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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000332-MR

JONATHAN D. STARK — APPELLANT

ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
V. NO. 03-CR-000069

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING AND REMANDING IN PART

Appellant, Jonathan Stark, was convicted by a Hopkins County jury of two counts of murder and was sentenced to life imprisonment without the possibility of parole. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions, but reverse and remand for a new penalty phase trial and sentencing.

On June 30, 2002, the nude body of Norrell Major and partially nude body of Tim Hibbs were discovered inside of Major's trailer. Both men had been shot to death. Approximately six months earlier, Major ended a homosexual relationship with Appellant, who was Major's employee. The relationship ended because Major had reportedly been cheating on Appellant. By all accounts, Appellant did not react well to the end of the relationship. Evidence presented at trial suggested that Appellant was obsessed with Major. He continued to initiate

contact with Major and eventually, filed a sexual harassment complaint against Major. However, his complaint was found to be unsubstantiated and he was removed from Major's department at work.

Sometime between February and June of 2002, Appellant saw Major with Hibbs and became jealous. He followed the men and became involved in a heated argument with Major. Appellant admitted assaulting Major at that time. Afterwards, Appellant called Major's son to report that he still loved Major and was sorry about the physical confrontation. Approximately two or three weeks prior to the murders, Appellant sent Major a card describing his feelings for him, but Major once again rebuked Appellant's sentiments.

On the day prior to the murders, Appellant claimed that he discovered some lawn furniture missing from his front porch. He assumed the "thief" was Major. That night Appellant went to a party but then left around midnight. One of Appellant's friends tried to call him soon after he left the party since it was not Appellant's habit to leave gatherings without saying goodbye. Later that night, Appellant returned his friend's call, reporting that he went to Major's trailer to ask about the lawn furniture but found no one home. He reported taking some lanterns in retaliation.

No signs of forced entry were found when Major and Hibbs's bodies were discovered that morning. Major's son reported that a key kept on the ledge above Major's front door was missing. Appellant immediately became a suspect and investigators went to his residence in the early hours of July 1, 2002.

During their conversation with Appellant, the investigators noted that Appellant spoke of Major in the past tense even though he had only been told

that Major was in an accident. Appellant denied having a handgun, but upon a search of his residence, shells for two different pistols and a gun cleaning kit were found. Appellant acknowledged that he had owned a handgun, but sold it approximately three weeks prior to the murder. He said he sold it to a man named David Blades, but police were unable to locate him. Clothes and shoes worn by Appellant on the night Major and Hibbs were murdered were never located despite a search of Appellant's possessions. Phone records also showed a call from Appellant to Major at 1:14 a.m. on the night of the murders. Eventually, Appellant's DNA was linked to the scene of the crime via a cigarette butt found inside Major's trailer.

Based on this evidence, Appellant was charged with and convicted of the murders of Major and Hibbs. Final judgment was entered on March 31, 2005. For the reasons set forth herein, we now affirm Appellant's convictions, but reverse and remand this case for a new penalty phase trial and sentencing.

I. Death qualified juries are constitutional.

Appellant first argues that it violates the Kentucky Constitution to bar persons who are opposed to the death penalty for religious reasons from serving on juries during the guilt phase of a capital case. In so arguing, Appellant relies on Kentucky Const. § 5 which states:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or

teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Although he cites to no venire panel members who were excluded from the jury based on their religious beliefs, Appellant did file a pre-trial motion, which was subsequently denied, asking that no potential juror be excused because of his or her religious opposition to the death penalty. Our own review of the record reveals at least two persons who conceivably made religious references in announcing their opposition to the death penalty.[1] Thus, we believe Appellant's argument is sufficiently ripe for our review.

Upon review, we find that "the civil rights, privileges or capacities" of the excused jurors were in no way "taken away or in anywise diminished . . . on account of [their] belief or disbelief of any religious tenet, dogma or teaching." Ky. Const. § 5. Religion played no part in the trial court's decision to dismiss those panel members who were opposed to considering the death penalty under any circumstances. Rather, just like those persons who are unwilling to consider sentences less than death regardless of the circumstances, the trial court correctly dismissed these persons due to their unwillingness to comply with the requirements of the law. See Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137 (1986) ("It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to

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[1] One person stated that she could not impose the death penalty under any circumstances because she believed that since "God put us in this world, only God can take us out." In another instance, when Appellant's counsel asked the panel member whether she was opposed to the death penalty because of her religious beliefs, the panel member answered, "yes, that's part of it."

temporarily set aside their own beliefs in deference to the rule of law."); Grooms v. Commonwealth, 756 S.W.2d 131, 137 (Ky. 1988) ("It has long been the law in capital cases that the Commonwealth is entitled to have excused for cause a person who has such conscientious objection to the death penalty that he would never, in any case, no matter how aggravated the circumstance, vote to impose the death penalty."); Buchanan v. Commonwealth, 691 S.W.2d 210, 212 (Ky. 1985) ("A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes.")

The fact that certain religious views regarding the death penalty may impair or prevent a person from performing his or her legal duties as a juror in capital cases also does not violate any of the religious freedoms guaranteed in Section five of our constitution. The U.S. Supreme Court held in Lockhart, supra, that since such persons are still qualified to serve as jurors in all other criminal cases, the fact that they are excluded in capital cases "leads to no substantial deprivation of their basic rights of citizenship." 476 U.S. at 176. It is also axiomatic that "[e]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." U.S. v. Lee, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982). Appellant's contentions to the contrary are without merit. See Uttecht v. Brown, ___ U.S. ___, 127 S.Ct. 2218, 2223, ___ L.Ed.2d ___ (2007) ("[T]he State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes."); State v. Willoughby, 892 P.2d 1319, 1335 (Ariz. 1995) ("Although religious beliefs may motivate one's opinion about the

death penalty, the beliefs themselves are not the basis for disqualification."); State v. Sandles, 740 S.W.2d 169, 178 (Mo. 1987) (holding that excusal of juror in capital case for his faith-based opposition to death penalty did not violate Missouri Constitution because jurors must follow laws of the State); Wolf v. Sundquist, 955 S.W.2d 626, 632 (Tenn. App. 1997) ("Notwithstanding the constitutional prohibitions against using religious tests, the courts have repeatedly approved excluding from jury service persons whose religious beliefs affect their ability to be impartial.").

II. KRS § 532.025 does not preclude victim impact evidence at capital trials.

Appellant next argues that KRS § 532.025 precludes juries in capital cases from considering victim impact evidence at the penalty phase of the trial. As support for his position, he notes that none of the eight statutory aggravating circumstances set forth in KRS § 532.025(2)(a) provide for the presentation of victim impact evidence. "It is a fundamental rule that 'all statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole.'" Aubrey v. Office of Attorney General, 994 S.W.2d 516, 520 (Ky. App. 1998) (citing Transportation Cabinet v. Tarter, 802 S.W.2d 944 (Ky. App. 1990)).

Although none of the eight statutory aggravating circumstances set forth in KRS § 532.025(2)(a) provide for the presentation of victim impact evidence, the statute as read in its entirety clearly provides for the presentation of aggravating circumstances not set forth in the statute if they are "otherwise authorized by law." KRS § 532.025(2) ("In all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions

to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law *and any of the following* statutory aggravating or mitigating circumstances which may be supported by the evidence . . .") (Emphasis added).

There is no doubt that the presentation of victim impact evidence during the penalty phase of capital trials is "otherwise authorized by law." See KRS 532.055(2)(a)(7) (providing for the presentation of victim impact evidence during the penalty phase in all felony cases); Bowling v. Commonwealth, 942 S.W.2d 293, 303 (Ky. 1997) (permitting use of victim impact evidence during penalty phase of capital trial). Accordingly, Appellant's argument is without merit.

III. Being placed on suicide watch did not create a manifest injustice at Appellant's trial.

Appellant seeks a palpable error review in light of the fact that this issue is unpreserved. RCr 10.26. Appellant was placed on "suicide" watch periodically both before and during his trial by officials at the Hopkins County Jail. When he was placed under this watch, Appellant was not allowed to have anything in his cell and thus, was unable to review documents related to his trial during those times. He was also not allowed material "on which to record questions that occurred to him" both before and during trial. He alleges that he became dehydrated "because he could not even have his own cup from which to drink water as he needed." Finally, because he was required to sleep on a mat on a concrete floor during this time, "[w]hat sleep he got was not restful."

Appellant alleges that the conditions set forth above deprived him of his right to meaningful access to counsel and to assist in the preparation of his

defense. Even if we were to accept Appellant's allegations at face value, Appellant fails to demonstrate how these conditions caused him manifest injustice at trial. Because he fails to demonstrate any manifest injustice resulting from the conditions set forth above, we find no palpable error.

IV. Appellant's Miranda rights were not violated.

Appellant claims that statements he made to Kentucky State Police officers should have been suppressed because he was not given Miranda warnings. Miranda warnings are required when a suspect is subject to custodial interrogation. Jackson v. Commonwealth, 187 S.W.3d 300, 305 (Ky. 2006) ("only statements made during custodial interrogations are subject to suppression pursuant to Miranda"). For the reasons set forth herein, we find no violation of Appellant's Miranda rights.

Detective Wolcott testified at the suppression hearing that shortly after finding the victims' bodies, the Police discovered that Appellant had been romantically involved with Major. Although it was very early in the morning, Wolcott felt it was important to speak with Appellant as soon as possible in order to solidify his alibi and learn more about his relationship with Major. Because police were unsure as to Appellant's involvement in the crime, Wolcott arrived at Appellant's residence with several officers. The officers surrounded the perimeter of the trailer. Two officers approached and knocked on Appellant's front door. Stark opened the door, stepped out of the trailer, and voluntarily agreed to answer questions. During a preliminary interview outside of Appellant's trailer, Appellant agreed to a search of his residence and to accompany officers to the police station for further questioning. Wolcott testified

that transportation was provided for Stark. Upon arriving at the station and being seated in an interrogation room, Wolcott testified that Miranda rights were administered to Appellant. Stark expressed an understanding of his rights. At some point during the interview, Stark expressed a desire to talk with his attorney. The interview was immediately terminated and Stark was transported back to his residence.

Stark testified that he had the impression that he was being arrested due to the early morning hour and the presence of several police officers. Stark agreed to go to the station with the officers but said he was given no choice as to transportation. Stark also testified that he did not remember being informed of his Miranda rights at any time. After reviewing the testimony and the demeanor of each witness, the trial court determined that Appellant's Miranda rights were not violated because "the initial questioning at [Appellant's] trailer did not require a Miranda warning and that [Appellant] was given a Miranda warning at the Kentucky State Police Post prior to questioning at that facility."

We find that the trial court's findings of fact are supported by substantial evidence. RCr 9.78. We also agree with the trial court that as a matter of law these facts do not support Appellant's contention that he was in custody prior to being read his Miranda rights at the police station. Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006) ("whether a defendant is in custody is a mixed question of law and fact to be reviewed de novo"). Accordingly, the trial court did not err when it overruled Appellant's motion to suppress statements he made to police.

V. There was no abuse of discretion in the trial court's denial of a continuance.

Appellant complains that the trial court erred in failing to grant him a continuance just prior to trial for the purpose of testing physical evidence. "The decision to delay a trial rests solely within the court's discretion." Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). "Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." Id.

A trial date was initially set in this case for February 9, 2004. Appellant moved for and was granted a continuance until August 17, 2004. Nevertheless, it appears Appellant's counsel did not review the physical evidence until August 11, 2004. On that date, he discovered that two sexual assault kits taken from the victims had not been tested. By consent of the parties, the trial court granted another continuance until March 15, 2005, to allow both parties to pursue testing of the evidence. In its order, the trial court stated that the "parties are encouraged to coordinate their testing, if possible and the defendant shall notify the Commonwealth as to the defense testing agency so that coordination may occur."

On February 28, 2005, Appellant filed a "Motion for Appropriate Relief" seeking more testing by the Commonwealth. Appellant alleged that only part of

the physical evidence had been analyzed by the Commonwealth and that the Commonwealth should be required to test the remainder of the evidence. The Commonwealth responded that the parties only discussed analyzing a portion of the evidence and that Appellant had plenty of time and opportunity to conduct his own analysis of the evidence if he so desired. Finally, the Commonwealth noted that all the material tested (fingernail scrapings, blood, and hair) was linked solely to the victim from which it came. The Commonwealth clarified that only one hair was at issue - a hair reportedly found on Hibbs' finger. Due to the low probative value of human hairs since they are easily transferred or transported due to shedding, the Commonwealth determined that it was too onerous to exhume Hibbs' body to obtain his DNA for testing of the hair. Finally, it was noted that Appellant had not provided his own hairs for analysis.

A hearing on Appellant's "Motion for Appropriate Relief" was conducted on March 3, 2005. At that hearing, it was revealed by the Commonwealth that further testing would take a minimum of forty-five working days. Appellant alleged that testing could be completed in three weeks. Appellant's counsel explained that he had not ordered his own testing because he assumed the Commonwealth would test the entire kit. The trial court overruled Appellant's motion, concluding that the Commonwealth was not required to conduct additional testing and that Appellant was not entitled to a continuance in order to perform it himself.

Upon review of the above facts and circumstances in light of the factors set forth in Snodgrass, supra, we find no abuse of discretion in the trial court's determination to deny Appellant's motion for an additional continuance just prior

to trial. Appellant had ample opportunity to test the evidence prior to trial and cannot show any prejudice whatsoever in the fact that the Commonwealth chose not to test the entire kits. Accordingly, Appellant's contentions are without merit.

VI. The trial court properly admitted photographs and a videotape of the crime scene.

Appellant argues that it was duplicative and prejudicial to admit both photographs and a videotape of the crime scene. We utilize an abuse of discretion standard to review a trial court's determination to admit photographs or other pictorial material. Ernst v. Commonwealth, 160 S.W.3d 744, 757 (Ky. 2005). Photographs and videotape of the victim and/or crime scene are generally admissible if relevant to illustrate a material fact or condition. Id.

In this case, Detective Wolcott testified regarding the crime scene and his investigation. A portion of Wolcott's testimony involved Wolcott describing photographs which depicted portions of the crime scene. Certain photographs depicted blood. A few of the photographs depicted the victims. Appellant initially objected to the admission of these photographs in light of the fact that a videotape of the crime scene was also scheduled to be admitted by the Commonwealth. After discussion at sidebar, the issue was resolved to both parties' satisfaction and certain photographs were omitted from the jury's view.

After discussing his investigation and his theories as to what likely happened the night the victims were murdered, the prosecutor asked to show a videotape of the entire crime scene to the jury without commentary. Appellant objected on grounds that the videotape was duplicative of the photographs just viewed. The Commonwealth argued that the videotape showed portions of the

scene not depicted in the photographs and was necessary to allow the jury to view the entire scene. The trial judge overruled Appellant's motion, finding the videotape to be relevant and not overly prejudicial.

Upon review, we find the trial court did not abuse its discretion when it admitted the videotape as well as the photographs. While the photographs were duplicative of the videotape to some extent, we believe they were necessary to assist the detective in explaining his investigation and his theory as to what happened to the victims. The videotape, on the other hand, functioned to show the unedited crime scene in its entirety so as to allow the jury to bring perspective to the detective's testimony and to draw its own conclusions about what happened to the victims.

VII. Failure to give penalty phase instruction on extreme emotional disturbance was error.

Appellant contends the trial court erred when it overruled his motion to submit a penalty phase instruction on extreme emotional disturbance as a statutory mitigating circumstance. Pursuant to KRS § 532.025(2), '[i]n all cases of offenses for which the death penalty may be authorized, the judge shall . . . include in his instructions to the jury for it to consider, any . . . of the following statutory aggravating or mitigating circumstances which may be supported by the evidence . . . ." One of the mitigating circumstances set forth in the statute is "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime." KRS § 532.025(2)(b)(2). For the reasons set forth herein, we agree with

Appellant that a penalty phase instruction on extreme mental or emotional disturbance as a statutory mitigating circumstance was supported by the evidence in this case.

In McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986), this Court explained the concept of extreme emotional disturbance as follows:

> There is little doubt that the phrase "extreme emotional disturbance" is a replacement for the old "sudden heat of passion" but is somewhat less limited in its application. The commentary to K.R.S. 507.030 explains that a reasonable explanation of extreme emotional disturbance is not limited to specific acts of provocation by the victim but may relate to any circumstance that could reasonably cause an extreme emotional disturbance. Although its onset may be more gradual than the "flash point" normally associated with sudden heat of passion, nevertheless, the condition must be a temporary disturbance of the emotions as opposed to mental derangement per se.

Id. at 468. Under our jurisprudence, a "triggering event" must precede the "extreme emotional disturbance." Baze v. Parker, 371 F.3d 310, 325 (6th Cir. 2004). "A triggering event is dramatic, creating a temporary emotional disturbance that overwhelms the defendant's judgment . . . ." Id. (internal citations omitted).

The Commonwealth's theory of the case was that Appellant was a spurned lover whose jealously propelled him to murder. Evidence established that Appellant engaged in increasingly obsessive and dysfunctional behavior after Major ended the relationship. Appellant made repeated attempts to reconcile with Major and was known to be jealous of Major's relationships with other men. It was also noted during trial that Major was naked and Hibbs was partially clothed at the time they were shot. Finally, Appellant introduced the testimony of a clinical psychologist who diagnosed Appellant as suffering from

both a mood disorder and depression which caused Appellant to cope poorly with losses in his life.

"[T]he quantum of evidence necessary to sustain a penalty phase instruction [on extreme emotional disturbance] is clearly less" than what is required to sustain a guilt phase instruction on extreme emotional disturbance. Hunter v. Commonwealth, 869 S.W.2d 719, 726 (Ky. 1994). "With respect to the concept of mitigation, this imperative reflects the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Id. (internal quotation omitted).

In Hunter, this Court found the instruction warranted in light of the fact that the defendant was "a disturbed young man involved in a five-week marriage that suffered from numerous separations and regular infidelities on the victim's part." Id. In Smith v. Commonwealth, 845 S.W.2d 534 (Ky. 1993) the instruction was required where a despondent and intoxicated defendant murdered the victim after his romantic advances were "spurned" by her several times. Id. at 539. The circumstances in this case simply cannot be meaningfully distinguished from the cases set forth above. Accordingly, the trial court erred when it denied a penalty phase instruction on extreme emotional disturbance. Thus, Appellant is entitled to a new penalty phase trial and sentencing.

VIII. Prosecutorial misconduct, if any, did not amount to manifest injustice.

Appellant also alleges several instances of prosecutorial misconduct which he acknowledges are not preserved and thus, are subject to palpable error

review. RCr 10.26. As to the guilt phase, Appellant identifies no prosecutorial misconduct whatsoever which rises to the level of manifest injustice. See id.

However, as to the penalty phase, we feel compelled to highlight the following comment made by the prosecutor during his closing argument: "I'm the one who may have to recommend that he die. I'm the one who is responsible; well, you are not responsible." In Caldwell v. Mississippi, 472 U.S. 320, 328-329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), the U.S. Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." When considering whether the rule set forth in Caldwell has been violated, we must adhere to the standard set forth in Tamme v. Commonwealth, 759 S.W.2d 51 (Ky. 1988).

In Tamme, we held that "any actions by the Commonwealth which would tend to lessen in the minds of the jury their awesome responsibility should be given the highest scrutiny." Id. at 52. Thus, pursuant to these standards, we must discourage and caution the Commonwealth to refrain from making such comments at retrial as they may lead the jury to believe that the responsibility for determining the appropriateness of the defendant's sentence rests elsewhere. Given our reversal on the penalty phase instructions, we need not address this issue further, other than to say, it should not recur on retrial. Nor do we address the other errors as they are unlikely to recur on retrial.

IX. Conclusion

For the reasons set forth herein, the judgment of the Hopkins Circuit Court convicting Appellant of two counts of murder is affirmed. However, Appellant's sentence is vacated and this case is remanded for a new penalty phase trial and sentencing.

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

COUNSEL FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Department for Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Michael A. Nickles
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601