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MODIFIED: MARCH 18, 2010
RENDERED: NOVEMBER 25, 2009
NOT TO BE PUBLISHED

FINAL
DATE 3/18/10 Kelly Mabu D.C.

Supreme Court of Kentucky

2008-SC-000465-MR

QUINCY OMAR CROSS — APPELLANT

V.

ON APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Quincy Omar Cross, was convicted by a Hickman Circuit Court jury of capital kidnapping, capital murder, first-degree sodomy, first-degree rape, abuse of a corpse, and tampering with physical evidence. For these crimes, Appellant received a sentence of life imprisonment without benefit of probation or parole for capital kidnapping, life imprisonment for capital murder, life imprisonment without benefit of probation or parole for first-degree rape, fifty years' imprisonment for first-degree sodomy, five years' imprisonment for abuse of a corpse, and three years' imprisonment for tampering with physical evidence. The trial court ordered all sentences to be served concurrently. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts seven arguments on appeal: 1) that the Commonwealth committed prosecutorial misconduct by executing a "document dump" during discovery; 2) that the jury instructions were confusing and effectively prevent a defense against double jeopardy; 3) that the trial court erred in denying his motion for a directed verdict of acquittal on the charges of capital kidnapping and first-degree rape; 4) that his Sixth, Eighth, and Fourteenth Amendment rights were violated when it was discovered a juror had a Bible in the jury room; 5) that the death penalty is a disproportional punishment for the crime of capital kidnapping and that the capital kidnapping statute is unconstitutional in light of Kennedy v. Louisiana, ____U.S._____ , 128 S. Ct. 2641 (2008); 6) that his convictions for both capital kidnapping and capital murder violate double jeopardy; and 7) that his Eighth Amendment rights were violated when the jury was allowed to consider murder as a death penalty aggravator for capital kidnapping. For the reasons set forth herein, we now affirm Appellant's conviction and sentence.

FACTS

Jessica Currin's burned and decomposed body was found on the grounds of the Mayfield Middle School on the morning of August 1, 2000. The state medical examiner, Dr. Mark LeVaughn, performed an autopsy on the body and determined that Currin was murdered by strangulation, based on the presence of a charred black, braided leather belt found next to the body at the scene. While Currin's body displayed none of the classic signs of

strangulation, Dr. LeVaughn believed that was either due to the deteriorated body or the method of strangulation. Currin's body also displayed no physical signs of rape, again due to the burned and deteriorated condition of her body.

Although Appellant was one of the original suspects in the murder, two individuals, Jeremy Adams and Carlos Saxton, were initially indicted for Currin's murder. However, those two indictments were dismissed by the Graves Circuit Court in 2003 due to discovery violations committed by the Mayfield Police Department. The case languished until 2005 when two witnesses, Victoria Caldwell and Vinisha Stubblefield, who had been previously interviewed by police, changed their stories to implicate Appellant.

At trial, Caldwell and Stubblefield were the Commonwealth's lead witnesses. Due to inconsistency of their testimony, we will summarize Caldwell and Stubblefield's testimony separately.

A. Victoria Caldwell's Testimony

Caldwell testified that Currin and Stubblefield came over to her house on the night of July 29, 2000. Stubblefield told Caldwell to look for a car with flashing lights to arrive shortly because they were going to "hang-out" with the driver. The driver of the car was Appellant. Currin, Caldwell, and Stubblefield got into the car and drove with Appellant to another house. At that house, Appellant exchanged the blue car for a white car, and then drove the four to another house where they picked up Tamara Caldwell and Jeff Burton. After picking them up, Appellant passed out cocaine to the group as they traveled to

Burton's house.

As they traveled, Appellant and Tamara Caldwell began to sexually harass Currin. Currin told them to stop to no avail. Upon arriving at Burton's house, Appellant picked up a mini-baseball bat from the floorboard of the car and hit Currin on the head. Caldwell testified that the blow "knocked" Currin out. Appellant and Burton carried Currin into a bedroom and placed her on the bed. Caldwell followed them into the bedroom.

Appellant then attempted to have oral sex with Currin, but her mouth would not open. Appellant instead masturbated. Burton then began to have sex with Currin while Tamara Caldwell held Currin's legs. During the sexual intercourse, Currin began to regain consciousness, to make noises, and to repeat the name of her infant son. In response, Appellant took a type of wrench and hit her in the head. Caldwell testified that the blow knocked Currin out again. Caldwell would later bury the wrench in her sister's yard. The wrench was recovered by police, and introduced as an exhibit at trial.

After hitting Currin with the wrench, Appellant took off his belt and began to strangle her. Caldwell described it as a black, braided leather belt. Currin initially gasped for air but then stopped. Caldwell testified that she knew at that point Currin was dead.

Appellant then ordered everyone in the room to perform different acts. Appellant ordered Caldwell to have oral sex with Currin's body, which she testified she did. Caldwell testified that other people in the room also

performed sexual acts on Currin's deceased body. After performing these acts, the group took more drugs. Then, the group began to have sex with each other.

Afterward, Currin's body was taken from the bed, wrapped in a blanket, and taken to Burton's garage. Later, after the body began to smell, Caldwell, Stubblefield, Burton, Austin Leech, and Isaac Benjamin took Currin's body to Mayfield Middle School where they dumped her out and set her on fire.

Caldwell also read at trial several excerpts from a diary she purportedly kept in 2000. One entry, dated August 1, 2000, states, "Damn, they found the body. I hope they don't find out it was us. Fuck men. Q is nowhere to be found and Jeff don't want to talk to me. This is bullshit... Fuck I am out." A later entry dated August 8 stated, "Man I am so scared. Fuck people keep staring at me. What am I supposed to do?" The next entry stated, "Vinisha is looking dumb as hell like she don't know . . . Man, I quit school."[1]

Caldwell also admitted on the stand that she previously lied to the police during their initial investigation, and made false statements which led to the original indictments against Adams and Saxton. Caldwell testified that she later moved to California and had no contact with Stubblefield until right before trial.

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[1] Appellant notes that the chief forensics chemist for the Secret Service testified at trial that he could not match the ink used for the journal entries with any known ink commercially available in the United States in 2000. However, the chemist further testified that there were numerous reasons that the ink may not have matched a known formulation, and that it did not mean the journal entries were faked or written at a later time.

B. Vinisha Stubblefield's testimony

Stubblefield testified that on July 29, 2000, she and Currin started the night by playing cards at a friend's apartment. Currin later decided to walk home. After a short time passed, Stubblefield decided to find Currin. Appellant picked Stubblefield up in a blue car. Stubblefield knew Appellant from a prior encounter. Appellant and Stubblefield then picked up Caldwell and drove to a house where they switched to a white car. Appellant, Stubblefield, Caldwell, Tamara Caldwell, and Jeff Burton then drove around looking for Currin. Stubblefield testified that all of the people in the car were using cocaine, pills, and marijuana.

After driving around for a while, the group finally found Currin. Stubblefield asked Currin if she would like a ride. Currin agreed, but emphasized that she only wanted to be taken home and nothing else. As soon as Currin got in the car, Appellant began to sexually harass her. Currin told Appellant to stop touching her, but Appellant refused. Appellant drove the group to Burton's house.

Once they got there, Appellant and Currin had a verbal altercation. Appellant apparently hit Currin and forced her to walk into Burton's back bedroom. Stubblefield went into the living room. After about twenty minutes had passed, Stubblefield testified that Burton told her to come to the back bedroom. Upon entering, Stubblefield saw Currin, unconscious on the bed, with Appellant pulling on a belt around her neck. It is uncertain from

Stubblefield's testimony whether she believed Currin was dead at this point. Appellant then got on top of Currin and began to have sex with her. After Appellant finished, Burton had sex with Currin. Appellant then instructed Stubblefield to have sex with Currin, which she did.

Like Caldwell, Stubblefield testified that all of the members of the group then had sex with each other. Afterwards, Appellant and Burton moved Currin's body to the garage. Later, Caldwell, Stubblefield, Burton, Leech, and Benjamin disposed of Currin's body at Mayfield Middle School.

C. Other Testimony

Several other witnesses testified at trial. Graves County Deputy Sheriff Mike Perkins testified that he arrested Appellant in Mayfield for possession of cocaine the morning after the murder. Deputy Perkins noted that Appellant at the time of the arrest had no belt on and continually had to pull his pants up. Other witnesses testified that after the murder Appellant made statements which were either admissions of guilt or implicated him in killing Currin. There was also testimony provided by Appellant's friend, Timothy Carr, that after the murder Appellant told him he had sex with Currin the night she was murdered. Caldwell's sister, Rosie Crice, testified that Appellant told her he was present in the room when Currin was killed.[2]

[2] Crice would later plead guilty to perjury for falsely testifying during trial that Appellant told her to tell Caldwell he was going to kill her for "running her mouth" about Currin's murder. Caldwell apparently instructed Crice to tell this fabrication on the witness stand.

Based on the evidence presented, the Hickman Circuit Court jury found Appellant guilty of all charges, and recommended a sentence of life imprisonment without benefit of probation or parole. Further facts will be developed below as necessary.

I. THE COMMONWEALTH'S DISCOVERY TACTICS DID NOT AMOUNT TO A "DOCUMENT DUMP"

Appellant first argues that the Commonwealth committed intentional discovery violations to prevent him from developing a proper defense. Prior to trial, Appellant moved the trial court to dismiss his indictments or, in the alternative, for a continuance, because the Commonwealth's discovery constituted what he called a "document dump." Appellant's motion described the amount of discovery provided by the Commonwealth as:

> massive. The documentation is mostly in the form of scanned documents electronically stored. There have been more than 4800 Bates numbers[3] assigned to [sic], but that does not mean that merely 4800 pages were provided. Dozens of transcripts of interviews, tapings, and the like have been provided, and each has been given only one Bates number regardless of the length of the transcript, be it 20 pages or more than 100 pages. In addition, the discovery has included 80 DVDs of interviews and other video evidence, 405 CDs containing audio interviews, phone calls, and the like.

Additionally, Appellant's motion complained that the discovery came in stages and that many of the documents provided were either duplications of evidence already produced, or irrelevant.

[3] Bates numbers are a method of numbering documents provided in discovery.

The trial court denied Appellant's motion, holding that the Commonwealth's production of thousands of pages of documents was an attempt to thoroughly comply with discovery requests, not prevent Appellant from developing a defense. The trial court further believed that the Commonwealth produced discovery in stages because its investigation into the murder was on-going, the defense requested some documents be provided in several different formats, and the Commonwealth had trouble finding some of the information requested by the defense. Appellant now asks that we find the Commonwealth's discovery tactics were in fact a "document dump" and that we vacate his conviction.

The term "document dump" does not appear in Kentucky case law. A "document dump" has been described as:

> responding to a document request by the opposing party with . . . as many colorably responsive documents as possible, [which] are turned over en masse in an effort to bury the opposition in paper, with the hope that with luck some material documents may be passed over, or at the very least, raise the cost to the opposition both in terms of money and time.

Steven Hetcher, The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable, 13 Mich. Telecomm. & Tech. L. Rev. 1, 43 (2006). Another scholar describes a "document dump" as where:

> the defendant is literally buried in thousands of pages of documents, many of which . . . are often immaterial or irrelevant to both the prosecution and the defense. These documents may be produced in either hard copy or electronic format, leaving the defendant to sift through hundreds of boxes of documents . . . in hopes of finding information, as if it were a needle in the haystack.

Morvillo, Bohrer, Balter, Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation, 42 Am. Crim. L. Rev. 157, 159 (2005). The practice of "document dumping" seemingly violates the spirit of Kentucky Rule Criminal Procedure 7.24, due to the rule's emphasis on reciprocal and open discovery.

A trial court's ruling on an alleged discovery violation is reviewed for an abuse of discretion. Penman v. Commonwealth, 194 S.W.3d 237, 249 (Ky. 2006). Using that standard, we find no abuse of discretion in the trial court's denial of Appellant's motions. The record does not indicate that the Commonwealth intended to commit a discovery violation by "document dumping." The investigation into Currin's murder took seven years and was conducted by three different agencies: the Mayfield Police Department, the Kentucky State Police, and the Kentucky Bureau of Investigations. During this investigation many witnesses were interviewed numerous times and multiple indictments were sought. It is reasonable to believe that such a long, in-depth investigation would turn up a considerable amount of discovery. We also cannot dispute the trial court's factual finding that Appellant and his co-defendants requested some of the evidence be provided in different forms than originally produced. It is reasonable to believe that the Commonwealth's copious evidence production was an attempt to avoid a discovery violation for not producing all evidence required, especially in light of the discovery violations that ended up in the dismissal of Saxton and Adams's indictments in

2003. Further, it does appear from the record that the Commonwealth did make efforts to create indexes and assign Bates numbers to the different documents provided in discovery to aid Appellant's search. Moreover, the trial court had already granted Appellant a two-week continuance to review the Commonwealth's most recent discovery. We thus cannot find that the trial court abused its discretion by denying Appellant's motion to dismiss his indictments or his motion for an additional continuance. See Penman, 194 S.W.3d at 249-250.

II. THE JURY INSTRUCTIONS DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS

Appellant next argues that the jury instructions provided by the trial court were erroneous. Appellant presents three arguments regarding the adequacy of the instructions: A) that the wording of the instructions prevents him from telling what theory of liability he was convicted of and he is thus prevented from defending himself against double jeopardy; B) that the evidence presented did not support all theories of liability included in the jury instructions; and C) that to the extent the jury instructions allowed a conviction on the basis of accomplice liability, the jury was never instructed on how to apply the definition for "complicity." Appellant concedes that his alleged errors are not preserved, so we review for palpable error. RCr 10.26. Each argument will be addressed separately.

A. The jury instructions which combined accomplice and principal liability

were proper and do not expose Appellant to subsequent prosecution

Appellant first argues that the jury instructions prevent him from determining under what theory of liability the jury found him guilty. As written, the jury instructions for capital murder and first-degree sodomy provided that the jury could find Appellant guilty of being either the principal actor, or of being complicit in some manner with Jeffery Burton or Tamara Caldwell in committing the crime. However, the instructions did not require that the jury specifically state under which theory of liability they found Appellant guilty. Appellant therefore argues that he is prevented from tendering a double jeopardy defense against subsequent prosecution on these same charges because he is unable to prove whether the jury found him guilty of being the principal or complicit actor.

Appellant's argument fails because it does not matter for the purposes of double jeopardy whether the jury found Appellant guilty of being the principal or complicit actor in the crimes. "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." Commonwealth v. McKenzie, 214 S.W.3d 306, 307 (Ky. 2007) (citing Commonwealth v. Caswell, 614 S.W.2d 253, 254 (Ky. App. 1981)). Thus, one who is convicted of complicity to a crime has the same status, and is guilty of the same crime, as one guilty of the principal offense. McKenzie, 214 S.W.3d

at 307. Therefore, once Appellant was found guilty of murdering and sodomizing Currin under either theory of liability, pursuant to the principles of double jeopardy, the Commonwealth is prohibited from seeking a second conviction on those charges under a different theory of liability. Appellant has a double jeopardy defense against future prosecutions.

B. The jury instructions were supported by adequate evidence and the jury's verdict was unanimous

Second, Appellant argues that the Commonwealth did not present adequate evidence at trial to support each of the theories upon which the jury was instructed, and therefore the jury's verdict was not unanimous. See Davis v. Commonwealth, 967 S.W.2d 574, 582 (Ky. 1998) ("Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another. If the evidence would support conviction under both theories, the requirement of unanimity is satisfied."). The jury instructions for murder, first-degree sodomy, and first-degree rape all allowed a guilty verdict against Appellant if the jury found that he acted alone or in complicity with Tamara Caldwell and/or Jeffrey Burton. Appellant argues that the jury instructions violate the concept of unanimity because the Commonwealth did not present evidence that Burton or Caldwell participated in Currin's murder, or that Burton or Caldwell engaged in first-degree sodomy

with Currin, or that Appellant raped Currin.[4] A review of the record refutes Appellant's argument.

First, sufficient evidence was presented that Burton and Caldwell were accomplices in Currin's murder. Accomplice liability can be based not only on one singular act, but on a continuum of events. See Mills v. Commonwealth, 44 S.W.3d 366, 371 (Ky. 2001) ("Thus, complicity liability often will not depend on a particular act, but on many different acts that occur at different points in time. Moreover, it may well be that it is only the accumulation of acts that serves to prove complicity. In other words, no particular act in and of itself would serve as the defining act . . ."). At trial, evidence was introduced that Burton assisted Appellant in either carrying or making Currin enter the bedroom where she was murdered. Caldwell testified that Burton and Tamara Caldwell were present when Appellant strangled Currin with his belt and that Burton and Tamara Caldwell participated in many of the acts which Appellant instructed them to do. Testimony also indicated that Appellant told several people after the crime that he did not murder Currin, but was present when others killed her. Looking at all the circumstances surrounding Currin's murder, the evidence supports a conclusion that Burton and Tamara Caldwell were part of the continuum of events that led to her death. Id. There is no unanimity problem with the murder jury instruction.

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[4] Appellant contends in his brief that there was insufficient evidence presented to convict him of kidnapping. We will address that argument in Part III.

Second, there was sufficient evidence presented that Burton and/or Caldwell engaged in first-degree sodomy with Currin. At trial, Stubblefield testified that she saw Appellant and Burton have sex with Currin while she was "unconscious." Tamara Caldwell was present in the room during this time. Caldwell testified that Tamara Caldwell assisted Burton by holding down Currin's legs so she could not move while he had sex with her. Additionally, Tamara Caldwell and Burton were present in the bedroom when Appellant masturbated on Currin. Since the jury was instructed on complicity, a jury could have reasonably found that Burton and/or Caldwell participated in or committed deviate sexual acts involving Currin. There is no unanimity problem with the first-degree sodomy instruction.

Third, there was sufficient evidence presented that Appellant raped Currin. Stubblefield testified that Appellant engaged in sex with Currin at a time when she was unsure whether Currin was dead or unconscious. Additionally, Appellant bragged to his friend Timothy Carr that he had sex with Currin on the night she was murdered. This testimony, along with the events surrounding the night of Currin's murder are enough to support Appellant's conviction for first-degree rape.

Further, it is clear that the jury could have found Appellant complicit in all of these crimes by his actions in forcibly bringing Currin to the bedroom where she was raped, sodomized, and murdered. His complicity was further demonstrated by the testimony that Appellant rendered Currin helpless on two

occasions by hitting her on the head, enabling Burton and Tamara Caldwell to commit crimes against her. There are no evidentiary or unanimity problems with the jury instructions provided.

C. The jury instructions on accomplice liability and complicity were understandable

Finally, Appellant argues that the jury instructions which allowed the jurors to return a verdict against him on the basis of accomplice liability were improper. Appellant argues that the term "complicity" was defined for the jurors, but that the jurors were never told how to apply that definition. The "complicity" instruction stated:

> [c]omplicity means that a person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense.

Appellant argues that this instruction, coupled with the instruction for first-degree rape, was incomprehensible for a jury to understand. However, the complicity definition mirrors the example provided in 1 Cooper, Kentucky Instructions To Juries (Criminal), §10.01 (5th ed. 2006). We find this definition to be concise and clearly understandable by jurors of ordinary intelligence. Further, Appellant presents no evidence that the jury did not or could not understand the instruction or how to apply it in conjunction with the rape

instruction. There is no error here.

III. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S DIRECTED VERDICT ON THE CRIMES OF CAPITAL KIDNAPPING AND FIRST-DEGREE RAPE

Appellant next argues that the trial court erred in denying his motion for a directed verdict of acquittal on the charges of capital kidnapping and first-degree rape. "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." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). We will address Appellant's arguments regarding capital kidnapping and first-degree rape separately.

A. Appellant was not entitled to a directed verdict because his conduct did not fall within the kidnapping exception statute, KRS 509.050.

Appellant argues that the evidence presented at trial did not support a conviction for capital kidnapping, but instead falls within the kidnapping exception statute, KRS 509.050. A three-part test was developed in Griffin v. Commonwealth, 576 S.W.2d 514, 516 (Ky. 1978), to determine if the kidnapping exemption applies to a particular defendant. That test is: 1) whether defendant's criminal purpose was the commission of a criminal offense defined outside of KRS Chapter 509; 2) whether the interference with the victim's liberty occurred immediately with, and incidental to the commission of

the underlying crimes; and 3) whether the interference with the victim's liberty exceeded that which is ordinarily incident to the commission of the underlying crimes. Id. In support of his argument, Appellant states that, according to the Commonwealth's case, his criminal purpose in this case was to murder and assault Currin, crimes which are outside of KRS Chapter 509. Appellant also argues that any interference with Currin's liberty was incidental to the commission of the murder and assault, and that the time Currin was restrained was no greater than what was necessary to commit the underlying criminal acts. The evidence presented at trial however, supports the denial of Appellant's directed verdict of acquittal motion.

Testimony indicated that while Currin voluntarily got into the car with Appellant, she only did so to receive a ride home. Instead of going to her house though, there was testimony that Appellant took her to one house, to change cars, then eventually to Burton's house, which she was in some manner physically forced to enter against her will. Detaining her during the time taken to travel from one house to the other exceeded the time needed to murder and rape Currin. The facts as they are leave considerable doubt as to whether the Griffin test for applying the exemption was satisfied. As such, the trial court correctly denied Appellant's motion for a directed verdict of acquittal on the kidnapping charge.

B. Adequate evidence was presented that Appellant committed first-degree rape

Appellant next argues that the trial court should have granted him a

directed verdict of acquittal on the first-degree rape charge because he does not believe that the Commonwealth proved that Currin was alive when he had sexual intercourse with her. However, a review of the record refutes this argument.

Stubblefield testified that upon entering the bedroom at Burton's house where Appellant and Currin were located, she saw Currin with a belt around her neck being held by Appellant. Stubblefield stated that she was unsure if Currin was deceased at this time. Stubblefield then testified that Appellant had sex with Currin. Additionally, Appellant told his friend Timothy Carr that he did in fact have sex with Currin on the night she was murdered. The facts surrounding Appellant's behavior toward Currin support a conclusion that his admitted sexual intercourse with her was not consensual. Moreover, the evidence amply supported a conviction under the rape charge as an accomplice to Burton's sexual intercourse with Currin at a time she was undeniably alive. Thus, reviewing all of the evidence, it would not be unreasonable for a juror to find Appellant guilty of first-degree rape. Looking at the facts in a light favorable to the Commonwealth, the trial judge correctly denied Appellant's motion for a directed verdict of acquittal. Benham, 816 S.W.2d at 187.

IV. APPELLANT WAS NOT ENTITLED TO A MISTRIAL AND NEW PENALTY PHASE DUE TO THE PRESENCE OF A BIBLE IN THE JURY ROOM

Appellant next argues that he was entitled to a mistrial and a new penalty phase due to the presence of a "pocket Bible"[5] in the jury room. After the jury had deliberated for seven and a half hours during the penalty phase of trial, the Bailiff informed the trial judge that one of the jurors had a "pocket Bible" and that the jurors had asked for the Bible located on the bench. Appellant immediately moved for a mistrial and insisted that the "pocket Bible" be removed from the jury room, presumably because of the concern that the jury was considering materials outside of the evidence presented in trial. The Commonwealth agreed that the "pocket Bible" should be removed from the jury room. The trial judge then had the jurors return to the courtroom, where the "pocket Bible" was confiscated. The trial judge provided the following admonishment:

> Ladies and gentlemen of the jury, I've been advised that there was a Bible in the jury room. You may have had one with you. I will admonish you that the only things that you are to consider are the exhibits and the evidence that's been presented. The Bible, although useful in some situations, is not to be considered with the same weight as evidence presented in this trial. And, you can continue with your deliberations. Thank you. If you'd return to the jury room.

Appellant did not object to the trial court's admonition, but again moved for a mistrial after the jurors returned to the jury room. The trial judge determined, based on the information before him that the jurors had not been influenced by the presence of the "pocket Bible," and he therefore denied the motion for a

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[5] The briefs presented in this case refer to the juror possessing a "pocket Bible." There is no evidence of whether this was a full Bible, or only contained certain books or verses. As such, we refer to the book as a "pocket Bible."

mistrial. Twenty minutes later, the jury returned a verdict of life imprisonment without benefit of probation or parole instead of the death penalty.

Appellant now argues that the admonishment failed to cure any error that occurred due to the presence of the "pocket Bible" in the jury room and that he should have been granted a mistrial and new penalty phase. We disagree.

A mistrial "is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005). The trial court's denial of a motion for a mistrial will be reviewed for abuse of discretion. Id. In this matter, there was no such manifest necessity. In dealing with the presence of outside materials in the jury room, a curative instruction telling the jury to consider only the evidence presented in trial frequently addresses the error. United States v. Lara-Ramirez, 519 F.3d 76, 87 (1st Cir. 2008) (explaining that in situations where outside evidence (such as the Bible) is potentially being considered by a jury, a curative instruction can "eradicate" the risk of prejudice). A mistrial is only an appropriate remedy when the trial judge believes that the jury's exposure to outside evidence is too great to repair by admonishment. Id. at 82. While the admonishment was not perfect, we believe it had the effected intent, to make sure the jury knew that the Bible was not to be considered as evidence in the case. A mistrial was unwarranted and Appellant is not entitled to a new penalty phase proceeding.

V. THE DEATH PENALTY IS NOT A DISPROPORTIONAL PUNISHMENT FOR THE CRIME OF CAPITAL KIDNAPPING AND THE CAPITAL KIDNAPPING STATUTE IS CONSTITUTIONAL

Appellant next argues that the capital kidnapping statute, KRS 509.040(2), is rendered unconstitutional by the recent United States Supreme Court opinion, Kennedy v. Louisiana, ____ U.S.____, 128 S.Ct. 2641 (2008). Appellant argues that Kennedy holds the death penalty is only constitutional when given to defendants who commit crimes involving the intentional murder of a victim. Appellant quotes the phrase "we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other" from Kennedy and insist that the case prohibits the death penalty as a punishment for crimes leading to non-intentional death. Id. at 2660. Thus, Appellant argues that our interpretation of KRS 509.040(2) in St. Clair v. Roark, 10 S.W.3d 482 (Ky. 2000) is unconstitutional because in that case we held that the capital kidnapping statute applies whenever a kidnapping leads to the death of the victim regardless of the defendant's mental state. Id. at 486-487.

Appellant misconstrues Kennedy's holding. Kennedy dealt with the constitutionality of a Louisiana statute which rendered a defendant death penalty eligible for a child rape conviction, in which the victim was not killed. 128 S.Ct. at 2647. Kennedy does not affect the constitutionality of applying

the death penalty to crimes which led to the death of the victim, such as capital kidnapping. In fact, Kennedy states: "[d]ifficulties in administering the [death] penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim." Id. at 2665. Thus, we find Kennedy has no bearing on our interpretation of the capital kidnapping statute, KRS 509.040(2), and our holding in St. Clair is not unconstitutional.

VI. APPELLANT'S CONVICTIONS FOR BOTH CAPITAL KIDNAPPING AND CAPITAL MURDER DO NOT VIOLATE DOUBLE JEOPARDY

Appellant next argues that his convictions for capital kidnapping and capital murder violate double jeopardy. Appellant tenders three arguments, each of which will be dealt with separately: A) that our ruling in St. Clair, 10 S.W.3d 482, was erroneous; B) that St. Clair does not survive Apprendi v. New Jersey, 530 U.S. 266 (2000); and C) that murder is a lesser-included offense of capital kidnapping.

A. Our opinion in St. Clair is not erroneous and reflects the current statutory scheme

Appellant first argues that St. Clair is based on a legal impossibility and is thus erroneous. St. Clair holds that the offenses of murder and capital kidnapping do not merge during the guilt phase because the capital kidnapping statute, KRS 509.040(2), is only implicated when the kidnapping leads in

someway to the victim's *death*, while murder "contains an element, i.e. either intent to kill or aggravated wantonness, which is not required to enhance kidnapping from a Class A felony to a capital offense." St. Clair, 10 S.W.3d at 486. We also found that the two offenses do not merge at the penalty phase because it is not "double jeopardy to impose a separate penalty for one offense while using the same offense as an aggravating circumstance authorizing imposition of capital punishment for another offense." Id. at 487 (citing Witte v. United States, 515 U.S. 389 (1995)). Appellant argues that St. Clair is based on a legal impossibility because it assumes a jury could find that a defendant's actions in kidnapping a victim led to the *accidental* death of that victim, but then also find that the defendant *intentionally* murdered the same victim. He argues that a jury could not find that the defendant killed both accidentally and intentionally.

Appellant, however, misreads St. Clair. St. Clair stands for the proposition that it is the *death* of the kidnapping victim that makes kidnapping a capital offense. St. Clair, 10 S.W.3d at 486. The jury is not required to determine the defendant's mental state to find him guilty of capital kidnapping, only that the victim died as a result of the kidnapping. See KRS 509.040(2). The defendant's intent or mental state is only determined when the jury determines whether the defendant murdered the victim. Murder then can be used as an aggravating circumstance which allows the imposition of the death penalty. KRS 532.025(2)(a)(2). Thus, there is no legal impossibility and we

believe that St. Clair comports with the statutory scheme enacted by the legislature.

B. Apprendi does not render the logic used in St. Clair invalid

Appellant next argues that the United States Supreme Court opinion in Apprendi v. New Jersey, 530 U.S. 466 (2000), invalidates the logic used in St. Clair. Apprendi states that any fact which increases the range of possible punishments is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." Apprendi, 530 U.S. at 494, fn 19. Appellant uses this language to argue that since murder is a death penalty aggravator for kidnapping, it is actually an element of capital kidnapping. Appellant thus believes that St. Clair is invalid since it holds that capital kidnapping and murder do not merge. St. Clair, 10 S.W.3d at 486-487. We disagree with Appellant's argument.

Apprendi only stands for the proposition that circumstances which enhance a penalty must be found beyond a reasonable doubt to a jury, not by a preponderance of the evidence and not just to a judge. 530 U.S. at 495 (citing McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)) ("When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'") Notably, Apprendi does not overrule prior cases which held that murder could be used as a circumstance to elevate a

punishment to the death penalty. See United States v. Booker, 543 U.S. 220, 240 (2005) (holding that Witte, 515 U.S. 389, is good case law post-Apprendi). Additionally, in a post-Apprendi case, we reaffirmed our support for St. Clair. Jacobs v. Commonwealth, 58 S.W.3d 435, 438 (Ky. 2001). Apprendi does not overrule nor affect our ruling in St. Clair.

C. Intentional murder is not a lesser-included offense of Capital Kidnapping

Appellant finally argues that based on his novel interpretation of the capital kidnapping statute to include murder as a required element of capital kidnapping, murder becomes a lesser-included offense of capital kidnapping. However, we again decline to accept Appellant's interpretation of the capital kidnapping statute. We stand by St. Clair for the proposition that capital kidnapping is committed when the death of the victim occurs as a result of the kidnapping, and that murder can be used as a death penalty aggravator.

VII. APPELLANT'S EIGHTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE JURY'S CONSIDERATION OF MURDER AS AN AGGRAVATOR FOR CAPITAL KIDNAPPING

Appellant finally argues that because of Kennedy and his interpretation of the capital kidnapping statute which requires murder to be an element of capital kidnapping, the guilty verdict Appellant received for murder could not be used as a death penalty aggravator for kidnapping. Appellant thus argues that during his trial, murder was improperly used twice: once as an element of capital kidnapping, and again as a death penalty aggravator for kidnapping.

Appellant believes he is entitled to a new penalty phase since he contends he was ineligible for the death penalty.

However, as previously stated, Kennedy does not stand for the proposition that kidnapping can only be raised to a capital offense if the defendant intentionally killed the victim. Further, as the statutory scheme indicates and our holding in St. Clair affirms, it is the death of the victim which raises kidnapping to a capital offense. 10 S.W.3d at 486. Thus, murder is an appropriate aggravator, and the jury could consider the death penalty in the range of penalties for Appellant's crimes. Even if we were to agree that murder was not an appropriate aggravator, the jury found Appellant guilty of first degree rape and first-degree sodomy, both of which could have been used to aggravate the kidnapping to a capital offense. KRS 532.025(2)(a)(2). Appellant's Eighth Amendment rights were not violated.

For the above stated reasons, we affirm the conviction and sentence of the Hickman Circuit Court.

All sitting. All concur.

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Supreme Court of Kentucky

2008-SC-000465-MR

QUINCY OMAR CROSS — APPELLANT

V.

ON APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

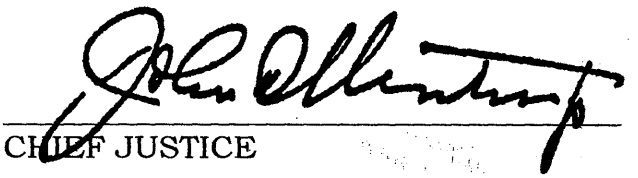
ORDER DENYING PETITION FOR REHEARING AND GRANTING MODIFICATION

The Appellant having filed a Petition for Rehearing and modification or extension of the Memorandum Opinion of the Court, rendered November 25, 2009; and the Court being otherwise fully and sufficiently advised;

The Court ORDERS that the Petition for Rehearing is DENIED; and that the Petition for Modification is GRANTED, and modifies the Memorandum Opinion of the Court, rendered November 25, 2009, to address additional arguments presented on appeal. The attached opinion is SUBSTITUTED in lieu of the original. Said modification does not affect the holding.

All sitting. All concur.

ENTERED: March 18, 2010.



CHIEF JUSTICE