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RENDERED: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0181-MR

FINAL

DATE 11-9-06 E.A. Brown, P.C.

JOSHUA WILLIAM COTTRELL

APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HON. KELLY M. EASTON, JUDGE
INDICTMENT NO. 03-CR-0465

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Joshua Cottrell, appeals his convictions for manslaughter in the second degree, tampering with physical evidence, and theft by unlawful taking over three hundred dollars. He was sentenced to twenty years in prison. He appeals his conviction as a matter of right, Ky. Const. § 110(2)(b), raising three issues on appeal. Finding no error, we affirm.

I. Background

Appellant was found guilty of killing Guinn Richard Phillips. In June of 2003, Appellant moved to Elizabethtown searching for employment and checked into the Budget Motel. Upon his arrival, he contacted Rob DeWitt, a man he had met at a shelter in LaRue County some years earlier. DeWitt helped him get on his feet in Elizabethtown, and even introduced Appellant to his friend, Phillips.

Because Appellant did not have a vehicle, Phillips agreed to drive him around Elizabethtown to pick up job applications from various businesses. According to

Appellant's testimony at trial, the pair spent about three hours searching for available employment before returning to the Budget Motel. Though not specifically invited, Phillips followed Appellant to his room. At this point, according to Appellant, Phillips began making sexual advances toward him. At first, Phillips verbally expressed his interest in Appellant. Then he removed his shoes and shirt and laid on the bed, inviting Appellant to join him. Appellant testified that he refused, repeatedly telling Phillips that he was not interested. Phillips then stood up and grabbed Appellant's crotch. Appellant backed away, but Phillips persisted and pulled down his own zipper. At this point, Appellant testified that Phillips's demeanor changed and he became more aggressive, grabbing Appellant by the back of the neck in an attempt to kiss him. Fearing for his safety, Appellant began hitting Phillips. After a few moments of mutual hitting and shoving, Appellant stated that he put Phillips in a headlock, or chokehold, and wrestled him to the ground. Phillips stopped fighting, so Appellant left the motel room, instructing Phillips to leave immediately. According to Appellant, when he left the room, Phillips was on all fours, attempting to rise.

Appellant returned about twenty minutes later. Phillips was lying on the ground, unresponsive. Appellant attempted unsuccessfully to revive him, then determined that Phillips was dead. According to his testimony, Appellant did not think that the police would believe his story, so he decided to dispose of the body himself. He put Phillips's body in a suitcase that he had purchased days earlier, and took the suitcase to Phillips's truck, still in the motel parking lot. He drove the truck to the Rough River and threw the suitcase into the water. He then threw Phillips's watch and wallet into "a lake." Finally, he drove Phillips's truck to Indiana where he abandoned it in a field near the Ohio River.

Other evidence admitted at trial called into question Appellant's version of events. Dr. Barbara Weakly-Jones, Commonwealth's medical examiner, performed the autopsy and testified at trial. Dr. Weakly-Jones identified the cause of death as asphyxia. However, because the water had caused significant decomposition of Phillips's body, she could not determine conclusively whether Phillips had been strangled or had died of "positional asphyxiation," which could have occurred when he was forced into the small suitcase. Also, Dr. Weakly-Jones testified that it could not be conclusively determined whether Phillips had been in a physical altercation prior to his death, as decomposition would have removed many pre-mortem bruises and abrasions.

The testimony of Appellant's aunt, Wendy McAnly, also contradicted his story in several key respects. According to McAnly, Appellant arrived at her house the day after Phillips's death and told her that he had killed a man because he had "come on to him." He also told his aunt that he had disposed of the body in a river. According to McAnly's testimony, however, Appellant told her that he had strangled Phillips with the strap of a duffel bag. She also told investigators that Appellant had burnt the duffel bag in a small fire behind her house. Investigators searched the burn pile but found no remnants of a duffel bag. Also, McAnly's credibility was seriously damaged by testimony concerning her own pending felony charges and her attempts to "make a deal" with prosecutors in exchange for her statement.

Another of Appellant's aunts, Christine Arwood, testified at trial. According to Arwood, Appellant also confessed the crime to her. Arwood stated that Appellant told her that Phillips had come on to him, that he had placed him in a chokehold, and that he found Phillips dead when he returned to the room later. He also admitted dropping the suitcase with Phillips's body in it into a river. Arwood further testified that she witnessed

Appellant burning the gear bag, including its strap. Like McAnly's testimony, however, Arwood's was seriously discredited by multiple, conflicting statements she had previously given to police and defense investigators.

Meanwhile, Phillips's mother, with whom he lived, had reported his disappearance. Detective Mike Romanoli served as lead investigator in what began as a missing person's case. The investigation turned course when two fishermen found Phillips's body, still in the suitcase, on the banks of the Rough River. Phillips's cell phone and wallet were found shortly thereafter on the shores of Hardin Springs.

Now investigating a homicide, Detective Romanoli interviewed several of Phillips's friends, including Rob DeWitt, Mark Sherone, and Phillips's boyfriend, Ronnie Stotts. Stotts mentioned to Detective Romanoli that Phillips had met and befriended Appellant. Later, the detective was contacted by April Wagner, a close friend of Appellant, who had heard from Sherone that Phillips's body was found in a suitcase. Wagner said that she recalled seeing Appellant at the mall purchasing a set of three suitcases. In fact, she had driven Appellant, along with the suitcases, from the mall to his motel room about a week before Phillips's death. Detective Romanoli later interviewed DeWitt, who informed him that Appellant had given him two small suitcases days earlier. According to DeWitt, Appellant said he only needed the largest case in the set, and gave the others to DeWitt in appreciation for helping him settle in Elizabethtown. Detective Romanoli also interviewed McAnly and Arwood, who revealed Appellant's alleged confessions.

Appellant was arrested at McAnly's home and indicted on charges of murder, robbery in the first degree, tampering with physical evidence, and being a persistent

felony offender in the second degree. He was tried before a Hardin County jury and found guilty on all counts. He now appeals, presenting three issues for review.

Additional facts are developed as necessary.

II. Photographs

Appellant first argues that he was unduly prejudiced by the admission of five post-mortem photographs of Phillips's body. Prior to trial, defense counsel objected to the introduction of eight photographs of Phillips's corpse. A hearing was held and the trial court determined that the photographs were admissible to demonstrate the nature of the crime and injuries. Mid-trial, the court held another brief conference at which the medical expert explained specifically how she intended to use the photographs during her testimony. Following this hearing, the trial court disallowed three of the photographs that depicted Phillips's face. At trial, the remaining five photographs were introduced during the medical examiner's testimony over renewed defense objection. Upon review of the record, we conclude that the photographs' gruesome and morbid nature did not preclude their admission. There was no error.

Relevant photographs are not rendered inadmissible simply because they are gruesome or revolting. Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992). Rather, such photographs are inadmissible only when they are "so inflammatory that their probative value is substantially outweighed by their prejudicial effect." Adkins v. Commonwealth, 96 S.W.3d 779, 794 (Ky. 2003); KRE 403. This Court has determined that photographs of a corpse are unduly prejudicial "when the condition of the body has been materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer." Clark v. Commonwealth, 833 S.W.2d 793, 794 (Ky.

1992). The decision whether to admit such evidence is left to the sound discretion of the trial court and will only be reversed on appeal upon a demonstration that this discretion was abused. Adkins, 96 S.W.3d at 795.

Here, the five photographs of Phillips's corpse had significant probative value. The first photograph depicts Phillips's upper body with a piece of gum lying on his chest. Dr. Weakly-Jones, the Commonwealth's medical examiner who performed the autopsy, explained that the piece of gum, actually removed from Phillips's mouth, helped her to rule out possible causes of death. The second photograph depicts Phillips's lower body with a money clip attached to the belt of his pants. The third photograph is a close-up of Phillips's upper arm tattoo. Both of these photographs demonstrated the nature of "skin slippage," which occurs when a body has been submersed in water for an extended period of time. Dr. Weakly-Jones explained how skin slippage prevented her from conclusively determining what types of injuries Phillips might have sustained. The fourth and fifth photographs show Phillips's corpse both inside the suitcase and on the autopsy table after its removal from the suitcase but prior to examination. These photographs were used to explain how Phillips might have died from positional asphyxia. Thus, the photographs were probative of the charges of murder and tampering with physical evidence, as they helped the jury to understand why a specific cause of death could not be identified, and they depicted the manner in which the body was disposed.

While the photographs are certainly gruesome and disturbing, we agree with the trial court's conclusion that they are not so inflammatory as to outweigh their probative value. First, it must be noted that the trial court lessened any inflammatory or shocking effect by disallowing those photographs depicting Phillips's face directly. Moreover, the

photographs do not depict the type of mutilation or decomposition condemned in Funk, v. Commonwealth, 842 S.W.2d 476 (Ky. 1992). In Funk, revolting pictures of a rotting cadaver were improperly admitted, as the images were “not directly relevant to the issues because the body had been materially altered by animal mutilation, decomposition and other extraneous causes unrelated to the commission of the crime.” Id. at 479. Here, the decomposition of Phillips’s body was due to submersion in water, which was directly relevant to the manner in which the body was disposed. Finally, having reviewed the photographs, we agree with the trial court’s determination that in light of modern society’s desensitization to the gory and graphic, these images are not so appalling or horrific as to inflame the jury. See Napier v. Commonwealth, 426 S.W.2d 121, 122-23 (Ky. 1968) (“The time has come when it should be presumed that a person capable of serving as a juror in a murder case can, without losing his head, bear the sight of a photograph showing the body of the decedent in the condition or place in which found.”).

We are persuaded by the record that the trial court gave considerable attention to this matter and made demonstrated efforts to minimize any inflammatory effects of the photographs. Although the images were gruesome, they held sufficient probative value to warrant their admission. There was no abuse of discretion.

III. Motions for Mistrial

Appellant next claims that he was entitled to a mistrial based on four instances of alleged error: (1) when the Commonwealth was permitted to display a framed photograph of Phillips at counsel table; (2) when a police detective was permitted to give hearsay testimony; (3) when the Commonwealth asked leading questions of its

witness, Wendy McAnly; and (4) when the Commonwealth allegedly exceeded the scope of cross-examination of Appellant. Upon review of the record, we find no error.

At the outset, we reiterate that a mistrial is an extraordinary remedy that is only to be employed when there is a manifest necessity to terminate the proceedings. Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002). It is a remedy that is to be employed “sparingly and only with the utmost caution, under urgent circumstances, and for very plain and obvious cases.” Commonwealth v. Scott, 12 S.W.3d 682, 685 (Ky. 2000). A mistrial is proper when an error or event occurs “of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way.” Maxie, 82 S.W.3d at 863. The decision to grant a mistrial rests within the sound discretion of the trial judge, who is in the best position to determine whether a fundamentally fair trial is possible. Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000). The trial court’s decision will not be disturbed on appeal absent an abuse of discretion. Id.

a. Display of Victim’s Portrait

Appellant first argues that the Commonwealth’s use of a framed portrait of Phillips warranted a mistrial. During the testimony of its first witness, Phillips’s mother, a framed portrait of Phillips was admitted into evidence without objection. Following the witness’s testimony, the photograph remained displayed at the Commonwealth’s counsel table until a recess later in the day’s proceedings. Defense counsel’s objection to the display was overruled, though the Commonwealth removed the picture. The following morning, defense counsel renewed the objection. Following a brief hearing on the matter, the Commonwealth agreed not to display the picture at counsel table again.

Appellant now argues that the trial court should have declared a mistrial based on this event.

It was not error for the trial court to admit the photograph of Phillips alive: “We have held many times that life photographs and testimony concerning a victim are admissible to remind ‘the jury that the victim was once a living person and not just a statistic.’” Love v. Commonwealth, 55 S.W.3d 816, 827 (Ky. 2001) (quoting Templeman v. Commonwealth, 785 S.W.2d 259, 261 (Ky. 1990)). This Court has also acknowledged that a “certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime.” Sanborn v. Commonwealth, 754 S.W.2d 534, 542 (Ky. 1988). Thus, the alleged prejudice rises not from admission of the photograph, but from its continued presence at counsel’s table.

We find no error in the trial court’s refusal to grant a mistrial based on the continued display of the portrait for the remainder of the day’s proceedings. At the hearing on the matter, the trial court first noted that no procedural rule specifically proscribes where evidence should be stored during the pendency of a trial. While acknowledging that the display of the portrait was not ideal, the trial court nonetheless concluded that no real prejudice had resulted. First, any potential prejudice was greatly reduced by the fact that the picture was entered into evidence without objection and published to the jury. Also, the Commonwealth had made no further reference to the portrait following its admission, and had not attempted to glorify or exalt Phillips’s memory in any way. Moreover, it was removed from counsel table during a recess on the first day of trial, and was not displayed again. Appellant has presented no indication that he was prejudiced by this circumstance other than the bare assertion that it aroused the sympathy of the jury. Having reviewed the record, we agree with the trial

court's reasoning and its denial of the motion for a mistrial. This event did not prevent a fair trial and, therefore, did not warrant the harsh remedy of a mistrial.

b. Investigative Hearsay

Appellant argues that testimony presented by a law enforcement officer constituted so-called "investigative hearsay." Detective Romanoli, the lead detective in the case, gave testimony concerning the progress of the investigation. Appellant cites three instances of hearsay during the testimony and argues that their cumulative prejudicial effect warranted a mistrial.

First, Detective Romanoli discussed a statement he obtained from Mark Sherone, a friend of Phillips. The detective stated that Sherone had referred to Phillips as his "best friend." Defense counsel objected and the trial court admonished the jury and the witness regarding hearsay. Shortly thereafter, Detective Romanoli discussed a statement obtained from Ronnie Stots, Phillips's boyfriend. Detective Romanoli revealed that Stots was the first person to tell him about Appellant. Defense counsel again objected but was overruled on the grounds that the statement had not been made for the truth of the matter asserted. Finally, Detective Romanoli testified about an interview he had with DeWitt. He stated that DeWitt had provided him with the suitcases that Appellant had given to DeWitt. Defense counsel objected and moved for a mistrial. The trial court denied the motion but did admonish the jury to consider the detective's statements only for purposes of explaining his actions during the investigation.

The first challenged statement does not constitute impermissible hearsay. Detective Romanoli's statement that Sherone referred to Phillips as his "best friend" was not offered to prove that Sherone was, in fact, Phillips's best friend. Rather, Detective

Romanoli clearly referenced this statement to convey why he lent credence to Sherone's information about Phillips.

The next portion of Detective Romanoli's testimony—concerning Stots's reference to Appellant—is hearsay, although it was properly admitted. This statement is a classic example of hearsay that is “admissible to prove why the police acted in a certain manner, but not to prove the facts given to the officer.” Gordon v. Commonwealth, 916 S.W.2d 176, 179 (Ky. 1995). Detective Romanoli had no knowledge of Appellant's existence or relationship with Phillips prior to speaking with Stots. The brief statement that “Stots was the first person to mention [Appellant's] name to us” was necessary to explain to the jury why Appellant was initially investigated. “In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct.” Gordon, 916 S.W.2d at 178 (quoting Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.05 (3d ed. 1993) (quoting McCormick on Evidence 734 (3d ed. 1984))).

Appellant is correct that the final challenged statement is inadmissible hearsay. The Commonwealth asked Detective Romanoli if he obtained any physical evidence from DeWitt, and he replied that DeWitt “gave [him] a suitcase that he said he got from [Appellant].” Arguably, this information was not necessary to the jury's understanding of the investigation. Detective Romanoli could have simply stated that he received physical evidence from DeWitt, without identifying the suitcase or relaying DeWitt's claim that he got it from Appellant. Nonetheless, this statement did not prejudice Appellant. DeWitt testified at trial that he received the suitcase from Appellant, thus

removing any taint from Detective Romanoli's statement. Moreover, the trial court admonished the jury to disregard the statement.

A mistrial was not warranted based on Detective Romanoli's testimony. The only error was in the admission of Detective Romanoli's statement regarding the suitcase. As explained, any prejudice resulting from this testimony was removed when DeWitt himself testified regarding the suitcase. Viewed in the context of the entire trial, Appellant was not unduly prejudiced or denied a fair trial by the admission of this statement. The motion for a mistrial was properly denied.

c. Leading Questions

Appellant next argues that a mistrial was warranted when the Commonwealth asked leading questions of its witness. Wendy McAnly, Appellant's aunt, gave testimony regarding his alleged confession. The following exchange occurred between the Commonwealth and its witness:

Q: Did he tell you he had been staying at a motel in Elizabethtown?

A: Yes he did.

Q: Did he tell you that he killed a man at that motel?

A: Yes sir, he did.

Q: Did he tell you that he called the man he killed and asked him to come and give him a ride?

A: Yes he did.

Following a sustained objection to leading questions, the Commonwealth continued:

Q: Back at the motel room, [Appellant] has told you that he hit Ritchie Phillips after he was bare-chested and asked him if he likes it, Ritchie touches him, he hits him, and he goes down?

A: Yes sir, and he chokes him.

Defense counsel again objected and moved for a mistrial. The trial court denied the motion, but did admonish the Commonwealth to rephrase its questions.

Leading questions should not be used on direct examination unless necessary to develop the witness' testimony. KRE 611(c). We agree with the trial court's determination that the Commonwealth, here, was impermissibly leading its witness. However, Appellant does not claim that the trial court failed to sustain any objections or that it refused to admonish the jury. Rather, Appellant argues that the leading questions warranted a mistrial. This exchange caused no prejudice warranting a mistrial.

Prior to McAnly's testimony, the jury had heard similar facts through the testimony of other witnesses to whom Appellant allegedly made incriminating statements. More importantly, Appellant testified at trial and admitted that he had asked Phillips for a ride, that they had gotten into a physical fight that ended when Appellant placed Phillips in a chokehold, and that Phillips died in the motel room. The rule against leading questions is designed to ensure reliable testimony and to remove the possibility that the leading question has created an inference in the witness's mind. See Blankenship v. Commonwealth, 234 Ky. 531, 28 S.W.2d 774, 775 (1930) ("It is well known that a leading question propounded to a witness may, by creating an inference in his mind, cause him to testify in accordance with the suggestion conveyed by the question, making his answer rather an echo to the question than a general recollection of events."). Because Appellant himself testified to the same facts, there is very little danger that McAnly was coaxed into unreliable or false testimony. Furthermore, any prejudice resulting from the substance of McAnly's testimony was certainly removed by Appellant's in-court admissions. There was no "shocking miscarriage of justice" here

that would warrant reversal due to leading questions. Tamme v. Commonwealth, 973 S.W.2d 13, 27 (Ky. 1998).

d. Cross-examination of Appellant

Appellant's final allegation of error warranting mistrial is that the Commonwealth exceeded the scope of cross-examination when it questioned him about his prior employment. On cross-examination, the Commonwealth asked Appellant three times whether he had ever worked for a tree service, which he denied. The Commonwealth then sought to introduce evidence of Appellant's prior conviction for theft by unlawful taking, which arose from his guilty plea to stealing a truck belonging to a tree service. Apparently, the Commonwealth believed that Appellant worked for the tree service from which he stole the truck, and sought to undermine his credibility by impeaching him on this point. At the bench, defense counsel clarified that Appellant never worked for the tree service. The trial court therefore overruled the Commonwealth's request to introduce details of the prior conviction, and no further questions regarding the theft were asked. Appellant now argues that the Commonwealth's questions created an unfair "innuendo and implication" that Appellant was untruthful.

We have reviewed the pertinent portions of the record and conclude that there was no error or prejudice warranting a mistrial. We are mindful that the manner and tone of the Commonwealth's questions regarding Appellant's alleged employment with the tree service clearly suggested that he was lying. However, we also note that Appellant gave emphatic and assured responses denying the employment. In fact, when asked for the third time whether he had ever worked for a tree service, Appellant very convincingly responded, "Ma'am, I am sure I never worked for a tree service."

Considering this exchange in its entirety, we are unconvinced that it unfairly damaged Appellant's credibility. Without being presented further extrinsic evidence clarifying the underlying conviction, the jury was left with Appellant's unequivocal denials to the Commonwealth's three questions regarding the employment. If anything, it was the Commonwealth that appeared ill-prepared by plainly "fishing" for an untruthful statement, then abandoning the topic without an impeachment. Furthermore, because the jury was provided no details of Appellant's prior felony conviction other than the fact of its existence, it was highly improbable that the jury would associate these questions with the prior conviction. This incident did not deny Appellant a fair trial, and the trial court did not abuse its discretion in denying a mistrial.

IV. Prosecutorial Misconduct

In addition to arguing that the alleged errors discussed above warranted a mistrial, Appellant also asserts that these circumstances, when viewed together, evidence a pattern of prosecutorial misconduct. "Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). Moreover, in order to warrant reversal, the "misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." Id.

Having reviewed the proceedings, we are convinced that Appellant received a fundamentally fair trial. The Commonwealth's attorney did not act improperly and the alleged errors of which Appellant complains did not result in any undue prejudice. Furthermore, the bases of Appellant's claim of prosecutorial misconduct—the framed photograph of Phillips, the leading questions posed to McAnly, etc.—concern evidence and testimony that were ruled upon by the trial court. "Issues involving the admission of

evidence or testimony, when ruled upon by the trial court, do not constitute prosecutorial misconduct.” Stopher v. Commonwealth, 57 S.W.3d 787, 806 (Ky. 2001). Reversal is not warranted.

V. Cumulative Error

Appellant’s final claim is that, even if the aforementioned irregularities do not individually warrant reversal, their cumulative effect was to deny him a fair trial. Having found no error, there can be no cumulative prejudice warranting reversal. See Woodall v. Commonwealth, 63 S.W.3d 104, 134 (Ky. 2001). Moreover, we are persuaded that Appellant received a fundamentally fair trial.

VI. Conclusion

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

All concur.

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