here, proof of Appellant shooting Wilburn was uncontroverted. Whether she was acting under EED at the time was closely contested; but after defense counsel objected to the Commonwealth's statements, no admonition was requested.

The portion of the closing remarks that Appellant contends was a misstatement of the law was the Commonwealth's reference to her being allowed to "walk out the door." This presumably refers to Appellant being free to leave if found NGI. However, the jury was made aware of the involuntary hospitalization proceedings that would result from a verdict of NGI.

Appellant relies on the U.S. Supreme Court decision in *Shannon v. United States*, 512 U.S. 573 (1994). In *Shannon*, the Court explained "[i]f, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would 'go free' if found NGI, it *may* be necessary for the [federal] district court to intervene with an instruction to counter such a misstatement," but that "[t]he appropriate response, of course, will vary as is necessary to remedy the specific misstatement or error." *Shannon*, 512 U.S. at 587

(emphasis added). Even in this decision, the Supreme Court declined to require a federal district court to instruct the jury about the commitment procedure that statutorily follows a NGI verdict. Unlike Kentucky law, there is no federal statute requiring the instruction be given. RCr 9.55.

We find that even if the argument by the prosecutor was confusing or misleading, we must assume that the jury read and understood the written instructions given and taken to the jury room. The instructions clarified the procedure which would be followed in case of a NGI verdict.

Appellant also takes issue with the Commonwealth's use of the word "scary" in its closing argument. However, Appellant did not specifically object to this language at trial. "If a party does not timely inform the trial judge of the alleged error and request the relief to which he considers himself entitled, the issue is not preserved for appellate review." *Stringer v. Commonwealth,* 956 S.W.2d 883, 888 (Ky. 1997). Therefore, this issue is unpreserved.

Accordingly, we find that the trial court did not err in denying Appellant's motion for a mistrial based on the remarks by the Commonwealth during closing argument.

Cross-Examination of Lead Detective

A video of Appellant's interview with police was played during Detective Iddings's testimony. Approximately twelve minutes into the statement, Appellant indicated that she wanted an attorney. The detectives then ended the interview after attempting to determine where Appellant wanted her children to be taken. After the interview had ended, Appellant knocked on her

holding cell door and asked Detective Iddings to come back and talk to her because she wanted to tell him the whole story. Detective Iddings explained that he did not continue the interview because Appellant had invoked her right to an attorney.

Through cross-examination, Appellant's counsel attempted to establish that Detective Iddings and his partner intentionally cut off Appellant's irrational answers so that the Commonwealth could later argue that she had fabricated them. Defense counsel claimed that the fact that Detective Iddings did not continue the interview after Appellant attempted to reinitiate it was further support for this argument. Appellant's trial counsel asked Detective Iddings whether he and his partner intentionally directed Appellant away from irrational responses during the interview. Counsel also read several portions of the interview transcript where this allegedly occurred.

During re-cross-examination, Appellant's counsel asked Detective Iddings: "You are aware that even if a suspect says they want an attorney, they can voluntarily reinitiate the discussion on their own?" The Commonwealth objected and the trial court sustained the objection. Appellant argues that her right to confrontation was unconstitutionally restricted by the trial court's ruling. We review a trial court's ruling limiting cross-examination for an abuse of discretion. *Nunn v. Commonwealth,* 896 S.W.2d 911, 914 (Ky. 1995).

"The Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Davenport v. Commonwealth,* 177

S.W.3d 763, 768 (Ky. 2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (emphasis in original)). Trial courts have broad discretion to control cross-examination. "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (quoting *U.S. v. Boylan,* 898 F.2d 230, 254 (1st Cir. 1990)).

We believe it was error for the trial court not to allow this line of questioning. The legal requirements of a proper investigation and interrogation of a criminal defendant are within the purview of an investigative detective. It did not require Detective Iddings to testify as to a legal conclusion. However, the error in excluding the relevant testimony was harmless.

A confrontation clause error has to be examined under the *Chapman* harmless error analysis. The test in *Chapman* is whether it appears "beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Neder v. United States,* 527 U.S. 1, 2 (1999) (quoting *Chapman v. California,* 386 U.S. 18, 24, (1967)).

A response to Appellant's question was unnecessary to convey her argument. Appellant's question to Detective Iddings contained, in itself, the fact that after a suspect requests an attorney, police may continue the interview if the suspect reinitiates the questioning. Also, Appellant's point came across through the questioning concerning the detectives' strategy for interviewing Appellant. Further, the parts of the interview where Appellant

alleged the steering was evident were read aloud during cross-examination. Although the line of questioning was not allowed, Appellant's argument was effectively presented to the jury. Thus, any error by the trial court was harmless.

Trial Court's Comments to the Jury and Jurors' Cell Phone Calls

During deliberations, the jury requested a replay of certain testimony from the trial. After the jurors had gathered in the courtroom, and without Appellant or her counsel being present, there was a casual exchange of "small talk" between the judge and jurors having nothing to do with this particular case. Later, during deliberations, and again without Appellant or counsel being present, the trial court brought the jurors into the courtroom and advised them that the evening meal was going to be ordered. At this point, there was another brief exchange between the court and jurors. The court also authorized jurors to make phone calls to family members. The trial court repeatedly admonished the jury not to talk about the case during their break, either with each other or their families.

We have reviewed the entire conversation between the judge and jurors and find no prejudice or inappropriate comments. See *Rushen v. Spain,* 464 U.S. 114 (1983). "There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Id.* at 118.

Appellant argues that the phone calls created the opportunity for improper influence and that it is the Commonwealth's burden to prove that none existed. She also argues that it was during a critical stage of the trial when the court allowed the jurors to make the cell phone calls, thus making her presence mandatory under RCr. 8.28(1). She further argues that the jurors should not have been allowed to make the calls without an agreement by the parties under RCr 9.66. We disagree.

We recognize the opportunity for improper outside influence in this circumstance, but admonitions, as thoroughly given by the trial court, are sufficient to prevent jurors from discussing cases. *Winstead v. Commonwealth*, 327 S.W.3d 386, 401-02 (Ky. 2010). Appellant is not entitled to relief absent proof of improper influence. *Id.* Here, Appellant has presented no evidence of prejudice, and the mere fact that jurors made cell phone calls does not create the presumption that they spoke about the case. *See also Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998).

Appellant cites no authority to support her claim that this occurred during a critical stage of the trial, hence making her presence mandatory under RCr. 8.28(1). "[T]he test with respect to whether an *ex parte* communication violated the defendant's right to be present at all critical stages of his prosecution was stated to be whether the presence of counsel was necessary to insure fundamental fairness or whether the defendant was deprived of a 'reasonably substantial . . . opportunity to defend against the charge.'" *Gabow v. Commonwealth*, 34 S.W.3d 63, 74 (Ky. 2000) (overruled on other grounds by

Miller v. Commonwealth, 283 S.W.3d 690 (Ky. 2009) (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985))).

Appellant's presence was not necessary when the trial court advised the jurors about dinner plans or gave them permission to make brief phone calls home. The jurors' calls to their families were unrelated to the subject matter of the trial. The trial court thoroughly admonished the jury not to speak about the case and the jury is presumed to have followed those admonitions. *Tamme*, 973 S.W.2d at 26.

Appellant further claims that the jurors could have used their cell phones to "text, tweet, send and receive e-mail, check Facebook and other social media, and surf the internet." She further claims that the trial court did not admonish the jurors to refrain from participating in these activities. However, the record reveals that the trial court had admonished the jurors several days earlier not to use any social media or watch the news. Again, the jurors are presumed to have followed the admonitions. *Id.*

For the abovementioned reasons, the judgment of the Fayette Circuit Court is hereby affirmed.

All sitting. All concur.

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