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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000014-MR

DAVID H. METCALF

APPELLANT

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE PAUL BRADEN, JUDGE
ACTION NO. 03-CR-00158

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

POTTER, SENIOR JUDGE: David Metcalf appeals from a judgment convicting him of one count of first-degree assault and one count of criminal trespass. He alleges that he was denied his sixth amendment right of confrontation; that his request for an instruction on second-degree assault and his motion for a mistrial were improperly denied; and that the trial judge's

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

hostility to his counsel denied him a fair trial. Finding no reversible error in any of the cited allegations of error, we affirm the judgment of the Whitley Circuit Court.

The charges stem from Metcalf's attempt to retrieve his all-terrain vehicle from the victim, Mr. Doug Young. Young, who worked for Metcalf, had agreed to work on the ATV in the hope that Metcalf would subsequently sell the four-wheeler to him. Young's attendance at work became sporadic and, after he missed several days of work, Metcalf went to Young's residence to pick up the ATV. Young refused to return the vehicle, which was locked in his basement. Shots were exchanged as Metcalf was attempting to break the lock on the basement door, resulting in serious injury to Young. A "punkin ball" injury to Young's femur required 85 days of hospitalization, six surgeries and the removal of three to four inches of bone, leaving one leg shorter than the other. Despite Metcalf's allegation that he shot Young in self-defense, he was convicted of first-degree assault and criminal trespass.

Metcalf first argues in this appeal that he was denied his Sixth Amendment right of confrontation when the trial court refused to allow him to attack Young's credibility by inquiring into his poor work history and alleged drinking problems. He also cites as error the denial of an opportunity to cross-examine Young concerning possible bias or motive to lie in that

a conviction would benefit Young in his civil suit against Metcalf. Metcalf submits that because he admitted shooting Young in self-defense, the Commonwealth's case was predicated solely upon Young's credibility and thus the inability to question Young on these matters essentially prevented him from fully presenting to the jury not only his self-defense theory, but his claim of extreme emotional disturbance as well. A review of the record does not support this contention.

Although it is true that testimony concerning Young's mental health history and civil suit against Metcalf were introduced only by avowal, the record reveals no limitation on the questioning of Young about his work history with Metcalf or his drinking problems. Furthermore, Young admitted taking medication for anxiety problems and that he had been prescribed Lithium ten to fifteen years earlier. It was only after this information had been elicited that the Commonwealth's objection to the line of questioning was sustained. We perceive no abuse of discretion in the exclusion of additional testimony as to Young's mental health history as it was no more than cumulative to his prior testimony.

Nor do we find reversible error in the exclusion of testimony concerning a civil suit Young had filed against Metcalf stemming from the shooting incident. While it may have been error to exclude this line of questioning, see generally

"Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction," 98 A.L.R.3d 1060, we conclude that the error must be construed as harmless upon a consideration of the evidence as a whole. We find no reasonable possibility that the result of this trial would have been different had the excluded testimony been admitted nor can we conclude that the exclusion of that evidence rises to the level of a result "inconsistent with substantial justice." RCr 9.24; Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969).

Metcalf next asserts that he was entitled to instructions on assault in the second degree and extreme emotional disturbance. Although it is well-settled that that trial court must instruct on every theory of the case reasonably deducible from the evidence, Ragland v. Commonwealth, 421 S.W.2d 79 (Ky. 1967), this duty does not require instructions on theories which had no evidentiary foundation. Thompkins v. Commonwealth, 54 S.W.3d 147 (Ky. 2001). The record contains absolutely no evidence of either wanton conduct, which is required for an instruction on second-degree assault, or testimony supporting a theory of extreme emotional disturbance. Metcalf's description of the shooting included statements that he intentionally shot Young in order to "stay alive" and

although he fired several "warning" shots at Young, he didn't hit him until he intended to hit him:

Q Now, apparently you fired a shotgun four times, I believe.

A. I'm not sure how many times.

Q. The one time that you hit him in the leg, the last shot?

A. Yes.

Q. You intended to hit him in the leg. Is that right?

A. That's the only time I intended to hit the man.

Q. The other times that you fired that shotgun, could you have hit him if you wanted to?

A. Absolutely. Absolutely. At that distance with a shotgun-

Q It's hard to miss, isn't it?

A. It took more effort to miss, believe me, than it did, would have, to hit. I didn't want to hit him, didn't want to shoot him.

* * *

Q. When you fired those shotgun shots at Doug Young did you feel you had any choice?

A. No. If I hadn't have done that he was going to kill me. I feared for my life. And I tried talking to him, you know, I tried giving him warning shots. None of that stuff worked. Then only thing that worked is when I hit him in the leg, and I aimed at the leg. That's the only

place I could hit him without killing him. He was coming towards me. His hands and arms were in front of him and if I'd have shot his hands and things at that time it would have killed him. The leg is the only place I could hit him without the very high likelihood of killing him, and I didn't want to do that. I didn't want to shoot him.

This description of Metcalf's state of mind in his own words dispels any suggestion of wanton conduct or actions taken in a state of extreme emotional disturbance. What Metcalf described were the calculated intentional acts of an actor in a rational state of mind. The requested instructions were not supported by evidence of record and accordingly the refusal to give them was not error.

Metcalf also challenges as error the denial of his motion for a mistrial on the basis of jury tampering. Metcalf's wife alleged that Jack Jones, Metcalf's "long-time enemy," was attempting to bribe jurors to send him to prison. In response to her allegation that she had seen Jones talking to jurors, the trial judge questioned the jurors each of whom denied having anyone attempt to speak to them about the case. The trial judge then questioned Jones who stated that the only person he had talked with was a juror who had been dismissed. Later during trial, Mrs. Metcalf again alleged that Jones was talking to jurors. The trial judge questioned a specific juror who stated that he had spoken to Jones outside the courthouse but that they

had not discussed the case. Metcalf's motion for a mistrial was denied and no request for a hearing on the matter was requested. Under these circumstances, we find no abuse of discretion and no manifest necessity for such action has been demonstrated. Gosser v. Commonwealth, 31 S.W.3d 897 (Ky. 2000).

Finally, Metcalf argues that the trial judge's hostility to his trial counsel compromised his ability to receive a fair trial. Not only does our review of the record fail to substantiate Metcalf's claim of hostility, it confirms any statements by the trial judge which might be construed as hostile were made outside the presence of the jury. The record also makes clear that the trial court afforded counsel considerable leeway and that the allegedly hostile statements were simply an attempt to secure counsel's adherence to his rulings. As noted by the Supreme Court in Fugate v. Commonwealth, 62 S.W.3d 15, 21 (Ky. 2001), "[a] judge has a right and obligation to maintain control over his own courtroom...." The allegedly hostile actions complained of in this case fall within that category and did not, in our opinion, jeopardize Metcalf's right to a fair trial.

The judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

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