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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 25, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000007-MR

DATE

7/16/09 Kelly Klaber D.C.

HARVEY EDWARD SKAGGS

APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
NO. 05-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a direct appeal from a judgment in which Appellant was convicted of murder and first-degree robbery. Appellant claims as error: the failure to give a “missing evidence” instruction regarding a van driven by Appellant on the night of the murder; allowing the jury to view the van, which was in a materially altered condition; the failure of the Commonwealth’s Attorney to be disqualified from the case; and the failure to give an instruction on circumstantial evidence. We reject all four claims of error and, thus, affirm.

In the summer of 2004, Julie Boyd met Appellant, Harvey Skaggs, at a divorce recovery group meeting at her church, the Severns Valley Baptist Church in Elizabethtown. At some point during their ensuing acquaintance, Boyd and Skaggs began to talk about Skaggs repossessing a truck from Boyd’s

estranged husband. At the time Skaggs worked as a repairman for Allen's Heating and Air Conditioning, but occasionally did work on the side for his cousin, Marvin Skaggs, a private investigator.

On Wednesday, December 29, 2004, Skaggs and Boyd met at the church to discuss Skaggs' repossession of the truck sometime that week. At Skaggs' request, Boyd brought a copy of the truck's title and a note granting Skaggs permission to drive the truck. The two then planned to meet the following evening.

On December 30, 2004, Skaggs met Boyd at the Jeri-Mart convenience store in Rineyville at 8:00 p.m. Skaggs was driving his work van and Boyd was driving her Ford Mustang that she had just picked up at her parents' house. The Commonwealth and Skaggs have different theories of what transpired after this point.

According to Skaggs, Boyd left her Mustang at the Jeri-Mart and got into the van with him. They drove around for two hours discussing the details of the repossession and then Skaggs brought her back to her car at the Jeri-Mart. According to Skaggs' January 15, 2005, statement to police, when Boyd exited the van, a man grabbed her from behind and pushed her back into the passenger's seat of Skaggs' van. This man and a second smaller man then got into the van through the cargo doors. Skaggs told police that the larger man entered the van with a gun, although he did not see the gun again that night. The men told Skaggs to drive, and for the next two hours he drove around

Hardin County.

Skaggs told police that the two men were wearing masks with an open area around the eyes and spoke “very proper with Yankee accents.” The men called Boyd by her first name, speaking to her in a mocking tone. They asked Boyd if she had enough money to save Skaggs’ life and asked Skaggs if he had enough money to save Boyd’s life. The men then asked Boyd if she had the money or if her husband had the money. Boyd told the men that she didn’t know what they were talking about.

According to Skaggs’ version of events, at some point the larger man began to hit Boyd in the mouth with his fist, almost every time with his right hand. The men continued to demand money from Boyd, and when they got an answer they did not like, they continued to strike her. Skaggs then heard a thud and looked over and saw that Boyd was bleeding. Skaggs looked down and saw a hammer lying on the floor by the passenger’s seat. When Skaggs told the men, “That’s not necessary” or “That’s uncalled for,” one of the men hit him in the back of the head. Sometime later the men hit Boyd in the head with the hammer a second time. Skaggs told police that Boyd never tried to block the blows from the men’s fists or the hammer because she never saw the blows coming.

The men directed Skaggs to drive to Boyd’s apartment in Rineyville. However, once they stopped there, the men told Skaggs to get out of the van and check on Boyd. Skaggs got out and went in the van through the cargo

doors and checked on Boyd in the passenger seat. He stated that she was still conscious. The men then told Skaggs to get back in the driver's seat and drive.

After driving around more, the men directed Skaggs to go back to the Jeri-Mart. Upon stopping, Skaggs claimed that one of the men put something like a shoestring around his neck and pulled him from the driver's seat into the cargo area of the van. Skaggs stated that he lost consciousness and when he woke up, he was lying next to Boyd in the van. Boyd had electrical tape around her neck and was making a gurgling sound. Skaggs said he removed the electrical tape and turned her head to the side to clear her airway.

Skaggs then drove the van from the Jeri-Mart to the Hardin Memorial Hospital. Skaggs arrived at the hospital at around 2:15 a.m. and parked the van in the parking garage instead of going to the ER entrance. Skaggs carried Boyd from the garage to the ER entrance where he collapsed. Hospital personnel immediately came to Skaggs' and Boyd's aid.

Upon arrival at the emergency room, Boyd had no cardiac or respiratory activity and she was pronounced dead at 2:26 a.m. The cause of death was determined to be multiple blunt force head injuries and ligature strangulation.

Emergency room nurse Jennifer King observed a small scratch on the back of Skaggs' head and dried blood on his hand and face. Otherwise, he had no visible injuries. A small mark on Skaggs' neck was visible in pictures taken at the hospital that night. However, Nurse King testified that she saw no marks on Skaggs' neck before he was placed in a C-Collar to stabilize his neck

and spine. Dr. Donna Hunsaker, a pathologist from the Louisville Medical Examiner's Office, testified that she had seen cervical collars make marks similar to the one seen on Skaggs' neck in the photograph.

Skaggs was interviewed by Kentucky State Police ("KSP") detectives at the hospital on December 31, 2004. Skaggs gave another statement to police on January 15, 2005, and was arrested for Boyd's murder immediately thereafter. On March 29, 2005, Skaggs was indicted for murder, first-degree robbery, and tampering with physical evidence. The tampering charge was later dismissed.

The case was tried before a jury from October 4, 2006, through October 24, 2006. The Commonwealth's theory of the case was that Skaggs fabricated the story about being abducted by the two men, and that Skaggs had robbed and killed Boyd because he was having financial problems. The Commonwealth's case was primarily based on: blood pattern evidence in and on the van; evidence that the engagement ring Skaggs gave his fiancé after the murder was the same ring that had been taken off Boyd's finger on the night of the murder; inconsistent stories Skaggs told police and other witnesses about the murder; and evidence that Skaggs was having financial problems at the time of the murder.

At the conclusion of trial, the jury found Skaggs guilty of murder and first-degree robbery and recommended a sentence of life without the possibility of parole for twenty-five (25) years for murder and twenty (20) years for first-degree robbery. The trial court sentenced Skaggs according to the jury's

recommendation, except that it ran the term of imprisonment for first-degree robbery concurrent with the life sentence for murder, as required by law. This direct appeal by Skaggs followed.

MISSING EVIDENCE

After interviewing Skaggs at the hospital, the police obtained and executed a search warrant on the van Skaggs was driving the night of the murder. The van, which was owned by Allen's Heating and Air Conditioning, was parked in the hospital's parking garage. There was a significant amount of blood on both the inside and outside of the van. After collecting some evidence and photographing the van, the police decided that a forensic team from Frankfort should be called to examine the van. The van was then covered with a tarp and taken to the Elizabethtown Police Department where it was secured.

Four days later, on January 4, 2005, a team of four KSP lab analysts and two KSP photographers arrived to examine and document the van. The team took blood swabs for DNA analysis, dusted for fingerprints, and collected trace evidence from the van, along with taking numerous photographs. The evidence collection and examination of the van by the KSP took 10-12 hours.

After securing the van at the Elizabethtown Police Department, the KSP contacted Allen's Heating and Air Conditioning. The company told KSP that they needed the van back as soon as possible to use for the business. KSP returned the van to the company on January 5, 2005.

Prior to trial, Skaggs moved to exclude the evidence regarding the van

because the evidence had been essentially destroyed (by giving the van back to the company) before the defense had an opportunity to conduct their own independent examination of the van. In the alternative, Skaggs requested that a “missing evidence” instruction be given which would allow the jury to infer that the evidence, if available, would be adverse to the Commonwealth and favorable to the Defendant. See Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988), overruled on other grounds by Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006). An evidentiary hearing was held on the motion, after which the court entered an order denying Skaggs’ motion to exclude the evidence or for a “missing evidence” instruction. The court specifically found there was no bad faith on the part of the police in giving the van back to the company.

On appeal, Skaggs argues that he was substantially prejudiced and denied due process by the trial court’s failure to exclude the evidence or give a “missing evidence” instruction regarding the van. It has been held that the intentional destruction of exculpatory evidence by the Commonwealth is a Due Process violation requiring (1) dismissal, (2) exclusion of the Commonwealth’s evidence, or (3) a “missing evidence” instruction. Sanborn, 754 S.W.2d at 539-40. In Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002), this Court clarified what constitutes a Due Process violation and when a “missing evidence” instruction is warranted:

First, the purpose of a “missing evidence” instruction is to cure any Due Process violation attributable to the

loss or destruction of exculpatory evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect or preserve any evidence. It just means that absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.

At the hearing in the present case, Detective David Norris of the KSP testified that under KSP procedure, property is returned to its owner on a case by case basis. Detective Norris stated that he returned the van to Allen's Heating and Air Conditioning when the KSP had finished with the van so as not to create a hardship for the company, which needed the vehicle for its business operations.

"When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." Jackson v. Commonwealth, 187 S.W.3d 300, 305 (Ky. 2006) (citing Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004)). Further, alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272, 275 (Ky.App. 2006).

The trial court in the instant case found there was no bad faith because

“[t]here was no evidence of any intention on the part of the police to deprive the Defendant of the opportunity to examine the van.” As this finding was supported by substantial evidence, Skaggs was not entitled, as a matter of law, to exclusion of the evidence or a “missing evidence” instruction. See also Coulthard v. Commonwealth, 230 S.W.3d 572, 580-81 (Ky. 2007) (holding that return of victim’s car after police testing was not bad faith, thus, “missing evidence” instruction was not warranted).

JURY VIEWING OF VAN

Prior to trial, the Commonwealth filed a motion in limine requesting that the jury be allowed to view, among other things, the van Skaggs was driving on the night of the murder. The Commonwealth argued that the pictures of the van would not be an adequate substitute for actually seeing the van in person. The court’s initial order allowed the viewing of actual sites involved in the case (hospital parking garage, hospital ER entrance, and Jeri-Mart parking lot), but reserved ruling on the viewing of the van.

During the trial, the Commonwealth renewed its motion for the jury to view the van. The Commonwealth argued that given the defense theory of the case that the two men killed Boyd within the confines of the van with a hammer, it was necessary for the jury to see the inside of the van in person to appreciate its dimensions in determining whether Boyd could have been killed in the manner alleged by Skaggs. The defense countered that because the van had been cleaned up and used by Allen’s Heating and Air Conditioning since

being returned, it was too materially altered from its condition on the night of the murder to be viewed as evidence at trial. The court ruled that so long as everything was removed from the van, except built-in features, it would allow the jury to view the van for the purpose of seeing its dimensions only. The court also admonished the jury as follows: “The van is not in the same condition as it has been described in this case.” The court noted that because it was requiring that everything be taken out of the van, there necessarily would be more room in the van than on the night of the murder. Thus, any prejudice from the jury’s viewing would be to the Commonwealth.

KRS 29A.310(3) provides:

When necessary the judge may authorize the jury to view the real property which is the subject of the litigation, or the place in which any material fact occurred, or the place in which the offense is charged to have been committed.

The decision of whether to allow the jury to view the place where the crime occurred is within the sound discretion of the trial court. Debruler v. Commonwealth, 231 S.W.3d 752, 761 (Ky. 2007); Tungate v. Commonwealth, 901 S.W.2d 41, 44 (Ky. 1995). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). “A change that is material to the probativeness of the evidence is fatal.” Rogers v. Commonwealth, 992 S.W.2d 183, 187 (Ky. 1999) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 11.00 (3rd ed. 1993)).

Skaggs argues that at the time of trial the van was in such a materially altered condition that it lacked probative value to be viewed by the jury. We do not agree. While the van had been cleaned and been in use by the owner, its basic dimensions remained the same, and that was the purpose for which it was to be viewed by the jury.

Edward Taylor, a forensic specialist for the KSP, testified to the blood spatter patterns on and in the van. One of Taylor's conclusions, which was critical to the Commonwealth's theory that Boyd was not killed inside the van, was that, given the configuration and dimensions of the interior of the van, the blood patterns were not consistent with a person being beaten to death inside the van. Taylor testified that if a person had been struck with a weapon inside the van, there would have been cast-off blood spatter patterns on various areas inside the van, which were not present.

From our viewing of the photographs of the van introduced at trial, it was difficult to ascertain the dimensions and layout of the inside of the van. Given Taylor's testimony, the inadequacy of the photographs, and the defense theory that two men beat Boyd to death within the confines of the cargo area of the van, we cannot say that the trial court abused its discretion in allowing the jury to view the van. As for the altered condition of the van, we believe that the trial court's admonishment was sufficient to apprise the jury that the van was not in the same condition as the night of the murder.

DISQUALIFICATION OF COMMONWEALTH'S ATTORNEY

On March 2, 2006, a year after Skaggs' indictment, Skaggs filed a motion to "recuse" Christopher Shaw, the Hardin County Commonwealth's Attorney, from prosecuting the case. The motion was based on the fact that Shaw's wife, Deborah Shaw, represented Skaggs' ex-wife, Jessica Skaggs, in seeking to have custody of their daughter modified from joint custody to sole custody after Skaggs was charged with murder. A hearing was held on the motion the day the motion was filed.

At the hearing it was learned Deborah Shaw had visited Skaggs at the Hardin County Justice Center while he was in jail awaiting trial to have him sign an agreed order regarding custody and visitation of his daughter. Harvey Skaggs testified that when Shaw approached him, he was expecting someone else and "told her some things" regarding his case. However, just when Skaggs had starting talking, Shaw stopped him, identified herself, and told him why she was there. At that point, Deborah Shaw presented Skaggs with the agreed order to sign. Skaggs conceded that the discussion of his case with Shaw was minimal.

As authority for his position that Deborah Shaw's representation of Jessica Skaggs and contact with Harvey Skaggs constituted a conflict requiring Christopher Shaw to disqualify himself and his office from the case, Skaggs' counsel cited SCR 3.130-1.8(i) which provides as follows:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a

representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

After hearing Skaggs' testimony and the arguments of counsel, the trial court denied the motion for Christopher Shaw to disqualify himself and his office from prosecuting the case. The court noted there was no evidence of prejudice to Skaggs in his criminal case.

On appeal, Skaggs argues that Christopher Shaw and his office should have been disqualified from prosecuting the case pursuant to KRS 15.733(2)(c) which provides:

Any prosecuting attorney shall disqualify himself in any proceeding in which he or his spouse, or a member of his immediate family either individually or as a fiduciary:

...
(c) Is known by the prosecuting attorney to have an interest that could be substantially affected by the outcome of the proceeding[.]

Contrary to the Commonwealth's assertion, we do not view the issue as unpreserved because Skaggs has cited a different statute than argued below to support his claim of a conflict of interest. Skaggs' basic argument is the same on appeal, and SCR 3.130-1.8(i) and KRS 15.733 are similar in their import, with the latter applying specifically to prosecuting attorneys.

In reading KRS 15.733(2) as it applies to the facts at hand, we believe it is significant that at the time the Commonwealth's Attorney began prosecuting the case, there would not have been any conflict because presumably Deborah

Shaw would not have been representing Jessica Skaggs in the custody modification matter since the custody change was a subsequent consequence of the murder charge. Although Jessica Skaggs was called by the Commonwealth as a witness in the case, the representation of Jessica Skaggs in the custody matter was only remotely related to the criminal case in that the change in custody was necessitated by the murder charge.

We also recognize, as did the trial court, that there was no showing of prejudice to Skaggs in his criminal case as a result of Deborah Shaw's representation of Jessica Skaggs in the custody matter or his limited contact with Deborah Shaw in jail. See Barnett v. Commonwealth, 979 S.W.2d 98, 102 (Ky. 1998) (holding disqualification of prosecutor who was limited guardian for victim was not required where prosecutor's interest could not have been substantially affected by trial's outcome and there was no showing of actual prejudice) and Clayton v. Commonwealth, 786 S.W.2d 866 (Ky. 1990) (actual prejudice required to warrant disqualification of prosecutor). But cf. Whitaker v. Commonwealth, 895 S.W.2d 953, 955-56 (Ky. 1995) (wherein this Court did not require a showing of actual prejudice in the case of defendant's former counsel joining the Commonwealth's Attorney's office; rather, the test was whether the former counsel had substantial and personal participation in client's defense). Skaggs did not specify what information he conveyed to Deborah Shaw at the jail, but he testified that his remarks were brief because she immediately stopped him.

Finally, Christopher Shaw did not personally prosecute the case against Skaggs. It was tried by one of his assistants, and the only record of Shaw's participation in the case after the hearing to disqualify him was in brief appearances at pretrial hearings regarding procedural matters. See Summit v. Mudd, 679 S.W.2d 225, 225-26 (Ky. 1984) (mere appearance of impropriety is not sufficient to disqualify the entire staff of the Commonwealth's Attorney's office), overruled in part by Whitaker, 895 S.W.2d at 955-56 (in the case of defendant's former counsel joining the Commonwealth's Attorney's office, inquiry was required to determine if entire office of Commonwealth's Attorney should be disqualified). Accordingly, the trial court did not err in failing to order the disqualification of Christopher Shaw or his office from prosecuting the case.

CIRCUMSTANTIAL EVIDENCE INSTRUCTION

Skaggs' final argument is that the trial court's refusal to instruct the jury on circumstantial evidence denied him due process of law. At the close of evidence, Skaggs requested the following instruction: "No defendant may be convicted on circumstantial evidence if the circumstantial evidence is as consistent with innocence as it is with guilt." The Commonwealth objected on grounds that such an instruction infringes on the reasonable doubt standard. The trial court ruled that absent some authority allowing for such an instruction in Kentucky, the proposed instruction would be inappropriate. The court also noted that Kentucky law favors bare bones instructions. See

McGuire v. Commonwealth, 885 S.W.2d 931, 936 (Ky. 1994).

An instruction nearly identical to the one sought in the instant case was requested in Armstrong v. Commonwealth, 517 S.W.2d 233, 236 (Ky. 1974).

Our predecessor Court rejected the instruction, stating:

Such an instruction would violate the fundamental principle that the court should never give an instruction as to any class of evidence or as to the weight to be accorded the evidence relating to any particular matter.

Id. at 236 (quotations and citations omitted). This Court is not inclined to depart from that view of such an instruction.

For the reasons stated above, the judgment of the Hardin Circuit Court is affirmed.

All sitting. All concur.

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