RENDERED: MARCH 16, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001616-MR

PAULA F. BECKNER (HATCHER) — APPELLANT

v.

APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, SPECIAL JUDGE
ACTION NOS. 03-CR-00121 AND 05-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,[1] SPECIAL JUDGE.

DIXON, JUDGE: Appellant, Paula Beckner (now Hatcher), was convicted in the Edmonson Circuit Court of trafficking in marijuana, more than eight ounces; possession of drug paraphernalia; possession of a methamphetamine precursor; two counts of trafficking in a controlled substance; and tampering with physical evidence. All of the drug offenses were firearm enhanced. She was sentenced to a total of ten years'

[1] Judge James Howard, concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

imprisonment and appeals to this Court as a matter of right. Appellant argues that the trial court erred by (1) failing to sever the charges; (2) admitting the autopsy photographs; and (3) requiring the jury to deliberate throughout the night. Finding no error, we affirm the convictions and sentences.

Evidence at trial established that in the early morning hours of November 6, 2003, Edward Tankersly and Chris Sexton drove to a home belonging to Allen Hatcher. When they arrived at the house, Tankersly knocked on the door and was greeted by James Rodney Gross. Sexton, who had returned to his car to retrieve a beer, entered the house a short time later and observed Tankersly talking to Appellant. A large quantity of marijuana was located next to Appellant.

A short time later, Allen Hatcher, apparently without provocation, retrieved a gun and demanded that Tankersly leave the premises. Hatcher began yelling profanities at Tankersly and then shot him in the leg. Sexton initially ran out of the house but immediately returned to retrieve Tankersly. As Sexton was attempting to pull Tankersly out of the house, Hatcher walked up to Tankersly and shot him in the head. Sexton dragged Tankersly into his car and drove to the first trailer he saw to seek help. Tankersly died the following day.

Meanwhile, Appellant and Gross fled the premises and drove to Elizabethtown where they rented a hotel room for the night. The two returned the next day and turned themselves into authorities.

Several hours after the shooting, Sexton led police back to the Hatcher residence. A search of the house revealed that carpet cleaner and bleach had been used in an attempt

to remove the blood from the crime scene. Police also seized marijuana, methamphetamine and cocaine, as well as the paraphernalia used in the consumption and sale of the drugs.

On December 18, 2003, an Edmonson County Grand Jury issued an indictment charging Appellant, Hatcher, and Gross with murder or complicity to commit murder, trafficking in a controlled substance, firearm enhanced, and possession of drug paraphernalia and possession of a methamphetamine precursor, also both firearm enhanced. Appellant was subsequently indicted for an additional count of trafficking in a controlled substance while in possession of a firearm.

Appellant, Hatcher and Gross were tried together in January 2005. The jury found Appellant not guilty of murder or complicity to commit murder, but guilty of all remaining charges. The jury recommended a total of ten years imprisonment and the trial court entered judgment accordingly. This appeal ensued. Additional facts are set forth as necessary.

I.

Appellant first argues that the trial court erred by denying her motion to sever the drug-related offenses from the murder charge. She contends that there was no evidence linking the victim's death to drug activity and that she was prejudiced by having all of the offenses tried together.

We would note that Appellant's written motion to sever was wholly inadequate as it failed to specify what charges should or should not be severed, and merely asserted that "the offenses, while perhaps part of a common scheme or plan, are

not so related that proof of one offense in [sic] admissible upon the trial of another." Further, while she alleged that, "the Commonwealth's evidence is extremely weak in one count and the 'spillover effect' from the other count may prejudice the defendant's right to a fair trial," she did not indicate which count she was referencing. During a subsequent hearing on the motion, defense counsel asserted, without any evidentiary support, that there was no nexus between some of the offenses and suggested that the murder charge be severed from the other charges.

RCr 6.18 provides:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

RCr 9.16 further provides, in relevant part, "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses . . ., the court shall order separate trials of counts . . . or provide whatever other relief justice requires."

A trial court has broad discretion with respect to the joinder and the severance of charges for trial. Such a decision will not be overturned absent a showing of prejudice and a clear abuse of that discretion. *Rearick v. Commonwealth*, 858 S.W.2d 185 (Ky. 1993). In *Harris v. Commonwealth*, 556 S.W.2d 669 (Ky. 1979), our Supreme Court held that a conviction resulting from a trial in which a motion for separation of the charges had been denied will be reversed on appeal only if the refusal of the trial court to

grant a severance is found to amount to "a clear abuse of discretion and prejudice to the defendant is positively shown."

In addition to the close geographical and temporal proximity between the drug evidence and the murder, the Commonwealth presented unrebutted evidence during the hearing to support an inference that Tankersly's murder was related to drug activity that was occurring at Hatcher's residence. The Commonwealth maintained that all of the offenses arose out of the same series of events and were intertwined. Indeed, the trial court concluded that "the events leading up to all charges against the defendant were part of a single event or transaction."

We note that Appellant was found not guilty of murder or complicity thereto. As such, she has failed to relate to this Court the manner in which she perceives herself prejudiced by the alleged misjoinder of offenses for trial. Regardless, based upon the record before us, we cannot conclude that the trial court abused its discretion by denying Appellant's motion for severance.

II.

Appellant next argues that she was entitled to a mistrial after the Commonwealth introduced autopsy photographs of the victim. We disagree.

Photographs that are probative of the nature of the injuries inflicted are not excluded unless they are so inflammatory that their probative value is substantially outweighed by their prejudicial effect. KRE 403. Further, relevant photographs are not inadmissible simply because they are gruesome and the crime they depict is heinous. *Stopher v. Commonwealth*, 57 S.W.3d 787, 802 (Ky. 2001), *cert. denied*, 535 U.S. 1059

(2002). *See also Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992). "The rule prohibiting the exhibition of inflammatory evidence to a jury does not preclude the revelation of the true facts surrounding the commission of a crime when these facts are relevant and necessary." *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003).

The four photographs in question were introduced during the testimony of a Kentucky State Police Detective who witnessed the victim's autopsy and took the photographs. They were again mentioned during the testimony of the medical examiner who performed the autopsy. While the photographs depicted the victim's injuries, none showed any post-mortem manipulation or significant natural changes to his body.

We are of the opinion that the photographs were relevant to a contested issue in the case. The Commonwealth's theory was that Hatcher approached the victim and shot him in the head without provocation. However, the defense claimed that the victim was shot in self-defense. As such, the photographs certainly provided the jury with relevant information as to the location and trajectory of the bullets.

The trial court properly reviewed the photographs and determined that they were relevant to the issues and not unduly gruesome. Since we do not find that the trial court abused its discretion by permitting their introduction, Appellant was certainly not entitled to a mistrial.

III.

Finally, Appellant claims that the trial court erred in forcing the jury to remain in court for twenty-one consecutive hours. Appellant concedes that this issue is not preserved but urges review under RCr 10.26 for palpable error. While not specifically

alleging a constitutional violation, she also claims she was denied a "fair trial" by the all night proceedings.

On the afternoon of the first day of trial, the trial court informed the parties that it wished to conclude the trial the following day, which was a Friday, so that it did not have to carry over until the next Monday. The trial court warned the jury, the attorneys, and court personnel to be prepared to stay late on Friday night.

The following day, the jurors were dismissed for dinner shortly before 8:00 p.m. At 9:57 p.m., the trial court read the instructions to the jury and the parties presented closing arguments. The jury recessed at 11:01 p.m. to deliberate, returning with verdicts at approximately 2:20 a.m. At that time, the trial court ordered a recess while penalty phase instructions were prepared. The jury again retired at 3:42 a.m. to deliberate and returned at 5:17 a.m. with recommended penalties.

Although Appellant entered no objection at the time with respect to any coercive or hastening effect, she now claims that the trial court's demand that the trial conclude without an additional day's delay prejudiced the jury's deliberations to such degree that the entire trial was rendered fundamentally unfair. Appellant further believes that the trial court's actions created an atmosphere where the jurors felt pressured to return a hasty verdict. Appellant points to an error in the jury's sentencing recommendation as evidence that exhaustion prejudiced the deliberations.

Ordinarily, the length of time a jury may be kept together for deliberation is a matter for the sound discretion of the trial court. *Mills v. Tinsley*, 314 F.2d 311, 313 (10th Cir. 1963), *cert. denied*, 374 U.S. 847 (1963). Whether that discretion has been

abused is determined by viewing the totality of the circumstances. *United States v. Coast of Maine Lobster Co.*, 557 F.2d 905 (1st Cir. 1977), *cert. denied*, 434 U.S. 862 (1977). However, the length of time the jury is compelled to deliberate is necessarily limited by the prohibition against forcing it to agree upon a verdict. Thus, the question is whether the efforts of the trial court to secure a verdict placed such pressure upon the jurors that at least one of them may have surrendered views that he or she conscientiously entertained. *United States v. Thomas*, 449 F.2d 1177, 1181 (D.C. Cir. 1971) (*en banc*).

The record herein reveals that the trial court provided the jurors numerous breaks and rest periods throughout the day. In fact, the jury declined one such break. Further, at no point did any party or juror complain or express concern that continuing with deliberations would result in any unfairness to Appellant. And, unlike the cases cited by Appellant, there is no evidence that the trial court made any statements to the jury in an attempt to coerce a verdict. *Cf. State v. Wells*, 639 S.W.2d 563 (Mo. 1982); *People v. London*, 198 N.W.2d 723 (Mich. App. 1972); *State v. Green*, 121 N.W.2d 89 (Iowa 1963). In fact, it is clear that the jury did not feel coerced as it spent a considerable amount of time deliberating.

Moreover, our Supreme Court examined these same facts in a co-defendant's unpublished appeal, and found no palpable error. *Hatcher v. Commonwealth*, No. 2005-SC-0623-MR, 2006 WL 2456354 (Ky. 2006). While the Supreme Court chastised the trial court's conduct as "immoderate and extremely insensitive to both parties and especially the jurors," that Court went on to determine,

> [t]he record reveals that the jury was provided adequate breaks for both lunch and dinner and that no juror complained or objected in any manner whatsoever to the extended deliberations. The jury took an ample amount of time in deliberating Appellant's guilt and in determining a recommended penalty. Finally, Appellant presents nothing which would lead us to believe that the verdict would have been different if the jury had more rest prior to deliberations. Considering the circumstances in their totality, we do not find that the trial court's requiring extended jury service resulted in manifest injustice affecting the substantial rights of a party. *Id.*

We would caution that the better practice in this instance might have been for the trial court to ask the jurors at a reasonable hour whether they preferred to continue deliberations or would rather resume their deliberations the next day after resting for the night. However, we conclude that Appellant has failed to demonstrate that the trial court's decision herein to continue deliberations throughout the night resulted in manifest injustice or otherwise seriously affected the fairness or outcome of her trial. Thus, we find no palpable error in the trial court's decision.

The judgment and sentence of the Edmonson Circuit Court are affirmed.

HOWARD, SPECIAL JUDGE, CONCURS.

ABRAMSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ABRAMSON, JUDGE, CONCURRING: I concur without reservation in the majority opinion as to the trial court's disposition of the severance motion and admission of the autopsy photographs. I concur on the third and very troubling issue, the duration and circumstances of jury deliberations, in part because our Supreme Court has addressed these very deliberations when it unanimously affirmed the conviction of

Beckner's co-defendant, Allen W. Hatcher, in his direct appeal to that Court. *Hatcher v. Commonwealth,* 2005-SC-0623-MR (September 14, 2006) (Not to be Published). Hatcher alleged that the trial court abused its discretion in requiring the jury to hear evidence and deliberate both phases of the trial in twenty-one consecutive hours stretching from 8:52 on Friday morning until 5:36 on Saturday morning. The Supreme Court properly took the trial court in this case to task for the manner in which he conducted the final stages of the trial, stating that it was "astonished and concerned" about the trial court's "immoderate and extremely insensitive" conduct. *Hatcher*, p. 6. Having criticized the process, the Court noted that Hatcher's counsel had not objected and then addressed the issue pursuant to the palpable error rule, RCr 10.26. Specifically, the Court found no manifest injustice affecting Hatcher's substantial rights, noting that he had offered nothing to suggest "the verdict would have been different if the jury had more rest prior to deliberations."

In *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997), the Kentucky Supreme Court observed that the "manifest injustice" requirement in RCr 10.26 has been interpreted "to mean that the error must have prejudiced the substantial rights of the defendant, *Schaefer v. Commonwealth*, Ky. 622 S.W.2d 218 (1981), *i.e*., a substantial possibility exists that the result of the trial would have been different." Applying this standard, as the *Hatcher* Court apparently did, it would be difficult to reach a result contrary to the result in *Hatcher* because Beckner too offers nothing to suggest that the verdict would have been different if the jury had not been subjected to a twenty-one hour work day. Indeed, the jury appears to have performed commendably in sorting through

the various charges and defendants, drawing the necessary distinctions between each defendant's conduct.

However, Beckner has characterized the issue before us as not merely an abuse of discretion but rather a denial of her right to a fair trial. Where federal constitutional rights are implicated, the harmless error analysis is not defined by our state court precedent but must conform to the United States Supreme Court's directive in *Chapman v. California*, 386 U.S.18, 24 (1967): "[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Given the substantial evidence of Beckner's guilt, this high standard has also been satisfied, but it bears particular note that in those criminal prosecutions where the defendant's guilt is a closer call the marathon schedule imposed by the trial judge in this case would most likely not pass constitutional muster. *See United States v. Yeager,* 327 F.2d 311, 315 n. 3 (3rd Cir.1964) *citing with approval United States ex rel. Leguillou v. Davis,* 115 F.Supp. 392 (D.V.I. 1953) *rev'd on other gds*, 212 F.2d 681 (3rd Cir.1954) (due process denied "where jury had been required to hear a criminal case all day and then to deliberate all night until a verdict of guilty was returned at 6:00 a.m.").

In sum, circuit court judges in Kentucky frequently have crowded dockets with many cases needing prompt attention. Jury trials, particularly criminal trials, must on occasion extend into the late night hours. Any experienced judge or lawyer recognizes these indisputable facts. Nevertheless, no defendant, juror or counsel should be subjected to a harrowing schedule such as the one imposed by the trial judge in this case. I concur

because that is the correct result under the law, but I cannot overstate my firm belief that if our justice system is to inspire the confidence of the Commonwealth's citizens, conduct such as this should not be repeated.

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BRIEF FOR APPELLEE:

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