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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000376-MR

ABDAL-AZEEZ JALAL HAKIM,
A/K/A LEE MARTIN STORY — APPELLANT

V.

ON APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
NO. 12-CR-00185

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Abdal-Azeez Jalal Hakim, a/k/a Lee Martin Story, was arrested on June 21, 2012 for fleeing or evading police, driving on a license suspended for DUI third offense, and being a persistent felony offender in the first degree. Appellant was taken to the Montgomery County Regional Jail. Two months later, on August 17, 2012, Appellant stabbed fellow inmate, Gary Muncie, in the neck with a pencil.

The events leading up to the stabbing began in July of 2012 when Appellant was placed in Cell 233. Appellant referred to this cell as the "racist cell" due to the alleged harassment he endured for being an African American Shiite Muslim. Appellant and his cellmates argued often, usually over trivial matters such as who retained control over the jail television and phone. Over

time, Appellant's cellmates became increasingly annoyed with him. Accordingly, the occupants of Cell 233 took a vote and decided to ask Appellant to vacate the cell. Initially, Appellant refused to leave.[1] At that point, Appellant claims that Muncie approached him and stated, "We want you out of here, or we will hurt and kill you." Muncie, however, denied that he threatened Appellant and no other witnesses could corroborate Appellant's allegation. In addition, Appellant failed to report Muncie's alleged threat to jail personnel.

Appellant was subsequently transferred to Cell 147, a cell which he claims was just as racist as Cell 233. Within several days of his placement to another cell, Appellant was assaulted. Appellant refused to "snitch" on the cellmate or cellmates that assaulted him. Per his attorney's request, Appellant was transferred to the Powell County Jail where he was incarcerated for a couple of weeks.

Upon his return to the Montgomery County Regional Jail, Appellant was placed in solitary confinement and then eventually moved to Cell 236. Appellant was pleased with his new placement and described Cell 236 as a much better environment. Unfortunately, due to overcrowding issues, jail administrators transferred Muncie to Cell 236 several days later. Before his transfer was approved, jail administrators confirmed that Muncie had no "keep apart" directions in the jail tracking system. This meant that Muncie was free to reside in the same cell as Appellant.

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[1] Montgomery County Regional Jail administrators determine the cell in which an inmate will reside. While inmates do not have the luxury of freely moving to any cell they desire, they may request a transfer if a problem with another inmate arises.

As Muncie entered Cell 236, Appellant immediately became defensive and told him to leave the cell. Yet, Muncie stood his ground and refused to vacate. Appellant testified that he replied, "Gary, I'm going to ask you one last time, leave man, please. I'm trying to go home. If you stay in here, you will kill me or I'll kill you." Thereafter, Appellant and Muncie began physically fighting. The other inmates quickly intervened and stopped the fight. The majority of eyewitnesses testified that Appellant continued to yell at Muncie and threatened to kill him if did not leave the cell. Appellant retreated to his bed and grabbed a pencil off the floor. He then walked back over to Muncie and stabbed him in the neck.

Appellant insists that he was acting in self defense. As he alleges, Appellant witnessed Muncie reach for a box of pencils sitting on a nearby table. Believing that Muncie was going to use a pencil to stab him, Appellant proactively picked a pencil up off the floor and stabbed Muncie first. Eyewitnesses, on the other hand, testified that Muncie did not reach for a pencil, but rather threw his mat on the ground and stood by the table. At that point, Appellant walked to his mat, retrieved a pencil, walked back over to Muncie, and then stabbed him in the throat.

Deputy Jailer Hardin rushed to the cell to aid Muncie. He testified that Appellant was yelling, "I told y'all, ain't nobody gonna do me. I'm gonna do them first." Muncie was rushed to the hospital where he underwent surgery to remove the pencil. Muncie's doctor stated that the pencil punctured his jugular vein, an injury which could have been fatal.

A Montgomery Circuit Court grand jury indicted Appellant on one count of criminal attempt to commit murder and for being a persistent felony offender in the first degree. During the trial, the Commonwealth called eleven witnesses to the stand, including Muncie, three Montgomery County Jail employees, and five inmates. After a three-day trial, a Montgomery Circuit Court jury found Appellant guilty of assault in the first degree and being a persistent felony offender in the first degree. The trial court sentenced Appellant in conformity with the jury's recommended sentence of thirty years imprisonment. Appellant now appeals his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution.

Directed Verdict

Appellant first argues that the trial court erred in failing to grant him a directed verdict of acquittal on the charge of criminal attempt to commit murder. Appellant claims that he was privileged to act in self-protection, or in the alternative that he was acting under an extreme emotional disturbance ("EED"). As grounds for Appellant's directed verdict motions, he maintains that the Commonwealth failed to prove the absence of both defenses. The trial court denied Appellant's motions, leaving the issues for the jury to decide.

This Court will reverse a denial of a motion for a directed verdict "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983)). We must keep in mind that, when ruling on a motion for a directed verdict, the trial court must

"assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony." *Id.* at 187.

Self-Protection

Appellant contends that the Commonwealth failed to disprove his self-protection defense beyond a reasonable doubt. Before beginning our analysis, it is important to note that "[r]arely is a defendant relying upon self-defense entitled to a directed verdict." *West v. Commonwealth,* 780 S.W.2d 600, 601 (Ky. 1989). Indeed, if evidence of self-protection "is contradicted or if there is other evidence from which the jury could reasonably conclude that some element of self-defense is absent, a directed verdict should not be given." *Id.* (citing *Townsend v. Commonwealth,* 474 S.W.2d 352 (Ky. 1971)).

Turning to the self-protection statute, Kentucky Revised Statute ("KRS") 503.050(1) describes the defense as follows:

> The use of physical force by a defendant upon another person is justifiable when the defendant *believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.*

(Emphasis added). This Court does not believe that the evidence presented to the jury conclusively established that Appellant stabbed Muncie in order to protect himself from the use or imminent use of physical force. Eyewitness testimony, for example, indicated that Appellant proactively attacked Muncie in an effort to remove him from the cell. In addition, notwithstanding Appellant's own testimony, none of the eyewitnesses saw Muncie reach for a pencil. On

the contrary, the eyewitnesses observed Appellant grab a pencil while Muncie stood idly without a weapon. Moreover, other than Appellant's own testimony, there was no evidence that Muncie threatened Appellant at any point before or during the altercation. In fact, the majority of witnesses stated that Appellant was the initial aggressor and it was he who repeatedly threatened to kill Muncie once he entered the cell. Therefore, this Court agrees that the issue of whether Appellant acted in self-protection was properly submitted to the jury.

Extreme Emotional Disturbance

Appellant also asserts that the Commonwealth failed to provide evidence of the absence of EED. This Court acknowledges that EED is a defense to the charge of criminal attempt to commit murder. *See Coffey v. Messer,* 945 S.W.2d 944, 945-46 (Ky. 1997). Consequently, "[o]nce evidence is introduced to prove the presence of EED, its absence becomes an element of the offense . . . ." *Id.* (citing *Gall v. Commonwealth,* 607 S.W.2d 97, 109 (Ky. 1980) (overruled on other grounds by *Payne v. Commonwealth,* 623 S.W.2d 867 (Ky. 1981)). However, KRS 500.070(1) explains that the Commonwealth's burden "does not require disproof of [the defense] . . . unless the evidence . . . is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal." In other words, "the Commonwealth need not affirmatively disprove EED unless the evidence of EED is so overwhelming that it necessitates acquittal on the charge . . . ." *Spears v. Commonwealth,* 30 S.W.3d 152, 154 (Ky. 2000).

Our predecessor Court has defined EED as "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 his brief, Appellant attempts to demonstrate that he experienced EED due to the previous "indignities" he suffered at the hands of his former cellmates. In particular, Appellant discussed the assault that occurred in Cell 147 and the harassment he endured due to what he believes is his race and chosen religion. Appellant claims that once he was placed in Cell 236, he felt relieved to finally reside in a peaceful cell. Therefore, Appellant claims that when Muncie walked into Cell 236, he experienced EED and lost all control over his actions.

After reviewing Appellant's proof at trial, we believe that he failed to present sufficient evidence to support an EED defense. At no point during the trial did Appellant testify to acting under the influence of EED, nor did he submit any expert testimony to support the defense. In fact, Appellant testified that he was aware of the events taking place, while carefully explaining the reasons behind his actions. Furthermore, Appellant failed to explain how Muncie's presence invoked an emotional disturbance. Muncie was not involved in the Cell 147 attack, nor did Muncie harass Appellant for his race or religion. The only negative history between the two men concerned Muncie's alleged warning that if Appellant refused to leave Cell 233 he would be hurt or killed. In essence, Appellant's version of events illustrates that he was cognizant of his

actions and stabbed Muncie to protect himself, not because Muncie's presence triggered a blind rage. As a result, the Commonwealth was not obligated to affirmatively disprove Appellant's EED defense in order to sustain its burden of proof. We conclude that the trial court did not err in denying Appellant's motion for a directed verdict.

Use Immunity

Appellant's next argument is that the trial court erred in failing to grant Christopher Hughes "use immunity." Hughes was an inmate at the Montgomery County Regional Jail and witnessed the assault on Appellant in Cell 147. Appellant subpoenaed Hughes to testify at trial, believing he would be able to identify the inmates that assaulted him and have an opinion as to whether the attack was racially motivated. Hughes was fearful that his testimony would be incriminating and, therefore, invoked his Fifth Amendment right to remain silent. Hughes also stated that anything he had to say would not benefit Appellant. Even so, Appellant requested that the trial court grant Hughes use immunity. The trial court denied Appellant's request and explained that the Commonwealth maintained the power to bestow use immunity, not the court.

Since Appellant failed to object to the trial court's ruling, Appellant's argument is unpreserved and will be reviewed for palpable error. RCr 10.26. Palpable error is an error that is obvious, so much so "that it jumps off the page . . . ." *Chavies v. Commonwealth*, 374 S.W.3d 313, 323 (Ky. 2012) (quoting *Alford v. Commonwealth*, 338 S.W.3d 240, 251 (Ky. 2011)

(Cunningham, J., concurring)). Appellant's alleged error regarding use immunity is anything but obvious. This Court is unaware of any precedential authority that authorizes the trial court to bestow use immunity upon a testifying witness without agreement of the Commonwealth.

Appellant provides us with two cases to support his position, neither of which is on point or controlling. The first is *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012), a case in which this Court used its supervisory authority to grant immunity to a probationer who was testifying at his own probation revocation hearing. This Court stated that a probationer's "testimony relat[ing] to new crimes given during a revocation hearing cannot be substantively used in a future criminal proceeding." *Id.* at 128. Clearly, *Barker* is not applicable to the case before us.

Appellant also urges us to adopt the test espoused in *Williams v. Woodford,* 384 F.3d 567 (9th Cir. 2004). In this case, the Ninth Circuit held that a trial court may impart use immunity on a witness if there is a showing that the witness's testimony is relevant and the prosecution's refusal to grant immunity was an attempt to distort the fact-finding process. *Id.* at 600. *Williams* is not the law in the Commonwealth. Even if it were, use immunity would still be improper as there is no proof that the Commonwealth was attempting to alter the fact-finding process. We find no palpable error in the trial court's refusal to provide Hughes with use immunity.

Testimony of Jailers

Appellant's last assignment of error occurred when the Commonwealth asked him to characterize other witnesses as liars. During the trial, three separate deputy jailers testified that they had no knowledge that Appellant was being harassed in Cell 233. Appellant, however, testified that he had warned the guards that other cellmates had threatened to kill him and that there was "a racial problem in [the] cell." During cross-examination, the Commonwealth asked Appellant whether the three guards were lying, to which Appellant answered in the affirmative. In addition, the Commonwealth asked Appellant whether inmate Patrick Church was lying when he testified that, before Muncie was stabbed, he was leaning with his hand on his knee at the table. Once again, Appellant testified that the witness was lying. At no point did Appellant make a contemporaneous objection to the Commonwealth's questions. Appellant now complains that the Commonwealth violated his due process rights to a fair trial. We will review this issue for palpable error.

It has long been held that asking a defendant to characterize another witness's testimony as a lie is improper and exceeds the bounds of cross-examination. *Howard v. Commonwealth,* 12 S.W.2d 324, 329 (Ky. 1928). With that being said, this improper line of questioning rarely results in a finding of manifest injustice or reversible error. *See, e.g., Ernst v. Commonwealth,* 160 S.W.3d 744, 764 (Ky. 2005); *Moss v. Commonwealth,* 949 S.W.2d 579, 583 (Ky. 1997). Considering the amount of evidence against Appellant, we do not believe the verdict would have been different had these questions been

withheld. Thusly, despite the Commonwealth's questioning being improper, we find no palpable error.

Conclusion

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

All sitting. All concur.

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