IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-21-06 ELIA GRANT D.C.

2004-SC-1096-MR

RALPH WAYNE GRIMES, JR. — APPELLANT

V.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
2003-CR-0004

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This appeal is from a jury verdict convicting Grimes of first degree manslaughter. He was sentenced to serve 20 years in the penitentiary.

Grimes presents three questions for review: 1) whether there was error when the trial judge refused a request for a continuance to allow the defense time to secure DNA related evidence and testimony; 2) whether a submitted jury instruction on an intoxication defense was properly not included for jury consideration; and 3) whether the jury instructions on protection of self and others were improper. We reverse on the first issue and remand for a new trial consistent with this opinion.

Grimes, a female friend and two other males, went to visit another female acquaintance at her trailer late in the evening. The victim was present when the group arrived at the trailer. There was conflicting testimony about the actual events but it is clear from all versions that a party ensued and everyone present consumed a significant quantity of alcohol.

The victim was involved in scuffles and arguments with several of the visitors during the hours of the party. There are conflicting versions of the exact sequence of events. Some claim the visiting foursome all left the trailer but returned to retrieve some personal belongs inadvertently left behind. Another version has the group remaining in the trailer until a melee broke out. Regardless of the exact factual sequence of events, at some point in time, the victim, wielding a knife, became aggressive toward one of the visitors although there was testimony from the female resident of the trailer that it was Grimes who introduced the knife into the fight. It was however, Grimes alone who suffered a knife wound.

During this final fight, Grimes, who was significantly smaller then the victim, managed to hold the victim in what he claims was a headlock and maintained this hold until the victim went still. The so-called headlock was in fact a strangle hold which was the ultimate cause of death.

At trial, Grimes was the only witness for the defense. He testified that he applied a "sleeper hold" until the victim was unconscious and that he saw blood from his nose. He admitted that he stomped the victim three times on his back.

Grimes was arrested after the death of the victim on November 23, 2002. An indictment was returned on January 14, 2003. He remained in custody. On May 23, 2003, the Commonwealth filed a motion seeking samples from Grimes to compare against evidence collected at the scene. A bloody knife was found near the victim and although he had been beaten, there were no knife wounds on the corpse. There was also conflicting testimony that the knife found at the scene was not the knife used during the fight. There was, however, sufficient potential evidence of some DNA variety

that was enough to cause the Commonwealth to seek a DNA match against a sample from Grimes.

That motion was granted two months later by the trial judge in an order entered July 16, 2003. On April 23, 2004, Grimes filed a motion to secure funding as authorized by KRS 31.185 for expert assistance in the evaluation of the DNA testing performed by the Commonwealth. The record is silent whether that funding was ever authorized although the trial judge later acknowledges verbally that he had approved the request. Grimes was eventually released on a modified bond by order entered April 30, 2004 after being held for trial in jail for over 17 months. A motion seeking a speedy trial was never filed.

On motion by the Commonwealth, the trial was scheduled for October 18, 2004 by order entered September 3, 2004. Grimes requested a continuance by motion filed September 24, 2004 and stated among other reasons that the results of the Commonwealth's DNA testing on the knife had yet to be received. Notices of providing the defendant with reports from the Kentucky State Police lab were filed on October 4 and 6, 2004, but the actual reports are not included in the record by either party. We are hesitant to assume that the reports provided 14 and 12 days prior to trial are the requested DNA reports sought by the defense but are left no other choice from the record. Discussions between the trial judge and counsel seem to indicate that some DNA test results had been obtained shortly before the trial date and that counsel had waited until receiving those results before attempting to secure the required expert assistance.

On October 14, 2004, the Commonwealth filed notice that it had elected to prosecute Grimes on the October 18 trial date established by the trial judge. All other

cases scheduled for that day were continued including the trials of the co-defendants who were present at the party and involved in the fight with Grimes. The trial commenced on October 18, 2004, lasted two days, and resulted in a jury convicting Grimes of first degree manslaughter. He was sentenced to serve 20 years in the penitentiary. Neither side offered DNA evidence at trial. This appeal followed.

I. Motion for Continuance

DNA evidence is an often critical and potentially deciding factor in many cases. See Sholler v. Commonwealth, 969 S.W.2d 706 (1998). The scientific knowledge provided by DNA testing can be invaluable to a jury. See Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999). This trial was a presentation of one set of facts that made the victim look good and another that made Grimes look as if he acted in the defense of himself or others. Had he been able to present evidence to the jury that the bloody knife contained his blood, it could have provided additional evidence for the jury to decide in his favor.

The standard of review under RCr 9.04 is that the trial judge upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it. Certainly the trial judge has broad discretion when deciding a motion to continue. Pelfrey v. Commonwealth, 842 S.W.2d 524 (Ky. 1993). That decision must be based on the unique facts and circumstances of each case. Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994). One of many factors under consideration, however, must be whether a denial will lead to substantial prejudice. Snodgrass v. Commonwealth, 814 S.W.2d 579

(Ky. 1991). We will not reverse a criminal conviction unless the trial judge is found to have not adequately considered the required factors. See Abbott v. Commonwealth, 822 S.W.2d 417 (Ky. 1992).

DNA evidence while not conclusive could have been used by the jury to determine the credibility of Grimes' version of the events at issue. We cannot guess as to how effective this additional evidence may have been but its absence raises questions whether Grimes was able to fully present his defense. The failure to allow Grimes the additional time needed to develop this evidence, after acknowledging his need by providing Chapter 31 funding, rises to a level that cannot be ignored. This was not harmless but could well have been evidence that altered the outcome of the trial, the verdict or the sentence. It was error for the trial judge to overrule the motion for a continuance because it denied Grimes the opportunity to present a defense. We reverse and order a new trial at which Grimes may attempt to introduce DNA evidence if he so chooses.

II. INTOXICATION INSTRUCTION

Grimes tendered a proposed instruction on voluntary intoxication which the trial judge refused to submit. While there is no doubt from the evidence that Grimes had been consuming alcohol, mere drinking is not sufficient to justify an intoxication instruction. Intoxication is a valid criminal defense if it "negates the existence of an element of the offense". KRS 581.080. In this situation, Grimes would have to have shown that he was so intoxicated that he did not know what he was doing. See Stanford v. Commonwealth, 998 S.W.2d 439 (Ky. 1999). The alcohol use must be so severe that it negated any intent. McGuire v. Commonwealth, 885 S.W.2d 931 (Ky. 1994). The trial judge heard the evidence and decided the evidence of drinking did not

rise to a level sufficient to warrant the instruction. We will not substitute our judgment for that of the trial judge absent a clear showing of abuse of discretion. The instruction was not appropriate.

III. PROTECTION OF SELF AND OTHERS INSTRUCTIONS

The instructions of the trial judge on self-defense and the protection of another were proper. Grimes admits that this issue was not properly preserved for appellate review, but we will consider the issue presented.

Grimes presents a number of arguments concerning the instructions presented to the jury regarding the lesser included charges of second degree manslaughter and reckless homicide. Specimen instructions have been previously provided in Commonwealth v. Hager, 41 S.W.3d (Ky. 2001) and should be substantially used as a model. Each case presents differing facts and the trial judge must always be prepared to craft a set of instructions that are determined by those facts. See Snell v. Commonwealth, 420 S.W.2d 127 (Ky. 1967). Sufficient guidance has been provided by Saylor v. Commonwealth, 144 S.W.3d 812 (Ky. 2004), to allow the trial judge to produce appropriate instructions based on the facts presented in evidence.

We decline to take this case as an opportunity to write model instructions. The trial judge is best situated to create appropriate instructions based on the facts of each case.

We find error and reverse on the first issue involving the continuance and DNA evidence and remand for a new trial consistent with this opinion.

All concur.

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