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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 12-13-06 E.I.A. Grounds, D.C.

2005-SC-000363-MR

WILLIAM NIEHAUS — APPELLANT

V.

ON APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
NO. 03-CR-00325

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

William Niehaus, Appellant, was convicted of first degree manslaughter, first degree possession of a controlled substance (cocaine), tampering with physical evidence, unauthorized use of a motor vehicle, and use/possession of drug paraphernalia. He was sentenced to twenty (20) years for manslaughter, and to two and a half years imprisonment each for tampering with physical evidence and first degree possession of a controlled substance (cocaine). These sentences were ordered to be served consecutively, for a total of twenty-five (25) years. All other sentences were ordered to be served concurrently with this twenty-five year sentence. Appellant appeals from his convictions as a matter of right.[1]

[1] Ky. Const. § 110(2)(b).

The facts of this case are as follows. Appellant called Derrick Jones for the purpose of meeting him to buy crack cocaine. Derrick Jones left a friend's house and went to meet Appellant. Jones pulled up in front of Appellant's apartment and honked twice. Appellant came out of his apartment, leaving the front door wide open, and got into the car. The two men haggled over the price of the cocaine. Throughout the encounter Jones had his left hand in his pocket and refused to take it out and show Appellant the piece of cocaine he wanted to purchase. Appellant apparently thought Jones was going to either rip him off or beat him up and take his money, as both had happened to him before. Appellant stabbed Jones in the torso. Jones got out of the car and Appellant got behind the wheel and drove away. Appellant abandoned the car several blocks away. Emergency medical personnel transported Jones to the hospital where he died shortly thereafter. Crack cocaine was found in the street where the car had been stopped and in the car.

Police searched Appellant's open apartment and found a crack pipe and learned Appellant's identity. He was arrested two days later. Detective Scott Aycock questioned Appellant, who confessed to stabbing Jones when Jones took his hand out of his pocket and his hand was empty. Appellant also admitted ownership of the crack pipe and that he had driven the car to the Red Carpet Inn and abandoned it.

Based on the foregoing, a McCracken County grand jury indicted Appellant on September 5, 2003, for murder (no mental state alleged); theft by unlawful taking over $300.00 for driving the car away from the scene; tampering with physical evidence, when he discarded the knife and his bloody T-shirt; first degree possession of a controlled substance, cocaine, based on the residue found in the crack pipe; and

possession of drug paraphernalia, first offense, based on the possession of the crack pipe.

Media coverage about Derrick Jones' death was extensive. In the ten days between Appellant's arrest and the day the case was presented to the grand jury, there were six newspaper articles in the *Paducah Sun*, one of which showed a photograph of Jones at his high school prom. By July 22, 2004, when Appellant moved for a change of venue, there had already been thirteen newspaper articles about the events surrounding Jones' death. Six articles focused on Jones' father, a minister in Hopkinsville, who brought his ministry to Paducah after his son's death.

After a hearing supported by affidavits, the trial court denied the change of venue motion because he knew people who didn't read the paper and didn't watch the news, but agreed to revisit the issue during voir dire. Trial commenced on February 7, 2005, and the trial court denied Appellant's renewed motion to move the trial from McCracken County. Following the guilty verdict, Appellant was sentenced as set forth above.

Appellant first argues that he was denied his right to due process of law and a fair trial when the trial court denied his motion to change venue from McCracken County. This issue was preserved by Appellant's petition for change of venue.

As previously mentioned, there were several newspaper articles dealing with the murder and events surrounding the murder. "Under either the due process clause or KRS 452.210, a change of venue should be granted if it appears that the

defendant cannot have a fair trial in the county wherein the prosecution is pending."[2] "The moving party must demonstrate that: 1) There has been prejudicial news coverage, 2) It occurred prior to trial, and 3) The effect of such news coverage is reasonably likely to prevent a fair trial."[3] Ordinarily, pretrial newspaper coverage of the defendant, and the crime of which he is accused, does not entitle him to a change of venue.[4] "There must be evidence, other than, and independent of, newspaper articles, showing that the condition of public sentiment in the county, and for that cause he cannot have a fair trial in the county in which the prosecution is pending, or at that term of court."[5] Furthermore, the amount of pretrial publicity does not determine whether venue should be changed.[6] The sole question is whether public opinion is so aroused as to preclude a fair trial.[7] The "mere fact that jurors may have heard, talked or read about a case does not require a change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant . . . . Prejudice must be shown unless it may clearly be implied in a given case from the totality of the circumstances."[8] "The trial court has discretion in this determination and such will not lightly be disturbed."[9]

During voir dire, Appellant's counsel asked the venire if they had read any newspaper articles, viewed any television reports, or been subjected to any other

---

[2] Bowling v. Commonwealth, 942 S.W.2d 293, 298 (Ky. 1997) (citing Brewster v. Commonwealth, 568 S.W.2d 232 (Ky. 1978)).
[3] Id. (citing Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.E.2d 600 (1966)).
[4] Carsons v. Commonwealth, 47 S.W.2d 997, 1001 (Ky. 1931).
[5] Id.
[6] Kordenbrock v. Commonwealth, 700 S.W.2d 384 (Ky. 1985).
[7] Stopher v. Commonwealth, 57 S.W.3d 787, 795 (Ky. 2001).
[8] Id. (citing Montgomery v. Commonwealth, 819 S.W.2d 713, 716 (Ky. 1991)).
[9] Bowling, 942 S.W.2d at 298. (citing Kordenbrock, 700 S.W.2d 384).

publicity concerning this case. Only six panelists remembered any news coverage surrounding this case. And, each of these six panelists said the news coverage had not affected their impartiality, nor had the news coverage affected their ability to judge the case fairly. One of these six panelists was dismissed later for cause on an unrelated issue.

The voir dire reflects the correctness of the trial judge's ruling. Although the publicity surrounding the trial may have been considered "extensive" based on the number of news articles, it is apparent from the record that Appellant was tried by a fair and impartial jury. The trial judge reviewed the publicity and found that it was not enough to prejudice Appellant. As the trial judge is given great discretion in these matters, we hold that he did not abuse that discretion.

Appellant next argues that he was substantially prejudiced and denied due process of law and a fair trial when the prosecutor introduced evidence in the guilt phase of the trial to arouse sympathy for the victim. Appellant concedes that this issue is unpreserved, but asks the court to review the claim of error under our palpable error standard.[10]

Appellant argues reversible error occurred when, during the Commonwealth's opening statement and closing argument, the jury was shown a picture of victim Jones at his high school prom. Appellant also argues reversible error occurred when the Commonwealth's first witness, Melissa McHaney, cried during her testimony. Lastly, Appellant argues reversible error occurred when the Commonwealth

---

[10] RCr 10.26.

made several statements describing the factual brutality of the killing. Appellant characterizes these unpreserved allegations of error as "victim impact evidence."

Appellant did not object when Jones' picture was shown to the jury during the opening argument. Appellant did not object, or ask for a recess, during Melissa McHaney's testimony. Appellant did not object to the Commonwealth's factual description of the brutal killing during its closing argument.

RCr 10.26, the palpable error standard, states as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

We have reviewed the record, and find no palpable error. The instances Appellant complains of amount to little more than creative advocacy. The picture of the victim was used to put a face on the man who was murdered. "[W]e find no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community."[11]

Furthermore, the fact that a witness, who lost a friend at the hands of Appellant, cried during her testimony is no basis for palpable error relief. Emotions are often strong in homicide cases, and we cannot say that palpable error occurred when a witness lost her composure while she testified.

Finally, the facts of this case were brutal, and the Commonwealth had every right to so inform the jury. A watered-down version of the facts of the crime is not required. The jury was entitled to hear the facts as they were.

---

[11] McQueen v. Commonwealth, 669 S.W.2d 519, 524 (Ky. 1984).

For the foregoing reasons we affirm the conviction of Appellant.

Lambert, C.J., and Graves, McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ., concur.

COUNSEL FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane'
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Room 118, Capitol Building
Frankfort, KY 40601

David W. Barr
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204