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RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

NO. 2005-SC-000391-MR

DATE 3-15-07 [illegible], D.C.

CLYDE JASON LITTON APPELLANT

V.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
INDICTMENT NO. 02-CR-00028

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION.

Clyde Jason Litton contends in this appeal that his convictions for murder, first-degree rape, and tampering with physical evidence should be reversed because the trial court erred by (1) refusing to sever for trial the rape and murder charges; (2) failing to instruct the jury on voluntary intoxication; and (3) failing to instruct the jury on first-degree manslaughter under extreme emotional disturbance. We reject all of Litton's arguments and affirm the judgment of the trial court.

II. FACTUAL AND PROCEDURAL HISTORY.

Litton, Sara Chapman,[1] V.D.,[2] and others attended a party in an apartment building where many of the attendees, including Litton, drank beer. Litton and Chapman flirted and engaged in physical horseplay during the party. The horseplay turned rough and, at one point, each twisted the other's nipple. When the party broke up in the early morning hours, Litton refused to leave. Instead, he remarked that he was going to "stay there and make out with that bitch [Chapman] with his dick."

Litton later told the authorities that after the other partygoers had left, Chapman invited him into her apartment, where they had consensual sex. During that sexual encounter, Chapman twisted Litton's nipple. According to Litton, he then pushed Chapman away and she fell and injured herself.

Chapman died as a result of this altercation with Litton. According to the physician who performed an autopsy on her body, Chapman had numerous bruises and lacerations and several broken ribs. Ultimately, that physician testified that Chapman died because she bled into her abdomen from damage to her liver.

Meanwhile, during that same night, V.D. awoke because she was being choked. It was so dark that V.D. could not see her attacker. V.D. was so frightened that she urinated, at which point her attacker released his chokehold on her neck. The attacker then told V.D. that they were out in the "boondocks" and that he had "kidnapped" her from the party. The attacker put his penis into V.D.'s vagina, but he then demanded that she perform fellatio on him. When V.D. protested, her attacker

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[1] Sometimes spelled Sarah Chapman in the record.

[2] Due to the nature of the crime perpetrated against her, we will use only her initials when referring to this victim.

punched her in the head. Eventually, the attacker and V.D. had forced intercourse until the attacker ejaculated. The attacker eventually identified himself to V.D. as Litton.

Litton told V.D. that he "killed the girl downstairs . . . because she didn't give him what he wanted." When V.D. asked Litton if he was joking, he responded, "[n]o, I murdered the bitch." By this point, enough daylight was present for V.D. to see Litton. V.D. then convinced Litton to let her get a cigarette from downstairs, so both Litton and V.D. went to Chapman's apartment downstairs, at which time V.D. saw Chapman's legs.

Trying to avoid further injury, V.D. convinced Litton that she would not tell anyone about the rape or murder. After warning V.D. that he would kill her if she told anyone else, Litton left. Once he was gone, V.D. told a neighbor about the rape and murder and the police were called. Although he initially denied any wrongdoing, sometime after he was taken into custody, Litton became distraught and blurted out that he "didn't mean to kill her [Chapman]." Furthermore, according to Litton, he became scared and got blood on his clothes while trying to help Chapman. And he also admitted that he became scared and tried to burn his clothes by a riverbank. Officers later discovered pieces of burned clothing behind Litton's brother's apartment.

Forensic laboratory testing revealed the presence of Chapman's DNA on Litton's watch and ear. Analysis of semen taken from Chapman's shorts revealed DNA matching Litton's. A vaginal swab of V.D. revealed semen which matched Litton's.

Litton was indicted for murder, first-degree rape, first-degree sodomy, and tampering with physical evidence. The death penalty was excluded as a possible

punishment for Litton due to his apparent mental retardation. But Litton's motion to sever the murder charge from the rape and sodomy charges was denied.

After a jury trial, Litton was acquitted of the sodomy charge but was convicted of murder, rape, and tampering with physical evidence. In accordance with the jury's recommendations, Litton was sentenced to forty-five years for the murder, twenty years for the rape, and five years for tampering with physical evidence, all to be served consecutively, for a total maximum sentence of seventy years' imprisonment. Litton now files this appeal as a matter of right.[3]

III. ANALYSIS.

Litton raises three arguments. First, he contends that the trial court erred by denying his motion to sever the murder charge from the rape and sodomy charges. Second, he contends that the trial court erred by refusing to instruct the jury on voluntary intoxication. Finally, he contends that the trial court erred by refusing to instruct the jury on first-degree manslaughter under extreme emotional disturbance.

A. The Denial of Litton's Motion to Sever Was Proper.

The question of whether separate offenses may be properly joined involves the interplay between Kentucky Rules of Criminal Procedure (RCr) 6.18 and 9.16. RCr 6.18 permits the joinder of two or more charges "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." But RCr 9.16 requires a trial court to sever previously joined counts if either the defendant or the Commonwealth "will be prejudiced" by a joinder. Since a defendant suffers prejudice from the mere fact

[3] Ky. Const. § 110(2)(b).

of standing trial,[4] mere prejudice alone is insufficient to warrant a severance under RCr 9.16. Rather, in order to merit relief under that rule, a defendant must prove that the joinder is so prejudicial as to be unfair or unnecessarily or unreasonably hurtful.[5] A trial judge has broad discretion when ruling on a motion to sever under RCr 9.16, and we must affirm a trial court's ruling on such a motion unless that ruling represents an abuse of discretion.[6]

A "significant factor" to be considered in ruling upon a motion to sever under RCr 9.16 is whether evidence of one offense would be admissible in a trial of the other offense.[7] Another factor to be considered is whether the joined offenses are closely related in character, circumstances, or time.[8]

Litton principally relies upon Romans v. Commonwealth[9] to support his contention that a severance was necessary. In Romans, a defendant was charged with raping two different women. His defense to each charge was different in that he claimed that he did not have sex with one woman, yet, admitted having consensual sex with the other. We reversed Romans's conviction on other grounds; but we suggested in dictum that on retrial, the charges should be severed because of Romans's separate defenses to each charge.

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4 Ware v. Commonwealth, 537 S.W.2d 174, 176 (Ky. 1976) ("[a] defendant is prejudiced, of course, by being tried at all.").

5 Ratliff v. Commonwealth, 194 S.W.3d 258, 264 (Ky. 2006).

6 *Id.*

7 *Id.*

8 *Id.*

9 547 S.W.2d 128 (Ky. 1977).

Contrary to Litton's argument, Romans is distinguishable rather than not controlling. First, the facts of this case are markedly different from those in Romans. Litton's rape of V.D. occurred during the same night as his murder of Chapman, unlike the situation in Romans where the two rapes were separated by approximately two weeks. Second, the language suggesting the need for severance in Romans was pure dictum[10] and cannot reasonably be read for the proposition that a defendant is automatically entitled to a severance when he presents different defenses to the array of charges against him. We actually attempted to point this out in Romans itself.[11]

In the case at hand, it appears that the murder and rape are part of a common plan or scheme. The commonality is evidenced by the fact that the offenses occurred very close to each other in time and place and by the fact that Litton used violence against each female in the course of having sexual contact with each. Indeed, additional evidence that the crimes were inextricably intertwined is the fact that Litton told V.D. that he had killed Chapman and, furthermore, permitted V.D. to see at least a portion of Chapman's apparently lifeless body. Additionally, Litton threatened to kill

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[10] Ratliff, 194 S.W.3d at 265, n.1 ("[f]urthermore, in Romans, the defendant's conviction was reversed on other grounds, thus the language regarding the propriety of a severance in that case is *dictum.").* Under longstanding precedent, dictum is not regarded as binding precedent. Greene v. National Surety Co., 186 Ky. 353, 217 S.W. 117, 118 (1919); Cawood v. Hensley, 247 S.W.2d 27, 29 (Ky. 1952); Cohens v. State of Virginia, 19 U.S. 264, 399-400 (1821) ("[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

[11] Romans, 547 S.W.2d at 131 ("[i]t is not always and inevitably prejudicial, in the legal or relative sense of the word, that two separate and unrelated charges of forcible rape against the same defendant be tried together.").

V.D. if she told anyone of her rape or Chapman's murder. Thus, regardless of the fact that the crimes were committed against separate people and Litton offered a separate defense to each charge, we conclude that the evidence of each charge would have been admissible in a trial of the other offense under Kentucky Rules of Evidence (KRE) 404(b)(2).[12] So we hold that the trial court's decision to deny Litton's motion for a severance was not an abuse of discretion.

B. The Trial Court Did Not Err in Denying Litton's Requested Voluntary Intoxication/Second Degree Manslaughter Instruction.

"In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony."[13] But "[a]n instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense."[14] Litton contends that the evidence supported a jury instruction on voluntary intoxication and that the trial court erred in refusing to so instruct.

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[12] KRE 404(b)(2) provides that evidence of other crimes or wrongs is admissible "[i]f so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." *Cf.* Price v. Commonwealth, 31 S.W.3d 885, 888 (Ky. 2000) (holding that evidence of sexual assault of appellant's stepdaughter was inexplicably intertwined with evidence of murder of appellant's wife); Wood v. Commonwealth, 178 S.W.3d 500, 514 (Ky. 2005) (holding that trial court did not abuse its discretion in denying motion for severance of murder, kidnapping, and assault as "the crimes against all three victims arose from a single chain of events that happened to involve two physical locations.").

[13] Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999).

[14] Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998).

Voluntary intoxication is a defense to an intentional crime.[15] However, voluntary intoxication is not a defense to a crime requiring a culpable mental state of either recklessness or wantonness.[16] Thus, voluntary intoxication can be a defense to intentional murder; but it is not a defense to second-degree manslaughter, which requires a wanton mental state under Kentucky Revised Statutes (KRS) 507.040.[17] So if the jury had been instructed on voluntary intoxication and had found that Litton was, in fact, so intoxicated as to negate the specific intent required to commit intentional murder, it would not have resulted in Litton's acquittal. Rather, such a finding would have resulted in Litton being found guilty of the lesser offense of second-degree manslaughter.[18] A trial court commits reversible error if it fails to instruct the jury on second-degree manslaughter if the evidence warrants such an instruction.[19]

It is uncontested that there was testimony indicating that Litton drank alcohol on the night in question, perhaps even to the point of intoxication. But evidence showing mere intoxication is insufficient to require an intoxication instruction.[20] Rather, "[i]n order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was

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15 McGuire v. Commonwealth, 885 S.W.2d 931, 934 (Ky. 1994).

16 *Id.*

17 Slaven v. Commonwealth, 962 S.W.2d 845, 857 (Ky. 1997) ("[t]hus, while voluntary intoxication is a defense to intentional murder, it is not a defense to second-degree manslaughter.").

18 *Id.* ("[a] jury's belief that a defendant was so voluntarily intoxicated that he did not form the requisite intent to commit murder does not require an acquittal, but could reduce the offense from intentional homicide to wanton homicide, *i.e.,* second-degree manslaughter.").

19 *Id.*

20 Morgan v. Commonwealth, 189 S.W.3d 99, 113 (Ky. 2006).

doing."[21] The evidence does not support a contention that Litton was so intoxicated as to be unaware of his actions, in light of the following: Litton freely conversed with V.D. regarding his murder of Chapman; Litton was sufficiently aware of the possible consequences for him of Chapman's death to threaten to kill V.D. if she told anyone that he killed Chapman; Litton had the presence of mind to attempt to burn his bloodstained clothes; Litton recalled killing Chapman while being interrogated, as shown by his emotional outburst;[22] and V.D.'s testimony that though Litton had been drinking, she believed he knew what he was doing. Such actions may be consistent with drunkenness but not a heightened intoxication sufficient to cause Litton to be utterly unaware of his actions. So we conclude that the trial court did not err in refusing to give an intoxication instruction.

C. The Trial Court Did Not Err in Denying Litton's Requested Instruction on Extreme Emotional Disturbance.

Litton contends that the trial court erred by refusing to instruct the jury on first-degree manslaughter under extreme emotional disturbance. According to Litton, he suffered extreme emotional disturbance when Chapman twisted his nipple during their sexual encounter.

A finding of extreme emotional disturbance does not mandate an acquittal.[23] Rather, a person suffering from extreme emotional disturbance may be

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[21] Springer v. Commonwealth, 998 S.W.2d 439, 451 (Ky. 1999).

[22] *See* Bills v. Commonwealth, 851 S.W.2d 466, 471 (Ky. 1993) (finding that voluntary intoxication instruction was not warranted because, inter alia, "[t]his is not a case in which the defendant had no memory at all of the events.").

[23] McClellan v. Commonwealth, 715 S.W.2d 464, 468 (Ky. 1986) ("[e]xtreme emotional disturbance for which there is a reasonable explanation or excuse does not exonerate or

found guilty of the lesser offense of first-degree manslaughter instead of intentional murder.[24] In order to demonstrate that a person suffers from extreme emotional disturbance, there must be evidence that the person has a temporary state of mind "so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes."[25]

In the case at hand, it appears that, at most, Litton became angry when Chapman twisted his nipple. But it is also clear that evidence of anger is insufficient to warrant an instruction on extreme emotional disturbance.[26] So Chapman's twisting of Litton's nipple during their alleged sexual encounter was not an event sufficient to constitute a triggering event causing Litton to suffer from extreme emotional disturbance, especially in light of the fact that Litton did not react violently when Chapman twisted his nipple during the party. Therefore, we hold that there was insufficient evidence presented to find that a second incident of nipple-twisting by Chapman caused Litton to become so uncontrollably enraged and disturbed as to suffer

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relieve one of criminal responsibility. It simply reduces the degree of a homicide from murder to manslaughter.").

[24] KRS 507.020(1)(a) ("a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime[.]"); KRS 507.030(1)(b) ("person is guilty of manslaughter in the first degree when: . . . . (b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.").

[25] McClellan, 715 S.W.2d at 468-69.

[26] Talbott v. Commonwealth, 968 S.W.2d 76, 85 (Ky. 1998).

from extreme emotional disturbance. Accordingly, the trial court did not err in refusing to issue an instruction on extreme emotional disturbance.

IV. CONCLUSION.

For the foregoing reasons, the judgment of the Martin Circuit Court finding Clyde Jason Litton guilty of murder, rape in the first degree, and tampering with physical evidence is affirmed.

All concur.

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