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RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-000039-MR

LEONARD WILLIAM DAY — APPELLANT

V.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
INDICTMENT NO. 02-CR-00273

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

This case is on appeal from the Boone Circuit Court where Appellant, Leonard William Day, was convicted of complicity to murder, tampering with physical evidence, and being a persistent felony offender in the first degree. Appellant raises three claims of error: (1) that he was denied his right to a speedy trial; (2) that the trial court improperly admitted a series of pictures of the decaying skeletal remains of the victim; and (3) the trial court improperly admitted highly prejudicial evidence of other crimes, wrongs, and bad acts. Finding no error, we affirm.

II. Background

Appellant's conviction arose from charges brought against him for the murder of his former girlfriend, Tina Rae Stevens, whose skeletal remains were found in Boone County on April 10, 2000. Stevens, who had been living in Covington, Kentucky, disappeared in May 1999. At the time, she lived with Thomas Jansen, with whom she

was engaged in a tumultuous, on-again-off-again relationship. She had been involved with Appellant before Jansen.

Appellant worked for Robert Walker installing fiber optic cable. In May 1999, Appellant and Walker were doing a job in Boone County. They were staying at a local motel. Walker had his wife with him, and Appellant had his then girlfriend, Deborah Hueitt, with him.

Sometime during this stay in Boone County, Walker ran into Stevens while playing pool at a bar. She asked Walker to take her to the motel where he and Appellant were staying. Walker, who claimed to have heard Appellant express his continuing love for Stevens but also to have heard Hueitt say she wanted to kill Stevens, called Appellant from the bar to see if he would like to see Stevens. Appellant said that he would, so Walker drove her to the motel. Appellant met Stevens and Walker in front of the motel. They went to Walker's room (number 124), where Appellant introduced Stevens to Walker's wife. Appellant and Stevens then went to room 135 in order to avoid Hueitt, who was sharing room 121 with Appellant.

Very early the next morning, Hueitt called Walker's room demanding to know where Appellant was. Walker denied any knowledge of his whereabouts. About thirty minutes later, Hueitt showed up at Walker's door. Walker described her as "drunk and irate," and claimed she said, "I know he's got a girl around here with him." Walker again denied any knowledge and closed the door in Hueitt's face. He then called Appellant in room 135 to tell him that Hueitt was hunting for him.

The next weekend, Appellant called Walker, who had returned to his home in North Carolina, to tell him that he and Hueitt had gotten into a fight and had been kicked out of the motel. Walker returned to Kentucky later in the week. When he picked

Appellant up at his new motel, Appellant told him, "I don't know what I'm going to do. She's ruined me for life." Walker and Appellant continued to work in Boone County for approximately one month.

In April 2000, a jail work crew found most of the skeletal remains of a human body in a remote area of Boone County in a garment bag. Dr. Emily Craig, the state's forensic anthropologist, found bones and teeth scattered along the incline where the garment bag was found. Several bones, including the skull and some from the neck, legs, and hands, were missing. The garment bag appeared to have been ripped open by animals, and Dr. Craig testified at trial that teeth marks on the bones led her to conclude that animals were probably the cause of most of the scattering of the remains. Dr. Craig also testified that the estimated time of death was 3 to 10 months before the remains were found, but that it could have been earlier—it was very difficult to tell given the varying condition of the remains inside and outside of the garment bag.

Michelle Martin, Stevens's daughter, had been trying to report her mother as missing since early 2000, but the police refused to take the report. She persisted in trying to report her mother missing, and when the remains were found in April 2000, she finally convinced the police to take the missing person report. This eventually led to the identification of the remains as those of Tina Stevens on June 5, 2000.

The investigation into Stevens's death was led by Detective Todd Kenner of the Boone County Sheriff's office. He initially suspected Thomas Jansen, Stevens's on-again-off-again boyfriend at the time of her disappearance. Detective Kenner followed several leads on Jansen, but he never found enough evidence to charge him.

In September 2000, Detective Kenner contacted Appellant, who was then working a cable job in North Carolina. Appellant told Detective Kenner about meeting

with Stevens in May 1999. He claimed that his girlfriend Hueitt was upset the next day, so they went to a breakfast buffet, and that on the way to the buffet he saw Stevens, for the last time, boarding a bus. When Kenner contacted Appellant again in November 2000, he told the same story. Hueitt told Kenner a similar story about seeing a woman she thought to be Stevens at a bus stop.

In 2002, Appellant came forward and claimed that his girlfriend Hueitt had admitted to killing Stevens and that he had seen her in some of Stevens's clothes. Appellant was incarcerated in Illinois at the time. Further investigation turned up many incriminating statements and admissions made by Hueitt to several witnesses. She was arrested for the murder on April 24, 2002 in North Carolina. Appellant was arrested on July 9, 2002 on the charge of tampering with physical evidence. His arrest was based on statements from several of his friends, associates, and cellmates. On July 16, 2002, he was also charged with murdering Stevens.

Appellant's case went to trial fourteen months later following several delays due to the illness of Detective Kenner, who was to be a lead witness for the Commonwealth. The Commonwealth presented the testimony of over eighteen witnesses, many of whom described Hueitt's jealousy and her numerous incriminating statements. Hueitt invoked her Fifth Amendment rights and was therefore unavailable to testify at trial.

Several former cellmates of Appellant testified that he admitted to having a role in the killing and that he described the event in detail. One cellmate said that Appellant claimed Hueitt found him and Stevens together, confronted them, and attacked Stevens, hitting her in the head several times and cutting her throat with a knife. Stevens fell down and Hueitt continued arguing with Appellant. Stevens was bleeding but still alive at this point, but Appellant claimed that she had suffered a fatal wound. He

then "finished" the job "out of compassion" by stabbing Stevens in the back of skull with the knife. They then cut Stevens's head and fingers off, put the body in a clothes bag, and dumped it by the river. Another cellmate said that Appellant claimed Hueitt did everything. A third cellmate overheard Appellant say, "She didn't do it right and I had to finish her off," and that no one would care about the victim because she was a prostitute.

Pamela Hendrix, a friend of Appellant, testified to statements Appellant made regarding the murder prior to and during a trip to purchase drugs, including the fact that he and Hueitt had discarded Stevens's body in a blue garment bag and that he had seen Hueitt cut off Stevens's head.

The jury found Appellant guilty of complicity to murder and tampering with physical evidence, and of being a first-degree persistent felony offender (PFO). He was sentenced to thirty years for the murder and five years for tampering with physical evidence, enhanced to twenty for the PFO, to be served consecutively for a total of fifty years. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

III. Analysis

A. Right to a Speedy Trial

Appellant claims that the fourteen-month delay between his indictment and trial violated his right to a speedy trial under Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution.

Claims of speedy trial right violations are evaluated under Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). "A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and that of the defendant are

weighed." Id. at 514, 92 S.Ct at 2184. Barker requires that a reviewing court consider four factors to determine whether a defendant had been denied his right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant. Id. at 530, 92 S.Ct. at 2192. "No single one of these factors is determinative by itself." Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000), overruled in part on other grounds by Crawford v. Washington, 541 U.S. 36, 60-61, 124 S.Ct. 1354, 1369-70 (2004), as recognized in Jackson v. Commonwealth, 187 S.W.3d 300, 304 (Ky. 2006).

The first Barker factor is the initial hurdle for an appellant claiming a violation of this speedy trial right. The length of the delay must be "presumptively prejudicial" in order to reach consideration of the remaining factors: "The inquiry must first be triggered by a presumptively prejudicial delay. There is no bright line rule for determining what length of delay suffices to trigger the inquiry, but actual prejudice need not be proven to establish a presumptively prejudicial delay." Id. The length of the delay in this case was over fourteen months between the time of Appellant's arrest and the commencement of trial. While the complexity of the case has some effect on whether a given delay is presumptively prejudicial, the United States Supreme Court has noted that "lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett v. United States, 505 U.S. 647, 652 n.1, 112 S.Ct. 2686, 2691 (1992). As such, we conclude that the fourteen month delay here is presumptively prejudicial. However, "'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker inquiry." Id. Thus, we must

still consider the remaining factors in the Barker balancing test to determine whether Appellant's rights were violated.

The second factor, the reason for the delay, is a crucial area of concern under Barker, because it amounts to a determination of who is to blame for the delay. With regard to this factor, the Barker Court noted:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

Appellant's trial was initially delayed for two primary reasons: a delay in receiving scientific tests of evidence and health problems of a witness. The Commonwealth had the Federal Bureau of Investigation perform lab tests on materials from the crime scene. A delay in receiving the lab reports from the FBI postponed the trial. This is a neutral reason and we cannot say that it was the Commonwealth's fault. The trial was also delayed because of the continuing health problems of Detective Kenner, the lead investigator and a primary witness. In the months leading up to trial, Detective Kenner underwent several procedures and surgeries. As a result, he was unavailable for pre-trial hearings and conferences, thereby contributing to the delay. The Commonwealth was forced to ask for multiple continuances, which were necessary to ensure that Detective Kenner would be present during the trial as a witness.

While none of the reasons for the delay can be attributed to the Appellant, neither can we weigh them heavily against the Commonwealth. The Commonwealth's motions for continuances all appear to have been made in good faith. We conclude that the

reasons for the continuances were "valid reason[s] . . . [and] serve to justify appropriate delay." Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

The next factor in the Barker inquiry centers on whether or not the Appellant actually asserted his right to a speedy trial. While the Barker Court noted that assertion of the right is not an absolute prerequisite, "[t]his does not mean. . . that the defendant has no responsibility to assert his right." Barker, 407 U.S. at 528, 92 S.Ct. at 2191. The Commonwealth claims that Appellant never asserted his right because he never explicitly did so, i.e., he never uttered the magic words "speedy trial," and that he is now relying solely on his motion to dismiss, which, in and of itself, is insufficient to assert the right. The Commonwealth is correct that we have previously held that "[a] motion to dismiss is not a formal demand for a speedy trial." Tamme v. Commonwealth, 973 S.W.2d 13, 22 (Ky. 1998). While Appellant did not formally invoke his right, he did make multiple efforts to set a trial date and objected to the Commonwealth's multiple motions for continuances. We conclude that this was sufficient to constitute an assertion of the right, thus allowing the third factor of the inquiry to weigh in Appellant's favor. Cf. Cain v. Smith, 686 F.2d 374, 384 (6th Cir. 1982) (holding that "a demand for a reasonable bail is the functional equivalent of a demand for a speedy trial").

Prejudice to the Appellant is the most compelling of the factors in the Barker balancing test. As noted above, the determination that the length of delay was presumptively prejudicial does not decide this factor. Instead, we must engage in a substantive analysis of whether Appellant was actually prejudiced by the fourteen month delay.

> Prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial

> incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Barker, 407 U.S. at 532, 92 S.Ct. at 2193. Appellant argues that he suffered oppressive pretrial incarceration and anxiety due to the delay and that the delay impaired his defense.

Appellant's pre-trial incarceration was due to the fact that he could not post bond, which was initially set at $1,000,000 on July 16, 2002.[1] Admittedly, this was a high bond, although it was for a very serious crime. On April 11, 2003, after several continuances were granted due to the illness of Detective Kenner, the Commonwealth requested that Appellant's bond be lowered to only $100,000. The trial court granted the Commonwealth's request, reducing the bond to $100,000 securable by 10% in cash. Despite the significant reduction, Appellant still could not make the bond.

Appellant also argues that he was prejudiced by the delay because it hampered his defense. He specifically notes that he was unable to introduce what he describes as self-incriminating statements of Thomas Jansen at trial.[2] He notes that at the beginning of his attorneys' investigation, they could not find Jansen. However, by September 2003, when the trial was held, Jansen had moved back to the northern Kentucky area. Thus, when Appellant attempted to introduce Jansen's hearsay statements at trial, the trial court held that Jansen was not an unavailable witness and could have been subpoenaed.

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[1] An order entered on July 31, 2002 appears to have increased Appellant's bond to $2,000,000. Subsequent documents discussing his bond, however, state that it was only $1,000,000.

[2] Among these alleged statements by Jansen are: that if any blood was found in his car, it probably was from Stevens; that he was being set up; and that he had killed several people.

Appellant's claim that the delay caused prejudice is not particularly clear. Although Appellant was barred from introducing the statements because Jansen became available again over the course of the delay, he could have avoided the difficulty simply by subpoenaing Jansen to testify at trial. Appellant argues that he was still prejudiced because the delay had been so long that his attorney's investigators had ceased looking for Jansen and thus had no way to know that he had returned to the area. But once this fact was brought to Appellant's attention at trial, he could have asked for a continuance or issued a last minute subpoena. He failed to do either.

Moreover, it is unlikely that the statements would have had any impact at trial because the police, who had originally suspected Jansen of the crime, were ultimately unable to find sufficient evidence to support charges against him, and because even Appellant agreed that it was his girlfriend, Hueitt, who had been the major participant in the murder.

While being incarcerated for over a year would cause some anxiety and concern for Appellant, the good faith on the part of the Commonwealth in getting Appellant's bond reduced and lack of significant prejudice to Appellant's case undercuts his claim of prejudice. That, combined with the fact that the delay was due to neutral reasons, leads us to conclude that Appellant's right to a speedy trial was not violated.

B. Admissibility of Photographs Showing Skeletal Remains

Appellant also argues that photographs of the victim's skeletal remains, which had been scattered somewhat by animals, was improper.

The general rule is that photographs do not become inadmissible simply because they are gruesome and the crime is heinous. Brown v. Commonwealth, 558 S.W. 2d 599 (Ky. 1977). Appellant is correct, however, in that we have previously held that "the

presentation of photographs depicting the animal multilation of the corpse goes far beyond demonstrating proof of a contested relevant fact." Holland v. Commonwealth, 703 S.W.2d 876, 879-80 (Ky. 1985); see also Funk v. Commonwealth, 842 S.W.2d 476 (Ky. 1992); Clark v. Commonwealth, 833 S.W.2d 793, 794 (Ky. 1992) ("This general rule loses considerable force 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.").

However, none of these cases presented exactly the same facts as this case. In Holland, we objected to photographs of a corpse with extensive animal mutilation. 703 S.W.2d at 879-80. Similarly, in Funk, we objected to photographs depicting a corpse with animal mutilation, substantial decomposition, and maggot infestation. 842 S.W.2d at 478-79. And in Clark, we objected to the introduction and lengthy display of multiple up-close color slides and a videotape of the substantially decomposed corpse from which "decompositional fluid" was oozing. 833 S.W.2d at 794-95. While the photographs in this case showed that some of the bones had been moved by animals, they did not show extensive decomposition and gore. Rather, the photographs consisted of images of the victim's bones from which most of the flesh had already decomposed. We conclude that the photographs in this case did not depict the sort of overly gruesome remains that were present in Holland, Clark, and Funk.

We also note that Holland, Clark, and Funk were tried before the adoption of the Rules of Evidence. Under the current rules, admissibility of evidence is primarily determined by evaluating it under KRE 403, which provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of undue

prejudice." Under this standard, we have been more sympathetic to the introduction of gruesome evidence, even that which involves depictions of some mutilation and postmortem movement. Thus, we have addressed this issue in a similar case as follows:

> The Commonwealth introduced partial skeletal remains of the victims as well as slides, photographs and testimony relating to those remains. Most of the evidence was introduced during the testimony of . . . the state forensic anthropologist . . . to explain his testimony and to corroborate . . . testimony concerning the methods used to dispose of the bodies. Even gruesome photographs are admissible if they have probative value. Likewise, bones and bone fragments from a victim's body are admissible if relevant. Evidence that a defendant attempted to dispose of or conceal evidence, including the body of his victim, is relevant in a criminal case.

Tamme v. Commonwealth, 973 S.W.2d 13, 36 (Ky. 1998). Thus, such photographs are admissible if they satisfy the KRE 403 balancing test.

The photographs in this case would have caused Appellant little if any undue prejudice. They showed little in the way of gore or actively rotting flesh. It is unlikely that the mere fact that they showed that some of the bones had been moved would arouse much passion in the jury against the Appellant.

Additionally, the photographs were relevant to and probative of several factual issues, namely the manner of death and the fact that the killer had attempted to hide the body. The photographs corroborated the claim that Hueitt had cut Stevens's throat and then cut off her head, as they revealed the knife marks present on Stevens's clavicle. The photographs also depicted the location of the body on an embankment in the woods near a river, thus showing that Stevens's body had been moved from the crime scene, and illustrating the manner of her body's disposal.

We conclude that the photographs were probative yet minimally prejudicial, and we cannot say that their potential for prejudice significantly outweighed their probative

value. As in Tamme, it was not an abuse of discretion for the trial court to allow the introduction of the photographs.

C. Admissibility of Prior Bad Acts Evidence

Finally, Appellant challenges the introduction of testimony as to prior bad acts. Specifically, he claims that the trial court erred in allowing Pam Hendrix to testify that the purpose of a trip she and Appellant took to Illinois, during which he made several incriminating statements, was to buy methamphetamine. Appellant also claims it was error for one of his former cellmates to testify that Appellant spoke about a methamphetamine lab about which Stevens had known too much. He claims the trial court erred by allowing another of Appellant's cellmates to testify that Appellant and Stevens had been doing cocaine the night she was murdered, that Stevens had known too much about a "meth operation," and that Appellant told him that Pam Hendrix had been using methamphetamine before and during the trip to Illinois. He also argues that the trial court erred by allowing another witness to testify that Stevens was waiting for Appellant to get out of prison in Florida in February 1998.

We begin by noting that this issue is only partly preserved for review. Appellant's attorney objected to the question that led to the aspect of Pam Hendrix's testimony now at issue. The trial court overruled the objection and allowed Hendrix to answer the question. There was no objection to the other testimony that Appellant now claims was admitted in error.

The Commonwealth argues that Pam Hendrix's testimony was necessary both to show why she was willing travel to Illinois with Appellant and to show why Appellant might have been willing to make the incriminating statements. Hendrix testified that before the trip to Illinois, she had asked Appellant not to come to her house, but that he

had ignored her request and returned. She also had overheard him make slightly incriminating remarks about violence, namely that Deborah Hueitt had killed one of his "ex-old-ladies" and that he "saw the bitch cut her head off." Yet, despite these statements and the apparent enmity between Hendrix and Appellant, she still agreed to drive Appellant to Illinois. She stated that she agreed to the trip because Appellant had promised to pay a $349 phone bill for her and to give her some of the drugs he was getting in Illinois. Hendrix's testimony about the nature of the trip, including the fact that Appellant bought drugs, was necessary to give context to her testimony and to explain her presence.

As Appellant notes, KRE 404(b) bars the admission of evidence of other crimes, wrongs, or acts for the purpose of proving character or propensity to commit crime. But the Rule allows introduction of such evidence for "some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." KRE 404(b)(1). Although the Commonwealth's reason for admitting the evidence is not one of the classic "other purposes" listed in the rule, that list is not exhaustive. We conclude that the "other purpose" of the evidence was sufficient to satisfy the rule.

However, evidence of prior bad acts is not automatically admissible simply because it is offered for "other purposes." It must still satisfy the relevance-probativeness-prejudice balancing test of Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994). Hendrix's testimony was relevant to show something other than Appellant's criminal propensity. The testimony was sufficiently probative of the fact that the drug-related trip took place, which in turn gave context to and explanation of the incriminating statements. Finally, the evidence was not particularly prejudicial to Appellant. The drug

crimes were materially different from the murder charge that Appellant faced. It is highly unlikely that the jury's knowledge of Appellant's drug activities would have increased the chance it would have found him guilty of murder. The balance of these factors weighs in favor of admissibility of Hendrix's testimony, and we cannot say that the trial court abused its discretion in admitting it. Id. at 891 ("A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion.").

As for the other statements about which Appellant complains, we note that because they were not subject to a contemporaneous objection at trial, we can only review them for palpable error under RCr 10.26. We need not engage in a lengthy discussion of whether admission of those statements was error. Even if they were error, we are satisfied that they did not result in "manifest injustice" under RCr 10.26. As such, no relief is warranted.

IV. Conclusion

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

All concur.

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