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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 21, 2009

NOT TO BE PUBLISHED
FINAL

Supreme Court of Kentucky

2006-SC-000912-MR

DATE 6/11/09 Kelly Klabor, D.C.
APPELLANT

LORETTA EVANS

V. ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
NO. 04-CR-00084-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Loretta Evans, was convicted by a Whitley Circuit Court jury in November 2006 of murder and first-degree robbery. For these crimes, Appellant was sentenced to life imprisonment on the murder conviction and twenty years on the robbery conviction, sentences to run concurrently. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts six arguments in her appeal: 1) that a mistrial should have been declared when the jury was informed of her attempted escape from jail; 2) that she should have received a directed verdict of acquittal on the first-degree robbery charge; 3) that the jury instruction on murder improperly varied from her indictment; 4) that she should have received a separate trial from her co-defendant; 5) that photos admitted into evidence inflamed the passion of the

jury; and 6) that her co-defendant's counsel improperly acted as a witness during cross-examination. For the reasons set forth herein, we now affirm Appellant's conviction and sentence.

On May 12, 2004, the dead body of Edgar Perkins was discovered lying face down in the floor of his dining room. The pockets of his pants were turned inside out and his empty wallet was found nearby. Perkins's brother later testified that it was strange the wallet was found empty because Perkins had won a considerable sum of money betting on the Kentucky Derby a few days earlier. An autopsy revealed that Perkins died of asphyxiation as a result of strangulation. Perkins also sustained cracked ribs and head trauma.

Two people became prime suspects in Perkins's murder, Appellant and her roommate, Evelyn Ball. Appellant turned herself in to the police and provided a statement on her version of the events leading to Perkins's murder. Appellant stated that she and Ball went to Perkins's house on May 11, 2004. While there the three drank beer and smoked cigarettes. While Appellant was distracted trying to adjust the air conditioner, Ball and Perkins got into an argument over something he said. Appellant stated that Ball became enraged and hit Perkins in the head with a wine bottle. Ball then choked Perkins, wrestled him to the floor, and killed him. Appellant and Ball then left Perkins's residence in Appellant's car. Mary Cook, one of Perkins's neighbors testified at trial that she saw a car fitting the description of Appellant's car at his house the day of the murder.

On June 14, 2004, Appellant and Ball were indicted by the Whitley County Grand Jury. The indictment charged Appellant with one count of first-degree robbery and one count of “criminal complicity to commit murder when she assisted Evelyn Ball in murdering Edgar Perkins while in the course of robbing him.” Ball was charged with one count of first-degree robbery and one count of first-degree murder. Appellant entered into a written agreement with the Commonwealth whereby she waived her Fifth Amendment rights and agreed to testify at trial. In return, the Commonwealth agreed not to seek the death penalty or other enhanced penalties against her.

At trial, Appellant testified consistently with the statement she gave the police. Ball produced an alibi witness, Johanna Douglas, who testified that Ball was with her on the day of the murder. Based on the evidence presented, the trial court instructed the jury on three possible alternatives regarding the murder charge. Appellant could be found guilty of murder as an accomplice to Ball, or as the principal offender in killing Perkins. The court also provided a combined instruction on murder as an accomplice and as the principal. Evelyn Ball was acquitted on all charges. The jury found Appellant guilty of first-degree robbery and murder as the principal in killing Perkins. For the reasons set forth herein, we now affirm Appellant’s conviction and sentence.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING
APPELLANT’S MOTION FOR A MISTRIAL

Appellant’s first allegation of error is that the trial court should have granted her motion for a mistrial when Ball’s counsel informed the jury that

Appellant allegedly escaped from jail. During *voir dire* Ball's counsel asked a potential juror whether she would hold Appellant's attempted escape from jail against Ball. The trial court held that Appellant's attempted escape was inadmissible and consequently excused the juror. Ball's counsel did not mention the attempted escape again during *voir dire*.

During the opening statements, Ball's counsel again brought up Appellant's attempted escape. Ball's counsel said, "The proof will be that the lab tests begin to come back and they contradict what [Appellant] is saying. Then [Appellant] does something. She escapes from jail." While speaking, Ball's counsel used a power point presentation to project onto the courtroom wall a reference to Appellant's attempted escape. Appellant's counsel immediately objected and moved for a mistrial. Both Appellant and the Commonwealth argued that this information was prejudicial and irrelevant. The trial court agreed but overruled the motion. Instead the trial court admonished the jury to "not consider for any purpose the last statement made by [Ball's counsel]."

"It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." Shabazz v. Commonwealth, 153 S.W.3d 806, 811 (Ky. 2005) (quoting Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996)). The granting of a mistrial is within the sound discretion of the trial court and its ruling should not be disturbed absent a showing of abuse of discretion. Combs v. Commonwealth, 198 S.W.3d 574, 581 (Ky.

2006). Additionally, a jury is presumed to follow any admonishment given by the trial judge. Id.

There are only two circumstances in which the presumptive efficacy of an admonition falters: (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. at 581-582, (quoting Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003)).

In this matter, the trial judge's admonition to the jury cured any potential prejudice to Appellant. Appellant's escape from jail can be probative evidence of her guilt, Bunton v. Commonwealth, 464 S.W.2d 810, 813 (Ky. 1971), but such evidence in this trial was not devastating to her defense or unfairly prejudicial. The mention of the escape from jail was brief and the admonition was given immediately thereafter. We see no reason to believe that the jury was unable to follow the trial court's admonition. The trial court did not abuse its discretion in denying the motion for a mistrial and thus, there is no error here.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A DIRECTED VERDICT ON FIRST-DEGREE ROBBERY

Appellant's second allegation of error is that the trial court improperly denied her motion for a directed verdict of acquittal on the charge of first-degree robbery. Appellant argues that there was insufficient evidence to convict her of first-degree robbery. KRS 515.020 states:

A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

- (a) Causes physical injury to any person who is not a participant in the crime; or
- (b) Is armed with a deadly weapon; or
- (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

The following evidence was presented at trial to indicate that a robbery occurred: testimony from Perkins's brother that Perkins won a lot of money betting on the Kentucky Derby and that the money cannot be found; the fact that Perkins's wallet was found empty at the crime scene; the fact that Perkins's pants pockets were turned inside out; that Appellant saw Ball with money after the murder that she thought was taken from Mr. Perkins; and that Ball had told someone she had money for Appellant from a cleaning job.

A trial court's decision regarding a directed verdict motion is reviewed under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky.1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187. Using this standard the trial court properly denied Appellant's directed verdict motion.

The facts presented adequate evidence for a jury to reasonably believe that Appellant committed first-degree robbery. Obviously physical force was used on Perkins. The empty wallet and the out-turned pants pockets provide solid circumstantial evidence that whoever attacked Perkins also took or attempted to take money from him. The Commonwealth does not need to present direct evidence that a robbery occurred before a conviction for robbery can be obtained. See Wade v. Commonwealth, 724 S.W.2d 207, 208 (Ky. 1986) (holding that direct testimony was unnecessary to conclude that defendant had committed first-degree robbery when the circumstantial evidence indicated that defendant acted with the intent to rob victim). It is of no consequence that the money Perkins won betting on the Kentucky Derby was never found. From the evidence presented a jury could reasonably conclude that some money was taken from Perkins's wallet and Appellant's own testimony put her at the scene of the crime. The trial court did not err in denying Appellant's motion for a directed verdict of acquittal on first-degree robbery.

III. THE JURY INSTRUCTION ON MURDER WAS NOT ERROR

Appellant's next argument is that, because the indictment only alleged that she acted as an accomplice, the trial court erred by instructing the jury that Appellant could be found guilty of murder on the theory that she killed Edgar Perkins. The indictment specifically charged that Appellant acted as an accomplice when "she assisted Evelyn Ball in murdering Edgar Perkins while in

the course of robbing him.” Prior to trial, the Commonwealth provided a Bill of Particulars, based largely on Appellant’s own statements to police, which detailed its theory of how the murder was committed and the role of each participant. The Bill of Particulars states:

While in the home of Mr. Perkins the defendants caught Mr. Perkins off guard and Evelyn Ball struck him in the back of the head with a wine bottle. The two defendants then proceeded to overtake the victim on the floor with Evelyn Ball sitting on his chest and strangling him. Evelyn Ball, during the course of her struggle with Mr. Perkins, administered several wounds to the head, hands, and other parts of his body.

Appellant argues that she was surprised and thrown off guard by the jury instruction on murder. Because Appellant did not preserve an objection to the murder instruction at trial, we will review to determine whether there was palpable error. RCr 10.26.

The indictment was never formally amended to reflect the theory that Appellant may have been the principal in committing the murder rather than the accomplice, but the question of whether that formality was required has not been raised. The murder instruction given by the trial court, to the extent it alleges an alternate means by which Appellant committed Murder, was a *de facto* or constructive amendment of the indictment, which would not be erroneous so long as the conditions for a formal amendment existed.

RCr 6.16 permits amendment of indictment when “no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.” “[O]ne who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense.” Parks v.

Commonwealth, 192 S.W.3d 318, 326-327 (Ky. 2006). Additionally, “amending the indictment to include an allegation that the defendant is guilty of the underlying charge by complicity does not constitute charging an additional or different offense.” Commonwealth v. McKenzie, 214 S.W.3d 306, 307 (Ky. 2007); see also Commonwealth v. Caswell, 614 S.W.2d 253, 254 (Ky. App.1981) (“KRS 502.020 does not create a new offense known as complicity. It simply provides that one who aids, counsels or attempts to aid another in committing an offense with the intention of facilitating or promoting the commission of the offense is himself guilty of that offense.”) The trial court’s instructions did not add a new or different offense against Appellant. We therefore consider whether the murder instruction naming Appellant as the principal offender violated her substantial rights.

“The essential question when examining [any] variance between the indictment and the proof is whether the defendant in fact had fair notice and a fair trial.” Johnson v. Commonwealth, 864 S.W.2d 266, 272 (Ky. 1993). A failure to amend an indictment is not a violation of a defendant’s substantial rights if the defendant is not “misled, surprised, or thrown off guard” by the ultimate jury instruction. Robards v. Commonwealth, 419 S.W.2d 570, 573 (Ky. 1967). In Wolbrecht v. Commonwealth, 955 S.W.2d 533 (Ky. 1997), Wolbrecht and others were originally charged with murder by shooting the victim or by aiding one of several specifically named individuals who murdered the victim. Midway through the trial, the court permitted the amendment of the indictment, charging her as an accomplice to some unknown killer. This

Court found that amendment to be a substantive change that prejudiced Wolbrecht's substantial rights because it created unfair surprise. Wolbrecht had denied involvement in the murder and had prepared a defense based on the activities of those individuals originally named in the indictment. The expansion of the indictment to include "anyone and everyone" as the potential principal offender completely undermined Wolbrecht's defense. She was entitled to an opportunity to discover additional evidence to appropriately defend the new scope of the allegation. Id. at 537.

In the case at hand, Appellant has no such claim of surprise. She admitted being at the scene of the murder, and staked her defense on persuading the jury that Ball was the killer. She had to know that if the jury believed Ball's alibi, it could reasonably believe that Appellant, the only one else at the scene, killed Perkins. Her indictment for complicity to commit murder is not a separate crime from the underlying criminal act of murder. We find no prejudice to Appellant's substantial rights by the instructions given. The evidence presented supported the trial court's instruction on murder. See Commonwealth v. Duke, 750 S.W.2d 432 (Ky. 1988) (stating that the jury must be instructed on all theories of the case deducible from the evidence); Lawson v. Commonwealth, 309 Ky. 458, 218 S.W.2d 41 (1949) (holding that the court's duty in a criminal conviction is to provide instructions on the whole law of the case). There is no error here.

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING BALL'S MOTION FOR A JOINT TRIAL

Appellant's next argument is that the trial court committed error by not granting the motion of her co-defendant for a separate trial. Appellant's counsel agreed with Ball's motion, but never independently moved for a separate trial. Several times before trial, Appellant and Ball clashed regarding their respective defenses. Ball wanted to admit evidence regarding Appellant's prior bad acts but the trial court refused to admit it since it was overly prejudicial to Appellant. Next the parties could not agree on the exercise of peremptory strikes. A deal was brokered where a juror that Ball wanted would be retained in exchange for striking a juror Ball wanted. Because of these clashes and the fact that Ball's alibi defense implied that Appellant was the only one who could have committed the murder, Appellant argues that separate trials should have been granted.

RCr 9.16 allows the trial court to order separate trials if it appears that a defendant will be prejudiced by the joinder of trials. However, the decision to grant a separate trial is within the sound discretion of the trial court. Rachel v. Commonwealth, 523 S.W.2d 395, 399 (Ky. 1975). Before a jointly indicted defendant is entitled to a separate trial, he must timely demonstrate to the trial judge that a joint trial would be prejudicial to him. Id.; see also RCr 9.16 ("a motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received.") We have never held as a matter of law that severance is required if the co-defendants have antagonistic defenses. Rachel, 523 S.W.2d at 399. There must be some factor present before we will reverse the trial judge's decision not to grant separate trials. Id. at 399-400.

The trial court did not abuse its discretion in holding a joint trial for Appellant and Ball. Appellant failed to make a motion for a separate trial before the trial started and she failed to show the trial judge how a joint trial would be prejudicial to her. Only Ball made a motion for a separate trial. Even if Appellant had made a proper motion for a separate trial, the trial court committed no error in allowing a joint trial to be conducted. While it could be argued that the defenses of Appellant and Ball were antagonistic, the same evidence that was presented in the joint trial could have been admitted in a separate trial. See Commonwealth v. Rogers, 698 S.W.2d 839, 841 (Ky. 1985) (holding that trial court did not abuse its discretion in failing to grant defendant's motion for separate trial, since co-defendant would have given same testimony in two separate trials, and none of the material testimony would have been inadmissible against defendant had he been tried separately). Though there may have been conflict between Ball and Appellant over the use of peremptory strikes, Appellant does not show how the presence of that juror denied her a fair trial. Additionally, the trial court properly excluded Appellant's prior bad acts evidence from being admitted in the joint trial. Appellant suffered no prejudice from being tried in a joint trial and there is no error here.

V. THE ADMISSION OF THE PHOTOS OF THE VICTIM DID NOT CONSTITUTE
ERROR

Appellant next argues that the introduction of photos of the victim prejudiced the jury and constituted reversible error. These photos showed a

cut above Perkins's eye, the coroner examining the cut, the coroner doing a post-mortem examination, Perkins's body affected by pressure on the floor, and the floor of the crime scene after the body was removed. We have previously held that it is reversible error to allow the introduction of gruesome photos into evidence when their sole purpose is to arouse the passions of the jury and there is little or no probative value to the photos. Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984).

However, the admission of the photos of Perkins's body did not constitute error. Relevant pictures are not rendered inadmissible simply because they are gruesome and the crime scene is heinous. Brown v. Commonwealth, 558 S.W.2d 599, 605 (Ky. 1977). These photos were admitted during the testimony of the coroner and were used to illustrate what the coroner found in his post-mortem examination. Thus, the photos were relevant and admissible. See Johnson v. Commonwealth, 105 S.W.3d 430, 438-439 (Ky. 2003) (holding that the Commonwealth has a right to choose the evidence it wants to use to prove its case and that the defendant cannot stipulate away the evidence he does not want the jury to see). Further, Appellant presents no evidence that the pictures show a body which was mutilated, decomposed, or altered. See Clark v. Commonwealth, 833 S.W.2d 793, 794 (Ky. 1991). There is no error here.

VI. THERE WAS NO PALPABLE ERROR IN CO-DEFENDANT'S CROSS EXAMINATION

Appellant's last allegation of error is that Ball's counsel acted as a witness during her examination of Appellant's mother. Ball's counsel asked,

“Do you remember talking to me before and telling me it was 4 p.m.?”

Appellant believes that this question bolstered Ball’s alibi defense by backing up the timeline she testified to and in part led to Appellant’s conviction.

Appellant argues that this question allowed Ball’s counsel to interject herself as a witness and put her credibility before the jury which is error. Holt v.

Commonwealth, 219 S.W.3d 731 (Ky. 2007). This question was not objected to at trial and we therefore review under our palpable error standard. RCr 10.26.

While an attorney cannot interject himself into the trial by presenting evidence like a witness, the question asked here was innocuous. In Holt, we found that it was reversible error for a prosecuting attorney to ask questions of a witness which effectively implied that the defendant had confessed to the crime. Holt, 219 S.W.3d at 739. The prosecutor asked the witness multiple leading questions trying to get him to testify that the defendant had in fact confessed to him. Id. This was considered reversible error because the long stream of questioning inevitably was not “harmless beyond a reasonable doubt.” Id. at 738. Thus, Holt held that there was a “reasonable possibility that the evidence complained of might have contributed to the conviction.” Id. at 738 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

In this matter, Ball’s counsel only asked one brief question of Appellant’s mother. While the evidence may have bolstered Ball’s alibi, it certainly was not the type of evidence like that presented in Holt which strongly implied that the defendant was a liar and had confessed to the crime previously. Thus, the

evidence almost certainly did not contribute to Appellant's conviction and any error in its introduction was not palpable.

For the foregoing reasons the judgment and sentence of the Whitley Circuit Court is affirmed.

All sitting. Minton, C.J., Abramson, Cunningham, Scott, JJ., concur. Venters, J., concurs in part and dissents in part by separate opinion in which Noble and Schroder, JJ., join.

VENTERS, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART: I fully concur with the Majority opinion, with the exception of its conclusion regarding the directed verdict on the robbery charge. There, I respectfully dissent because I do not believe the evidence on the robbery charge was sufficient under the Benham¹ standard to warrant submission of that charge to the jury.

The following evidence was presented at trial to establish the commission of a theft or an attempted theft: Perkins won a lot of money betting on the Kentucky Derby several days before his murder, and that the money cannot be found; Perkins's empty wallet was found at the crime scene; Perkins's pants pockets were turned inside out; Evelyn Ball, according to Appellant, had some money after the murder, at a restaurant, which she claimed had been earned from a cleaning job she had done.

¹ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) ("On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt beyond a reasonable doubt").

While it is obvious that physical force was used on Perkins, the facts presented to the jury cannot establish beyond a reasonable doubt that a theft occurred, or that if a theft occurred Appellant committed it. The commission of a theft or attempted theft is an essential element of robbery. See Tipton v. Commonwealth, 640 S.W.2d 818 (Ky. 1982) (holding that the offense of robbery is not committed unless the defendant's conduct involves either an unlawful taking or attempted taking of property). While the empty wallet and the outturned pants pockets do strongly suggest that whoever attacked Perkins was looking for something of value to take from him before or after his death, this evidence does not prove that a robbery occurred. Further, the mere fact that money won by Perkins a few days before his death could not be found following his murder does not prove that it was stolen. Moreover, there is no evidence to link Appellant to the empty wallet, outturned pants pockets, or any potential theft. Despite the substantial evidence that sustains her murder conviction, the conclusion that a robbery occurred is speculation. The verdict of guilty on the murder charge is well substantiated, but on the robbery, I believe a directed verdict was required.

Noble and Schroder, JJ., join.

COUNSEL FOR APPELLANT:

Shannon Renee Dupree
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Ste 301
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Jason Bradley Moore
Assistant Attorney General
Attorney General's Office
Office of Criminal Appeals
1024 Capitol Center Drive
Frankfort, Kentucky 40601-8204