

2006 WL 436071

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ST RAP Rule 41 before citing.

Supreme Court of Kentucky.

Scot Eugene GAITHER Appellant

v.

COMMONWEALTH OF
KENTUCKY Appellee

No. 2004–SC–0474–MR

|

Feb. 23, 2006.

Synopsis

Background: Defendant was convicted following a jury trial in the Circuit Court, Daviess County, [Thomas O. Castlen, J.](#), of first-degree manslaughter, kidnapping, theft by unlawful taking of property valued at less than \$300, and tampering with physical evidence. Defendant appealed.

Holdings: The Supreme Court held that:

[1] hearing was not required into possible effect on verdict resulting from discussion of case by witness during break in prosecution;

[2] trial court did not abuse its discretion in refusing to admonish jury after playing inaudible cassette tape;

[3] removal of biased juror through use of peremptory challenge was harmless error;

[4] trial court did not err in failing to conduct pre-trial hearing to determine whether Commonwealth's expert witness was qualified to testify;

[5] evidence was sufficient to support conviction of first-degree manslaughter;

[6] alleged prosecutorial misconduct did not warrant reversal of conviction; and

[7] jury instruction on kidnapping was proper.

Affirmed.

[Lambert](#), C.J., concurred in the result only.

[Cooper](#), J., dissented without an opinion.

West Headnotes (18)

[1] **Criminal Law** 🔑 Objections and disposition thereof

Hearing was not required into possible effect on verdict resulting from discussion of case by witness during break in manslaughter prosecution, where witness testified that she discussed case in break room during lunch with her family, but that no jurors were present, and, after trial resumed, no jurors reported hearing any comments about case.

[2] **Criminal Law** 🔑 Excluding evidence from consideration

Trial court did not abuse its discretion in refusing to admonish jury after playing inaudible cassette tape of conversation between defendant and victim's daughter in manslaughter prosecution; trial judge stopped tape after 10 minutes because defendant's side of conversation was inaudible, defendant's objection to tape was sustained, and defendant did not request further curative relief.

[3] **Criminal Law** 🔑 Sound recordings
Criminal Law 🔑 Documents or demonstrative evidence

Cassette tape made by police of phone calls made by defendant to victim's family was properly admitted into evidence in manslaughter prosecution, and thus there was no error in allowing jury to hear tape during deliberations.

1 Case that cites this headnote

[4] **Criminal Law** 🔑 Competency of jurors and challenges

Defendant's contention that Commonwealth discriminated against prospective jurors who had mental health issues in manslaughter prosecution was not preserved for appellate review, where defendant failed to object to Commonwealth's use of peremptory challenges, and defendant accepted final composition of jury panel.

[5] **Criminal Law** 🔑 Sustaining challenges to jurors

Removal of biased juror through use of peremptory challenge was harmless error in manslaughter prosecution, where jury that heard case was impartial.

[6] **Jury** 🔑 Relationship to attorney or counsel

Juror who stated during voir dire that she knew Commonwealth's attorney and his staff because her son was prosecuted and convicted of felony was not biased juror in manslaughter prosecution, where defendant did not object to juror serving on panel, and there was no evidence juror was incapable of rendering fair and impartial verdict. [Rules Crim.Proc., Rule 9.36.](#)

[7] **Criminal Law** 🔑 Bodily and mental condition

Criminal Law 🔑 Determination of question of competency

Trial court did not err in failing to conduct pre-trial hearing to determine whether Commonwealth's expert witness was qualified to testify in manslaughter prosecution; expert was licensed psychologist employed by Kentucky Correctional Psychiatric Center (KCPC), he conducted two court-ordered competency evaluations of defendant, expert was called in rebuttal following testimony of defendant's expert and, because defendant's expert testified at length regarding findings in report prepared by Commonwealth's expert, it was apparent that

Commonwealth's expert was qualified to testify regarding tests administered at KCPC.

[8] **Criminal Law** 🔑 Mental condition or capacity

Jury was not improperly confused by Commonwealth's use of testimony of its expert witness regarding defendant's competency to stand trial to rebut defendant's mental illness defense in manslaughter prosecution, where both parties emphasized difference between competency to stand trial and criminal responsibility for charged crimes, and defendant's expert relied on Commonwealth's expert evidence to back up his findings.

[9] **Homicide** 🔑 Manslaughter in general

Evidence was sufficient to support conviction for first-degree manslaughter; defendant shot former business partner and attempted to make it appear that kidnapping had occurred.

[10] **Criminal Law** 🔑 Arguments and conduct of counsel

Defendant's objections to conduct of prosecutor in questioning witness and in making closing argument in prosecution for first-degree manslaughter were not preserved for appellate review, where defendant's failure to move for mistrial signaled that requested admonition was sufficient remedy for prosecutor's improper comments.

[11] **Criminal Law** 🔑 Particular statements, arguments, and comments

Criminal Law 🔑 Presentation of evidence

Prosecutor's comments during cross-examination of defendant, questioning of lead police detective, and additional comments made during prosecutor's closing argument did not constitute palpable error in prosecution for first-degree manslaughter, where manifest error did not result from alleged error affecting substantial

rights of defendant. [Rules Crim.Proc., Rule 10.26](#).

element of offense and required affirmative finding by jury on all elements.

[12] Criminal Law 🔑 Miscellaneous particular issues

Alleged prosecutorial misconduct did not warrant reversal of conviction in first-degree manslaughter prosecution, where defendant received fundamentally fair trial in case. [Rules Crim.Proc., Rule 10.26](#).

[17] Witnesses 🔑 Documents made by or in the presence of witness

Use of notes by lead detective while testifying in prosecution for first-degree manslaughter and kidnapping was not improper, where detective referred to his notebook for specific dates and times ransom telephone calls were made to victim's family.

[13] Sentencing and Punishment 🔑 Admissibility
Sentencing and Punishment 🔑 Hearing

Combined capital sentencing and truth-in-sentencing hearing did not deny defendant right to present mitigation evidence in prosecution for first-degree manslaughter, where defendant's parents testified as mitigation witnesses during penalty phase, and jury was instructed on mitigating circumstances when determining defendant's punishment.

[18] Criminal Law 🔑 After party offering evidence has rested

Trial court did not abuse its discretion in allowing Commonwealth to reopen its case in rebuttal moments after Commonwealth's attorney stated case was closed in prosecution for first-degree manslaughter and kidnapping; Commonwealth's attorney renounced his statement that case was closed within one minute after realizing he had failed to call expert witness as rebuttal witness, and it was unlikely defendant suffered harm due to reopening of case, considering that defendant's expert had previously testified regarding portions of report prepared by Commonwealth's expert.

[14] Criminal Law 🔑 Estoppel or Waiver

Defendant's contention that trial court erred in failing to apply kidnapping exemption statute was not preserved for appellate review, where, during defendant's first motion for directed verdict in kidnapping prosecution, defense counsel told trial court that he was not arguing that exemption statute applied. [KRS 509.050](#).

1 Case that cites this headnote

Appeal from Daviess Circuit Court Honorable [Thomas O. Castlen](#), Judge. 02–CR–00446.

Attorneys and Law Firms

Scot Eugene Gaither, Kentucky State Penitentiary, Eddyville, KY, Appellant pro se.

[Gregory D. Stumbo](#), Attorney General, [Ian G. Sonego](#), Assistant Attorney General, [Matthew Robert Krygiel](#), Assistant Attorney General, Office of the Attorney General, Frankfort, KY, for Appellee.

[15] Criminal Law 🔑 Kidnapping charges

Evidence did not warrant giving of jury instruction on unlawful imprisonment as lesser-included offense to kidnapping.

[16] Kidnapping 🔑 Instructions

Jury instruction on kidnapping was proper, where instruction properly enumerated each

MEMORANDUM OPINION OF THE COURT

AFFIRMING

*1 Appellant, Scot Eugene Gaither, was convicted by a Daviess Circuit Court jury of first-degree manslaughter, kidnapping, theft by unlawful taking of property valued less than \$300, and tampering with physical evidence. The jury recommended a life sentence without the possibility of parole, and the trial court entered judgment accordingly. Appellant prosecutes a *pro se* appeal to this Court as a matter of right. [Ky. Const. § 110\(2\)\(b\)](#).

FACTUAL BACKGROUND

James Parson, Sr., was reported missing on August 30, 2001. The next day Parson's family received a telephone call claiming Parson was being held for ransom. Since several calls concerning ransom were made to Parson's home, the Kentucky State Police (KSP) and the FBI began surveillance. As a result of the surveillance, Appellant was arrested while making a ransom call at a pay telephone.

Appellant was indicted for the murder, kidnapping, and robbery of Parson, Appellant's former business partner. Appellant testified that on the day of Parson's disappearance, Parson drove Appellant to a rural area and held Appellant at gunpoint. According to Appellant's testimony, during a struggle for the weapon, the gun discharged and Parson was shot. Appellant left Parson for dead in a roadside ditch, then drove Parson's van to Evansville, Indiana, where it was abandoned in a shopping mall parking lot. Appellant argued he acted in self-defense, and that he was mentally ill at the time.

Appellant raises fifteen claims of error on appeal. While we find most of Appellant's claims are unpreserved for our review, we address each error in light of the severity of the punishment involved. Because several arguments relate to the same issue, we have combined some of the arguments presented individually in Appellant's brief.

I.

[1] Appellant argues he was entitled to a *Remmer* hearing after the trial court learned a witness for the Commonwealth discussed the case during a break in the trial.  *Remmer*

v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). This issue is not properly preserved for review. Nevertheless, we find no error because there is nothing to suggest that any jurors heard comments from Appellant's ex-girlfriend.

This Court determined the propriety of a *Remmer* hearing in  *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky.2004), stating “a hearing is required ‘only when the alleged contact presents a likelihood of affecting the verdict,’ and bias is not implied, but must be demonstrated by the moving party.”

 *Id.* at 10 (quoting and citing  *United States v. Frost*, 125 F.3d 346, 347 (6th Cir.1997)).

During voir dire, the trial judge admonished both jurors and witnesses against speaking about the case. Witness Patricia Zamorano, Appellant's ex-girlfriend, testified regarding a conversation she had with Appellant after his arrest. A bailiff told the trial judge that Zamorano was overheard discussing the case in the break room during lunch. The trial judge questioned Zamorano, who admitted she discussed the case with family members, but no jurors were present. The trial resumed, and no jurors reported hearing any comments about the case. Appellant made no objection, and there was no indication that any juror heard Zamorano's statement. As such, a *Remmer* hearing was not required.

II.

*2 [2] Appellant contends the trial court erred by failing to admonish the jury after playing an inaudible cassette tape. The Commonwealth played an audiotape of conversations between Appellant and the victim's daughter, Leigh Ann Dukes. Appellant placed collect phone calls to Ms. Dukes from jail, and she recorded the conversations. Appellant objected to the recording because it was inaudible and prejudicial. The trial judge ultimately stopped the tape after ten minutes because only Ms. Dukes' side of the conversation was audible.

The trial judge has discretion whether to exclude a recording that is inaudible.  *Sanbon v. Commonwealth*, 754 S.W.2d 534, 540 (Ky.1988). After review of the record, we find no evidence the trial court abused its discretion. Furthermore, contrary to Appellant's argument, the judge was not required to admonish the jury *sua sponte*.  *Hall v. Commonwealth*,

817 S.W.2d 228, 229 (Ky.1991), *overruled on other grounds* by  *Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky.1996). Appellant's objection to the tape was sustained, and he did not request further curative relief. Consequently, there was no reversible error.

III.

[3] Appellant claims the trial court erred in allowing the jury to listen to an audiotape during deliberations. This argument is unpreserved and without merit. The cassette tape was a recording by KSP detectives of phone calls made by Appellant to the victim's family. At trial, the tape was properly authenticated and admitted into evidence without objection. Additionally, the jury heard the tape in open court during the testimony of the victim's son. After review of the record, it is apparent there is no error in allowing the jury to hear the tape during deliberations, as it was properly admitted evidence. See *Burkhart v. Commonwealth*, 125 S.W.3d 848, 850 (Ky.2003).

IV.

[4] Appellant's fourth and fifth claims of error are combined for discussion in this section as both relate to jury selection. Appellant first contends the Commonwealth discriminated against prospective jurors who had mental health issues. Appellant points out that the Commonwealth used two peremptory challenges to strike jurors who had received psychiatric treatment in the past. We find this claim entirely speculative and without merit. Furthermore, this claim is unpreserved, as Appellant failed to object to the Commonwealth's use of peremptory challenges. Moreover, Appellant accepted the final composition of the jury panel.

[5] Appellant also asserts error because a peremptory challenge was "wasted" on a prospective juror who should have been struck for cause, thereby allowing a "biased" juror to sit on the jury. Prospective juror S.O. disclosed during voir dire that she babysat for the victim's grandchild on a few occasions. S.O. further noted that she had no personal or social relationship with the family and her ability to be impartial was not impaired. This Court recently held that provided the jury that hears the case is impartial a biased juror being removed via peremptory challenge is harmless error. *Morgan v. Commonwealth*, — S.W.3d —, slip op. at 10

(Ky.2006). Accordingly, there is no error, as S.O. did not sit on Appellant's jury.

*3 [6] Appellant also claims a biased juror was impaneled. During voir dire, Juror C.E. stated she knew the Commonwealth's Attorney and his staff because her son was prosecuted and convicted of a felony. Appellant did not object to C.E. serving on the panel, and there is no evidence C.E. was incapable of rendering a fair and impartial verdict. RCr 9.36. Consequently, we find no error in jury selection.

V.

[7] In this section Appellant's enumerated claims six, eight, and nine are combined as all relate to his mental illness defense. Appellant claims the trial court erred in failing to conduct a pretrial *Daubert* hearing to determine whether Dr.

Steven Free was qualified to testify.  *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Dr. Free is a licensed psychologist employed by Kentucky Correctional Psychiatric Center (KCPC), and he conducted two court-ordered competency evaluations of Appellant. Dr. Free was called in rebuttal following the testimony of Appellant's expert.

"We decline to speculate on the outcome of an unrequested *Daubert* hearing, or to hold that the failure to conduct such a hearing *sua sponte* constitutes palpable error."  *Tharp v. Commonwealth*, 40 S.W.3d 356, 368 (Ky.2000). In this case, Appellant's expert testified at length regarding the findings in Dr. Free's report. Consequently, it was likely that Dr. Free would be called in rebuttal, and it is apparent Dr. Free was qualified to testify regarding the tests administered at KCPC. Accordingly, the trial court did not err in failing to conduct a pretrial *Daubert* hearing.

[8] Appellant next alleges the Commonwealth improperly confused the jury by utilizing the testimony of Dr. Free and the KCPC competency evaluation to rebut Appellant's mental illness defense. After review of the record, it is clear that both parties emphasized the difference between competency to stand trial and criminal responsibility for the charged crimes. Furthermore, Appellant's expert witness relied on the KCPC evaluation to "back up" his findings and read aloud from the KCPC report during his testimony. Consequently, we find no error in the Commonwealth's use of competency evidence to rebut the mental illness defense.

[9] Appellant also asserts the combination of the two preceding errors effectively relieved the Commonwealth of its burden of proof and precluded a verdict of guilty but mentally ill (GBMI). It appears Appellant essentially argues the evidence was insufficient to support the jury's verdict. We find this argument unpreserved, as it was not raised in Appellant's motion for directed verdict at the close of evidence. However, even if the issue were preserved, Appellant does not have a viable claim. "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."  *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). We do not find the jury's verdict clearly unreasonable, and the evidence presented by the Commonwealth was sufficient to support the jury's decision in this case.

VI.

*4 The next issue raised by Appellant is prosecutorial misconduct. Appellant asserts seven different errors on the part of the Commonwealth.

[10] We first examine the comments to which Appellant entered an objection. Appellant objected to the Commonwealth "badgering" Appellant's expert witness on cross-examination, and he also objected to perceived misstatements of law in closing argument. In  *West v. Commonwealth*, 780 S.W.2d 600, 603 (Ky.1989), this Court stated that defense counsel's failure to move for a mistrial signaled that the requested admonition was a sufficient remedy for the prosecutor's improper comments. In the case at bar, Appellant's defense counsel merely objected to the improper statements, and sought no further remedy in the form of an admonition or mistrial. "[I]t is clear that a party must inform the court of the error and request the relief to which he considers himself entitled. Otherwise the issue may not be raised on appeal."  *Id.* at 602. Accordingly, we presume the relief granted by the trial court was satisfactory.

[11] Appellant next urges palpable error review of comments made during the cross-examination of Appellant, questioning of the lead police detective, and additional comments made during the Commonwealth's closing argument. Relief may be granted for palpable error under RCr 10.26 only if "manifest injustice" results from an error

affecting the "substantial rights" of a party. We do not find that Appellant's claim reaches the level of palpable error in this case.

[12] Furthermore, even if the claim were preserved, it is without merit. To warrant reversal, prosecutorial misconduct must be so egregious "as to render the entire trial fundamentally unfair."  *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky.1996). The reviewing court "must focus on the overall fairness of the trial, and not the culpability of the prosecutor."  *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411–12 (Ky.1988). The evidence reveals that Appellant received a fundamentally fair trial in this case. Consequently, we find no reversible error due to prosecutorial misconduct.

VII.

[13] Appellant next claims he was denied the right to present mitigation evidence because the punishment phase combined the capital sentencing and truth-in-sentencing hearing. Appellant concedes this issue is unpreserved. The record also reflects Appellant requested that his attorney not present any mitigating evidence but instead ask the jury to consider the death penalty.

At any rate, Appellant's argument is without merit because review of the record clearly shows Appellant's parents testified as mitigation witnesses during the penalty phase. Likewise, the jury was instructed on mitigating circumstances when determining Appellant's punishment. We also note Appellant suffered no prejudice as a result of combined sentencing proceedings. Accordingly, there is no reversible error.

VIII.

Appellant claims he was denied effective assistance of counsel because his attorney failed to fully investigate Appellant's potential neurological impairment and failed to object to alleged prosecutorial misconduct. We decline to address Appellant's assertions of ineffective assistance at this time, as this issue has not yet been presented to the trial court.

See  *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky.1998).

IX.

***5 [14]** Appellant claims the trial court erred by failing to apply the kidnapping exemption statute, [KRS 509.050](#). Appellant also alleges the trial court erred in declining to instruct the jury on first-degree unlawful imprisonment.

After a review of the record, we find both claims are unpreserved and without merit. During Appellant's first motion for directed verdict, counsel told the trial court he was not arguing that the exemption applied, and the trial court agreed.

[15] Likewise, Appellant was not entitled to an instruction on unlawful imprisonment as a lesser-included offense to kidnapping. "[T]o support a lesser included instruction the posture of the evidence must be such as to create a reasonable doubt as to whether the defendant is guilty of the higher or lower degree."  [Tipton v. Commonwealth](#), 640 S.W.2d 818, 820 (Ky.1982). In this case, both counsel agreed there was no evidence warranting an unlawful imprisonment instruction. The trial court agreed and instructed only on kidnapping. Accordingly, there is no error.

X.

[16] Appellant contends the kidnapping instruction was unconstitutional because it allowed the jury to base guilt solely on the fact the victim was not released alive. This claim is unpreserved and without merit. After a review of the record, we note the kidnapping instruction properly enumerates each element of the offense and requires an affirmative finding by the jury on all elements. Accordingly, there is no error.

XI.

[17] Appellant claims he was denied a fair trial because the lead detective improperly bolstered the testimony of other witnesses and impermissibly reviewed notes while testifying. Appellant concedes this claim is unpreserved and requests review as palpable error.

We find no evidence the testimony was improper. Detective Ballard referred to his notebook for the specific dates and times ransom telephone calls were made to the victim's family. Furthermore, Appellant acknowledges the detective was allowed to sit at counsel table during the trial. Accordingly, there is no palpable error.

XII.

[18] Appellant claims the trial court erred when it allowed the Commonwealth to reopen its case in rebuttal after stating the case was closed. The Commonwealth's Attorney announced closed, but retracted his statement within one minute upon realizing he failed to call Dr. Free as a rebuttal witness. Appellant objected to the reopening of the case, but the trial court allowed the testimony. The trial court noted Appellant suffered no prejudice because Dr. Free was expected to testify, and the time that elapsed was brief.

It is within the discretion of the trial court to allow a party to reopen its case for additional evidence.  [Davis v. Commonwealth](#), 795 S.W.2d 942, 947 (Ky.1990); [RCr 9.42](#). It appears Appellant likely suffered no harm due to the reopening of the Commonwealth's case, especially considering Appellant's expert had previously testified regarding portions of Dr. Free's report. Consequently, we find the trial court did not abuse its discretion.

CONCLUSION

***6** For the reasons stated herein, we affirm the judgment and sentence of the Daviess Circuit Court.

[GRAVES](#), [JOHNSTONE](#), [ROACH](#), [SCOTT](#), and [WINTERSHEIMER](#), J.J. concur. [LAMBERT](#), C.J., concurs in result only. [COOPER](#), J., dissents without an opinion.

All Citations

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