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RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000411-MR

ADRIAN BENTON — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 06-CR-01043-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the early morning hours of May 25, 2006, in Lexington, Kentucky, Appellant Adrian Benton requested marijuana from Le'mon Allen. After Allen explained that he had no marijuana, Benton shot his gun towards the floor next to Allen's leg. Benton then proceeded to chase Allen down the street while firing bullets in his direction.

Subsequently, Benton was involved in a second altercation. Benton, along with his co-defendant, Richard Wright, visited a residence located at 317 Wilson Street (hereinafter referred to as the "Mattingly residence"). John Mattingly and Will Mattingly, both residents of the home, along with Jeff Procter and Katie Mattingly, were present at the time. Benton and Wright knocked on the door, at which point Benton forcibly entered the Mattingly

residence at gunpoint. Once inside, Benton robbed Will Mattingly and then proceeded to assault and rob Procter. At some point, John Mattingly called the police. During the call, Wright fatally shot John Mattingly in the head. As Wright and Benton fled the scene of the crime, Benton fired multiple shots towards individuals standing on the porch of the Mattingly residence.

On May 2, 2011, Benton was jointly tried with Wright in the Fayette Circuit Court on numerous charges, including aggravated murder. During the fourth day of trial, Wright entered a guilty plea to the murder of John Mattingly. Benton's trial proceeded with the death penalty being removed as a sentencing option.

The jury ultimately found Benton guilty of complicity to first-degree robbery, complicity to second-degree manslaughter, three counts of first-degree robbery, second-degree assault, first-degree wanton endangerment, second-degree wanton endangerment, and one count of being a persistent felony offender in the second degree.

The jury recommended that Benton serve all of his sentences concurrently for a total of twenty-seven (27) years imprisonment. The trial court, however, ordered portions of Benton's sentences to be served consecutively for a total of forty-four (44) years imprisonment.

Benton now appeals his conviction and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b). Several issues are raised and addressed as follows.

Jury Selection

Death Qualification

Benton contends that his Sixth and Fourteenth Amendment rights to a fair trial were violated when the trial court allowed a death qualified jury to determine his guilt. After Wright pled guilty to the murder of John Mattingly, Benton's counsel moved the court to remove the death penalty as a sentencing option. The trial court granted the motion in light of Wright's guilty plea and the "lingering issues as to Defendant Benton's intellectual capabilities." Benton then moved the trial court to select a new venire panel comprised of non-death qualified jurors. The trial court denied Benton's motion and resumed with seating the jury.

Whether the trial court deprived Benton of a right to a fair trial by allowing the death qualified jury to determine Benton's guilt is an issue of law to be reviewed *de novo*. *Commonwealth v. Lucas,* 195 S.W.3d 403, 405 (Ky. 2006).

Death qualifying a jury is the process of eliminating potential jurors from the venire panel who are adamantly opposed to capital punishment. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). Constitutional challenges to death qualified juries are commonly based on two related arguments: (1) death qualified juries do not represent a fair cross-section of the community; and (2) death qualified jurors are more prone to convict. *See, e.g.*, *Buchanan v. Commonwealth*, 483 U.S. 402, 415-17 (1987).

In *Lockhart v. McCree*, 476 U.S. 162, 165 (1986), the U.S. Supreme Court addressed both arguments. First, the Court held that the fair cross-section requirement applied to venires, not petit juries. *Id.* at 173. Even if the fair cross-section requirement applied to petit juries, the Court stated that the death-qualification process does not contrive a distinct group because jurors are excused not because of their gender or race, but rather their inability to apply the law to the facts in a capital case. *Id.* at 174.

Secondly, the Court addressed the allegation that death qualified jurors are more likely to convict. The defendant in *McCree* presented the Court with fifteen studies of empirical data supporting the proposition that death qualified jurors are more prone to convict than non-death qualified jurors. *Id.* at 173. The Court declared that, as long as jurors are still capable of applying the law to the facts, such a proclivity is constitutionally permissible. *Id.* at 178.

The practice of death qualifying a jury undoubtedly passes constitutional muster. *See Buchanan*, 483 U.S. at 416, 420; *McCree*, 476 U.S. at 165. In the case *sub judice*, however, the correct inquiry is whether the practice of death qualifying the jury was constitutionally appropriate. Our predecessor Court and the U.S. Supreme Court have provided us with some guidance. We know that a death qualified jury does not violate the defendant's constitutional rights when the defendant would be eligible for the death penalty upon conviction. *McCree*, 476 U.S. at 162. Furthermore, we understand that it is also constitutional for the prosecution to death qualify a jury in a joint trial in

which at least one of the defendants faces the death penalty. *Buchanan*, 483 U.S. at 402.

Likewise, this Court has on one occasion, albeit in an unpublished opinion, determined that a defendant's constitutional rights were not violated when he was tried by a death qualified jury despite his ineligibility for the death penalty. *Shavers v. Commonwealth*, Nos. 2001-SC-0232-MR and 2001-SC-0923-MR, 2003 WL 21990214 (Ky. Aug. 21, 2003). During the capital trial in *Shavers*, it came to light that the defendant was fifteen years old at the time he committed the capital offense, making him ineligible for the death penalty under KRS 640.040(1). *Id.* at *1. Nonetheless, the trial court allowed the trial to proceed with the death qualified jury. *Id.* On appeal, the Court found both *McCree* and *Buchanan* as controlling. *Id.* at *2.

We agree with the reasoning set forth in *Shavers* and find that *McCree* and *Buchanan* control this issue. Similar to *Shavers*, the jury in Benton's trial was death qualified on the presumption that the death penalty was a possible option upon conviction. The removal of death from the sentencing options did not magically transform the jury into an imbalanced and partial one.

For the reasons stated above, we find that the trial court did not violate Benton's constitutional rights to a fair trial by allowing the death qualified jury to proceed with determining his guilt and sentence.

Fayette Circuit Court's Jury Empanelling Practice

Benton next argues that the Fayette Circuit Court's jury empanelling practice violated Kentucky's Administrative Procedures of the Court of Justice,

Part II, Sections 1 and 10. On March 25, 2011, Benton filed a "Motion for Fair and Efficient Jury Selection" and a hearing on the motion was conducted. The trial judge, in "the spirit of compromise," attempted to appease all parties by allowing the venire panel to be split into two smaller groups of thirty-eight and forty-three, respectfully, for the purpose of general voir dire. When asked if the tailored voir dire selection process was acceptable, Benton's counsel stated "yes" and at no point objected. For those reasons, we believe this issue is not preserved for our review. *Stringer v. Commonwealth,* 956 S.W.2d 883, 888 (Ky. 1997).

Benton requests a palpable error review pursuant to RCr 10.26. He complains that the Fayette Circuit Court's customary voir dire selection process would force him to question the entire venire panel of more than 100 prospective jurors all at once. The trial court alleviated this problem adequately. We cannot find that Benton endured a manifest injustice as a result of the trial court's voir dire selection process.

Peremptory Strikes

Benton urges the Court to find that the trial court erred in modifying the number of his peremptory strikes. The trial court initially—when the death penalty was still an option—ruled that Benton and Wright would each receive fifteen peremptory strikes. This number represented the eight required strikes pursuant to RCr 9.40, two additional strikes for two alternate jurors, and five "gratuitous" strikes in consideration of the defendants being tried jointly and their eligibility for the death penalty. Once Wright pled guilty and death was

removed as a possible sentencing option for Benton, the trial court determined that the five "gratuitous" peremptory strikes previously conferred were no longer necessary. Benton still maintained ten peremptory challenges. On appeal, Benton argues that he refrained from moving to strike jurors for cause on the assumption that he could use a total of fifteen peremptory strikes at a later time.

The decision whether to grant a party additional peremptory challenges is within the sound discretion of the trial court. *E.g., Epperson v. Commonwealth,* 197 S.W.3d 46, 64-65 (Ky. 2006). A trial court's determination of the appropriate number of peremptory challenges to grant each party will not be disturbed absent an abuse of that discretion. *E.g., Smith v. Commonwealth,* 734 S.W.2d 437, 445 (Ky. 1987). In *Peak v. Commonwealth,* this Court considered whether it was error for the trial court to reduce the number of peremptory challenges available to the defendants one week into voir dire. 197 S.W.3d 536, 545-46 (Ky. 2006). This Court determined that the trial judge did not abuse his discretion because the defendants were allotted the correct number of challenges pursuant to RCr 9.40, and the defendants could not show any prejudice. *Id.*

Similarly, Benton actually received one more peremptory strike above the amount to which he was entitled under RCr 9.40. In addition, Benton failed to show any prejudice as a result of the trial judge's determination. Benton explains that "[he] did not decline to exercise strikes because [he] had additional peremptories." Instead, Benton states that he failed to pursue

questioning to establish grounds to excuse potential jurors for cause because he believed he could have excused those jurors with the additional peremptory strikes.

The trial court has little, if any, control over discretion utilized by defense lawyers in voir dire. Besides, Benton's argument that he failed to pursue questioning on strikes for cause because he had additional peremptory challenges is unconvincing. In essence, he would have been wasting his peremptory strikes had he relied on them as an excuse not to vigorously pursue potential challenges for cause.

We find that the trial court did not abuse its discretion in modifying the number of Benton's peremptory strikes.

Evidentiary Rulings

Benton contends that the trial court's exclusion of specific evidence violated his right to present a defense.

Benton has a constitutional right to present a complete and meaningful defense. *Beaty v. Commonwealth,* 125 S.W.3d 196, 206-07 (Ky. 2003). This right, however, is not without limits. The right to present a defense is normally guided by the rules of evidence. *McPherson v. Commonwealth,* 360 S.W.3d 207, 214 (Ky. 2012). Furthermore, the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent abuse of discretion. *Matthews v. Commonwealth,* 709 S.W.2d 414 (Ky. 1985).

Evidence Refuting Randomness of the Crime

The Commonwealth moved to exclude the investigation of James Lee Mudd, an occupant at the Mattingly residence who was not present on the night John Mattingly was murdered. The investigation revealed that John Mattingly aided Mudd in selling marijuana out of the Mattingly residence. The trial court excluded the evidence as irrelevant. We find no abuse of discretion.

Generally, prior bad acts of a defendant, or in this case the victim, are inadmissible to prove action in conformity therewith. However, even if the evidence is admissible pursuant to one of the exceptions set forth in KRE 404(b)(1), it must still pass the KRE 403 balancing test. *Lanham v. Commonwealth*, 171 S.W.3d 14, 31 (Ky. 2005).

We agree with the trial court that the prior investigation of Mudd is neither relevant nor probative to the present case against Benton, even within the context of proving knowledge and motive. The investigation of Mudd is of little probative value in proving whether Benton subjectively believed that drugs and money were at the Mattingly residence on the night in question. Any remaining probative value of introducing the prior investigation of Mudd is further negated by the fact that the trial court allowed the introduction of evidence collected at the crime scene, i.e., baggies of marijuana, scales, pipes, rolling papers, bongs, and other drug paraphernalia. We believe this evidence sufficiently illustrated to the jury that marijuana may have been sold at the Mattingly residence, and that Benton may have been there to obtain it.

Testimony of three witnesses

Benton mentioned during a pretrial conference and in his appellate brief that he had obtained three witnesses who would testify to his knowledge of drug dealing in the Mattingly residence. After a thorough review of the record, it appears that the trial court never ruled that such testimony would be inadmissible. Therefore, this issue is not properly before us. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998).

Richard Wright's statements to Detective Bill Brislin

Benton attempted to introduce several statements made by co-defendant Wright to Detective Bill Brislin during the course of his investigation. Specifically, Wright made statements to Detective Brislin that both he and Benton knew marijuana was being sold at the Mattingly residence, and that was in fact why they went there.

Officer Brislin's testimony regarding statements Wright made to him clearly constitutes hearsay. Benton argues that Detective Brislin's testimony falls within at least one of the hearsay exceptions, in that it is a statement against interest pursuant to KRE 804(b)(3). Particularly, Wright's statements would expose him to criminal liability for attempting to obtain marijuana. The trial court ruled that Wright's statements were not necessarily against his interest and were likely made in an attempt at exoneration.

We agree with the trial court's determination. In order for Wright's statements to qualify for admission under KRE 804(b)(3), "the statement must, in a 'real and tangible way,' subject the declarant to criminal liability." *Varble v.*

Commonwealth, 125 S.W.3d 246, 253 (Ky. 2004) (quoting *United States v. Monaco,* 735 F.2d 1173, 1176 (9th Cir. 1984)). Wright was incarcerated and charged with multiple crimes, including capital murder, when he made the excluded statements to Detective Brislin. Wright's admission that he was attempting to obtain marijuana from the Mattingly residence can hardly be viewed as Wright opening himself up to criminal liability. Additionally, KRE 804(b)(3) requires corroborating circumstances to "clearly indicate the trustworthiness of the statement." Not only were Wright's statements procured months after the crime, but Detective Brislin stated that Wright made inconsistent statements throughout his interview. Consequently, we do not believe that the trial court abused its discretion in excluding the statements Wright made to Detective Brislin.

Evidence of Requisite Mental State

During the trial, Benton presented the testimony of Dr. Finke to support his defense that, because of his mental retardation, he lacked the ability to form the mental state of wantonness. Finke testified that test scores indicated that Benton was borderline mentally retarded. Without referring to numerical scores, he stated that Benton was right on the high side of the mental retardation range and on the low side of borderline retardation.

The Commonwealth made a motion to exclude that portion of Dr. Finke's testimony which would have discussed the numerical range of mental retardation and borderline mental retardation. The Commonwealth also objected to the witness talking about the 5% standard of error on IQ tests, as

well as the Flynn Effect. The Flynn Effect is the theory that a person's IQ increases three points every ten years. Benton attempted to introduce this evidence to show that his test score of borderline retardation was most likely inaccurate, and that his IQ was below the mentally retarded threshold. The Commonwealth argued that Dr. Finke's proposed testimony was superfluous, overly cumbersome, and likely to confuse the jury. The trial court sustained the Commonwealth's motion.

From reviewing the record, it is confusing as to what purpose this evidence would serve. "Mental retardation" or "intellectual disability" is part of the insanity defense. KRS 504.020(1). Thus, for it to be raised as a defense it is subject to the same procedural restrictions as the insanity defense, including the notice requirement of KRS 504.070. But apparently the "mental retardation" defense was not being attempted in this case. This is evidenced by the lack of giving notice and no tendered instruction to that effect. The only relevancy of such evidence appears to be that which was argued by Benton on closing argument. In that summation, Benton urged the jury to consider his intellectual disability in finding that he acted recklessly instead of wantonly—a lessor degree of culpability. With that being the case, we find there was sufficient evidence introduced at trial to support such an argument.

The trial court permitted Dr. Finke to testify as to what he believed Benton's IQ range to be, albeit in terminology and not specific numbers. For example, Dr. Finke testified that Benton's intellectual functioning was within the range of "mild mental retardation." Dr. Finke was also allowed to give his

opinion about whether a person with a similar IQ range would be able to form intent and understand consequences. Thus, Benton was not denied his right to present to the jury his defense that he lacked the mental ability to form a wanton state of mind.

Directed Verdict

Benton argues that the trial court improperly denied his motion for a directed verdict on the following three counts: complicity to second-degree manslaughter; wanton endangerment of Le'mon Allen; and wanton endangerment of the individuals occupying the porch at the Mattingly residence. Benton contends that the Commonwealth failed to prove his conduct was wanton.

The trial court should refrain from granting a motion for a directed verdict if "the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty . . . ." *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991). The trial court must draw all fair and reasonable inferences in favor of the Commonwealth, reserving questions of credibility and weight of the evidence for the jury. *Id.*

Wanton Endangerment

KRS 501.020(3) states that wanton conduct occurs when:

> [A person] is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

With respect to the first count of wanton endangerment, Benton shot his gun so close to Allen that the bullet grazed the leg of his pants. The second count of wanton endangerment resulted from Benton shooting his gun at individuals occupying the porch at the Mattingly residence. This Court has consistently found that shooting a gun at someone, and in some cases even pointing a gun at another person, is proof of wantonness. *See, e.g., Paulley v. Commonwealth,* 323 S.W.3d 715 (Ky. 2010).

We cannot find it unreasonable for a jury to conclude that Benton's actions constituted wanton conduct. We also believe that it is not unreasonable for a jury to find that Benton was aware of the risk involved when firing his gun at or near people. As the Commonwealth pointed out, Benton made several statements during the commission of the crimes which would allow a reasonable juror to infer that Benton understood the dangers and possible consequences of shooting at people. For example, Benton called Wright "crazy" for shooting his gun at John Mattingly. Also, Benton stated that he was "shocked that Wright shot somebody." Indeed, the Commonwealth produced "more than a mere scintilla of evidence" that Benton understood the inherent risks of shooting a gun at another person. The trial court did not err in denying Benton's motion for a directed verdict as to both counts of wanton endangerment.

Complicity to Second-Degree Manslaughter

As applied to Benton, complicity to second-degree manslaughter pursuant to KRS 502.020(2) requires proof that: (1) Wright killed John

Mattingly; (2) Benton actively participated in Wright's actions which resulted in John Mattingly's death; and (3) Benton acted wantonly. The first element is clearly met. Additionally, there was sufficient evidence that Benton actively participated in the death of John Mattingly. Benton not only helped Wright gain access into the Mattingly residence, but also assisted Wright by assaulting and holding others in the Mattingly residence at gunpoint. Furthermore, there was enough evidence to allow a reasonable juror to find that Benton maintained a wanton state of mind. Benton and Wright, both using guns, knowingly forced their way into the Mattingly residence. It is not unreasonable to infer that both assailants knew they would be robbing the residents of drugs and/or money, and that by using firearms their actions could foreseeably result in death.

We find that the Commonwealth put forth "more than a mere scintilla of evidence" that Benton acted wantonly and perceived his actions as a substantial and unjustifiable risk which could result in death. The trial court did not err in denying Benton's motion for a directed verdict as to the complicity to manslaughter charge.

Sentencing

Lastly, Benton argues that the trial court abused its discretion by disregarding the jury's recommendation that his sentences run concurrently.

Pursuant to KRS 532.055(2), criminal juries are required to recommend whether multiple sentences are to run concurrently or consecutively. However, a jury's sentencing recommendation is not binding upon the trial court. This

Court has consistently and unambiguously held that trial courts have great latitude in deciding whether a defendant's sentences run concurrently or consecutively, despite the jury's recommendation. *E.g.*, *Dotson v. Commonwealth*, 740 S.W.2d 930, 932 (Ky. 1987). In sentencing Benton, the trial court properly considered the pre-sentence investigation, the violent nature of the offense, and the jury's recommendation. Ordering Benton to serve some of his sentences consecutively was well within the trial court's discretion.

Conclusion

For the forgoing reasons, the Fayette Circuit Court's judgment is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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