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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0623-MR DATE 9-14-06 ELIA Graves, D.C.

ALLEN W. HATCHER — APPELLANT

APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
V. 03-CR-00118 AND 05-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

An Edmonson Circuit Court jury convicted Appellant of (1) murder; (2) trafficking in marijuana more than eight ounces but less than five pounds, while in possession of a firearm; (3) possession of drug paraphernalia, while in possession of a firearm; (4) possession of a methamphetamine precursor, while in possession of a firearm; (5) tampering with physical evidence; and (6) two counts of trafficking in a controlled substance, while in possession of a firearm. For these crimes, Appellant was sentenced to a total of thirty years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The crimes for which Appellant was convicted stemmed from events that occurred during a late night/early morning visit to Appellant's residence by Edward Tankersley, Jr., and Chris Sexton. Tankersley and Sexton were drinking at a bar late that night. At closing time, Tankersley suggested that he and Sexton should stop by the residence of a "girl" he knew. Sexton agreed, and a short time later, the pair arrived at Appellant's residence. Sexton admitted that the pair had smoked some marijuana, ingested "just a little" cocaine, and had drank a few beers prior to arriving at the residence. Sexton admitted that they had a "pretty good buzz," but denied that they were ever intoxicated.

Sexton testified that upon arrival they knocked on the door and were allowed inside. Sexton did not enter the house at that time but went back to the car to get a beer. When Sexton entered the house, he observed Tankersley talking with Paula Beckner, a co-defendant, who was standing next to a tray containing a plenteous quantity of marijuana. Suddenly, Appellant emerged and yelled, "I told you to get out of my house." Appellant then ran to a back room of the residence and re-emerged with a gun. According to Sexton's testimony, Appellant shot Tankersley in the leg without any provocation whatsoever. Sexton ran away out of fear but then re-entered the residence to drag his friend out of the house. While doing so, Sexton alleged that Appellant shot Tankersley in the head.

After Tankersley had been shot in the head, Sexton continued to drag the victim out of Appellant's house and place him in the car. Sexton drove to a nearby residence, aroused the occupants, and asked them to call 911. Tankersley died soon after emergency personnel arrived.

Appellant was subsequently charged with the crimes set forth above. At trial, Appellant and his co-defendant, Beckner, claimed that Tankersley and Sexton broke into their house and that Appellant shot Tankersley in self-defense. The jury nonetheless convicted Appellant of all the charged crimes. Appellant now appeals to this Court, alleging errors which he claims entitle him to a new trial. For the reasons set forth herein, we affirm.

The first error claimed by Appellant is the trial court's denial of his motion to sever the drug charges from the murder charge pursuant to RCr 6.18 and RCr 9.16. RCr 6.18 provides that two or more offenses may be joined together "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." Id. Appellant contends that there was "absolutely no evidence linking the victim's death to the drugs and drug paraphernalia that was later discovered at the location of the shooting." We disagree.

The Commonwealth's theory of the case was that the victim had obtained drugs at Appellant's residence on previous occasions and that he likely returned to Appellant's residence the night of his death to buy or obtain more drugs. When the victim arrived, Appellant decided to kill the victim because of a dispute over a prior drug debt. Evidence supporting this theory included (1) the presence of drugs at Appellant's residence, the scene of the crime; (2) Sexton's testimony; and (3) testimony from an inmate stating that he heard Appellant tell others in jail that he shot the victim because of a dispute over a prior drug debt. This evidence was more than adequate to establish a sufficient link between the murder charge and the drug charges, and therefore it was not an abuse of discretion to join the charges pursuant to RCr 6.18. See Cannon v.

Commonwealth, 777 S.W.2d 591, 596 (Ky.1989) (joinder will not be overturned unless a clear abuse of discretion is demonstrated).

The joinder in this case also did not violate the dictates of RCr 9.16. Under RCr 9.16, "a defendant must prove that joinder would be so prejudicial as to be 'unfair' or 'unnecessarily or unreasonably hurtful.'" Commonwealth v. Rogers, 698 S.W.2d 839, 840 (Ky.1985) (internal citations omitted). The standard of review under RCr 9.16 is also abuse of discretion. Skinner v. Commonwealth, 864 S.W.2d 290, 294 (Ky.1993).

Appellant argues that the drug crimes evidence impaired his credibility and increased the probability of the jury presuming him guilty of murder based solely on his involvement with drugs. While this may be a reasonable inference, we do not believe that such potential prejudice rises to the level of being "unfair" or "unnecessarily or unreasonably hurtful." Rogers, supra at Id. The drug crimes evidence was necessary and relevant to prove the Commonwealth's case regarding the murder charge. Under these circumstances, there was no abuse of discretion in the trial court denying Appellant's motion for severance.

Appellant next argues that the trial court erred in admitting four autopsy photographs of the victim and denying Appellant's motion for mistrial based on the same. He claims that these photographs were overly prejudicial in that they unnecessarily aroused the passions of the jury and appalled them. "The general rule is that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous." Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992).

The photographs in this case were relevant to illustrate the medical examiner's testimony and to prove the victim's injuries and cause of death. The proper scope of

review, therefore, is whether the probative value of the photographs was outweighed by undue prejudice. Adkins v. Commonwealth, 96 S.W.3d 779, 794 (Ky. 2003). We review such trial court determinations under an abuse of discretion standard. Id. at 795.

The trial court personally examined the above mentioned photographs and expressly found that they were neither gruesome nor overly prejudicial. Appellant complains that the photographs were unnecessarily grim since the victim's body was somewhat altered by the autopsy. Such a detail however is not sufficient to overcome the probative value of the photographs, and consequently there was no abuse of discretion on the part of the trial court.

In his final argument, Appellant alleges that the trial court abused its discretion by requiring the jury to remain in court for twenty-one (21) consecutive hours. At the start of trial, on Wednesday, July 6, 2005, the trial court informed the parties and the jury that every effort would be made to complete the case by Friday, July 8, 2005. When the trial court adjourned on Thursday, July 7, 2005, the trial court reaffirmed its intent to make every effort to conclude the case by the following day and told the jury that it should be "prepared for a late night."

On Friday, July 8, 2005, the trial was reconvened at 8:52 a.m. The trial court granted a recess at 11:54 a.m. and reconvened again at 1:00 p.m. Another recess was granted at 7:52 p.m. and court was reconvened at 9:14 p.m. At 11:01 p.m., the presentation of the case was concluded and was submitted to the jury for a decision. At 2:20 a.m. on July 9, 2005, the jury announced its verdicts of guilty on all charges. Penalty phase instructions were prepared during a brief recess and were then read to the jury. At 5:17 a.m., the jury announced its recommendations concerning the penalty.

At 5:36 a.m. on Saturday, July 9, 2005, the jury was excused some twenty-one (21) hours after arriving in court the day before.

We are astonished and concerned that the trial court's conduct was immoderate and extremely insensitive to both the parties and especially the jurors, who are conscripted into service. Parties, jurors, and court personnel should not be so abused. However, Appellant expressed no reservations at the time and chose not to object to the trial court's decision. Appellant now asserts his objection as palpable error. Because the evidence does not show that the trial court's conduct resulted in manifest injustice affecting the substantial rights of a party, Appellant is not entitled to relief. RCr 10.26.

The 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.

Accordingly, the judgment of the Edmonson Circuit Court is affirmed.

All concur.

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