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RENDERED: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-9-06 [illegible] D.C.

2004-SC-000261-MR

JAMES T. CLEMONS — APPELLANT

V.

APPEAL FROM GARRARD CIRCUIT COURT
HON. C. HUNTER DAUGHERTY, JUDGE
CASE NO. 02-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On October 31, 2002, the Appellant, James T. Clemons, was indicted for murder, tampering with physical evidence, and abuse of a corpse. Following a jury trial in the Garrard Circuit Court, he was found guilty of murder and tampering with physical evidence. On February 23, 2004, he was sentenced to an aggregate of thirty-nine (39) years in the penitentiary. He now appeals his conviction pursuant to Ky. Const. § 110(2)(b), asking this Court to reverse his conviction and afford him a new trial. We affirm the conviction.

FACTS

The Appellant lived on a farm located in Garrard County, Kentucky, owned by Jervis Sutton. He was behind on his rent, and Mr. Sutton decided to rent the premises to another tenant. On October 9, 2002, Mr. Sutton went to the farm, unannounced, to meet with Bobby Johnson to discuss mowing the property for new tenants. The Appellant was not at the farm when Sutton arrived. Sutton

starting cleaning up some limbs around the farm and took them over to a burn pile near where he had seen two chairs back to back with some sort of vinyl cover on top of them. He then noticed a carcass underneath the cover. When Johnson arrived, he and Mr. Sutton examined the carcass. Johnson thought it looked like the remains of a human or monkey. Thereafter, Johnson called his brother-in-law, Alvin Brickey, who worked at a cemetery. They decided it was the remains of a human and called the police.

When the police arrived, the smell of burnt flesh was still strong in the air and could be smelled from the Appellant's house. The burn pile was only thirty feet from its back door. Two lawn chairs were on either side of the carcass, with a blanket drooped over them to form a tent over the body. The body was lying face up, burned beyond recognition. A leg of one of the chairs went through the pelvic area of the body, clearly having been placed there after the fire because the chair was not burned. Neither was the blanket. A stake pierced the body, staking it to the ground. A partially filled container of gas was found near the backdoor of the farmhouse.

After a search warrant was obtained for the house, the officers executed it and videotaped what they found in the house. Inside a bedroom closet, a sleeping bag with a pillow and a pair of handcuffs were found, laid out like someone had been sleeping there. Several fans were running. Near the Appellant's bed were several newspapers dated October 2 through October 8.

When Deputy Coroner David East arrived at the farm, he recognized the remains as human. Emily Craig, a forensic anthropologist with the Kentucky State Medical Examiner's Office also examined the body and determined that the

trash had been piled on top of it before it was set afire. She was able to determine that the body had been moved after burning, as skull fragments were found beneath the buttocks. An old tire rim was found on top of the body. A stick was stabbed through the vagina area. Animal bones were also found on top of the body. The upper arm of the body, as well as portions of the skull, was missing. Adult maggots were present on the body and based upon the life stage of the insects, Craig estimated that it had been 4-7 days since the fire.

The body was removed from the scene and was later identified as the remains of Ms. Rhonda Michelle Brown, who had been reported missing October 8, 2002. She was last seen on October 1. The autopsy revealed she had suffered three broken ribs as a result of a blunt force, injuries which were thought to have occurred at, or near, the time of death.

Another forensic pathologist, Jon Hunsaker, also examined the victim's body. He concluded that the manner of death was homicide. But, due to the condition of the body, a specific cause could not be determined. Another forensic pathologist, Mike Ward, examined the maggots found in the body. A drug screen on the maggots, which can detect 75-100 drugs, was done and no drugs were found in the body or in the victim's flesh.

On October 10, the Appellant called the Garrard County Sheriff's office. He claimed he wanted to know what was happening on the farm because he had been gone and someone had driven by the farm and said the police were there. He was told to contact Detective Van Wright with the Kentucky State Police, and later that day, he called to ask what was going on. Det. Wright told the Appellant that he needed to speak with him. The Appellant then got his step-father Johnny

Todd, Sr., to drive him to the courthouse. On the way, the Appellant told Todd, Sr. that he knew that the police wanted to talk to him about a girl, who had come home with him about four days before, did some drugs, and had sex. The Appellant stated the girl stopped breathing during sex and he panicked and left the house.

At the courthouse, he told the officers he had not been to the house since the previous Sunday or Monday and that he did not notice anything out of the ordinary. Although the Appellant had stated that he had not been to the house for a week prior to the discovery of the body, he was seen at the farmhouse September 28, October 3, and October 5. After the interview the Appellant went to his sister's home.

There, he told his brother-in-law, Craig Norton, that he had met a girl at Al's place in Lexington. He brought her home and she smoked crack and he did valium. He said that she died or passed out while having sex and he freaked out, causing him to place her on the burn pile, covering her with trash. He took her clothes and placed them in a dumpster in Lexington. He then told him that while he was out to work, someone came out and burned the trash and her body.

He next contacted a friend, Jeff Marion, and told him to tell police that the Appellant had asked him to care for his horses. Once arrested, he contacted Marion again to clear up their stories. He even sent Marion a letter, asking Marion to lie for him. Marion turned this letter over to the Commonwealth's Attorney's Office. When the Appellant found out, he called Marion and threatened him.

Prior to trial, the Appellant moved to suppress statements made in his second interview with the police. He claims he asserted his right to remain silent, but the police did not stop questioning. Following the hearing, the trial judge redacted two of his statements referring to other bad acts, but did not suppress the Appellant's statements about his relationships with prostitutes.

The Appellant also moved for a copy of the victim's medical records. The trial judge did an in-camera inspection of the records. After review, he stated that the records showed the victim had type II diabetes, was not insulin dependent, was non-compliant with her medication, and further, had no history of diabetic coma or loss of consciousness.

The Commonwealth called twenty-four witnesses at trial. During trial, the Appellant objected to the Commonwealth's introduction of several photos and videos, which showed the charred remains of the victim. The images showed the crime scene and her charred body. One of the videotapes showed a set of handcuffs found during the first search of the house. The trial court allowed the photos and videos to be introduced.

At the conclusion, the jury found the Appellant guilty of intentional murder and tampering with the physical evidence. They recommended sentences of thirty-four (34) years and five (5) years respectively to be served consecutively for a total of thirty-nine (39) years. The trial judge imposed judgment and sentence consistent with the jury's recommendation.

ARGUMENT

I. The trial court did not err when it allowed introduction of the statements made by the Appellant.

The Appellant argues he was denied due process when the trial judge did not suppress statements made in his second interview with police after his arrest on October 23, 2002. He argues he invoked his Fifth Amendment right to silence, and was not given a full hearing in accordance with applicable law. We find no error.

The Appellant was taken to the courthouse to be interviewed after his arrest. He was informed of the charges against him, after which the officer stated, "I think now's the time if you've got something to say, I'd like to hear it." The Appellant replied, "I don't have anything to say." The police officer then told the Appellant they had a search warrant for his vehicle and the search was going to be done at the crime lab. The Appellant responded, "Go ahead. Knock yourself out." Over the next minute and a half the officers continued to talk to the Appellant. Appellant then started disputing their version of the evidence. The interview continued for about two and a half more hours, during which time he made the statements concerning his previous dealings with prostitutes.

At a hearing on December 3, 2003, the Appellant made the motion to suppress these statements. The trial court ruled, however, that the Appellant did not invoke his right to silence because he then invited the questioning by responding, "go ahead and knock yourself out."

A. Invocation of his right to remain silent.

Once an accused in custody unequivocally invokes the right to remain silent, interrogation must ordinarily cease. Miranda v. Arizona, 384 US 436, 473-474, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694 (1966). "However, the statement in question was not unequivocal and, given the context . . . it cannot even be fairly

characterized as an equivocal or ambiguous invoking of the right to remain silent." Soto v. Commonwealth, 139 S.W.3d 827, 847 (Ky. 2004); see also Bradley v. Meachum, 918 Fed. 338, 342 (2d Cir. 1990)(accused's statement that he was not going to say whether he was involved in a crime, followed by immediate denial of involvement was not invocation of right to remain silent). In Soto, during questioning after being mirandized, the defendant stated, "I trust myself not to say anything." Thereafter, he continued to answer questions "without expressing any desire to discontinue the interrogation." 139 S.W.3d at 847.

In Commonwealth v. Vanover, 689 S.W.2d 11 (Ky. 1985), the defendant declined to make any statement after being mirandized. After two officers made statements to him regarding evidence against him, he told the deputy where to find the items that he had stolen. This Court ruled that his Fifth Amendment right to remain silent had not been violated because his admissions were a product of being confronted with the totality of the evidence against him. This was the case here.

The Appellant had been properly mirandized. When the officer said to him, "I think now's the time if you've got something to say, I'd like to hear it." The Appellant stated, " I don't have to say anything." The officer's next comment regarding the forthcoming search of his car was followed by the Appellant's statement, "Go ahead. Knock yourself out." The Appellant then continued to respond and answered select questions asked about his relationships with prostitutes. Although he did, in his own way, refuse to answer several of the

officers' questions, he did not express a further desire to discontinue the interview and there were no coercive measures used by the police officers.

Like Soto, supra, the Appellant "continued to answer questions after the statement was made without expressing any desire to discontinue the interrogation." Soto, 139 S.W.3d at 847. And the statements were in response to inquiries about his dealings with prostitutes, not whether he killed the victim. Moreover, as in Soto, the Appellant "did not provide any significant information thereafter, thus rendering any possible error [in this regard] harmless beyond a reasonable doubt." Id.

B. Sufficiency of the suppression hearing

When a defendant moves to suppress a confession or other incriminating statements made by him, RCr. 9.78 requires that the trial judge conduct an evidentiary hearing and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact. Lewis v. Commonwealth, 42 S.W.3d 608, 610 (Ky. 2001); Mills v. Commonwealth, 996 S.W.2d 473, 480-81 (1999), cert. denied, 528 U.S. 1164, 120 S.Ct. 1182, 145 L.Ed.2d 1088(2000). The court then can make a decision after viewing the evidence as a whole.

Here, on the Appellant's motion, the court examined the transcript of the interrogation and made a ruling without objection by the Appellant as to the court's only reviewing the transcript to make its determination. The trial court then ruled that the Appellant's statements were not made involuntarily or in violation of his Fifth Amendment right because he had not stated he wanted an attorney and because he proceeded to tell the officers, "go ahead and knock yourself out." After this ruling, the Appellant's counsel replied to the trial court,

"ok," and then proceeded to argue the next motion. The Appellant never voiced an objection to the way the hearing was held. "It is elementary that a reviewing court will not consider for the first time an issue not raised in the trial court." Caslin v. General Electric Co., 608 S.W.2d 69, 70 (Ky. App. 1980).

Furthermore, Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), is distinguishable from this case. In Jackson, the Supreme Court ruled that the New York trial court's procedure regarding the voluntariness of a confession fell short of the constitutional requirements. There, "if the evidence present[ed] a fair question as to [the confession's] voluntariness," the trial judge admitted the confession into evidence and allowed the jury to decide whether the statement was voluntary or not. Id. at 377, 84 S.Ct. at 1781. There, the Court ruled that this procedure did not afford the defendant protection under the Due Process Clause of the Fourteenth Amendment's barring the use of involuntary confessions. Id. at 391; 1788.

We find no such error in the trial court's ruling or conduct in this instance.

II. Photos and videos were not erroneously admitted

The Appellant next argues that the trial judge denied him due process of law when he allowed the Commonwealth to admit photos and videos of the victim's charred body and the execution of the police warrant.

During trial, the Commonwealth introduced seven crime scene photographs and two crime scene videos. The photos were directly relevant to the charge of tampering with the physical evidence and helped establish the foundation for a scientific test that indicated the victim had no drugs in her system prior to death, contrary to the Appellant's statements.

"[A] photograph 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)(citing Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980)). "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). Were the rule otherwise, the state would be precluded from proving the commission of a crime that is by nature heinous and repulsive." Id. Since the Commonwealth must prove the "*corpus delicti*, photographs of a crime scene, though repulsive, can be admitted if prejudice does not outweigh probativeness." Id. The same standard that is applied to photos also applies to videos that show what may be heinous images. Fields v. Commonwealth, 12 S.W.3d 275 (Ky. 2000). It is elementary that intent may be inferred from the character and extent of a victim's injuries, and it is proper to infer intent because an actor is presumed to intend the logical and probable consequences of his own actions. Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997). Furthermore, a defendant's state of mind may be inferred from his actions preceding and following an act. Id. See also Hudson v Commonwealth, 979 S.W.2d 106 (Ky. 1998). It is well established that "[e]vidence that a defendant attempted to dispose of or conceal evidence, including the body of the victim, is relevant in a criminal case." Tamme v. Commonwealth, 973 S.W.2d 13, 36 (Ky. 1998). Review of the court's decision to admit photographs is reviewed, like any evidentiary ruling, under the abuse of discretion standard. Ernst v. Commonwealth, 160 S.W.3d 744, 757 (Ky. 2005).

The Commonwealth introduced seven photographs and two videos depicting the crime scene. The Appellant made a general objection prior to trial in regard to the photos and the video tapes as being redundant. These objections were overruled. The Commonwealth's exhibits were as follows.

Exhibit three (3) was an overall scene picture depicting the charred body at the burn area with chairs and the blanket. The Appellant did not object to its introduction.

Exhibit six (6) was of the body taken before anything was moved. The purpose of this photo was to show a close-up of where the chair leg entered the body in order to show that the chair was not burned, and thus, had been placed there after the fire. The Appellant objected but was overruled.

Exhibit eight (8) was a crime scene video created by the police. The Appellant did not object.

Exhibit ten (10) showed one of the victim's legs intertwined in the chair, which could only be fully seen once the blanket was removed from atop the chairs and body. The Appellant did not object.

Exhibit eleven (11) showed the wood-like stalk that was staked through the victim's body to hold it to the ground. The photo showed that there was no evidence of burning on the stick; thus it was placed there after her body was burned. Craig also used the photo to show the position of the chairs and the stick. The Appellant did not object.

Exhibit twelve (12) was a photo showing maggots on the victim. The Appellant objected, and the Commonwealth responded that the photo showed

the maggots which were later collected and tested for drugs. The objection was overruled.

Exhibit thirteen (13) showed the victim's body position in relation to the edge of the burn pile. The Appellant did not object.

Exhibit fifteen (15) was used by Craig. It showed the victim's body on a body bag and showed that all the skull was not present when the body was moved. Skull fragments were recovered after the body was moved. The Appellant did not object.

Exhibit eighteen (18) was a video prepared of Craig's exam in which it shows her at the crime scene and actually performing her exam and evaluation. She narrated the tape at trial. It showed that animal bones had been placed on the victim's body, and that skull fragments and other material were beneath the metal tire rim. The Appellant did not object.

Here, the photos and videos depicted the actions of the Appellant after the victim's death such as the disrobing of the corpse, dumping trash on her body, burning and moving the corpse, and the staking the corpse to the ground after covering it up with a blanket - all of which goes to show intent. Also, the video and photos go to the tampering with physical evidence charge. The Commonwealth is required to prove that the Appellant destroyed, mutilated, concealed, removed, or altered physical evidence which he believed was about to be produced. Also, that the Appellant intentionally murdered the victim, all of which can be inferred from the photos and video. There was no abuse of discretion, and their admittance was not error.

III. Other crimes evidence

The Appellant argues that evidence concerning the murders of prostitutes in Fayette County was erroneously admitted. This issue is unpreserved, and therefore must be reviewed under the palpable error standard as set forth in RCr. 10.26.

When a defendant opens the subject he is not in a position to complain when the Commonwealth seeks to question on that subject also. Cf. Norris v. Commonwealth, 89 S.W.3d 411, 415 (Ky. 2002)(citing Harris v. Thompson, 497 S.W.2d 422, 430 (Ky. 1973). And, when "a witness makes an inadmissible assertion the opposing party is permitted to introduce evidence to the contrary." Id. at 414.

During cross examination of Det. Van Wright, the Appellant, through counsel, asked the following questions:

> Appellant: Were you there when the Lexington police department came down?
>
> Det.: Yes I was.
>
> Appellant: Do you know what their purpose was?
>
> Det.: Yes ma'am.
>
> Appellant: And what was that?
>
> Det.: They were there to interview him in reference to some murders in Fayette County of prostitutes that they wanted to talk to him about. They have had several murders, and they wanted to talk to him about it.
>
> Appellant: Did they even take his cigarettes that he had been smoking that day?
>
> Det: Yes, they did.
>
> Appellant: And to your knowledge has he been charged with any of those?

Det: I have, no, when the detective left the jail that night I have not had any further contact with him as far as that goes. I can't testify to anything as far as that goes.

Appellant: Do you know since you were working a so called murder of a prostitute down here, I assume that you kind of paid attention to what was going on up in Lexington didn't you?

Det.: To the best of my recollection there has not been an arrest made on their, well actually, there has been one arrest made on one of them, but I don't know about the rest.

Appellant: Okay Dennis Ray Bullins, does that sound right?

Det: I don't know any names ma'am I just heard there had been one arrest made

The Commonwealth conducted re-direct and asked the following:

Commonwealth: Detective I think you mentioned that they had several murders of prostitutes in Lexington.

Det: yes

Commonwealth: And were the, is the area that we have been talking about around Martin Luther King and 5th-6th7th street area is that the prostitute area of Fayette County

Det: Yes, sir.

Commonwealth: Where the prostitutes have been turning up missing?

Det: Yes, sir.

Commonwealth: Is that the same area where Mr. Clemons was given a traffic ticket in September?

Det: Yes, it is.

Commonwealth: Is that the same area that Mr. Clemons later moved to?

Det: Yes, it is.

Commonwealth: Is that the general vicinity where Al's bar is?

Det: Yes, it is

Commonwealth: And from the time that James Clemons was arrested on October 23rd, 2002 have there been any deaths of prostitutes in Fayette County?

Det: No sir there have not.

The Appellant then asked Det. Wright if any witness said that they saw the Appellant or the victim at Al's bar and he replied only that they looked familiar.

The Appellant clearly opened the door to the Commonwealth's questions by bringing up the unsolved murders. The questions were directed to rebut the possible misinterpretations of the Appellant's questioning. The Commonwealth established the location of the murders and showed that this was an area in which the Appellant had lived and received a parking ticket. If the Appellant had not brought up the murders, the Commonwealth would not have been able to question on the subject. The Commonwealth was merely attempting to rebut evidence brought in by the Appellant. The Appellant opened the door to this evidence and did not object when the Commonwealth asked their questions during re-direct examination. There was no error, and thus, no palpable error.

IV. Victim's medical records

The Appellant next argues that the trial court erred when it did not allow him to have full access to the medical records of the victim.

It is true that medical records of a victim are materials that can establish a defense to a criminal allegation and are discoverable. Quarels v. Commonwealth 142 S.W.3d 73, 85-6 (Ky. 2004). Here, the trial court did an in camera review of the medical records of the victim. The court advised the Appellant and the Commonwealth that the only relevant evidence was that the victim was a type II diabetic and did not properly watch her diet or medication, but she was not

insulin dependent and had no prior history of diabetic comas or loss of consciousness. The evidence from the medical records contradicts the Appellant's assertion that the record proves the victim had been administered insulin because it was not in the records. There was an incident where the victim was being walked out to a state car and fell, hitting her head. However, there was nothing in the record to infer it was caused by a lack of insulin. Therefore, there was nothing in the medical records that was exculpatory. Thus, whether it was error for the trial court to withhold the actual records from the Appellant, in this instance, is immaterial, as it was utterly harmless.

V. Letter from Appellant to Marion

The Appellant argues it was error for the trial court to admit a letter that he wrote to his friend, Jeff Marion. He claims that the letter was not properly authenticated at trial.

KRE 901 sets forth an illustrative list of methods that may be employed for authenticating written documents. In KRE 901 (b)(4), characteristics of the document combined with the surrounding circumstances may be used. A document may be authenticated by a wide variety of means, including circumstantial evidence. Soto v Commonwealth, 139 S.W.3d 827, 864 (Ky. 2004). "The proponent's burden of authentication is slight with only a prima facie showing needed." Johnson v. Commonwealth, 134 S.W.3d 563, 566 (Ky. 2004). A finding of authentication is normally reviewed under an abuse of discretion standard. Id. Here, however, it is unpreserved and will be reviewed for palpable error.

Marion testified that the Appellant had asked him to lie. Appellant told Marion to tell police that he had been by the Appellant's farm to feed the horses, and noticed the police there, causing him to call the Appellant to inquire as to what was going on. The reasoning was to give the Appellant an excuse as to why he called the sheriff's office with knowledge that something was wrong, thereby not hindering his story that he had not been to the farm all week. Marion cooperated and lied to the sheriff.

Later, Marion received a call from the Appellant in which he tried to coordinate stories and dates with Marion. In that conversation, the Appellant told Marion that he would be sending him a letter in the mail, and a few days later he received it at his home. The letter was an attempt to influence the testimony of Marion. The letter gives details about the investigation in the case, as well as, suggestions as to what Marion should say about where the Appellant was staying and so forth. Marion turned the letter over to the authorities. The Appellant later found out and called him threatening to get even.

Marion identified the letter as the one he received from the Appellant. The Appellant did not object. The surrounding circumstances of the letter leave no doubt that the Appellant wrote it. He told Marion that he would be sending a letter. It is signed by the Appellant. It contains specific references to the facts of the case and encourages Marion to lie. Marion testified and identified the letter as the one he received. Further, after turning over the letter to the authorities, he called Marion and threatened to even the score with him.

There was no error, and thus, no palpable error in the admission of the letter.

VI. Motion to redact letter was properly overruled.

Appellant next argues that the trial court improperly overruled his motion to redact a portion of the Appellant's letter to Marion which read, "Hey when you told them that I could have killed someone but I wasn't dume [sic] enough to leave the body there, try to clean that up for me, so I don't look so bad." The Appellant argued that it was opinion testimony and the trial court denied the motion. Now, the Appellant argues that it should have been excluded as impermissible character evidence.

KRE 801 defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. Ragland v. Commonwealth, 191 S.W.3d 569, 587 (Ky. 2006). The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

> Then existing mental, emotional, or physical condition. A statement of the declarant's then existing **state** of **mind**, emotion, sensation, or physical condition (such as **intent**, plan, **motive**, design, mental feeling, pain, and bodily health). . . .

Bray v. Commonwealth, 68 S.W.3d 375 (Ky.2002)(emphasis added). "Intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense." Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997). See also Davis v. Commonwealth, 967 S.W.2d 574, 581 (Ky. 1998). In prosecution for criminal abuse and homicide, "[i]ntent may be inferred from the act itself and/or the circumstances surrounding it." Ratliff v. Commonwealth,194 S.W.3d 258, 275 (Ky. 2006). Moreover, any attempt by a defendant to *suppress a witnesses'*

testimony or induce falsehoods or non-appearance at trial is evidence tending to show guilt. Graves v. Commonwealth, 17 S.W.3d 858 (Ky. 2000).

There was no error here. The letter contains the Appellant's own words. It is proof of intent of the Appellant to coerce Marion into lying for him. It also tends to show motive to cover up a crime that he committed. As a whole, it is nothing more than a request for Marion to commit perjury. That portion of the letter was needed to understand the full meaning of "try to clean that up for me so I don't look so bad." It was not impermissible character evidence as the Appellant suggests. This was not offered to show the proof of the matter asserted, that he killed the victim, but used to show motive of the defendant to cover up his crime, trying to get the witness to falsify his story. There was no error.

VII. Comment by witness that the Appellant was in jail was not reversible error.

The Appellant argues that the Commonwealth elicited the fact that the Appellant was incarcerated while he was awaiting trial.

During trial, Marion read a portion of the letter from the Appellant where the Appellant asked Marion to not tell anyone that he had talked to Marion about the case. The Commonwealth asked Marion what he understood that to mean, and Marion replied, "Asking me to lie. I mean, I know that every phone call that comes out of that jail is or can be recorded." The Appellant objected and moved for a mistrial. The court overruled the motion. The Appellant did not ask for an admonition.

A mistrial is an extraordinary remedy and therefore a manifest necessity must exist before it will be granted. Lynch v. Commonwealth, 74 S.W.3d 711, 714 (Ky. 2002). "Manifest necessity has been described as an 'urgent or real necessity.'"

Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000)(citing Miller v. Commonwealth, 925 S.W.2d 449, 453 (Ky. 1995)). "The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." Gould v. Charlton Co., 929 S.W.2d 734, 738 (Ky. 1996). The denial of a request for a mistrial is to be reviewed under an abuse of discretion standard. Bray v. Commonwealth, 68 S.W.3d 375, 383 (Ky. 2002). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. English v. Commonwealth, 993 S.W.2d 941, 945 (Ky. 1999).

There was no abuse of discretion here because there was no manifest necessity to declare a mistrial. Marion's statement that he knew calls coming from jail could be recorded did not rise to the level of manifest necessity for a mistrial. The comment was not elicited by the Commonwealth. Marion did not state that the Appellant was in jail, but that calls coming from the jail are or can be recorded. This statement did not cause an urgency needed to declare a mistrial. Cf. Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). There was no abuse of discretion. Moreover, based upon the totality of the evidence, this statement, if omitted, would not have changed the outcome of the trial, and therefore was harmless in any event.

VIII. Motion for directed verdict was properly denied.

At the close of the Commonwealth's evidence, and again at the close of all evidence, the Appellant made a motion for directed verdict. Both motions were denied.

"'On appellate review the test of a directed verdict is if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt.'" Beaty v Commonwealth, 125 S.W.3d 196, 203 (Ky. 2003) (quoting Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

In this case, it was not unreasonable for the jury to have found the Appellant guilty of the charges against him. There was proof that he had tried to get a friend to lie for him. There was a charred body of a female found on the farm that he admitted to having sex with when she died. It had been established that he took her body out to the burn pile and covered her up with a blanket underneath two lawn chairs. He claimed that he and the victim were doing drugs that killed her, yet according to the evidence, no drugs were found in her body. Moreover, the victim had suffered, near or at the time of death, significant rib fractures. The Appellant had described to his relatives that the victim was "crisp." All in all, the denial of the directed verdict was not error.

IX. Admission of handcuffs was not error

Finally, the Appellant argues that the evidence of handcuffs found in the Appellant's residence was improperly admitted because they had been connected to the crime the Appellant was charged with.

The determination of the relevance and admissibility of evidence is within the sound discretion of the trial court. Rake v. Commonwealth, 450 S.W.2d 527 (Ky.1970). "A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard." Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair

or unsupported by sound legal principles. English v. Commonwealth, 993 S.W.2d 941, 945 (Ky. 1999).

On the video of the search warrant execution, a pair of handcuffs was seen along with a pornographic video and picture. The Commonwealth explained that the handcuffs and the other materials were found inside a storage bin in the Appellant's closet, where it looked like someone had been sleeping. However, the police did not take the handcuffs during the first search and when they went back to get them on a second search, they were gone. In his first statement to police, he admitted to using them with women, but later recanted that statement. The trial court allowed the video with the handcuffs to be admitted, but redacted the pornographic material. It explained that the Appellant had referenced to them in a statement, and that if they had remained in the house, the police could have taken a DNA sample, therefore, the removal of the handcuffs was relevant. This was relevant to show that the Appellant had tampered with evidence, which was in line with him taking the victim's clothes to a dumpster in Lexington, cleaning up the house and sheets after the victim's death and putting her naked body on a burn pile and dumping trash on top of her. The handcuffs were never introduced into evidence, only the video of the search warrant in which the handcuffs were seen. There was no error.

CONCLUSION

For the above stated reasons, the judgment of the Garrard Circuit Court is affirmed.

All concur.

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