

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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AS MODIFIED: JANUARY 24, 2008
RENDERED: JUNE 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-000643-MR

DATE 1-24-08 E.A.G. GRIFFITH, D.C.

DEBORAH L. HUIETT

APPELLANT

V. ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE STANLEY BILLINGSLEY, SPECIAL JUDGE
NO. 02-CR-000280

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Boone Circuit Court where Appellant, Deborah Huiett, was convicted of murder and tampering with physical evidence. Appellant raises six claims of error: (1) that the trial court improperly denied her motion for a mistrial when a witness testified as to statements made by Leonard Day; (2) that the trial court improperly denied her motion for a mistrial when a witness provided hearsay testimony that inculpated Appellant; (3) that the trial court improperly denied her motion for a mistrial when it was discovered that a witness was improperly questioning other witnesses; (4) that the trial court improperly admitted highly prejudicial evidence of other crimes, wrongs, and bad acts; (5) that all of these errors amount to cumulative error; and (6) that the trial court improperly failed to grant a directed verdict.

Appellant's claim concerning the trial court's failure to grant a directed verdict was not preserved and this Court finds nothing to suggest palpable error. Appellant's claim of cumulative error is moot as this Court finds no error, but will discuss the Appellant's remaining claims in turn.

I. Background

Appellant was charged with the murder of Tina Rae Stevens, the former girlfriend of her boyfriend, Leonard William Day, and with tampering with physical evidence. Stevens disappeared in May 1999 and her skeletal remains were found in Boone County on April 10, 2000.

In May 1999, Day and his employer, Robert Walker, were working in Boone County. Day had Appellant staying with him. Walker ran into Tina Stevens, who asked him to take her to the motel where Appellant and Day were staying. Walker called Day to see if he wanted to see her. Day agreed, so Walker took Stevens to Walker's room (124) at the motel. Day and Stevens then went to Room 135 in order to avoid Appellant, who was sharing Room 121 with Day.

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

The next weekend, Day called Walker, who had returned to his home in North Carolina, to tell him that he and Appellant had gotten into a fight and had been kicked out of the motel due to complaints from other guests about the two arguing. After the couple left, motel management discovered that Room 121 was "basically trashed," with

broken glass, furniture and garbage everywhere, and that the walls of Room 135 were streaked from either water or spray cleaner. One of the beds in Room 135 had sheets on it not belonging to the hotel, and there was a large brown stain on one of the mattresses. A garment bag had been left behind in Room 121.

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 testified that the estimated time of death was 3-10 months before the remains were found, but that it could have been earlier since it was difficult to tell given the varying condition of the remains inside and outside the garment bag.

The investigation into Stevens's death was led by Detective Todd Kenner of the Boone County Sheriff's office. In September 2000, Detective Kenner contacted Day, who described meeting with Stevens in May 1999. Day claimed that Appellant was upset the day after he met with Stevens, so they went to a breakfast buffet. Day claimed that on the way to the buffet, he saw Stevens for the last time, boarding a bus.

In 2002, Day came forward and claimed that Appellant had admitted to killing Stevens and that he had seen her in some of Stevens's clothes. Day was incarcerated in Illinois at the time. Further investigation turned up many incriminating statements and admissions made by Appellant to several witnesses. She was arrested on April 24, 2002 in North Carolina. Day was arrested on July 9, 2002. His arrest was based on statements from several of his friends, associates, and cellmates.

Day did not testify at trial because he invoked his Fifth Amendment right not to testify. The jury found Appellant guilty of murder and of tampering with evidence and sentenced her to life in prison. Appellant now appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

II. Analysis

A. Statements by Leonard Day Overheard by Lopez

Appellant argues that Rudy Lopez, a witness who was a cellmate with Leonard Day in Indiana, was allowed to improperly testify to what he claimed he heard Day say. At a bench conference concerning Day's testimony, the prosecutor said Lopez would testify to the effect that "Deb cut her up but she didn't do shit right so I had to finish her off." The prosecutor wanted to redact the statement to only "he finished her off." The trial court agreed with defense counsel that "That would be too far. It would get us in dangerous water." The judge further opined that to him "finished implies confederate."

During questioning of Lopez the prosecutor asked if Day made any statements about what he did with a body. Lopez first mentioned Day said something about a bag and parts of a body. When asked if he remembered specifically what Day said or did, Lopez blurted, "He said he had to finish her off." Defense counsel immediately objected, thus preserving this issue for review.

Another bench conference ensued, and on further reflection the judge denied the Appellant's motion for a mistrial for the following specific reasons: 1) the statement did not mention the Appellant; 2) the language could mean no more than what happens when a hunter shot a deer that had run off wounded; and 3) the jury did not have to read into the statement "any accusation towards the defendant." The prosecutor had warned the witness not to make the statement and no claim was made that it was improperly elicited. In the trial court's view the important distinction preventing a mistrial was that the statement did not refer to the Appellant. With this in mind, the trial court feared that giving an admonition would "draw an inference that's not necessarily already

there.” No admonition was requested because the defense took the position that the testimony was incurable.

What the trial court said before hearing the testimony and after hearing it did differ. However, the trial court’s final view of the matter after hearing the testimony in context was better informed than when hearing only a proposed statement out of context. His view of the actual evidence has more weight than an anticipated statement. The strongest inference that could be drawn from the actual testimony is that some unnamed person may have injured the victim, left her to die, and that Day “had to finish her off.” That inference certainly would not be sufficient to convict Appellant, who was not mentioned in the statement. It in no way identified her as a confederate. In fact, the statement is equally consistent with Day himself having to finish what he started. The trial court did not err in denying the motion for mistrial. There is no reasonable possibility that this statement affected the verdict, and even if it were error, it would be harmless.

B. Hearsay

Appellant claims that the trial court erred when it failed to grant a mistrial when Pam Hendrix, a friend of Day’s, twice provided hearsay testimony that inculpated Appellant in the death of Stevens.

On May 11, 2005 during the testimony of Hendrix, and during direct examination by the Commonwealth, Hendrix discussed a specific instance when she was riding in a car and Day’s name came up in conversation. Hendrix stated that when she heard the name Leonard Day, she said to the other people in the car, “I heard him and his girlfriend might have killed a friend of mine.” Defense counsel immediately objected. At the bench, they argued that the statement was hearsay and had improperly implicated

Appellant since it had clearly been established throughout the trial that Day and Appellant were boyfriend and girlfriend.

The Commonwealth argued that the statement Hendrix had made on the stand was inconsistent with her prior statements in which she claimed to have only said that Day might have killed a friend of hers. The Commonwealth further argued there was no error because Hendrix had only said "girlfriend" and had not specifically referenced Appellant by name. The trial court overruled the Motion for Mistrial.

Moments later during cross examination of Hendrix, she was asked about an interview she had with a Detective Blagg. In response, Hendrix again stated that she said she had heard that Day and his girlfriend killed Stevens. Defense counsel again asked for a mistrial and stated that "once was bad enough and now we have gone into it twice." The motion was overruled. At this point, the judge admonished the jury to disregard Hendrix's statements.

Hendrix's statements were clearly inadmissible hearsay under KRE 801(c). The Commonwealth did not offer any argument that the statements fit into an exception to the hearsay rule. They only explained that they had not anticipated Hendrix's statements because her original statement did not mention "girlfriend." The Commonwealth then argued that Appellant's name wasn't mentioned, only the word, "girlfriend." These explanations do little to resolve the issue. The jury was well aware that Day and Appellant were in a relationship. Clearly, any reference to "girlfriend" was a reference to Appellant.

However, in order for a mistrial to be granted, the record must reveal a manifest necessity for a mistrial. Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985). This Court has previously held that for a mistrial to be proper, the harmful event must be

of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed no other way. Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996).

In this case, the judge admonished the jury to disregard Hendrix's statements. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). Appellant correctly points out that there are two exceptions to this rule: 1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or 2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial." Id.

Neither of Hendrix's statements were attributed to Day. They were merely conjecture. With regard to both statements, the defense was given the opportunity to cross examine Hendrix. There is no indication of any "overwhelming likelihood" that the jury could not follow the admonition. Furthermore, and most significantly, there was nothing "devastating" regarding the nature of the testimony. Prior to Hendrix's testimony, one of the witnesses testified that she heard Appellant admit killing the victim. Another witness testified that Appellant admitted to her that she "stabbed her and cut her up but couldn't finish the job, so she called Mr. Day to help her finish and then they went and dumped the body..." Yet another witness testified that Appellant admitted to her that she "just went into a rage and started cuttin' her," and that she and Day cut the victim's fingers and head off.

Given all of this testimony, it is entirely unreasonable to suggest that Hendrix's statements were so inflammatory or devastating as to warrant an exception to the

admonition rule. Therefore, this court concludes that any harm to Appellant caused by Hendrix's hearsay statements were cured by the trial judge's admonition to the jury. The trial court's refusal to grant a mistrial was proper.

B. Improper Questioning of Witnesses

Appellant claims that the trial court erred by not granting her motion for a mistrial when it discovered that Roxanne Phillipi, Day's sister, was improperly questioning witnesses regarding their testimony.

During a witness examination, the bailiff interrupted the proceedings and asked if he could approach. He informed counsel and the trial court that he had received a call that Day's sister, Phillipi, was asking questions of other witnesses. The bailiff further stated that other witnesses had brought it to his attention because they were being questioned by Phillipi, did not think it was right, and wanted him to know. The trial court ordered a recess, brought Phillipi up to the bench and instructed her not to discuss her testimony or to ask other witnesses about their testimony. Phillipi indicated she did not feel this is what she had been doing, but told the judge she understood that she was not to discuss testimony with other witnesses. After Phillipi left, the bailiff stated he had heard no conversations between witnesses. Appellant asked for a mistrial and this request was denied.

Appellant claims that what happened was comparable to bribing a witness, as prohibited by KRS 524.020, or tampering with a witness, as prohibited by KRS 524.050. However, there is no evidence of any pecuniary benefit offered by Phillipi to influence testimony or induce the absence of a witness. In fact, no claim of any violation of KRS 524.020 or KRS 524.050 was asserted at the trial court and any such claim here is, therefore, unpreserved. In order for a mistrial to be granted, the record must reveal a

manifest necessity for a mistrial. Skaggs, 694 S.W.2d at 678. No such necessity was shown regarding Phillipi. The denial of Appellant's motion for a mistrial was proper.

C. KRE 404(b)

Appellant claims that the trial court erred when it failed to sustain Appellant's objection to Colista Shotts's testimony involving an alleged statement attributed to Appellant because it was in violation of KRE 404(b).

Shotts testified that at some point after the alleged murder, she spoke with Appellant and confessed to sleeping with Day. Appellant became upset, yelling and calling Shotts names. After Appellant calmed down, the two women returned home in Appellant's truck. Shotts testified that on the way, Appellant said, "To be honest Colista, I brought you out here to slice your throat and leave you for dead." The two women had further shouting matches and physical altercations when Appellant later saw Shotts dancing with Day in a bar. During one of these arguments, Shotts testified that Appellant told her she would kill her, that she had done it before and she would do it again.

According to KRE 404(b), evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a person in order to show action in conformity therewith unless it meets one of the exceptions provided for under KRE 404(b)(1).

The trial court found in this case that Appellant's statement about having killed before is intertwined with the case, thus permitting its inclusion under 404(b). The standard is that the evidence must be so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party. This Court finds nothing to indicate that Appellant's statements to Shotts were inextricably linked to Stevens's murder. The

dispute between Shotts and Appellant had nothing to do with Stevens, and took place in another state and at a time well after Stevens's death. The comments are easily separable from the rest of the Commonwealth's case against Appellant. Given the nature of the other evidence against Appellant, it is clear that there would have been no serious adverse effect on the Commonwealth had these statements been barred.

Regardless, the statements Appellant complains of do meet an exception provided for in KRE 404(b)(1) in that they showed a motive for Appellant to kill Stevens. The circumstances of this case are similar to those in Davis v. Commonwealth, 147 S.W.3d 709 (Ky. 2004). The Commonwealth's theory was that Appellant's motive for killing his victim was his obsession with Christina Levy and her relationships with other men. This Court found that "evidence of Appellant's extreme obsession with Levy and jealousy of any other man with whom Levy had a social or sexual relationship fell within the 'other purpose' exception [to KRE 404(b)]." Id. at 723-24.

In Appellant's case, it is clear that she demonstrated an obsession with Day and that she was jealous of other women with whom he was involved. Appellant's argument that her statements to Shotts were in another state and a time after Stevens's death are not persuasive. This Court has stated that "temporal remoteness is a factor in determining admissibility [where motive is concerned] but is not grounds for exclusion; remoteness bears more heavily on weight than on admissibility." Id. at 725 (quoting Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)).

Schotts's testimony was admissible under the "other purpose" exception to KRE 404(b). The trial court properly exercised its discretion with regard to Schotts's testimony and there is no error.

III. Conclusion

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

All sitting. Lambert, C.J.; Cunningham, Noble, Schroder and Scott, JJ., concur.

McAnulty, J. concurs by separate opinion in which Minton, J., joins.

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CONCURRING OPINION BY JUSTICE McANULTY

I concur in the result but write separately to address the prosecution's failure to provide notice as required under KRE 404(c) of its intent to introduce evidence under KRE 404(b). Here, the trial court allowed evidence of Huiett's other wrongs or acts over defense counsel's objection on the basis of notice. Although Huiett declined to pursue this issue on appeal, upon review of the trial, I am compelled to comment as the prosecution failed to follow the rules and the trial court glossed over the omission. Under KRE 404(c), upon the prosecution's failure to give the requisite notice, the trial court could have properly excluded the evidence or for good cause shown excused the prosecution's failure to provide such notice and grant Huiett a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure. I believe the trial court erred in overruling defense counsel's objection and allowing the evidence without considering the prosecution's failure to abide by KRE 404(c) and providing a remedy to avoid unfair prejudice to Huiett. Nonetheless, I do not believe the error

affected Huiett's substantial rights and Huiett did not raise the notice issue on appeal, therefore I concur.

Minton, J., joins.

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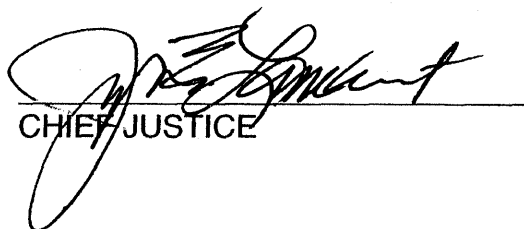
APPELLEE

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing is denied. The Opinion of the Court rendered on June 21, 2007, is modified on its face by substitution of the attached Opinion in lieu of the original Opinion.

All concur, except Minton, J. Abramson, J., not sitting.

ENTERED: January 24, 2008.


CHIEF JUSTICE