

RENDERED: May 7, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002132-MR

ERNEST BLEDSOE

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 01-CR-00123

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: JOHNSON, MINTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Ernest Bledsoe appeals from the judgment of the Powell Circuit Court, entered on a jury verdict finding him guilty of manslaughter in the first degree, for which he was sentenced to ten years' imprisonment. Bledsoe argues on appeal that the circuit court erred by failing to dismiss the indictment because the Commonwealth did not make an audio or stenographic recording of the Commonwealth's Attorney's presentation of the defendant's request to testify to the grand jury. Bledsoe also argues that the court erred by failing to

declare a mistrial after a potential juror stated in open court that he knew the defendant from the detention center, and that the court should have ordered a mistrial when the Commonwealth improperly commented on the defendant's failure to call his wife to testify. We affirm.

Bledsoe shot and killed his next-door neighbor, Gary Carver, after a confrontation over whether Carver would be allowed to have any contact with Bledsoe's son. Carver had been drinking, and Bledsoe alleges that Carver was drunk and belligerent and that he feared for his safety. The situation began when Carver confronted Bledsoe over Bledsoe's order to his son not to have anything to do with Carver when he had been drinking, and his subsequent grounding of his son who had visited Carver's house against Bledsoe's wishes. Carver became loud and belligerent, and Bledsoe became fearful for his safety. Bledsoe attempted to get the police to intervene by appearing in person at the police station, but the dispatcher was unable to reach an officer to assist Bledsoe before Bledsoe left the police station and returned home. Bledsoe then armed himself with a pistol and waited for his wife to return home. When she did, he went outside to escort her in, and Carver, seeing Bledsoe, went to confront him again. Bledsoe yelled at Carver to stop and not come any closer, and when Carver kept coming, Bledsoe shot him twice. Carver was not armed, but had one hand

in his pocket and one hand balled into a fist when he was approaching Bledsoe. Carver died of his injuries at the hospital.

Bledsoe was charged and stood trial, and the jury convicted him of manslaughter in the first degree, for which he received a ten-year sentence. This appeal followed.

On appeal, Bledsoe argues that the court should have dismissed the indictment for the prosecution's failure to inform the grand jury of his request to testify to the grand jury. The grand jury record of the proceedings does not include the Commonwealth's presentation to the grand jury of the defendant's request to testify, but the assistant Commonwealth's Attorney who handled the grand jury proceeding submitted an affidavit that she did in fact present the defendant's request to testify to the grand jury. Based on the attorney's affidavit, the trial court denied the motion to dismiss. Bledsoe argues that the court erred to his substantial prejudice by failing to dismiss the indictment.

Rule of Criminal Procedure (RCr) 5.08 requires that "if the defendant notifies the . . . Commonwealth in writing of his . . . desire to present evidence before the grand jury, the attorney for the Commonwealth shall so inform the grand jury. The grand jurors may hear evidence from the defendant but are not required to do so." RCr 5.16 provides that a record of all

testimony at the grand jury proceeding shall be made and that failure to have a record made shall be grounds for dismissal unless the Commonwealth can show good cause for its failure.

Here, the Commonwealth's Attorney handling the proceeding testified without contradiction that she did in fact inform the grand jury of the defendant's request to present evidence. The Appellant admits that the court's scope of review is limited and that unless fundamental unfairness to the defendant or intentional subversion of the process by the prosecution is shown, we may not disturb the indictment. Here, the Commonwealth's Attorney's affidavit is not contradicted by other evidence. The trial court was entitled to rely on that affidavit to find that the Commonwealth had shown good cause for not complying with RCr 5.16. While this Court would prefer that the Commonwealth make a clear record, the rules allow the Commonwealth to avoid dismissal of the indictment for good cause shown. We decline to disturb the court's ruling on appeal.

Bledsoe also argues that the trial court erred to his substantial prejudice by failing to declare a mistrial when a potential juror, an employee of the jail, announced that he knew the defendant from the detention center. After a bench conference, the court did not admonish the jury pool about the potential juror's remarks. We note at the outset that the defendant did not request an admonition or a mistrial, but

instead relies on RCr 10.26, asking this Court to regard this as a palpable error. We decline to do so. Bledsoe cites RCr 8.28, which recognizes that a defendant may not be exhibited to the jury while handcuffed and, when feasible, to wear ordinary clothing instead of prison garb before the jury. The reason for this rule, as the defendant states, is so that the jury will not construe his pre-trial incarceration as a suggestion that he is dangerous or that he may be incarcerated on other charges. Even so, we perceive no palpable error here. The trial court's failure to declare a mistrial following the potential juror's statement was not error; and its failure to give a curative admonition, if error at all, certainly was not palpable error.

Lastly, Bledsoe argues that the Commonwealth improperly commented on his wife's failure to testify in closing arguments. The Commonwealth's Attorney stated in closing, "The defendant's wife, who was there - and by the way did not testify - yelled out, 'no, Ernest, no.'" His wife knew there was no reason for self-protection. His wife knew there were other ways to handle this situation. He pulled the gun out. His wife yelled, 'no, Ernest, no.'" Bledsoe argues that this reference to his wife's failure to testify was improper and requires reversal as a palpable error under RCr 10.26. Citing the rule of marital privilege, Bledsoe argues that the courts of Kentucky have long recognized marital privilege, and that the courts have

repeatedly held that it is improper for the Commonwealth to comment on the failure of a spouse to testify. However, as the defendant acknowledges, the threshold in considering claims of prosecutorial misconduct is quite high. We "must determine whether the conduct was of such an egregious nature as to deny the accused his constitutional right to a fair trial."

Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987),  
citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868,  
40 L.Ed.2d 431 (1974).

Bledsoe argues that the Commonwealth's comment was "highly inflammatory", and that not only did the Commonwealth comment on her failure to testify but speculated as to what her testimony might have been. We disagree. Carver's wife, also a witness at the scene, testified that she heard Bledsoe's wife yell, "No, Ernest, no" as Bledsoe was about to shoot Carver. While it is true that the Commonwealth's Attorney should not have commented at all on Bledsoe's wife not testifying, he did not speculate about what her testimony would have been, but instead fairly commented on the evidence presented by Carver's wife. We do not agree that the attorney's remarks deprived Bledsoe of a fair trial, and so we reject this contention.

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

ALL CONCUR.

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