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RENDERED: JUNE 20, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000526-MR

ROBIN MAPEL

APPELLANT

V.
ON APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS
NO. 11-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Robin Mapel was convicted in Carter Circuit Court of murder and kidnapping. He was given a life sentence without the possibility of parole. On appeal, he claims that the trial court erred by denying his motion for a directed verdict on the murder and kidnapping charges, by denying his motions to strike two jurors for cause, and by denying his motion for a mistrial. Because the trial court did not err, the Court hereby affirms Mapel's convictions and sentence.

I. Background

On the morning of November 8, 2008, Melissa Patrick called her mother to come get Melissa's toddler from her home. A few minutes later, she called again and asked if her mother would call Melissa's employer and say that she would not be coming to work because she was sick. When her mother asked what was wrong, Melissa began to cry and said that she could not explain. Her

mother and stepfather lived nearby, and the stepfather came to Melissa's home to get the child. When he arrived, he saw Appellant, Melissa's boyfriend, standing at the window and Melissa sitting on the couch, dressed only in her underwear. When the stepfather asked what was going on, Appellant put a gun to Melissa's head. The stepfather started toward Melissa and Appellant struck him in the head with the butt of the gun, which prompted a physical altercation. During the altercation, Melissa grabbed the child and ran toward the door. Appellant fired two shots at them, with one striking Melissa in the upper arm.

Appellant pursued Melissa outside to the porch, where he put his knee on her back to restrain her while he reloaded the gun. The stepfather grabbed the child and retreated to his home nearby, and returned to Melissa's house with a rifle. When he arrived, Appellant was backing Melissa's car out of the driveway. The stepfather fired one shot from the rifle into the car and struck Appellant in the chest. He did not see that Melissa was also in the car. Melissa's mother called 911.

Appellant went to the home of Edgar King, who observed that Appellant had a chest wound, and had his girlfriend call 911. When King came back outside, he saw a 9-millimeter handgun lying on the floorboard, and that Melissa was dead, doubled over with blood everywhere. When police arrived and arrested Appellant, a 9-millimeter shell casing fell out of Appellant's clothing as he was being moved for medical attention.

At Melissa's residence, the police found blood on the floor and two bullet holes in the blinds over the sliding glass door. They also found blood on the porch and down the porch steps.

Appellant was indicted for murder and kidnapping.

At trial, the medical examiner, Dr. Kristin Rolf, testified that the cause of Melissa's death was a brain injury due to a gunshot wound to the head. She removed two 9-millimeter bullets from Melissa, one from her brain and one from her upper arm. The wound to her head was located behind the bottom of her left ear. Black marks around the head wound indicated that the tip of the barrel of the gun had been very close to or touching the skin when the shot was fired. The medical examiner also found pieces of plastic in the head wound. On cross-examination, Appellant's counsel asked Dr. Rolf if the head wound could have been caused by suicide. Dr. Rolf stated that because the head wound was caused by a gun placed against the head, it was consistent with both homicide and suicide, and that she could not say with medical certainty that it was homicide.

The jury, however, convicted Appellant of murder and kidnapping, and recommended sentences of life without the possibility of parole for the murder charge and life for the kidnapping charge. The trial court sentenced Appellant to life without the possibility of parole. This appeal followed as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises three issues on appeal: (1) the trial court erred by denying his motions for a directed verdict on the murder and kidnapping

counts; (2) the trial court erred by not striking two jurors for cause; and (3) the trial court erred by denying Appellant's motion for a mistrial based on the Commonwealth presenting testimony that Appellant had escaped from the Montgomery County jail approximately one month before the incident.

A. Directed Verdict

Appellant claims that he was entitled to a directed verdict on both charges. As to the murder charge, he contends that there was no proof that he fired the shot that caused Melissa's death. As to the kidnapping charge, he claims there was no evidence that he restrained Melissa in the vehicle or made her go anywhere.¹

Under the standard for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991). The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; but if

¹ KRS 509.040(1) provides:

A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:

- (a) To hold him for ransom or reward; or
- (b) To accomplish or to advance the commission of a felony; or
- (c) To inflict bodily injury or to terrorize the victim or another; or
- (d) To interfere with the performance of a governmental or political function; or
- (e) To use him as a shield or hostage; or
- (f) To deprive the parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor as the term "person exercising custodial control or supervision" is defined in KRS 600.020.

Appellant argues that he did not restrain Melissa, but furthers no alternative argument regarding his intent.

more evidence is produced and it would be reasonable for the jury to return a verdict of guilty, then the motions should be denied. *Id.* On appellate review, the standard is slightly more deferential; the trial court will be reversed only if “it would be *clearly unreasonable* for a jury to find guilt.” *Id.* (emphasis added).

As to the murder charge, Appellant argues that the evidence showed Melissa’s death could have been a result of either homicide or suicide. He points to Dr. Rolf’s testimony that the nature of Melissa’s head injury alone, absent any other evidence, would suggest suicide in most cases. Also, no gunshot residue testing was done to demonstrate whether Melissa or Appellant had fired any shots from a 9-millimeter pistol.²

This proof merely establishes, however implausibly, that Melissa’s death *could* have been the result of suicide. But, despite Appellant’s suggestion to the contrary, the medical examiner’s testimony did not create an even-odds decision between murder and suicide because that was not the only evidence. In addition to the medical examiner’s testimony, the Commonwealth introduced evidence that Melissa’s death was immediately preceded by a violent altercation between her and Appellant, that Appellant had shot Melissa in the arm with a 9-millimeter handgun a few minutes before her death, and that a 9-millimeter round was recovered from Melissa’s shoulder. There was also proof that the head wound was caused by a 9-millimeter handgun, one of which was recovered from the floor of the car. The stepfather had seen Appellant fire the shot that struck her arm, and had seen him chase Melissa

² This testing was not done at the time because the police did not expect Appellant to survive the gunshot wound to his chest.

onto the porch, force her down, and reload a gun. This proof was more than sufficient to tip the scales from the even suicide-homicide proposition in favor of homicide, which would allow a reasonable jury to conclude that Appellant killed Melissa.

Appellant also suggests that Melissa's stepfather may have fired the fatal bullet. He notes that the fragments of plastic found in Melissa's brain could have come from the door of the automobile from when Robert Perkins shot a bullet from the rifle into the car, which implies that Perkins fired the fatal shot.³ The problem with this bordering-on-ludicrous theory is that there was no question that the fatal head wound was caused by a 9-millimeter bullet and that the rifle fired by Robert was not a 9-millimeter. Moreover, the wound resulted from a shot fired at point-blank range, not one from outside the car and through the door. The evidence was more than sufficient for a reasonable jury to discount the rifle shot as a possible source of the fatal wound.

The Commonwealth's evidence that Appellant killed Melissa is certainly more than a scintilla, and it would not be clearly unreasonable for a jury to find Appellant guilty of murder. Thus, the trial court did not err in denying Appellant's motion for a directed verdict as to the murder charge.

Likewise, the trial court did not err in denying Appellant's motion for a directed verdict as to the kidnapping charge. Appellant's argument is that there was no evidence that he forced or restrained Melissa near or in the vehicle or that he forced her to go anywhere with him, as would be required for him to be

³ Apparently, the police never did ballistics testing on the bullets, in part because Appellant was not expected to live after he was shot in the chest.

convicted of kidnapping. He notes that a neighbor testified that he heard Appellant say that they needed to leave the scene before the police arrived and heard Melissa respond that she at least needed to put on clothes before they left. Appellant claims that if Melissa were, in fact, restrained, she would not be allowed to return to the house, and suggests that Melissa actually accompanied him voluntarily.

This claim is undermined by the proof that Melissa left with Appellant only after he had already fired a gun at her, striking her in the shoulder, while she attempted to flee the home with her infant son. As noted above, after shooting her in the arm, he pursued her outside onto the porch, where he pinned her down with his knee on her back while he reloaded the gun. Additionally, when he told Melissa that they needed to leave before the police arrived, he was still armed with the gun he had already used to shoot her in the arm.

There is substantial evidence that Melissa was not acting of her own free will during the altercation with Appellant except to try to flee from him. He had just shot her, and it is not unreasonable to believe that she would not willingly leave with him. Given the evidence, it is not clearly unreasonable for a jury to find Appellant guilty of kidnapping. Thus, the trial court did not err by denying Appellant's directed verdict motion on the kidnapping charge.

B. Failure to Strike Jurors for Cause

Appellant claims that the responses of two potential jurors indicated that they had an implied bias against criminal defendants where there has been an allegation of domestic violence by the victim against the defendant.

The first juror stated that she had been a victim of domestic violence fifteen years before and that she had obtained a Domestic Violence Order at that time against her former husband. When asked whether her own personal experience with domestic violence would “strike a chord” with her that maybe it would not with another juror, she answered, “Possibly, but I really don’t think that it would.” When pressed further by Appellant’s counsel, she claimed that the events were in her past and that she had blocked them out.

Appellant argues further that the second juror clearly stated his bias against criminal defendants against whom an allegation of domestic violence had been made. This juror answered affirmatively when he was asked whether he believed that someone is more likely to be guilty of murder when there has been a prior allegation of domestic violence against that person.

At that point, the trial court attempted to clarify the juror’s response by asking him a series of questions, including whether he would vote to convict if he had a reasonable doubt about Appellant’s guilt, whether he believed in Appellant’s presumption of innocence, and how he would weigh evidence of domestic violence. He answered those questions appropriately, and also responded that the Commonwealth would have to prove that domestic violence actually occurred, rather than show a mere allegation, before he considered that evidence. The trial court stated that it believed the juror would consider all the evidence, believed in Appellant’s presumption of innocence, and would not convict if he had reasonable doubt.

Appellant moved to strike both jurors for cause and the trial court denied the motion. Appellant then used two of his peremptory strikes on the jurors

and, pursuant to the procedure outlined in *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854–55 (Ky. 2009), indicated that he would have struck two other jurors, who ultimately served on the jury who convicted Appellant, had he not used peremptories on the two challenged jurors.

On appeal, the issue is whether the jurors' personal experiences were such that, despite their disclaimers, they could be considered impliedly biased against a person standing trial for an offense involving domestic violence. See *Soto v. Commonwealth*, 139 S.W.3d 827, 850 (Ky. 2004). This Court reviews a trial court's determination regarding the exclusion of a juror for cause for an abuse of discretion. *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). Also, "the decision to exclude a juror for cause is based on the totality of the circumstances, not in response to any one question." *Id.* Specifically, "[t]he test for determining whether a juror should be stricken for cause is 'whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.'" *Thompson v. Commonwealth*, 147 S.W.3d 22, 51 (Ky. 2004) (quoting *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994)). "[T]he party alleging bias bears the burden of proving that bias and the resulting prejudice." *Cook v. Commonwealth*, 129 S.W.3d 351, 357 (Ky. 2004). Once this is shown, "[t]he court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Shane v. Commonwealth*, 243 S.W.3d 336, 228 (Ky. 2007).

The first juror's experience with domestic violence occurred fifteen years prior to the trial. She stated that her own experience would not affect her

impartiality in this case and that she would not automatically find Appellant guilty because of her experience. Moreover, she was asked only if her experience would “strike a chord” that perhaps it would not strike in other jurors, to which she responded that it could, but she did not think so. She never indicated in any response to questions that her impartiality would be affected.

“[T]he mere fact that a person has been the victim of a similar crime is insufficient to mandate a prospective juror be excused for cause.” *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997). Given the remoteness of the juror’s domestic violence experiences and her unequivocal statements that she would be impartial, the trial court did not abuse its discretion by denying Appellant’s motion to strike the juror for cause.

The second juror is a closer call,⁴ but ultimately the Court holds that the trial court did not abuse its discretion in denying Appellant’s motion to strike him for cause. The juror’s response to Appellant’s first question suggested that he might not believe Appellant’s presumption of innocence because he said that he would be more likely to find a person guilty of murder where there has

⁴ The Court repeatedly has cautioned trial courts about refusing to strike jurors for cause where a bona fide doubt exists about the juror’s impartiality. *See, e.g., Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013) (“[t]he trial court should err on the side of caution by striking the doubtful juror; that is, if a juror falls within a gray area, he should be stricken.”). In addition to raising questions about a defendant’s right to an impartial jury, the practice of seating doubtful jurors in many cases wastes valuable judicial resources. In this case, for example, the trial court spent the better part of an hour clarifying the juror’s response to questioning, rewatching the videotape of his responses, and explaining its rationale for denying Appellant’s motion. While we are confident that the trial court’s discretion was appropriately exercised in ultimately determining that the juror should not be struck for cause, we again express our belief that the practice of saving doubtful jurors needlessly expends judicial resources, both at the trial and appellate level.

been a prior allegation of domestic violence made by the murder victim. Where a juror is truly equivocal with regard to his ability to render an impartial judgment, it is reversible error for a trial court not to strike that juror for cause. *See McDaniel v. Commonwealth*, 341 S.W.3d 89, 94 (Ky. 2011).

The trial court, however, engaged in a lengthy discussion with the juror in order to discern exactly what he meant by his response. The juror stated that he would weigh all the evidence and provide Appellant with a presumption of innocence, and if he had any doubt as to Appellant's guilt, he would not vote to convict him. The trial court also explained that the juror merely indicated that he would weigh any evidence of domestic violence committed by the Appellant when determining his guilt, as each juror was expected to do in a case where that evidence is presented at trial. While the juror indicated some equivocation with his first response, the trial court, in requiring him to explain his responses, allowed him to state that he was unequivocal in his ability to render an impartial judgment. Thus, this Court holds that the trial court did not abuse its discretion in denying Appellant's motion to strike the juror for cause.

C. Motion for a Mistrial

Prior to the sentencing stage, the trial court reminded the parties that Appellant's escape from jail a few weeks before the murder could not be used because his conviction for that offense was still on appeal.

During the sentencing phase, Appellant called Dwayne Myers, who was a deputy jailer at the Montgomery County jail. Appellant questioned Myers in an attempt to show that Melissa Patrick had visited him at the jail eleven times

from August 2 through October 1, 2008, in violation of a DVO that was set to expire on December 12, 2008.

On cross-examination, the Commonwealth stated, “I don’t see any more visits after October 1, 2008?” Myers responded, “Actually, at that time, Mr. Mapel had escaped from jail.” Appellant immediately moved for a mistrial. A long bench conference followed and Appellant agreed to an admonition stating that Appellant walked away from an outside work detail while he was a trustee at the jail and the jurors should not consider or give weight to the testimony. Appellant now argues that the trial court abused its discretion in denying the motion for a mistrial.

“The standard for reviewing the denial of a mistrial is abuse of discretion. A mistrial is appropriate only where the record reveals a manifest necessity for such an action or an urgent or real necessity.” *Knuckles v. Commonwealth*, 315 S.W.3d 319, 322 (Ky. 2010). This Court has long held that an admonition is usually sufficient to cure the erroneous admission of evidence, *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001), and the presumption is that the jury will heed that admonition, *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky. 1993).

Myers’s response was clearly inadmissible, per the judge’s earlier warning. However, the Appellant agreed to an admonition and crafted the very admonition read by the trial court to the jury, which had already convicted Appellant of murder and kidnapping prior to Myers’s statement. The admonition was sufficient in this case. There was no manifest necessity for a

mistrial. Thus, this Court holds that the trial court did not abuse its discretion by denying Appellant's motion for a mistrial.

III. Conclusion

For the foregoing reasons, the judgment of the Carter Circuit Court is affirmed.

All sitting. All concur.

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