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RENDERED: OCTOBER 25, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000255-MR

FREDERICK W. DAVIS — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 09-CR-000399

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Latosha Owens and James Allen had an on-and-off romantic relationship for several months in late 2008. She had a similar relationship with Appellant, Frederick W. Davis, during this same period. Davis was bothered by Owens' relationship with Allen. Even after Owens had ended the relationship with Allen and resumed her relationship with Davis, Davis was still angry that she had apparently dated both men simultaneously for a short time.

Tensions between the two men heightened when Allen went to Owens' apartment on February 2, 2009, and broke a window. Owens' young son was in the house at the time. Davis considered the boy to be his own, though he was not his biological father. Because of his affection for the child, Davis was made especially angry by the vandalism. In his own words, Davis felt that Allen had disrespected him by endangering the boy. In a text message, he

asked Owens for Allen's phone number in order to scare him. Davis wrote to Owens that he wanted to "nock (sic) him off."

The next day, Davis bought a gun from a friend. The following day, February 4, Davis spoke with Owens several times on the phone and made arrangements to take her to the grocery store that evening. Later, Owens sent Davis a text message asking where he was. Via another text message, Owens told Davis that Allen was at her apartment and asked him to "come on" and "hurry up now." Davis believed that Owens was afraid and wanted him to come to her apartment right away.

When Davis arrived at Owens' apartment building, he saw Allen standing near a window. Davis asked Allen if he was looking for Owens, who was inside the apartment. Allen responded "yeah," but turned and slipped on some ice. As he lay on the ground, Davis shot Allen seven times. Allen bled to death as a result of the multiple gunshot wounds. One of the shots fired went through the window of a neighboring apartment belonging to Charlotte Moore. Davis fled the scene and threw the gun into a sewer.

Davis was taken into custody several hours later. Detective Kristin Downs interviewed Davis, during which he explained that he went to Owens' apartment at her request because she was afraid of Allen. Davis also revealed his anger about Owens' relationship with Allen and his feeling that Allen had disrespected Owens' child by breaking her window. Davis was subsequently arrested and charged with murder, tampering with physical evidence, and two

counts of wanton endangerment in the first degree. At trial, Owens testified on Davis' behalf.

She claimed that she was afraid of Allen following the incident on February 2. When he arrived on the night of the murder, Allen was banging on her door, which frightened her, so she texted Davis for help. However, on cross-examination, Owens acknowledged that she had spent time with Allen earlier that morning and that Allen later sent her a text message saying he "had fun." When she departed from Allen on the morning of the murder, Owens admitted that they hugged and kissed goodbye. She also conceded that she did not call the police when Allen started banging on her door, though she did call 911 two nights earlier when he broke her window.

Davis was found guilty on all counts. The jury recommended a combined sentence of thirty-seven (37) years, which the trial court adopted. He now appeals as a matter of right, raising four issues for review. Further facts will be discussed as necessary.

Voir Dire

Davis first argues that the trial court improperly limited the scope of voir dire questioning. The extent and scope of voir dire questioning lies within the sound discretion of the trial court. *Fields v. Commonwealth*, 274 S.W.3d 375, 392 (Ky. 2008). On appeal, this Court reviews the trial court's rulings for an abuse of that discretion. *Id.* The crucial inquiry is not whether a particular question should have been permitted, but whether denial of that question

implicates fundamental fairness. *Lawson v. Commonwealth*, 53 S.W.3d 534, 540 (Ky. 2001).

Defense counsel questioned the panel about their views towards self-defense and whether "you have the right to defend yourself." She then posed a hypothetical question, asking whether it would constitute self-defense if she walked out of the courtroom and stabbed someone in the lobby area. All jurors responded in the negative and some elaborated on their answers. When some of these jurors opined that, in the hypothetical scenario, defense counsel had "initiated the attack," the trial court asked the parties to approach.

The trial court warned defense counsel that she was delving into a difficult area of the law and cautioned her against asking the jurors to speculate as to what an "initial aggressor" might be. The court specifically told her, however, that she could explore the jury's feelings towards self-defense in general. Defense counsel then continued with her questioning and asked jurors if they could consider self-defense if the trial court instructed on it.

Finally, she asked the panel: "If you find that Mr. Davis . . . was defending himself, or defending others, what must your verdict be?" The trial court sustained the Commonwealth's objection to the phrasing of this question and reminded defense counsel that she could ask if the jurors could follow the court's instructions. Defense counsel rephrased the question as suggested and asked no further questions. Davis now argues that he should have been permitted to question jurors more extensively about the right of self-defense and defense of others in order to expose any prejudice or bias.

At the outset, we note that this issue is not adequately preserved for appellate review. In order to seek review of a limitation placed on voir dire questioning, the aggrieved party must propose the specific question to the trial court and seek a ruling. *Lawson*, 53 S.W.3d at 541. On appeal, Davis argues that he would have asked additional questions to determine if the panel members had a particular bias concerning the right to defend one's self or others. However, it is unclear exactly what additional questions defense counsel would have asked the panel. For this reason, we are left to speculate as to what the trial court's ruling would have been regarding these additional questions.

Still, we have reviewed the questions that the trial court did specifically exclude and we find no error. The trial court allowed defense counsel to explore the panel's general feelings towards self-defense, whether they could consider a theory of self-defense, and whether they could follow the court's instructions. The trial court properly excluded questions that asked the panel members to commit in advance to a certain idea or verdict. *Woodall v. Commonwealth*, 63 S.W.3d 104, 116 (Ky. 2001). The trial court did not entirely exclude questions that were designed to ascertain the jury's potential bias towards self-defense. *Cf. Hannah v. Commonwealth*, 306 S.W.3d 509 (Ky. 2010). There was no error.

Extreme Emotional Disturbance

Davis next asserts that he was entitled to an instruction on first-degree manslaughter under an extreme emotional disturbance (EED). The trial court

has a duty to instruct on the whole law of the case, including any lesser-included offenses supported by the evidence. *Crain v. Commonwealth*, 257 S.W.3d 924, 928 (Ky. 2008). A trial court's rulings on jury instructions are reviewed for an abuse of discretion. *Tunstull v. Commonwealth*, 337 S.W.3d 576, 583 (Ky. 2011).

To warrant an instruction on EED, the defendant must present some evidence of a "temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). In addition, there must be evidence that the EED was "the result of adequate provocation, i.e., a 'triggering event,' and that the EED remained uninterrupted from the provocation until the killing." *Caudill v. Commonwealth*, 120 S.W.3d 635, 667 (Ky. 2003). Evidence that the defendant was upset, hurt, or angry is insufficient. *Talbott v. Commonwealth*, 968 S.W.2d 76, 85 (Ky. 1998).

To support his claim that an EED instruction was warranted, Davis points to the fact that Allen had broken Owens' window on February 2, her subsequent fear of Allen, and the text messages she sent to Davis asking him to come to the apartment. When viewed cumulatively, Davis argues, the jury could reasonably believe that these events triggered an enraged state of mind.

While these cumulative events may have supported a finding that Davis acted in protection of Owens, as the defense argued at trial, it does not support

the conclusion that Davis was so enraged or inflamed as to overcome his judgment. No evidence of a triggering event was introduced, nor was there any evidence indicating that Davis was acting uncontrollably. In both the interview with Detective Downs and the text messages to Owens, Davis expresses his anger at Allen, his intent to confront Allen, and his feeling that Allen had disrespected him. The jury was left to decide the only legitimate question created by the evidence introduced at trial: whether Davis acted in defense of Owens. The trial court properly refused to deliver an instruction on EED.

Testimony of Detective Downs

The Commonwealth introduced Davis' videotaped interview with Detective Downs during her testimony. During the interview, Detective Downs is often seen agreeing with Davis, appearing to sympathize with his feelings towards Allen, and supporting his belief that Owens feared Allen. After the interview was played for the jury, the Commonwealth sought to clarify the discrepancy between Detective Downs' statements to Davis during the interview and her testimony at trial.

To that end, Detective Downs testified that she often lied to suspects as an investigative tool in order to make them feel more comfortable and speak more candidly. The Commonwealth then asked: "So, to clarify, you said on numerous occasions you gave him your, sort of, theory about what happened. Is that what you believed to be the case?" Detective Downs replied in the negative. The trial court overruled defense counsel's objection to this question. The Commonwealth then re-asked the detective: "[A]s I asked, you give a theory

of the case several times to the defendant when you're interviewing him. Is that the theory that you believed to be true?" She responded "no."

On cross-examination, defense counsel explored this topic more thoroughly. Detective Downs restated that she is permitted to lie to suspects during an interview. Counsel raised statements Detective Downs made during the interview, specifically addressing Davis' claim of self-defense. Defense counsel also expressly referenced the fact that, during the interview, Detective Downs told Davis that she thought Owens had seemed fearful when they had spoken after the shooting.

Later, on re-direct, the Commonwealth again sought to clarify Detective Downs' statements to Davis during the interview. Referencing a portion of the interview in which the detective acknowledges Owens' fear of Allen, the Commonwealth asked: "Did you actually believe that she was fearful when this happened, when James Allen was shot?" Defense counsel again objected. In overruling the objection, the trial court observed that the question was intended to clarify whether Detective Downs' statement during the interview was part of an investigative technique, as opposed to an actual expression of her belief.

On appeal, Davis argues that Detective Downs' statements constitute improper opinion evidence. At the outset, we reject Davis' argument that Detective Downs was testifying as an expert witness. Her testimony was limited to an account of her investigation of the shooting and her interview with Davis, all of which was based on her personal perception. KRE 701.

Still, a witness may not give an opinion as to the credibility of another witness. *See Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997) ("A witness should not be permitted to characterize the testimony of another witness . . . as lying."). *See also Hall v. Commonwealth*, 337 S.W.3d 595, 602-03 (Ky. 2011). Detective Downs' testimony on direct examination was properly admitted, as it did not involve a commentary on the credibility of another witness. She testified generally that she was permitted to lie to suspects during investigative interviews, and that she was lying when she expressed agreement with Davis' "theory" of what had happened.

However, the Commonwealth's questions on re-direct went further and violate the rule set forth in *Moss*. When Detective Downs testified that she did not believe Owens' claim that she feared Allen, she was essentially permitted to testify that Owens was lying. The testimony is marginally relevant, as it tends to disprove Davis' defense that he was protecting Owens. KRE 401. However, the prejudicial effect of having a police detective testify that another witness is lying far outweighs any probative value. KRE 403. It is within the province of the jury to assess a witness' credibility.

Nonetheless, we consider the error to be harmless. Defense counsel opened the door to this testimony during cross-examination by specifically identifying the portions of the interview when Detective Downs was lying to Davis. The detective had already stated on cross that she was lying when she told Davis his feelings towards Allen were legitimate and when she told Davis that Owens seemed fearful of Allen. It, therefore, would not have been

particularly noteworthy for the jury to hear Detective Downs testify, albeit more directly, that she did not believe Owens' claim that she feared Allen. Because we do not believe that this portion of Detective Downs' testimony substantially influenced the verdict, the error was harmless. RCr 9.24. *See also Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009).

Directed Verdict Motion

Davis was charged with two counts of wanton endangerment in the first degree based on the shot that he fired into Charlotte Moore's apartment. At the close of the Commonwealth's case, defense counsel moved for a directed verdict on those charges. Counsel argued that there was no evidence that Moore or her son were actually home when the shots were fired. The trial court properly denied the motion. Detective Downs testified that she spoke with Moore after the shooting and that Moore told her that she and her son were in the apartment when the bullet entered the home.

On appeal, Davis now argues that the directed verdict motion should have been granted on other grounds. He claims that there was insufficient evidence to establish that his conduct manifested extreme indifference to the value of human life required under KRS 508.060. Davis acknowledges that this specific rationale was not presented to the trial court and is, therefore, not preserved for appellate review. He requests palpable error review pursuant to RCr 10.26.

The thrust of Davis' argument seems to be that his conduct does not qualify as "extreme wantonness" because there was no evidence that he knew

that the apartment was occupied at the time of the shooting. He directs our attention to the commentary to KRS 508.060, which states that "aimlessly firing a gun in public is not as wanton in degree as firing a gun into an occupied automobile and should not carry the same criminal sanction." According to Davis, his conduct amounted to firing a gun in public rather than directly into an occupied apartment.

We disagree. On a motion for a directed verdict, the trial court views the evidence in a light most favorable to the Commonwealth to determine if there is sufficient evidence to induce a reasonable juror to find guilt beyond a reasonable doubt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Doing so, the evidence established that Davis fired a gun at least eight times while standing directly in front of a row of apartments. At least one shot was fired through the kitchen window of one of the apartments. There is no requirement in KRS 508.060 that Davis know whether or not these apartments were actually occupied at the moment he shot the gun. Based on this evidence, a reasonable jury might conclude that Davis consciously disregarded the possibility that the apartment was presently occupied, thereby "engag[ing] in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060. The trial court properly submitted this question to the jury. As such, palpable error review is not warranted. RCr 10.26.

Conclusion

The judgment of the Jefferson Circuit Court is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Schroder, Scott and Venters, JJ., concur. Noble, J., dissents by separate opinion.

NOBLE, J., DISSENTING: Appellant has claimed the defense of protection of others. He was in a relationship with Latosha Owens, and regarded her young son as his own, though he was not the biological father.

Owens previously had a relationship with the victim, James Allen. She claimed that she had ended her relationship with Allen a few months before the shooting in 2008. In February 2009, Allen, upset at the break-up, went to Owens' apartment, and when he could not get in, broke a window and tried to kick in the door. Owens' young son was present in the apartment and could have been injured from the flying glass. She reported this to police, and sent text messages to Appellant asking for his help with Allen.

Appellant was upset at what he believed was risk to the child, and texted back to Owens that he would call Allen and scare him about "nocken em off." Owens did not want Appellant to do this because she was afraid Allen would know where Appellant got the phone number; she also texted, "some more shyt gone happen n im gone have 2move." The next day, Appellant bought a gun.

The following day, Owens and Appellant spoke frequently on the phone, and Appellant agreed to take Owens to the grocery later that day. Sometime later, Owens sent a text message to Appellant, asking where he was. In the ensuing text conversation, she told him that Allen was at her apartment and asked Appellant to "come on" and "hurry up now." She later testified that she was afraid of Allen after he broke her window, and that when he appeared at

her apartment on the day of the shooting and began banging on her door, she texted Appellant for help. In light of Allen's actions of two days before, Appellant believed he was threatening Owens and her son, and that she was asking him to come right away, presumably to protect them.

When he got to the apartment, Appellant saw Allen standing outside near another window. He asked Allen if he was looking for Owens. Allen said that he was, and he turned toward the Appellant. As he turned, he slipped on ice and fell. At that point, Appellant shot Allen seven times, from which he bled to death. Appellant fled the scene, and threw the gun away.

When he was arrested several hours later, Appellant was interviewed by Detective Kristin Downs. He admitted the shooting but claimed that he did it because Owens was afraid of Allen. Later, Owens supported Appellant's version of events in her trial testimony, but her true motives were put in question by her testimony on cross-examination that she had actually spent time with Allen that morning, and hugged and kissed him when he left. He later sent her a text saying he "had fun." However, there is no evidence that Appellant was aware of this apparently friendly exchange earlier in the day.

During the interview with Appellant at the police station, Detective Downs agreed with Appellant's story, appeared to sympathize with him, and led him to believe that she believed his view that Owens feared Allen.

The Commonwealth wanted to offer this recorded statement at trial, but was faced with a tape where the police officer appeared to agree with the Appellant's version of events. Fearing that having a police officer agree with the

accused would influence the jury to believe Appellant's version of events, the Commonwealth asked the detective at trial if she actually believed what the Appellant had told her in his statement. Obviously, the Commonwealth believed her *agreeing* with the Appellant would have weight and influence with the jury. Her answer at trial was that she had not believed him, but that she was lying to Appellant to make him be more forthcoming. In fact, the detective had actually laid out a theory of the case on the tape that clearly supported a claim of protection of others, and which agreed with Appellant's statements.

Defense counsel objected, was overruled, and the Commonwealth actually *repeated* the same question to which the detective again answered that she did not believe Appellant's "theory" of the case to be true. Effectively, the detective was allowed to testify that Appellant was lying, which is not permissible opinion testimony. *Hall v. Commonwealth,* 337 S.W.3d 595, 603-04 (Ky. 2011).

The majority holds that this is error, but harmless. To that, I must ask, if it was so prejudicial to the Commonwealth to show the detective *agreeing* with Appellant, and thereby appearing to vouch for him, why is it not equally prejudicial to give an opinion that he was lying? Can such prejudicial evidence be harmless under the facts of this case?

In fact, the entirety of this testimony is not relevant. It is not material whether the detective agreed or disagreed with Appellant's version of events. Here, we had a piece of evidence that the Commonwealth wanted to use, but which did not work to its advantage. The Commonwealth wanted to nullify the

part of the statement it found harmful by having the detective say she was lying at the time the statement was made. In attempting to fix a problem for itself, the Commonwealth created a problem for the Appellant. This was simply a piece of evidence that could not be presented without damage occurring to the Commonwealth, unless the Commonwealth was allowed to "spin" the statement. In doing so, it prejudiced the Appellant for the very same reason the Commonwealth felt that it was prejudiced: there is weight given to statements made by an officer of the law.

I believe the only choice the Commonwealth had was to not play the tape if the detective's agreement was that damning, or to play it as is, and trust the common sense of the jury to figure out that the detective was stringing the Appellant along—that is, lying to him when she appeared to agree with his version of events.

The burden of proof is on the Commonwealth, and consequently the burden to produce *adequate* evidence to convict. Using opinion testimony in an improper manner is not producing appropriate evidence. Somewhere along the line, in the context of criminal litigation, the view has developed that it is fine to lie to defendants to drag a confession out of them. Thus when statements made to the police are full of lies by the officers, these tactics often make the statements not as effective when they are introduced at trial. This leads to a collateral line of questioning such as that here, which serves only the purpose of making the deceptive acts of the police officers less harmful to the

Commonwealth's case. It is not the purpose of the Rules of Evidence to make it easier for the Commonwealth to tell its version of events.

Rather, the Rules of Evidence were created to ensure that evidence which is not relevant and is unduly prejudicial is not used to convict or obtain a result. Here, just as the detective should not bolster the Appellant, she likewise should not *prejudice* him.

The prejudice at issue is *evidentiary prejudice,* not *factual prejudice.* Sometimes the evidence simply goes against a defendant, and of course he is prejudiced by those bad facts. But evidentiary prejudice is something else: it is using evidence that is unfair because it does not do what evidence is supposed to do. It is evidence that is collateral, or opinions that cannot be substantiated by experience or actual knowledge, or statements that have no indicia of reliability, or any of the other types of evidence forbidden by the rules. The basic tenet of the Rules of Evidence is that using such evidence is *unfair,* which denies essential due process.

Here, the majority states that the testimony of the detective that she did not believe the Appellant was "marginally relevant" and that "the prejudicial effect of having a police detective testify that another witness is lying far outweighs any probative value." Indeed, this Court has repeatedly held that "'[a] witness's opinion about the truth of the testimony of another witness is not permitted.... That determination is within the exclusive province of the jury.'" *Moss v. Commonwealth,* 949 S.W.2d 579, 583 (Ky.1997) (quoting *State v. James,* 557 A.2d 471, 473 (R.I. 1989)); *cf. Stringer v. Commonwealth,* 956

S.W.2d 883, 888 (Ky.1997) ("Generally, a witness may not vouch for the truthfulness of another witness."). This principle applies equally when the in-court witness attempts to attack the out-of-court statement of another witness, as happened in this case. Thus, I agree that the detective's testimony was error and resulted in evidentiary prejudice.

But I cannot agree that it was harmless.

It was on *direct* examination by the Commonwealth that the detective talked about often lying to defendants to get a better story. When the Commonwealth then asked her if she believed the Appellant's story "to be the case," defense counsel objected. When the trial court overruled the defense's objection and allowed the Commonwealth to *repeat* the question and the detective's answer, defense counsel had little recourse but to try to salvage the situation by questioning the detective about her "lies" on cross. The problem was then exacerbated by the Commonwealth asking the detective on re-direct whether she believed specific facts stated in the interview, to which she again said she did not.

I cannot agree with the majority that this sequence of events results in the defense counsel "opening the door." It was the Commonwealth that introduced the subject, not Appellant. If it is ever prejudicial to a defendant to have a police officer testify that he or she believes a defendant is lying, which it almost always is, it is definitely so in this case. And, given that the statement was made by an officer of the law, I believe it substantially swayed the verdict.

The significance of this error is that the Appellant was not given the benefit of any reduction in sentence that comes from a finding of protection of others. This was never going to be a case where the defendant was not convicted of *something.* He admitted the killing. But whether his defense that he acted in protection of others would be believed directly depended on the credibility given to his stated motivation. Owens admitted to being the instigator of his actions. Whether she was really afraid or not is immaterial; what matters is whether Appellant believed she was afraid. And the facts here offer two possible motives: jealousy of the victim or protection of what Appellant viewed as his family. The only evidence about motive came from Owens' testimony and the Appellant's own statements, which support that Appellant was acting in response to Owens' fear and perceived risk to the child. The only evidence of jealousy was that Appellant got angry when Owens "messed with" other men, which he admitted. But he did not know she had seen Allen earlier that day or that the meeting may have been friendly.

What the detective was allowed to say is that she believed Appellant was lying about the reason he shot the victim. For any juror waffling on the protection-of-others theory, this would surely have tipped the scales against the Appellant due to the detective's perceived experience, training, and standing in the community as a law enforcement officer. I cannot, therefore, say that this error did not substantially sway the verdict, and given that the error is evidentiary prejudice, this case should be reversed for a new trial.

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