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RENDERED: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2003-SC-0883-MR DATE 3-16-06 ELLA GROUND, D.C.

KATHY HARLESS — APPELLANT

V.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
2001-CR-0080

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Harless of murder and tampering with physical evidence. She was sentenced to life in prison on the murder charge and five years for the tampering charge. The events in question occurred in April 2001, prior to the enactment of Kentucky's Fetal Homicide Statutes, KRS 507A.020-507A.050, and the decision in Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004), which abrogated the born-alive rule. Consequently, neither are applicable here.

The questions presented are whether Harless was entitled to a directed verdict on the murder charge; whether a written statement of an absent witness was improperly admitted into evidence; whether prosecutorial misconduct occurred; and whether the trial judge abused his discretion in denying the motion for a change of venue.

A service man arrived at a flea market in order to clean out the septic tank of an outhouse. His hose became clogged while pumping the tank and upon inspection, he discovered the body of a dead newborn baby in the cesspool. The baby was full-term and showed no signs of trauma or abnormalities.

A witness informed the police that Harless had been seen by the toilet a few days before and was covered in blood from the waist down. When a detective confronted her at another flea market, she neither admitted nor denied giving birth to the baby. Blood samples later confirmed that Harless was the mother.

Harless was indicted for murder and tampering with physical evidence. She was also indicted for concealing the birth of an infant and abuse of corpse, but these charges were later dismissed.

When police attempted to arrest Harless, they learned that she had left Kentucky. She was eventually arrested in Florida and returned here for a trial that was held on October 27, 2003. The jury convicted Harless of murder and tampering with physical evidence. She was sentenced to life for the murder and five years on the tampering charge, the sentences to run concurrently. This appeal followed.

I. Directed Verdict

The standard of review for determining whether a directed verdict is proper is set out in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The test 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. At trial, on a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Accord* Dishman v. Commonwealth, 906 S.W.2d 335 (Ky. 1995). The trial judge is required to assume that all the evidence

presented by the prosecution is true. Baker v. Commowealth, 973 S.W.2d 54 (Ky. 1998). The trial judge is required to consider not only the actual evidence, but also must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). The court, acting as an appellate court, cannot reevaluate the evidence or substitute its judgment as to the credibility of a witness for that of the trial judge and jury. Commonwealth v. Jones, 880 S.W.2d 544 (Ky. 1994).

In this case, there was sufficient circumstantial evidence of "live birth" to support a belief in a reasonable juror that the child was born alive and not stillborn. Dr. Donna Hunsaker, a Kentucky medical examiner, testified on behalf of the prosecution to the effect that her autopsy on the child revealed that he was 22-1/8 inches long, with a head circumference of 15 inches, and that the infant weighed seven pounds at the time of the autopsy. Dr. Hunsaker offered the opinion that because of the decomposition of the child, it probably weighed more than seven pounds when it was born. The medical examiner stated that, based on the overall characteristics of the child, it was normal in all respects and had no obvious external body abnormalities. The internal organs of the infant male appeared normal and to be those of a full-term developed infant. The child had an umbilical cord stump that was half an inch in length with no tears or lacerations. She gave her opinion that a quick and violent delivery would have resulted in tears in the umbilical cord; that the cord is very tough and a person would have to expose it to 3,300 "G" forces before it would tear on its own, that is, without a cutting.

Dr. Hunsaker testified that the external extremities of the infant were fully developed; that he had a patent anus which is a sign of no gross gastro-intestinal abnormalities. All of the organs of the child inside the abdominal cavity were in their

proper position and all were normally developed. Her examination of the organs indicated no diseases or abnormalities. The common test to determine whether an infant has taken a breath, the so-called float test, was not available because of the advanced decomposition of the body. The cardiac exam of the child was normal with no gross cardiac defects. The respiratory system appeared to be normal also. The child's pancreas and adrenal glands were normal, as were the urinary and genital tracks. The spleen was also developed normally.

The child's skull was intact, and there were no bone or congenital abnormalities. None of the structures of the skull were overlapping. Dr. Hunsaker explained that when an infant dies in the womb, the brain is reabsorped by the body. As a result, the skull structures begin to collapse onto one another as the brain shrinks. This was not present in this case. Overlapping skull structures is a clear sign of stillbirth or intrauterine death. In addition, the examiner testified that there was no evidence of maceration on the body of the child. Maceration is a condition of the skin which gives the appearance of being scalded, and is a sign that a child died in the womb and occurs when the body begins to break down in the sterile environment of the womb.

The expert could find no indication that the infant was stillborn. Nevertheless, because of the advanced decomposition of the body from its time in the cesspool, she was unable to medically conclude with certainty that the infant was born alive.

The decision of this Court in Morris, supra, which overruled Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983), provided that a viable fetus is a human being for the purposes of the homicide statutes. However, the majority of the court did not allow the retroactive application of the new rule. Consequently, the old Hollis rule of "born alive" is applicable here. Even so, there was overwhelming circumstantial

evidence here to support a finding that the child was actually born alive. Although she could not determine with scientific certitude that the child was born alive, she also could not find any indication that it was a stillbirth. It is clear that normal scientific examinations were severely impeded by the decomposition of the body of the child. This spoliation of the evidence was directly caused by Harless in placing the child in a cesspool below the flea market toilet. There was more than sufficient evidence for the jury to conclude that the child was born alive when the mother put him into the cesspool.

It must also be remembered that Harless left Kentucky and was eventually arrested in Florida. It has long been held that flight to elude capture or to prevent discovery is admissible because flight is always some evidence of a sense of guilt. Rodriguez v. Commonwealth, 107 S.W.3d 215 (Ky. 2003).

When the evidence is considered in the light most favorable to the Commonwealth, it supports a fair and reasonable inference that the child was born alive. It was not clearly unreasonable for the jury to have found guilt.

II. Written Statement of Absent Witness

Harless contends that permitting the reading of a written statement of an absent witness was a violation of her constitutional rights to cross-examination and confrontation. She admits that her defense counsel agreed to the procedure employed, but seeks review pursuant to RCr 10.26.

One of the witnesses subpoenaed by the Commonwealth was hospitalized and not present on the day of trial. The prosecutor asserted that he could not go forward without the testimony of this witness and sought permission to depose him that evening. Defense counsel did not object to this plan and later stated that he could just stipulate

to the testimony. The statement by the witness was read to the jury by the police detective. The trial judge informed the jury why the witness was absent and that the parties agreed to have the statement read to them.

This issue has been waived and review pursuant to RCr 10.26 is unwarranted. A criminal defendant may waive the constitutional right of confrontation and cross-examination. Illinois v. Allen, 397 U.S. 337, 342-43, 90 S.Ct. 1057, 1060-61, 25 L.Ed.2d 353 (1970); Parson v. Commonwealth, 144 S.W.3d 775 (Ky. 2004). We reject the argument by Harless that a defendant in every instance must personally waive the right to confront the witnesses against him. Hawkins v. Hannigan, 185 F.3d 1146, 1155 (10th Cir. 1999); Parson, supra. In any event, the statement of the witness did nothing more than confirm what Harless herself had stated, that she had been at the flea market near the toilets and that she had blood on her clothes. Any error here was harmless. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967); RCr 9.24.

III. Alleged Prosecutorial Misconduct

Harless complains of five supposed incidences of prosecutorial misconduct. We will address the complaints separately.

First, Harless claims that the prosecutor informed the jury of her subsequent pregnancy in violation of a pretrial agreement. In a pretrial conference, it was agreed that the prosecutor would not mention that a subsequent child of Harless was born in jail. It was made clear that where the child was born was not relevant.

While questioning the detective during trial, the prosecutor asked him if he ever learned of the subsequent pregnancy. The detective responded that he had learned of the pregnancy when she ". . . was back at the jail." Defense counsel offered a general

objection, which the trial judge overruled so long as the prosecutor demonstrated the relevance. Thereafter, the prosecutor introduced the medical records that showed that the birth-weights of the other children born to Harless, including the most recent, was similar to the birth-weight of the child in question.

The pretrial agreement only prohibited the Commonwealth from introducing evidence that the child was born in the jail. The detective never mentioned that the child was born there, only that he learned of the subsequent pregnancy after Harless was back at the jail. No error occurred and even if it did, it was harmless. RCr 9.24.

Second, Harless asserts that the prosecutor improperly commented on her right to remain silent. While questioning the detective, the prosecutor asked him whether Harless had said anything during the 15-hour drive from Florida to Kentucky following her arrest. The detective responded that she had said nothing. There was no contemporaneous objection to this testimony at trial and consequently, this issue is not properly preserved for appellate review. There was no palpable error.

Harless also maintains that the prosecutor impermissibly remarked during closing argument that any normal innocent person would have said it was a stillbirth when first confronted. There was no objection offered at trial. The prosecutor was not commenting on the silence of Harless, but rather on her initial statement to the police that it was a "possibility" that she had a baby while at the flea market. There was no error and certainly no palpable error.

Third, Harless argues that the prosecutor erroneously commented on photographic evidence not presented to the jury. She also complains that she was prejudiced when the prosecutor stated that the jury would never be the same after seeing the pictures and indicated that the defendant was at fault for that. There was no

objection at trial. The photographs referenced by the prosecutor had all been admitted into evidence. These comments were within the wide latitude afforded prosecutors during closing argument. There was no error of any kind.

Fourth, Harless argues that the prosecutor improperly mentioned his personal belief of her guilt. She directs our attention to the following statement: "I believe this baby was born alive with all my heart because that is what the evidence tells me." No objection was made to this statement. There was no palpable error.

Fifth, Harless contends that the highly inflammatory and prejudicial closing argument by the prosecutor is reversible error in this case. She specifically protests the fact that he observed that she failed to name the baby and that he suggested that the baby be named Justice. There was no objection raised at trial. These comments were within the wide latitude afforded prosecutors during closing argument. There was no palpable error.

IV. Change of Venue

Harless complains that it was error to deny her motion for a change of venue when it was obvious that she could not receive a fair trial in Grayson County due to the pre-trial publicity. She states that the trial judge was provided with both sworn affidavits as well as media clippings to show the community awareness and possible bias. Harless notes that she was even pictured on the television show America's Most Wanted.

Whether to grant a change of venue is within the sound discretion of the trial judge. Gill v. Commonwealth, 7 S.W.3d 365 (Ky. 1999). That decision will not be disturbed on appeal absent a clear abuse of discretion. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997), *cert. denied*, 522 U.S. 986, 118 S.Ct. 451, 139 L.Ed.2d

387 (1997). "It is not the amount of publicity which determines that venue should be changed; it is whether public opinion is so aroused as to preclude a fair trial." Kordenbrock v. Commonwealth, 700 S.W.2d 384, 387 (Ky. 1985), *cert. denied*, 476 U.S. 1153, 106 S.Ct. 2260, 90 L.Ed.2d 704 (1986). In a truly exceptional case, the degree and the bias of pretrial publicity can be so great that prejudice may be presumed. Jacobs v. Commonwealth, 870 S.W.2d 412, 416 (Ky. 1994). That is not the case here.

Although Jacobs, supra, holds that undue prejudice may be implied from the pretrial publicity surrounding a trial, the court in that case relied on the fact that the trial judge had a difficult time selecting an impartial jury to support its holding. In the present situation, the trial judge had little difficulty in selecting a jury. Only an hour and fifteen minutes elapsed between the swearing of the venire panel and the swearing of the petit jury. There is no allegation that any of the jurors were not qualified to sit. The trial judge did not abuse his discretion by denying the motion by Harless for a change of venue.

The judgment of conviction is affirmed.

All concur. Johnstone, J., not sitting.

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