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RENDERED: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0133-MR

JOE ALLEN EVANS — APPELLANT

V

APPEAL FROM MARTIN CIRCUIT COURT
HON. DANIEL SPARKS, JUDGE
NO. 03-CR-0038

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Joe Allen Evans, was convicted of murder and sentenced to twenty years in prison. He appeals his conviction as a matter of right, Ky. Const. § 110(2)(b), raising five issues for review. We affirm.

I. Facts

Appellant and his girlfriend, Amanda Maynard, attended an outdoor party at Hager Hill, arriving around 9:00 p.m. in her vehicle. (Though we refer to the vehicle as Amanda's, it should be noted that it was actually owned by Amanda's father, Kentucky State Trooper Arthur Maynard.) According to Appellant's testimony, he and Amanda had spent the afternoon "partying" together. Appellant stated that, earlier in the day, he had taken two prescription pills—one Soma (a muscle relaxant) and one Lorcet (a painkiller containing the narcotic hydrocodone). On the way to the party, Appellant and Amanda stopped at Gene McCarty's house where they joined McCarty's girlfriend, Jaime Slone. Once the group arrived at the party, Appellant had about two beers.

After about an hour at the party, Appellant noticed that Amanda kept nodding off, or "passing out." He and another friend placed Amanda in the back seat of her car. Shortly thereafter, Appellant left the party, driving Amanda's car with her asleep in the rear passenger-side seat. Appellant went to Top Cat Liquors, arriving shortly after midnight. He purchased a soft drink and two candy bars. According to his own testimony, Appellant purchased the drink for the express purpose of taking "the rest" of the prescription pills that he had in his possession. The rest of the pills consisted of five additional Soma pills and five Xanax pills, which Appellant ingested while in the parking lot of the Top Cat. When questioned at trial, Appellant stated that he figured he had just enough time to get home before the pills would "hit [him] real good."

The rear tire on Amanda's car had a blowout several miles from the liquor store, near the Beechfork Mine security station. Appellant walked to the station and asked the security guard, John Spaulding, for assistance. After determining that Spaulding's own spare tire would not fit, the two walked to a second guard station to use the telephone. Though Appellant testified that he was still "fine" at this point, he also admitted that he did not remember going to the second guard station. Nonetheless, phone records indicate that a call was made from that guard station to a local towing service shortly after 1:00 a.m. According to Spaulding, the towing service was unavailable so he took Appellant back to his guard station. Appellant decided to put the flat tire and rim back on the wheel, and attempt to drive home in the disabled car.

In all, Spaulding estimates that he was with Appellant for approximately an hour to an hour and a half. He acknowledged seeing Amanda asleep in the backseat but did not inquire further. He also testified that Appellant did not smell of alcohol, but that he did appear "high." According to Appellant, leaving the guard station was the last event he recalls of the evening.

The exposed wheel rim of Amanda's car left an indentation, or groove, in the road, providing a trail of the vehicle's path as it left the Beechfork Mine on Route 3. Using this trail, an accident reconstructionist concluded that Amanda's vehicle had traveled about seven miles from the mine when it left the roadway and struck the right shoulder guardrail. Prior to this collision, the path of the vehicle was very chaotic, indicating, according to expert testimony, that the driver did not have control of the car even before the collision. It should also be noted that the groove in the roadway and tire remnants found several miles away remove the possibility that the collision with the guardrail resulted from a tire blowout.

When Amanda's vehicle hit the right-side guardrail, a steering maneuver was performed and the vehicle returned to the roadway with a sharp left turn. Because the tire had been removed, the car was unbalanced and it did not fishtail, as would normally be expected. Rather, the vehicle stopped short and Amanda was flung from the backseat of the car through the rear passenger window. Blood trails on the roadway indicate that Amanda skidded through the median before resting with her lower body outstretched in the left lane of Route 3.

The path of the vehicle was extremely erratic from this point. It first traveled north in the southbound lanes of Route 3 for a short time. The vehicle then hit a second guardrail and continued in the wrong lane for several hundred more feet before finally returning to the correct lane for a short time. As it continued down Route 3, the vehicle periodically traveled on the shoulder, crossed the center line, and even went through the parking lot of a business at one point. The groove caused by the exposed rim ended at Appellant's driveway, where police later found Amanda's car parked. The grooving on the roadway indicated that the vehicle did not stop at any point before arriving at Appellant's driveway.

Shortly after 2:00 a.m., law enforcement received a call that a woman was lying in the middle of Route 3. After identifying the body as Amanda's and securing the scene, officers followed the groove in the road to Appellant's home. Local police officers surrounded and secured the house until Kentucky State Police investigators arrived. Around 6:00 a.m., Appellant was summoned to the front door, read his Miranda rights, and questioned about the prior evening. Detectives stated that Appellant did not smell of alcohol but did appear slightly intoxicated. Nonetheless, the detectives testified that Appellant was coherent and able to carry on a conversation, providing cogent and appropriate responses to their questions. Appellant's statement to police that morning was tape-recorded and played at trial. He was arrested at his home and taken into custody.

Appellant was tried before a Martin Circuit Court jury, and testified on his own behalf. He admitted voluntarily taking the ten pills outside Top Cat liquors, and provided no evidence that he was legally prescribed these drugs. He denied any memory of the collision with the guardrail and of arriving home that evening. He also testified that, when the police appeared at his home the following morning, he thought he remembered carrying Amanda into his house. According to Appellant, he did not learn that Amanda was dead until the following morning when a guard at the jail informed him of the murder charge.

Appellant was found guilty of wanton murder pursuant to KRS 507.020(1)(b) and was sentenced to twenty years in prison. He now appeals his conviction as a matter of right, raising five allegations of error: (1) that the Commonwealth was improperly permitted to impeach a defense witness, (2) that it was unduly prejudicial to force Appellant to cut his hair prior to trial, (3) that Appellant was denied a fair and impartial

jury, (4) that the trial court erroneously admitted his taped statement to police, and (5) that the trial court improperly admitted irrelevant evidence.

II. Improper Impeachment of Defense Witness

Appellant first argues that it was improper to permit the Commonwealth to impeach Jaime Slone, a defense witness, with prior misdemeanor convictions. The Commonwealth concedes that impeachment with a misdemeanor conviction is not permitted by KRE 609. See also Slaven v. Commonwealth, 962 S.W.2d 845, 859 (Ky. 1997). However, the Commonwealth argues that the error was harmless. We agree.

Slone testified briefly concerning Appellant's actions prior to leaving the Hager Hill party in Amanda's vehicle. She confirmed that Appellant and Amanda arrived at the home of her boyfriend, Gene McCarty, on the evening of the accident. Appellant and Amanda socialized with McCarty while Slone finished getting ready. Eventually, the group left for Hager Hill in separate vehicles. According to Slone, Amanda was "pretty high" when she arrived at the party and then became even more intoxicated after consuming an alcoholic beverage and an unknown pill. Slone corroborated Appellant's claim that Amanda passed out and was carried to the backseat of her vehicle, and that Appellant drove away in the car a short time later. She also characterized Appellant as "real high" when he left the party.

While the trial court erred in permitting the Commonwealth to impeach Slone with her prior misdemeanor convictions, the error was undoubtedly harmless. An error in the admission or exclusion of evidence is harmless when there is no reasonable possibility, absent the error, that the verdict would have been different. Hodge v. Commonwealth, 17 S.W.3d 824, 849 (Ky. 2000). Here, Appellant essentially admitted to every element of the offense during his own testimony. He acknowledged voluntarily taking ten prescription pills before driving a vehicle in the dead of night with a sleeping passenger

in the backseat. Expert medical testimony confirmed what was established by the accident reconstructionist: that Appellant was intoxicated to the point of incoherence at the time of the collision. He offered no explanation or defense of his actions other than to blame Amanda for falling asleep and Spaulding, the mine security guard, for allowing him to drive home. In light of Appellant's extremely damaging admissions at trial, we find no reasonable possibility that absent the improper admission of Slone's misdemeanor convictions, the jury's verdict would have been any different. Furthermore, there is no indication that Appellant's substantial rights were violated or that denial of relief would be inconsistent with substantial justice. RCr 9.24.

III. Prejudicial Hair Cut

Appellant next claims that reversible error occurred when the trial court forced him to proceed to trial after his hair had been cut while he was in custody awaiting trial. According to Appellant, this new, shorter hairstyle made him "look like a convict" and thus prejudiced the jury. This claim is without merit.

Criminal defendants may not be required to appear before the jury wearing "the distinctive clothing of a prisoner," nor may they be physically restrained in the presence of the jury absent "good cause shown." RCr 8.28(5). Appellant has presented no basis for the conclusion that a short haircut is distinctive of a prisoner. Nor has Appellant presented any legal authority for the proposition that a certain hairstyle is inherently prejudicial, as would be an orange prison jumpsuit or handcuffs. See Hill v. Commonwealth, 125 S.W.3d 221, 233 (Ky. 2004). There was no error.

IV. Venue

Appellant next argues that he was denied a fair and impartial jury. Following voir dire, defense counsel sought to strike all prospective jurors and move the trial to

another county, arguing that pretrial publicity had tainted the panel. The request was denied. We find no error.

A motion for a change of venue must be submitted in writing and verified by the defendant. KRS 452.220(2). The motion must also be accompanied by the affidavits of two credible persons. Id. Here, though defense counsel orally requested a change of venue, neither a written petition nor an affidavit was presented to the trial court. Compliance with the statute is mandatory, and failure to file the required documents is fatal to the claim. Welborn v. Commonwealth, 157 S.W.3d 608, 615 (Ky. 2005). Thus, the trial court did not err in denying the request for a change of venue.

Because it seems that Appellant is arguing that his substantial rights were violated by the failure to change venue, we will briefly review his claim for palpable error. RCr 10.26. Upon examination of the jury selection proceedings, we are confident that Appellant was afforded a fair and impartial jury. Though most of the venire panel had been exposed to some pretrial publicity, it was not so pervasive or inflammatory as to prevent a fair trial. See Foley v. Commonwealth, 942 S.W.2d 876, 881 (Ky. 1997) (noting that the central inquiry regarding a change of venue request is "whether public opinion is so aroused as to preclude a fair trial"). Nearly every venireperson had only a vague recollection of the accident based on media reports nearly a year earlier, and no one indicated exposure to false or contested information. See Bennett v. Commonwealth, 978 S.W.2d 322, 324 (Ky. 1998). Furthermore, defense counsel was permitted to liberally question prospective jurors regarding their knowledge of the case. See Montgomery v. Commonwealth, 819 S.W.2d 713, 715 (Ky. 1991). Most importantly, each selected juror gave unequivocal assurances that he or she could disregard any prior knowledge of the accident and fairly consider only the evidence

presented at trial. Appellant was tried by an impartial jury, and therefore no manifest injustice occurred. RCr 10.26.

V. Admission of Recorded Statement

Appellant claims that the trial court erred by failing to suppress the statements he made to police officers who arrived at his home the morning after the accident. Mid-trial, defense counsel objected and requested a suppression hearing, arguing that Appellant was too intoxicated when he gave the statement to voluntarily waive his Miranda rights. The objection was made during the testimony of Detective David Maynard, who was present at Appellant's home when he gave the statement. The trial court overruled the objection and denied the request for a suppression hearing due to the timing of the motion within the context of the trial. Two other detectives had already presented nearly identical information regarding Appellant's statement prior to Detective Maynard taking the stand. Concluding that it would be futile to conduct a suppression hearing concerning a statement that had already been exposed to the jury, the trial court denied the motion.

Without specifically determining whether the trial court erred in denying the motion for a suppression hearing, we can conclude that the error, if any, was harmless. RCr 9.24. There is little information contained in the statement that Appellant did not freely reiterate when he voluntarily took the stand in his own defense. The only substantive disparity between the statement and Appellant's testimony concerned his ingestion of prescription pills that evening. Appellant told the officers that he had not taken any illegal medication that evening, and had only consumed a "little" beer at the party and some whiskey once he arrived home. However, at trial, Appellant made the far more damaging admission that he ingested ten prescription pills outside the Top Cat Liquor store and that he had drank beer at the Hager Hill party. Thus, any prejudice

flowing from the admission of the statement was rendered harmless by Appellant's testimony at trial. We find no substantial possibility that the verdict would have been any different, even if the statement had not been admitted at trial, as the jury received the same and more damaging information directly from Appellant.

VI. Admission of Liquor Bottle

Appellant's final allegation of error is comprised of a mere three sentences. He first makes a vague statement about "all of the errors that was [sic] made in this trial . . . ." He then argues there was no evidence that he drank the alcohol found in his house prior to the accident, meaning that the alcohol was not relevant at trial. We assume this refers to the bottle of whiskey that was seized at his home following his arrest and introduced at trial.

Even if we consider this discussion to be an "argument," its presentation does not comply in any way with the requirements of CR 76.12(4)(c)(v): it contains no reference to the record to show that the alleged error was preserved, nor does it provide citations to pertinent authorities. Failure to comply with CR 76.12(4)(c)(v) in identifying and presenting a claim of error is a sufficient reason for an appellate court to decline to address the claim absent palpable error. See Elwell v. Stone, 799 S.W.2d 46, 47-48 (Ky. App. 1990).

Nonetheless, suffice it to say that any alleged error in the admission of the whiskey bottle was harmless. RCr 9.24. As has been repeatedly stated herein, the evidence of Appellant's guilt was overwhelming and his testimony extremely damning. Moreover, Appellant was afforded a fundamentally fair trial and no manifest injustice warranting reversal occurred. RCr 10.26.

VII. Conclusion

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

All concur.

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