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RENDERED: DECEMBER 19, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000522-MR

COURTNEY BALTIMORE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
NO. 10-CR-03201

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Courtney Baltimore, appeals from a judgment of the Jefferson Circuit Court convicting him of murder and sentencing him to thirty-three years' imprisonment. As grounds for relief Appellant contends that the trial court erred (1) by failing to grant his motion for a directed verdict; (2) by failing to strike two jurors for cause; (3) by denying his motion to suppress his post-arrest statement to police; and (4) by denying his motion for lesser included offense instructions on first-degree manslaughter and second-degree manslaughter.

For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Andre Josh Jackson rode with his friend, Gary Cole, to the McKendree Court apartments in Louisville, where he got into a prolonged fight in the

parking lot with Appellant. A large crowd watched the fight. For several minutes, Jackson seemed to be getting the best of Appellant. Then, someone handed Appellant a gun which he used to shoot Jackson in the chest. The gunshot killed Jackson. Many of the witnesses who saw Appellant shoot Jackson told police what they had seen. Appellant was interviewed by police the night of the shooting and he denied both knowing Jackson and shooting him.

Appellant was indicted and charged with murder. At trial no less than six witnesses testified that they had seen Appellant shoot Jackson. Appellant presented no witnesses, but through cross-examination of the Commonwealth's witnesses and argument he put forward a defense of denial. The jury found Appellant guilty of murder and recommended a sentence of thirty-three years. The trial court subsequently entered a judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Appellant first contends that he was entitled to a directed verdict on the murder charge because the Commonwealth's evidence was so "scant and unreliable" that no reasonable juror could find beyond a reasonable doubt that he was guilty of murder. In support of his argument, Appellant notes that, of the six witnesses who testified to seeing him fire the fatal shot, five were friends of the victim or members of his family, and the remaining eyewitness was a neighbor of the victim's mother. Appellant also claims that inconsistencies between the witnesses' trial testimony and their statements to police on the

night of the shooting so completely undermined their credibility that "there was no hard evidence on which a jury could have based an inference that [Appellant] fired the shot that killed [the victim]." He further points out that the absence of gunshot residue on the victim refutes the testimony that the shooting was at "close range," thereby further undermining the witnesses' credibility.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. *Id.* For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserve for the jury questions as to the credibility and weight to be given to such testimony. *Id.* "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). "[T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham*, 816 S.W.2d at 186–87.

With six witnesses testifying that they actually saw Appellant shoot the victim, there was easily a sufficient quantity of evidence supporting the jury's

verdict. Despite the inferences of bias that one might draw from the witnesses' relationships with the deceased, and the inferences of deceit that might be drawn from inconsistency among their statements, the well-established rule is that "[c]redibility and weight of the evidence are matters within the exclusive province of the jury." *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999) (citations omitted). Jurors are free to believe parts and disbelieve other parts of the evidence including the testimony of each witness. The jury was certainly able to measure the credibility of the eyewitnesses against the indicia of unreliability that Appellant presented. Accordingly, we cannot agree that Appellant should have been granted a directed verdict. Moreover, we note that as friends and family of the victim, one could reasonably infer that they would want to see to it that the actual killer was brought to justice. It is, therefore, not self-evident that their affinity for the victim would translate into unjustifiable animus directed toward Appellant. Finally, the absence of gunshot residue on the victim does not negate the witnesses' testimony that the shooting occurred at close range with such certainty that it casts doubt upon the validity of the verdict. The trial court properly denied Appellant's motion for a directed verdict.

III. FAILURE TO STRIKE JURORS FOR CAUSE

Appellant next contends that the trial court erred by failing to strike two jurors for cause. "RCr 9.36(1) provides that the trial judge shall excuse a juror [for cause] when there is reasonable ground to believe that the prospective juror cannot render a fair and impartial verdict." *Smith v. Commonwealth*, 734

S.W.2d 437, 444 (Ky. 1987). We have "long recognized that 'a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.'" *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008) (quoting *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002)); *see also Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). That determination, however, "is based on the totality of the circumstances, [and] not on a response to any one question." *Fugett*, 250 S.W.3d at 613. This must be so because "the duty of the trial court [is] 'to evaluate the answers of the prospective jurors in context and in light of the juror's knowledge of the facts and understanding of the law.'" *Id.* (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001)).

The established 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." *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). Where such a showing has been made, "[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, 338 (Ky. 2007).

With these standards in mind, we now examine the trial court's decision not to strike the two jurors identified by Appellant.

1. Juror A

During voir dire Juror A informed the court that her nephew had been in and out of jail numerous times, including for charges relating to "drunk driving, robbery, you name it, drug possession, all kinds of them" and that this pattern went on for over ten years. She further informed the court that her nephew ended up dying in an alcohol-related driving accident. When asked if that would affect her ability to be fair, Appellant stated, "I think I wish he would have gotten locked up" because then he may still be alive. She further stated that "It may affect me now. I think if someone commits a crime they should be incarcerated for [it] and not let go over and over and over. So in that case, I would probably be more stern." In follow-up questioning, Juror A said she acknowledged the presumption of innocence and confidently assured that as she sat there, she was able to look at Appellant and presume him innocent.

Appellant's concern is Juror A's statement that her nephew's experience would make her "more stern." We do not regard that expression as a disqualification for jury service. It is to be expected that jurors, and presumably judges as well, have had life experiences that shape their attitudes about punishment for crimes. Some individuals like Juror A may characterize themselves as "more stern" than others whose life's experiences instill within them a more sympathetic approach to punishment. That is simply part of the mix that comes when jurors from various walks of life are assembled into a venire of twelve. The diversity of personalities and attitudes is a virtue of the jury system and it complements the fact that the legislature has established a

range of punishment for each crime. Nothing in the voir dire colloquy with Juror A suggested that she was unable or unwilling to conform her views to the requirements of the law and render a fair and impartial verdict. "It is the totality of all the circumstances, however, and the prospective juror's responses that must inform the trial court's ruling." *Brown v. Commonwealth*, 313 S.W.3d 577, 598 (Ky. 2010). Based upon the totality of Juror A's responses we are satisfied that the trial court did not abuse its discretion in denying Appellant's motion to strike Juror A for cause.

2. Juror B

Appellant also challenged Juror B for cause because of a possible relationship with a potential witness in the case. When asked during voir dire about any relationships with potential witnesses, Juror B disclosed that he had once supervised an employee with the same name as one of the persons mentioned as a possible witness, and because the name was unusual, the Juror allowed that it might be the same person. Appellant challenged Juror B for cause, and argued that out of an abundance of caution, and because this was a murder case, the juror should be stricken for cause.

After further questioning, Juror B stated that his past association with the individual, if it happened to be the former employee, would not affect his assessment of the witness's credibility. As it turned out, that witness was never called to testify, and no one ever ascertained, during voir dire or afterwards, whether it was the same person. Appellant complains that he was forced to expend a peremptory challenge to remove Juror B because the trial

court refused to excuse him for cause. However, nothing said by Juror B revealed any bias for or against the potential witness, and the mere association that was disclosed does not give rise to any presumed bias, assuming that it was in fact the same individual.

We are persuaded that the trial court did not abuse its discretion in denying Appellant's motion to excuse Juror B for cause. Moreover, because the witness was not called to testify, whatever bias that may have arisen from his relationship with the juror could not have been prejudicial to Appellant. In summary, the trial court did not abuse its discretion in denying Appellant's motion to strike Juror B.

IV. DENIAL OF MOTION TO SUPPRESS

As the investigation of the crime developed, an arrest warrant was issued for Appellant, and he turned himself in to the police. It is not disputed that Appellant was in police custody when he submitted to an interview by Detective Perry. Appellant was read the *Miranda* warnings and advised of his rights but he refused to sign the preprinted waiver form acknowledging that he understood his rights.[1] After Appellant was Mirandized, Detective Perry asked Appellant whether he would like to discuss what happened at the apartment complex, and Appellant responded that he "*had nothing to say.*"

[1] For reasons which remain unclear, the form was later determined to have "refused" written on it, with a different date than the date of the interview. It appears that neither Appellant nor Detective Perry wrote "refused" on the form; however, in any event, this aspect of the situation is of little relevance to our review. Appellant was Mirandized prior to the interview and acknowledged that he understood his rights and that he had been read his rights.

Nevertheless, Detective Perry continued by asking Appellant if there was a reason why Jackson was shot. Appellant responded that "he didn't have anything to do with it" and that "he wasn't there." Then, Appellant complained about his ribs hurting. When told that several people witnessed the event, Appellant responded "I ain't got nothing to do with nobody else, I'm my own person." When asked again about the reason for the shooting Appellant responded "you tell me, you all know something." When Detective Perry asked how a fist fight turned into a gun fight, Appellant replied that "they" said it was two girls fighting.

The interview continued in the same fashion for several more minutes. At one point, Perry asked Appellant if he had called his girlfriend that night, and Appellant told the officer to check the phone records. Later during the interview, Appellant began discussing a different, unrelated homicide. When Perry told Appellant that they had plenty of time, Appellant repeated that he "*had nothing to say*, but had plenty of time." Perry again asked Appellant to give his side of the story and Appellant responded that he "ain't got no side" and that he "*told him twenty minutes ago that he had nothing to talk about.*" Perry then informed Appellant that he would have to be booked into jail, and Appellant stated that he was "alright." Perry again asked whether Appellant wanted to respond to what others were saying, and Appellant again responded that he "*had nothing to say.*"

Prior to trial Appellant, moved to suppress any statements Appellant made during the interview with Detective Perry. After an evidentiary hearing,

the trial court denied Appellant's motion, concluding that "although at a point during the interrogation, [Appellant] advised that he did not want to say anything else, there is no evidence that the subsequent questioning of him was coercive, [nor] is there any evidence that [Appellant's] subsequent responses to the questioning were not voluntary."

In reviewing the trial court's decision on a motion to suppress, we first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive. RCr 9.78; *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (citations omitted).

In *Miranda v. Arizona* the Supreme Court of the United States held:

> [O]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked.

384 U.S. 436, 473–74 (1966). "[A] suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an

attorney.'" *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 30 (Ky. 2011) (quoting *Davis v. United States*, 512 U.S. 452 (1994)). "The same standards apply to assertions of the right to remain silent." *Id.* (citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010)).

The trial court's ruling that Appellant did not invoke his *Miranda* right to remain silent with his statement that "he had nothing to say" conflicts with the essential holding of the *Miranda* decision. The trial court's ruling was therefore an error and, it follows, so was the refusal to suppress the statements that Appellant made after that invocation. While it is true that a suspect must unequivocally assert his right to remain silent in order to cut off questions from the police, *Berghuis*, 560 U.S. at 381 (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)), nevertheless, the invocation of his rights need not be formal. *Buster v. Commonwealth*, 364 S.W.3d 157, 162-63 (Ky. 2012). Rather, he may simply tell the police that he does not want to talk to them. *Berghuis*, 560 U.S. at 382; *see State v. Morrisey*, 214 P.3d 708, 722 (Mont. 2009) (defendant's statement, "I ain't saying nothing," was sufficient to assert the right to remain silent); *State v. Crump*, 834 S.W.2d 265, 269 (Tenn. 1992) (defendant's statement, "I don't have anything to say," was sufficient to invoke his right to cut off further interrogation.). Consistent with these authorities, in *Buster* we held that the suspect's statement that she "had nothing to say" was an adequate invocation of her right to remain silent under *Miranda*. *Buster*, 364 S.W.3d at 163. Accordingly, we are constrained to reach the same conclusion in this case.

The remaining question is whether the error was reversible. Because it was an error of a constitutional magnitude, reversal of the conviction is required unless it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *McGuire v. Commonwealth*, 368 S.W.3d 100, 107 (Ky. 2012) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

An examination of the statements made by Appellant during his interrogation discloses that he said nothing of substance that was detrimental to, or in conflict with, his defense. He did not incriminate himself. Rather, he asserted his innocence and expressed his desire not to discuss the matter with police.

We recognize that a suspect's justifiable refusal to cooperate with police request for information can be used to cast the accused in a negative light.[2] We see in this case, however, no attempt by the Commonwealth to take unfair advantage of Appellant's invocation of his right to remain silent, and none has been cited to us. Moreover, given that six witnesses testified to seeing Appellant shoot the victim and there was no evidence suggesting an alternative perpetrator from any of the dozens of persons in the crowd witnessing the event, we are persuaded that the trial court's erroneous holding regarding Appellant's invocation of his right to remain silent, and the court's

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[2] *Cf. Ordway v. Commonwealth*, 391 S.W.3d 762, 778 (Ky. 2013) ("The Commonwealth suggests that Appellant's outburst evidences a hostile, uncooperative attitude toward police that is indicative of guilt because, so the Commonwealth argues, the innocent are eager to assist police.").

corresponding error in failing to suppress his interview with Detective Perry, was harmless beyond a reasonable doubt.

V. DENIAL OF LESSER INCLUDED OFFENSE INSTRUCTIONS

Finally, Appellant contends that he was entitled to lesser included offense instructions on first-degree manslaughter and second-degree manslaughter.

A court need only instruct a jury on a lesser included offense when it is warranted by the evidence. *Dixon v. Commonwealth*, 263 S.W.3d 583, 586 (Ky. 2008). "An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky. 2003).

The trial court instructed the jury upon the theories of intentional and wanton murder per KRS 507.020.[3] Upon compliance with the above standards, a defendant charged with murder would be entitled to a lesser included instruction for first-degree manslaughter under KRS 507.030(1)(a) on the basis that in causing the victim's death there is evidence that his actual

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[3] KRS 507.020 provides, in part, that "(1) A person is guilty of murder when: (a) With intent to cause the death of another person, he causes the death of such person or of a third person. . . . However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or (b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."

intent was to merely cause serious physical injury. Similarly, one accused of murder would be entitled to a second-degree manslaughter instruction pursuant to KRS 507.040(1) when there is evidence that he wantonly, rather than intentionally, caused the death of another person.

Here, the trial court properly denied Appellant's request for lesser included instructions on first-degree and second-degree manslaughter. The only evidence concerning the shooting was that Appellant, engaged in an unarmed fight with Jackson, accepted a gun from someone in the crowd and then pointed the gun at the victim's chest and shot him at close range. It is common knowledge that, with the heart, lungs and vital arteries located in the chest, a gunshot to that part of the body is likely to be fatal. As gleaned from the evidence presented to the jury, Appellant's conduct exclusively manifests an intention to kill. Nothing from the evidence supports a countervailing theory that Appellant intended to inflict a serious, but non-lethal injury. There is no reasonable possibility that the jury might have had a reasonable doubt as to Appellant's guilt under the murder instruction, and yet believe beyond a reasonable doubt that he was guilty of the lesser offense.

And to the extent the conduct could have been found to be wanton conduct instead of manifesting an intent to kill, it was combined with conduct which also created a grave risk of death (a shot to the left-center of the victim's chest), which would bring the conduct within the scope of wanton murder, and not second-degree manslaughter. As such, we are persuaded that the trial

court properly denied Appellant's request for lesser included offense instructions on first and second-degree manslaughter.

VI. CONCLUSION

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

All sitting. All concur.

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