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RENDERED: AUGUST 29, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000205-MR

DANTE C. STONE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
NO. 14-CR-002425

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jefferson County jury found Dante Corvette Stone guilty of murder. He was sentenced to life in prison. This appeal followed as a matter of right. Having reviewed the arguments of the parties, we affirm the judgment of the Jefferson County Circuit Court.

I. BACKGROUND

In the early morning hours of September 10, 2014, Chauncey Miles was shot in the chest and killed. Detective Leigh Maroni was the lead investigator on the case for Louisville Metro Police Department. During her investigation, Detective Maroni interviewed multiple witnesses and potential suspects,

including Maegan Wheeler, Bryan Davis, and Dante Stone. Wheeler and Stone were in a relationship at the time of the shooting. Wheeler, Davis, and Miles were all friends and had been for a number of years. Both Wheeler and Davis identified Stone as the individual who shot and killed Miles. Stone was arrested and charged with murder.

Stone was initially appointed an attorney from the Louisville Metro Public Defender's Office to represent him. After it was discovered that the Public Defender's Office also represented Wheeler in an unrelated case, Stone was assigned conflict counsel. While he had counsel representing him, Stone sent several letters to the trial court judge in the case. He also filed several *pro se* motions. He eventually requested to represent himself, and the trial court granted this request. The trial court also ordered Stone's conflict counsel to act as stand-by counsel. The case was litigated in the trial court for over three years, during which Stone requested that his stand-by counsel be promoted to hybrid counsel. The trial judge granted this request as well. Throughout the three years, the trial court held several *ex parte* hearings to address issues relating to Stone's concerns about his counsel, as well as his desire and ability to represent himself.

At trial Stone undertook many of the main trial tasks. He performed *voir dire*, presented his own opening statement and closing argument, and cross-examined several of the Commonwealth's witnesses. He made many of his own objections and participated fully in bench conferences. Stone was found guilty, and the jury recommended a sentence of life imprisonment. The trial court

followed this recommendation. Stone now appeals this conviction as a matter of right.

II. ANALYSIS

Stone argues several grounds for relief: (1) the trial court erred by failing to limit the scope of Stone's self-representation; (2) the trial court erred in admitting evidence of Stone's paranoia; (3) the trial court erred in prohibiting Stone from approaching Wheeler during his cross-examination of her; and (4) the trial court erred in admitting character evidence. We will address each contention in turn.

A. Scope of Self-representation

Stone's first argument on appeal is that the trial court erred in failing to limit the scope of his self-representation. He contends that his mental illness, along with his confusion about the legal system, created a situation in which the trial court had a duty to impose limits on his self-representation. A trial court's decision to allow a defendant to represent himself is generally reviewed under an abuse of discretion standard. However, because Stone requested to represent himself, this issue is not preserved. Therefore, we will review the trial court's actions for palpable error under Rule of Criminal Procedure (RCr) 10.26. We will reverse under the palpable error standard only when a "manifest injustice has resulted from the error." RCr 10.26. "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). When we engage in palpable error review, our "focus is

on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013).

The United States and Kentucky constitutions give defendants the right to counsel as well as the right to represent themselves. *See Faretta v. California*, 422 U.S. 806 (1975); Ky. Const. § 11. Further, the Kentucky Constitution gives defendants the right to hybrid representation.[1] Thus, in Kentucky, unlike in federal courts, "an accused may make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services (within, of course, the normal scope of counsel services)." *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974). Any waiver of right to counsel, even a limited waiver to create hybrid representation, must be knowing and intelligent. "[T]he trial court must conduct a hearing to determine that any such waiver is made knowingly and intelligently." *Major v. Commonwealth*, 275 S.W.3d 706, 718 (Ky. 2009) (citing *Wake*, 514 S.W.2d at 697). This hearing must "comport[] with the requirements and protections afforded" to defendants by *Faretta*. *Id.* at 718–19.

The standard for competency to stand trial is the same as the standard for competency to waive other constitutional rights, including the right to counsel. *Id.* at 719. *Dusky v. United States* holds that the standard for competency to stand trial is whether the defendant has "sufficient present

[1] *See* Ky. Const. § 11 ("In all criminal prosecutions the accused has the right to be heard by himself and counsel.").

ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." 362 U.S. 402 (1960) (per curiam). "Upon a finding of competence to stand trial, a criminal defendant is deemed to be competent enough to choose to waive any of his constitutional rights." *Major*, 275 S.W.3d at 719 (citing *Godinez v. Moran*, 509 U.S. 389, 396 (1993)).

> "[S]ince there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights," a *Dusky* finding of competence to stand trial entails a finding of competence to exercise or waive any other constitutional right.

Id. (quoting *Godinez*, 509 U.S. at 399).

In this case, Stone was evaluated for competency at the Kentucky Correctional Psychiatric Center (KCPC). The doctor at KCPC expressed an opinion that Stone was competent to stand trial. The trial court, based on the report by the KCPC doctor, found Stone to be competent to stand trial. Stone's competency to stand trial was not an issue raised on appeal, and therefore is not in dispute.

We acknowledge that some defendants can be considered borderline-competent. In those cases, the trial judge has the discretion to limit the defendant's self-representation if necessary to ensure he receives a fair trial. We have previously stated in *Major*:

> [*Indiana v.*] *Edwards* found that: "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to

> do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards* thus recognizes a trial judge's right to take a realistic account of a particular defendant's mental capacities and to create an individualized representation specifically tailored to a defendant's abilities; a just mix designed to assure defendants, such as Appellant, a fair trial.

Id. at 721 (quoting *Indiana v. Edwards*, 554 U.S. 164, 176 (2008)) (internal citations omitted). The situation in this case, however, is the reverse of that in *Major*. In *Major*, the defendant argued that the trial court abused its discretion by limiting the scope of his self-representation. Stone, in contrast, is arguing that the trial court abused its discretion in *failing* to limit the scope of his self-representation.

In the case at bar, the trial court held a short but effective *Faretta* hearing.[2] The trial court ensured that Stone's waiver of his right to counsel was knowing and intelligent. Also, as the jury trial date approached, the trial court held an *ex parte* hearing to discuss the division of labor between Stone and his hybrid counsel. From our review of the record, it is clear that Stone's decision to waive his right to be represented by counsel and assert his right to hybrid representation was knowing and intelligent.

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[2] At his *Faretta* hearing, the defendant stated he wanted two law students to serve as whisper counsel. He was clear that he did not want his current assigned counsel to represent him. However, he also stated that he did not want to address the jury himself. At this hearing, he, arguably, equivocated in his request to waive his right to counsel. However, the trial court found that he "unequivocally stated that he wanted to represent himself." There is no argument on appeal that Stone's request was equivocal, so we will not address it further.

Stone cites to his history of mental health diagnoses, his "questionable motion practice," his failure to understand that he was facing life imprisonment (as opposed to life without parole), and his ineffective and inefficient cross-examinations to demonstrate that the trial judge should have limited the scope of his self-representation. Stone also argues that the KCPC doctor's diagnosis of antisocial personality disorder was enough to require the trial court to limit his self-representation. We do not find these arguments persuasive.

While it is clear from the record that Stone did not have a complete and accurate understanding of all of the laws to which he cited, this is not required. "[The defendant's] technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Faretta*, 422 U.S. at 836.

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'

Id. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). As we have previously stated, the record is clear that Stone's decision to represent himself was "made with eyes open."

The United States Supreme Court has stated:

> [A]lthough the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored[.]" Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," a

> criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.

Godinez, 509 U.S. at 400 (quoting *Faretta*, 422 U.S. at 834-36) (emphasis in original) (internal citations omitted). In this case, Stone boasted numerous times about how he previously represented himself and "beat" a felony charge. He also asserted that he assisted in writing an appellate brief that eventually resulted in one of his convictions being reversed. He was able to make many articulate arguments to the trial judge. He conducted his own *voir dire*, presented his own opening statement and closing argument, cross-examined witnesses, and participated in bench conferences. While Stone's presentation of his defense may not have been as skillful as that of an attorney, this mere lack of skill, even coupled with mental health diagnoses, does not create a concern that his competency was so borderline as to require the trial court to limit the scope of his self-representation. Accordingly, the trial judge did not err by failing to exercise her discretion in limiting the scope of Stone's self-representation.

B. Evidence of Stone's Paranoia

Stone next argues that the trial court improperly admitted evidence of his paranoia. During the Commonwealth's direct examination of Detective Leigh Maroni, portions of Stone's court filings were admitted as evidence. The specific evidence complained of is the following statement made by Stone in a motion he had filed with the trial court:

> There were several individuals of interest whom [sic] played a part or contributed to the apprehension of Mr. Stone. These individuals [sic] names and identities are being withheld. But

> they are identifiable as an agent posing as an AT&T worker who planted a tracking telephone on Mr. Stone, a young man posing as a TARC passenger used to identify Mr. Stone, two individuals posing as a couple used to identify Mr. Stone, an agent posing as a Dominos pizza delivery driver used to signal law enforcement.

The Commonwealth, in closing argument, then referred back to this statement when she stated, "The defendant is paranoid. He's cracking under the pressure that the police are on to him. He thinks that police are spying on him, sending someone to act as the Domino's deliveryman." The Commonwealth, however, then went on to say, "Remember he said to Sargent Maroni, 'I was talking in code for nothing?' He thought that they were listening in on his calls. You don't need to talk in code if you have nothing to hide."

Prior to Stone's statements being admitted at trial, hybrid counsel objected. Thus, this alleged error was properly preserved and will be reviewed under an abuse of discretion standard. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Evidence must be relevant to be admissible. Kentucky Rules of Evidence (KRE) 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

Stone argues that evidence of his paranoia is improper character evidence under KRE 404. In general, character evidence is inadmissible unless it falls within certain exceptions. KRE 404(a). "The word 'character,' used most narrowly and accurately, describes the disposition or personality of an individual." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.20[1][a], at 102 (5th ed. 2013). We do not find that Stone's paranoia in this case is a character trait falling under the purview of KRE 404. The proper analysis is one weighing relevancy and undue prejudice under KRE 401 and 403.

Stone also cites to *Stansbury v. Commonwealth* for the proposition that evidence of mental illness should generally be excluded. 454 S.W.3d 293 (Ky. 2015). However, in *Stansbury*, this Court stated, "[G[enerally, evidence of [the defendant's] mental illness and anger management issues *could* have been excluded." *Id.* at 302 (emphasis added). Further, evidence of a heightened sense of paranoia in a particular circumstance is not necessarily the same as evidence of mental illness.

The Commonwealth argues that Stone's statements were relevant to rebut his defense that there was a conspiracy against him. This was not argued by the Commonwealth at trial, nor do we see the relevancy. However, we find that the evidence of his paranoia after the crime was committed to be relevant to his state of mind and guilty conscience. This evidence is of limited relevance,

however, and must be closely scrutinized under the balancing test found in KRE 403 – specifically the danger of undue prejudice.

Undue prejudice goes beyond evidence that is merely detrimental to a party's case. *Webb v. Commonwealth*, 387 S.W.3d 319, 326 (Ky. 2012). Evidence is unduly prejudicial if there is "a risk that it might produce a decision grounded in emotion rather than reason...[or] a risk that the evidence might be used for an improper purpose." Lawson, *The Kentucky Evidence Law Handbook* § 2.15[3][b], at 93 (internal citations omitted). In this case, the evidence of Stone's paranoia was limited to the admission, through Detective Maroni, of a single statement Stone made in a motion he filed with the trial court, quoted *supra*. It was also referenced in a small portion of the Commonwealth's closing argument. The trial judge excluded the motions themselves, therefore, the motions were not available to the jury during deliberations. Given the small role this evidence played in a multiple day trial, we do not believe there was a great risk that it would produce an emotion-based decision by the jury or that the jury would use it for an improper purpose. Therefore, we do not find that this evidence, despite its limited relevance, is *substantially outweighed* by the danger of *undue* prejudice. The trial court did not abuse its discretion in admitting this evidence.

C. Different Standards for Approaching Witnesses

Stone next argues that the trial court erred in prohibiting him from approaching Maegan Wheeler and Bryan Davis with exhibits during his cross-examination of them. Only the potential error regarding Wheeler's cross-

examination is preserved. Therefore, we will review the trial court's ruling prohibiting Stone from approaching Wheeler for an abuse of discretion and its ruling prohibiting Stone from approaching Davis for palpable error.

In a pretrial hearing, the Commonwealth requested that Stone be prohibited from approaching Wheeler during his cross-examination of her. After some discussion, the trial judge indicated that she was inclined to prohibit both sides from approaching Wheeler and ended the hearing stating, "Let's be thinking about it." At trial, the court overruled Stone's objection to the Commonwealth's approaching Wheeler, yet still prohibited him from approaching her. The trial court's basis for this ruling was Wheeler's allegation that Stone had previously committed acts of domestic violence against her.

At the beginning of Stone's cross-examination of Bryan Davis, Stone handed a transcript to a sheriff's deputy to be given to Davis instead of approaching Davis with it himself. Later in his cross-examination of Davis, Stone asked the trial court, during a bench conference, if he could show Davis some of the exhibits that had previously been admitted by the Commonwealth. The trial court told the parties that hybrid counsel would assist with this. Stone made no objection to this procedure.

Stone argues that the trial court's imposition of different limitations on his cross-examination of witnesses, compared to the attorneys, eroded his presumption of innocence. We do not find this argument persuasive.

As discussed before, a defendant in a criminal case has the constitutional rights to be represented by counsel, to represent himself, and to

have hybrid counsel. The right to represent oneself includes the right "to control the organization and content of [one's] own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). "[W]hether the defendant had a fair chance to present his case in his own way ... [and t]he specific rights to make his voice heard ... form the core of a defendant's right of self-representation." *Partin v. Commonwealth*, 168 S.W.3d 23, 27 (Ky. 2005) (quoting *Wiggins*, 465 U.S. at 177). A defendant does not, however, have a constitutional right to personally cross-examine the victim of his crime. *Id.* at 27. In *Partin*, we further addressed the trial court's authority in these types of situations:

> Furthermore, KRE 611(a) provides that a trial court "shall exercise reasonable control over the mode ... of interrogating witnesses ... so as to ... [p]rotect witnesses from harassment or undue embarrassment." In the context of a Confrontation Clause claim, the United States Supreme Court has held that "trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety...." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). *See also Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (The Confrontation Clause only "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

Id. at 29. A trial court's decision to limit a *pro se* defendant's cross-examination of witnesses is reviewed for an abuse of discretion. *Id.*

In this case, Stone was permitted to personally cross-examine any of the witnesses that he chose, having delegated cross-examination of certain witnesses to his hybrid counsel. He merely was prohibited from approaching Maegan Wheeler and Bryan Davis with exhibits. Stone made motions and objections, argued at bench conferences, conducted his own *voir dire*, and gave his own opening statement and closing argument, and in every other respect was able to "present his case in his own way." Given the allegations of domestic violence, discussed in more detail below, we do not find that the trial court abused its discretion in prohibiting Stone from approaching Wheeler during his cross-examination of her. Further, given the clear animosity between Stone and Davis, we do not find palpable error in the trial court's decision to prohibit Stone from approaching Davis.

D. Evidence of Domestic Violence and Violent Disposition

Stone's next argument is that the trial court erred in admitting evidence of specific acts of domestic violence and evidence of his violent disposition. The potential error in the admission of the specific acts of domestic violence was preserved, therefore the trial court's ruling on that issue will be reviewed for an abuse of discretion. No objection was made to the evidence of Stone's violent disposition, so that evidence will be reviewed for palpable error.

1. Specific Acts of Domestic Violence

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This evidence may be admissible if offered for some

other purpose. Because the degree of the potential prejudice associated with evidence of this nature is significantly higher, exceptions allowing evidence of collateral criminal acts must be strictly construed. As a result, KRE 404(b) is exclusionary in nature. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). The admissibility of KRE 404(b) evidence is within the discretion of the trial court. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007).

In order to determine if other bad acts evidence is admissible, the trial court should use a three-prong test: (1) Is the evidence relevant? (2) Does it have probative value? (3) Is its probative value substantially outweighed by its prejudicial effect? *Purcell v. Commonwealth*, 149 S.W.3d 382, 399-400 (Ky. 2004). The first prong of the test is whether the proffered evidence is relevant for a purpose other than criminal disposition. KRE 404(b)(1) provides a list of other acceptable uses of "other bad acts" evidence. This list, however, is not exhaustive but illustrative. *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998).

In Stone's case, the specific acts of domestic violence were offered to explain why Wheeler lied to the police when first questioned about who shot Miles. She says she did not tell the police Stone was the shooter because she was afraid of him. She said she was afraid of him because he had previously assaulted her. The trial court allowed her to testify to two specific acts of domestic violence – an instance when Stone kicked her in the hip at the site of a surgical incision, and an instance when he punched her, causing a black eye.

Stone cites extensively to *Wilson v. Commonwealth* in his brief to argue that the level of detail the jury heard about the specific acts of abuse was overly prejudicial compared to its probative value. 438 S.W.3d 345 (Ky. 2014). However, Stone's case is much more analogous to *Dickerson v. Commonwealth*, 485 S.W.3d 310 (Ky. 2016). In *Dickerson*, testimony regarding prior domestic violence perpetrated by the defendant on the witness was admitted to explain, among other things, why, in the witness's initial statements to the police, she minimized the defendant's culpability. This is almost exactly the situation in Stone's case. Just as the trial court in *Dickerson* did not abuse its discretion in admitting the prior acts of domestic violence, we hold that the trial court in this case did not abuse its discretion in admitting testimony regarding Stone's prior domestic abuse of Wheeler.

2. Violent Disposition

Maegan Wheeler testified that Stone was "a very dangerous and vicious person." She further testified "it's sinking in that I was in danger, my family was in danger." No objection was made, so any potential error was not preserved. As such, we will review the admission of this evidence for palpable error. To determine if an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). To be palpable, an error must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (citing *Black's Law Dictionary* (6th ed. 1995)). A palpable error must be so grave that,

if uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005).

In general, character evidence is inadmissible unless it falls within certain exceptions. KRE 404(a). It is a long-held tradition in our common law that "[t]he prosecution could not introduce evidence of evil disposition for the purpose of proving commission of a crime." Lawson, *The Kentucky Evidence Law Handbook* § 2.20[2][a], at 104. In this case, Wheeler's testimony was relevant to her mental state, as opposed to being offered solely to prove that Stone acted in conformity with his "dangerous and vicious" personality. Any potential error in the admission of this evidence does not rise to the level of palpable error.

E. Cumulative Error

Stone's final argument is that his conviction should be reversed for cumulative error. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (internal citation omitted). In this case, we have not found the errors to be such, and thus, Stone's cumulative error argument is without merit.

III. CONCLUSION

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

All sitting. All concur.

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