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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-13-07 E.W.A.

2006-SC-000427-MR

JUSTIN KEITH CONLEY — APPELLANT

V.

ON APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIMBERLY CHILDERS, JUDGE
NOS. 05-CR-000010 AND 05-CR-000011

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

On December 17, 2004, Appellant shot and killed his girlfriend, Jessica Newsome. The murder came five days after Appellant claimed he received a spiritual revelation from God while deer hunting. The divine message warned him that the end of the world was near and that he needed to save his family and friends.

Appellant's religious experiences darkened over the next several days as he reported seeing demons at various places in possession of people he knew. He even reported seeing horns growing out of the head of his girlfriend, and also believed that demons were after him.

On the morning of the murder, Appellant ran the victim's brother from his house because the "devil had possessed him." He then shot Jessica and her dog, killing them both. According to a statement he later made, Appellant shot Jessica because he believed she was possessed by demons.

After the shootings, and before the police arrived, Appellant moved his girlfriend's body to a steep bank in front of his yard. After this, he threw the handgun used to kill Jessica across the road. Appellant then moved Jessica's body back into the house, placed it on the couch, and covered it with a blanket. Shortly thereafter the police arrived, and Appellant disclosed to them the location of the gun. He was arrested and lodged in the Knott County Jail.

The following morning, Appellant got into an altercation with two of the jailers and threw what appeared to be urine on them. According to one of the officers, Appellant was simply "wild." His bizarre behavior continued over the next several days. Appellant claimed there were demons in his cell and he used his blanket to cover the drain and keep them out. He removed his clothes and growled like a dog. Appellant talked to the female correctional officers as if they were his murdered girlfriend, calling them by her name. He related what had occurred, but said that the shooting was done by the victim's brother, Dylan Newsome. He was eventually sent to the Kentucky Correctional Psychiatric Center for a mental evaluation where he was found competent to stand trial.

On May 3, 2006, a Knott County Circuit Court jury found Appellant guilty of murder and tampering with physical evidence, as well as one count each of first degree assault and third degree assault against a police officer. He was sentenced to life in prison for the murder, five years imprisonment for tampering with physical evidence, twenty years imprisonment for first degree assault, and five years imprisonment for third degree assault. The sentences were ordered to be served consecutively.

The first issue asserted by Appellant is that the trial court abused its discretion when it struck a prospective juror for cause upon motion of the Commonwealth. "A determination as to whether to exclude a juror lies within the sound discretion of the trial

court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not revise a trial court's determination." Commonwealth v. Lewis, 903 S.W.2d 524, 527 (Ky. 1995). After reviewing the record of this case, the Court finds that the trial court did not abuse its discretion in removing for cause the prospective juror that is the subject of Appellant's complaint.

In his second claim of error, Appellant states that the trial court committed reversible error when it allowed the assault charges – allegedly unrelated to the murder – to be tried together with the murder charge. The Commonwealth correctly notes that the record does not reflect that the alleged error was preserved.[1] Therefore, this Court must first decide if there was error in consolidating the charges. If error was committed, we must then determine if it was palpable and warranting review pursuant to Kentucky Rules of Criminal Procedure (RCr) Rule 10.26. This two-prong test is set down in the case of Ernst v. Commonwealth, 160 S.W. 3d 744, 758 (Ky. 2005).

RCr 6.18 provides that two (2) or more offenses may be charged in the same indictment if the offenses are based on the same acts or transactions connected together. Also, RCr 9.12 allows two (2) or more indictments to be joined together for trial if they could have been joined together in a single indictment. "[A] trial court has broad discretion with respect to joinder, and will not be overturned absent a showing of prejudice and clear abuse of discretion." Rearick v. Commonwealth, 858 S.W. 2d 185, 187 (Ky. 1993). One of the most persuasive factors to be considered is whether evidence of one offense would be admissible at the trial of the other offenses. Brown v. Commonwealth, 458 S.W. 2d 444, 447 (Ky. 1970) (joinder of offenses was proper

[1] Appellant's motion to supplement the record was denied.

where four distinct crimes were of the same character, though occurring over the span of about two weeks).

Here, Appellant raised the issue of his mental state with respect to both the assault charges and the murder charge. The jailers testified to a great extent upon questioning by counsel for Appellant as to his unruly behavior in jail, both before and after the assaults. Throwing food and water, dousing his clothes in the toilet, and other apparent bizarre behavior even led one of the jailers to advise the trial court that Appellant was too mentally unstable and unruly to appear for his first arraignment. Therefore, the perverted behavior of Appellant, both before and after the killing of Jessica Newsome, and even throughout the next morning, would all be admissible as pertaining to his mental state with respect to all charges. Moreover, much of the testimony concerning Appellant's mental state was solicited by the defense in a clear attempt to establish that Appellant was insane during the commission of all the crimes, leading this Court to the conclusion that the failure to object to the joinder was a tactical decision. The trial court did not commit error or abuse its discretion in allowing these charges to be tried together. Accordingly, review pursuant to RCr 10.26 for palpable error is unwarranted.

Appellant's next assertion of error deals with comments made by his counsel, Taylor Strasser. After cross-examination of the Commonwealth's witness, Tabitha Stacy, Strasser – apparently frustrated by the witness's testimony – commented to Appellant that she would like to "take the witness out back and teach her a lesson." Unfortunately, this comment was heard by some of the jurors who then informed the other jurors during break. The trial court questioned each juror separately in chambers as to whether any of them would hold such comments against Appellant. Only one juror

stated that Strasser's comments would prejudice him against Appellant. That juror was excused. Following the in chambers interview of the jury, defense counsel made no further request for relief. Nonetheless, Appellant requests palpable error review, arguing that he was denied a fair and impartial trial. Upon review of the matter, we find no error.

The decision to remove a juror from a panel that has already been seated lies within the sound discretion of the trial court. Lester v. Commonwealth, 132 S.W.3d 857, 863 (Ky. 2004). Here, the trial court dealt with the matter in an exemplary manner. Considering the inappropriate and unprofessional nature of defense counsel's comments, it was entirely proper for the trial court to question the jurors individually in chambers. Furthermore, the record indicates that the trial court removed the single juror who stated that he could not remain impartial. Appellant's claim that the remaining jurors were prejudiced, despite their representations to the contrary is purely speculative. See Kinser v. Commonwealth, 741 S.W.2d 648, 653 (Ky.1987), habeas granted sub nom. on other grounds, Vincent v. Parke, 942 F.2d 989 (6th Cir.1991) ("No conclusion of prejudice ... can be supported by mere speculation."). Moreover, because no request for further relief was made, we can only conclude that defense counsel was satisfied with the trial court's remedy. See West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989). The trial court did not abuse its discretion and, furthermore, there is no indication that Appellant's substantial rights were prejudiced by this incident. RCr 10.26.

Appellant next contends that the trial court should have entered a directed verdict of not guilty by reason of insanity. The burden of proof as to the question of a defendant's insanity at the time of the commission of a crime never shifts from the

defendant. Wainscott v. Commonwealth, 562 S.W.2d 628, 631 (Ky. 1978). In fact, almost since the inception of the Kentucky penal code, this Court has held that "the introduction of proof of insanity by a defendant does not place a burden on the Commonwealth to prove defendant sane; rather, it entitles the defendant to an instruction to the jury that they may find him not guilty by reason of insanity. Thus, the issue of insanity becomes a matter for the jury's determination." Edwards v. Commonwealth, 554 S.W.2d 380, 383 (Ky. 1977). If the jury's verdict is not clearly unreasonable, it will not be disturbed on appeal. Wiseman v. Commonwealth, 587 S.W.2d 235, 238 (Ky. 1979).

Here, Appellant seems to argue that he was entitled to a directed verdict because the Commonwealth presented no expert testimony that he was sane at the time of the offenses. However, this Court has long recognized expert witnesses are not required to be rebutted by expert witnesses. Wiseman, 587 S.W.2d at 237. In fact, specifically regarding the issue of sanity, this Court has stated that "it would not be clearly unreasonable for a jury to find against the defendant on the issue of insanity, regardless of the fact that all of the expert testimony was to the contrary." Ice v. Commonwealth, 667 S.W.2d 671, 678 (Ky. 1984). Furthermore, the jury has the discretion to believe all or none of the witnesses. The jury also has the prerogative to believe some of the witnesses and not others. Gillispie v. Commonwealth, 212 Ky. 472, 279 S.W. 671, 672 (1926). See also Dunn v. Commonwealth, 286 Ky. 695, 151 S.W.2d 763, 764 (1941).

While the lay witnesses did not offer a great deal of support for the Commonwealth's proof, there was evidence – particularly through the psychiatrist and the psychologist – that Appellant's criminal activity was drug -induced and not the result

of a schizophrenia or psychosis. The state's psychologist, Dr. Candace Walker, cited various reasons for this diagnosis. Appellant himself admitted to using drugs but refused to answer further questions concerning the extent of his addiction. There was some evidence Appellant tampered with his urine sample by adding tap water. The withdrawals Appellant experienced as he related them to the psychiatrist were consistent with withdrawals from various drugs, including methamphetamine. Also, Appellant was not treated for schizophrenia, but rather for depression. Furthermore, there was evidence from both the psychiatrist and from psychological testing that Appellant's behavior was inconsistent and that he may well have been malingering or posturing to some extent. In short, there was sufficient evidence to support the jury's finding that regardless of the testimony of Appellant's insanity, the heinous crime committed by Appellant on December 17, 2004, was drug -induced and not the result of a mental disease or defect. The motion for a directed verdict was properly denied.

Next, Appellant complains the trial court erred in its ruling with regard to the admission of other bad acts into evidence. Kentucky Rules of Evidence (KRE) Rule 4.04(b)[2] states as follows concerning evidence of other crimes:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or (2) if 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.

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[2] Amended by 2007 Kentucky Court Order 03 (C.O. 03). The 2007 amendment to this rule makes a change with respect to the admissibility of evidence of the character of an accused (as provided in subsection (a)(1) of the provision) and leaves all of the other provisions of the rule unchanged.

The acts complained of herein arise out of the testimony of three witnesses. Primarily, Appellant complains that some of the prior acts occurred over a year prior to the murder, and, therefore are too remote in time to have been admitted into evidence.

This would seem to be a textbook example of why prior wrongs or acts are admissible to show intent. At the trial, Appellant put forth a strong and persuasive case of insanity. This theory, as it was developed, was rooted in the proposition that Appellant simply snapped mentally while deer hunting, and that he subsequently acted upon the belief that he was being guided by God as he proceeded with totally irrational and violent acts which ultimately culminated in Jessica's death. Inherent within this scenario is at least the inference that up until that time Appellant felt no animus or ill will toward the victim. In other words, that his intent to harm was solely the result of his sudden mental disease or defect and that his murderous behavior was totally inconsistent with his prior relationship with the victim.

Threats and acts of violence perpetrated by Appellant against Jessica for a period of time going back over one year prior to his alleged mental breakdown are certainly probative and relevant to rebut the insanity claim, and also to show the necessary intent to commit murder. See Parker v. Commonwealth, 952 S.W.2d 209, 214 (Ky. 1997) ("The trial judge properly determined that the evidence of prior injuries was relevant to demonstrate the animus of Parker towards the child and to show the absence of accident or mistake."). Therefore, the introduction by the Commonwealth of the testimony of witnesses that had observed Appellant threatening Jessica, as well as using physical force upon her, was not error.

Also, Appellant's claim of the remoteness of one of these acts is without merit. In fact, the further back the evidence runs as to Appellant's ill feelings toward Jessica is of

importance to show that his state of mind punctuated with ill will toward her was of long standing prior to the deer hunting revelation. Since this Court finds no error in any of the trial court's rulings concerning those matters raised by Appellant, there is no need to address the latter argument as to cumulative error. Sanborn v. Commonwealth, 975 S.W.2d 905, 913 (Ky. 1998).

Apparently the Commonwealth concedes, and this Court so finds, that the trial court erred in sentencing Appellant to a term of years consecutive to his life sentence. "[I]t is improper to order a term of years sentence to run consecutively with a life sentence." Stewart v. Commonwealth, 153 S.W. 3d 789, 792 (Ky. 2005). See also Bedell v. Commonwealth, 870 S.W. 2d 779, 783 (Ky. 1993). They must run concurrent.

For all of the foregoing reasons, Appellant's convictions for murder, tampering with physical evidence, assault in the first degree, and assault in the third degree are affirmed. His sentences for the tampering with physical evidence and assault convictions are reversed, and this matter is remanded to the Knott Circuit Court for re-sentencing consistent with this opinion.

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

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