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RENDERED: DECEMBER 19, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000117-MR

VAN MOONEY, JR. — APPELLANT

V.

ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES CLAUD BRANTLEY, JUDGE
NO. 06-CR-00270

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Van Mooney, Jr., of first-degree murder and tampering with physical evidence, resulting in a judgment sentencing Mooney to thirty-one years' imprisonment. Mooney now appeals from the judgment as a matter of right.[1]

On appeal, Mooney argues three main grounds for reversal:

1) the jury was not representative of the community because too few minorities, especially African-Americans, were members of the petit jury;

2) Mooney's right to a fair trial was violated when he was forced to use a peremptory strike to remove a prospective juror who should have been stricken for cause; and

3) the admission of two autopsy photos was unduly prejudicial.

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[1] Ky. Const. § 110(b).

As a result of the alleged errors, Mooney requests this Court to reverse his conviction and remand for a new trial. Finding no error, we affirm the judgment of conviction and sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Mooney hosted a party at his home. The guests included various persons allegedly associated with the crack cocaine trade in the community.

At some point in the evening, Desmond "Box" Hightower arrived, bringing crack cocaine allegedly ordered by one of the guests, Dewann Marshall. Hightower allegedly produced less crack cocaine than Marshall had ordered, which sent Mooney into a rage. Hightower attempted to calm Mooney by suggesting that he must have dropped a piece of it on his way in, and he convinced the guests to step outside to search the front yard with a flashlight for the missing piece of crack cocaine. Meanwhile, Mooney grabbed his pistol and threatened to shoot Hightower.

One of the guests, Donnell Drake, attempted to defuse the clash by ushering Hightower out of the house. On the way to the door, Hightower continued to offer possible explanations for the missing cocaine but Mooney was unappeasable. Mooney fired a shot in Hightower's direction, the bullet lodging in the wall between Hightower and Drake. As Hightower implored Mooney with more excuses, Mooney shot Hightower at close range. The bullet passed through Hightower's mouth and lodged in his brain stem, killing him almost instantly.

Witnesses testified that Mooney did not want to call 911 after the shooting but wanted help dragging Hightower's body out of the house. Mooney dragged Hightower's body onto the front porch, began cleaning the house, and changed his clothes. One of the guests called the police.

When the police arrived, they found Hightower's body on the front porch, drag marks across the carpet inside, a large stain on the carpet that showed evidence of attempted cleaning, and blood-stained clothing washing in a blood-smeared washing machine.

The police arrested Mooney and charged him with murder and tampering with physical evidence. At trial, the jury found Mooney guilty of both charges and recommended twenty-six years' imprisonment for the murder and five years' imprisonment for evidence-tampering. The jury recommended the sentences run consecutively for a total sentence of thirty-one years' imprisonment, and the trial judge accepted the jury's recommendation and imposed the sentence.

II. ANALYSIS.

A. The Composition of the Venire did not Render Mooney's Trial Unfair.

Mooney argues the trial court erred by denying his motion to dismiss the venire who reported for his trial and summons a new one. The crux of Mooney's complaint is that the venire was not sufficiently ethnically diverse to be representative of the community. Specifically, Mooney, an African-American, argues minority representation in the venire was fatally lacking and,

as a result, constituted a violation of his constitutional right to be tried by a jury of his peers. We find this argument meritless.[2]

A defendant's right to challenge the composition of the venire is well-established. In order to present a prima facie claim, a defendant must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to a systemic exclusion of the group in the jury-selection process.[3]

Notably, the burden is on the defendant to make this showing.[4] We concede, as we have previously acknowledged,[5] that African-Americans constitute a "distinctive group" within the community.[6] As a result, Mooney satisfies the first prong.

In attempting to satisfy the remaining two prongs, Mooney argues against the clear weight of our precedent. To prove that the representation of the "distinctive group" is not in relation to the number of such persons in the community, Mooney simply directs us—as he did the trial court—to the

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[2] Mooney properly preserved the issue for review by moving to have the venire dismissed when he observed it. Apparently, despite juror information being available nearly two months pre-trial, neither the Commonwealth nor Mooney knew the racial composition of the venire because that information was not gathered in advance of trial. Accordingly, Mooney made the trial court aware of the alleged defect in composition as soon as reasonably possible.

[3] *Mash v. Commonwealth*, 376 S.W.3d 548, 552 (Ky. 2012) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

[4] *Id.*

[5] *See, e.g., Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009).

[6] We acknowledge that Mooney alters his argument slightly in his reply brief to include simply all minority classifications, not strictly African-Americans. For reasons articulated below, Mooney's attempt to broaden the "distinctive group" is unavailing.

population data published in the 2010 Census. According to the 2010 Census, African-Americans comprise 6.57% of the population of Hopkins County, Kentucky, the venue of the trial. Taking into account all minority groups, or "distinctive group[s]" for purposes here, the percentage rises to 8.51.

According to the record, 95 names appeared on the venire list to report for jury duty in the Hopkins Circuit Court on the day of Mooney's trial. Of these 95, only 81 reported for service that day. After the first African-American venireperson was struck for cause as a result of a defense motion, there remained 5 African-Americans in the venire. That meant that 6 of the 81 potential jurors available for selection were African-American, for a percentage of approximately 7.4. Mooney argues that if we assume the 14 jurors who failed to report were all white,[7] there was only a 6.3% African-American representation in the venire. This deficiency is all that Mooney uses to prove the venire was flawed. This is insufficient.

Mooney's argument fails because, as the case law makes clear, merely referencing Census data does not meet the requisite burden to show underrepresentation or that any alleged underrepresentation is the result of

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[7] Certainly, at the very least, this is sloppy statistical methodology. But making the faulty assumption that all 14 venirepersons who did not answer the roll call for trial are white is Mooney's only route to argue the percentage of African-Americans is lower than the county-wide numbers from the 2010 Census. We simply note that if a single one of those 14 absent venirepersons was African-American, the percentage would have been 7.4. Furthermore, it is improper to do any statistical analysis on this phantom group of 14 venirepersons without being more informed on the reason for their absence. It may very well be that the judge already excluded some of the 14 for legitimate reasons yet their names remained on the roll. If that were the case, the pool of jurors would be smaller and the relative percentage of African-Americans, or other minority groups, would rise accordingly.

the jurisdiction's jury-selection process systematically excluding a "distinctive group." As we said in *Miller v. Commonwealth*, "[i]t is not enough to merely allege a particular jury failed to represent the community."[8] And Census data does not provide any proof that African-Americans, or any other minority group, are unfairly and unreasonably underrepresented in past Hopkins Circuit Court juries.[9] Nor does Census data provide any insight into whether alleged underrepresentation results from systematic exclusion. We plainly rejected this notion in *Miller*. The trial court did not err in denying Mooney's motion.

B. Mooney was not Unfairly Forced to use a Peremptory Challenge on Juror #324.

Mooney argues that the trial court erred by denying his motion to strike prospective Juror #324 for cause. By denying the motion, Mooney argues the trial court forced him to exercise a peremptory strike to remove Juror #324. This is reversible error under *Shane v. Commonwealth*[10] if the juror should have been struck for cause as Mooney argues.

Juror #324 approached the bench during voir dire and revealed that she knew Danny Hopper, a former local police officer. Hopper was one of the investigators in the case and a key witness for the Commonwealth. Juror #324 stated she was acquainted with Hopper, and she explained that she attended some of the same social functions as Hopper and knew him well enough to

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[8] 394 S.W.3d 402, 409 (Ky. 2011).

[9] *Id.*

[10] 243 S.W.3d 336 (Ky. 2007).

greet and talk to him. Juror #324 was unequivocal in her opinion that this acquaintance would not cause her to favor Hopper's testimony. She repeatedly stated that she could consider the evidence and would be comfortable finding in favor of Mooney irrespective of any future contacts with Hopper.

Mooney failed to preserve the issue for appellate review; and, as a result, we will not address the merits of his argument. In *Gabbard v. Commonwealth*, we held that "in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck."[11] Mooney admittedly failed to disclose which juror he would have eliminated had he not been forced to use a peremptory challenge on Juror #324. "[O]ur holding in *Gabbard* has been strictly applied by this Court, and we see no persuasive reason to depart from its application here."[12] We do not need to address further Mooney's claim regarding Juror #324. Mooney has requested palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26, but we decline to review for such error.[13]

Even if we were to find Mooney properly presented this argument, we are unable to find any abuse of discretion in the trial judge's ruling on this prospective juror. Juror #324 did not waver in her pledge of impartiality. And

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[11] 297 S.W.3d 844, 854 (Ky. 2009).

[12] *Hurt v. Commonwealth*, 409 S.W.3d 327, 331 (Ky. 2013).

[13] Assuming for argument's sake that we were to engage in palpable error review, there is no evidence of manifest injustice with respect to the seating of Juror #324.

the fact that a potential juror is acquainted with a witness, without more, is not sufficient grounds to strike for cause.

C. The Trial Court did not Abuse its Discretion in Admitting the Autopsy Photographs.

Mooney argues the trial judge erred by admitting two photographs taken during the autopsy of Hightower's body. These autopsy photos show the mouth being held open by a person wearing protective gloves. Mooney contends that these photographs of the body were unnecessary in light of the testimonial evidence and other photographs of the crime scene, including, in particular, a photo of the upper body. As a result, Mooney argues these autopsy photographs were unduly prejudicial because they served only to inflame the passions of the jury. We disagree.

The trial court allowed admission of the autopsy photographs into evidence over objection during the testimony of the medical examiner, Dr. Schluckebier. According to Dr. Schluckebier, the cause of Hightower's death was a gunshot wound to the mouth. Dr. Schluckebier testified that Hightower's body had gunshot residue on the mouth, indicating the shot was delivered at close range, *i.e.* six inches or less. The bullet entered Hightower's mouth, chipped a tooth, and then lodged in the brain stem, resulting in nearly instantaneous death. In offering this testimony, the Commonwealth sought to enter into evidence the two autopsy photos. The Commonwealth argued the photos were offered to prove cause and manner of death.

Unfortunately, the nature of certain crimes carries with it gruesome descriptions, images, videos, testimony, or other illustrative evidence that may

be difficult to view. But this Court has routinely held that gruesome images, including autopsy photos, are admissible at trial to prove an element of a crime. Typically, these images are admitted to prove the injuries that caused a victim's death. Unless the probative value of the photographs is substantially outweighed by their prejudicial effect, the jury should be allowed to view them.[14] Undeniably, the risk of inflaming the minds or passions of the jury exists when discussing the admission of photos even remotely perceived as gruesome.[15] But, of course, the Commonwealth is not and cannot be "precluded from proving the commission of a crime that is by its nature heinous and repulsive."[16] We find no error in this case.

The autopsy photos were useful in showing the path of the bullet that killed Hightower. Here, the photo of Hightower's upper body that Mooney argues is sufficient does not provide any degree of proof of how Hightower was murdered. We must concede that the photo Mooney would allow does depict Hightower's face, but a juror cannot reasonably deduce a cause of death from the image showing simply the existence of a head wound. The autopsy photos are relevant in showing that a bullet passed through Hightower's mouth, allowing the fact-finder to deduce that the wound was the cause of death, as the medical examiner described. Any prejudicial effect is outweighed by the

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[14] *See Dant v. Commonwealth*, 258 S.W.3d 12 (Ky. 2008); *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003).

[15] *See Poe v. Commonwealth*, 301 S.W.2d 900, 902-03 (Ky. 1957).

[16] *Epperson v. Commonwealth*, 809 S.W.2d 835, 843 (Ky. 1990).

probative value of these disputed photos. We can find no abuse of discretion by the trial court in allowing the photos to be admitted.[17]

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of conviction and sentence.

All sitting. All concur.

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[17] Due to the overwhelming amount of evidence against Mooney, even if we were to find the trial court to be in error, we would find it highly unlikely the admission of these two photographs was harmful to a degree sufficient to sway the jury to convict Mooney.