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RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000107-MR

JOHN WAYNE COLLINS — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, SPECIAL JUDGE
NO. 2007-CR-00804

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

John Wayne Collins appeals as a matter of right from a judgment of the Warren Circuit Court convicting him of two counts of murder and imposing a sentence of life without the possibility of parole for a minimum of twenty-five years for each count. A kidnapping charge was dismissed by the trial court on Appellant's motion for directed verdict. The charges against Appellant alleged that he shot and killed Stevie Collins and that, several days later, Appellant shot and killed Christa Wilson, who had been one of the witnesses to the murder of Stevie Collins. Although the crimes occurred in Clay County, the inability to seat an impartial jury there resulted in a transfer of the case to Warren Circuit Court.

On appeal, Appellant asserts 1) that he was prejudiced by joinder of the two murder charges; 2) that he should have been granted a mistrial after a

witness improperly commented on a prior assault; 3) that the erroneous admission of hearsay statements attributed to Appellant's father constituted reversible error; and 4) that allowing the wife of one of the victims to remain in the courtroom as a "victim's representative" violated Appellant's due process rights. As Appellant's assertions of error do not merit relief, we affirm the trial court's judgment.

RELEVANT FACTS

On October 10, 2004, Appellant and his girlfriend, Christa Wilson, were visiting Appellant's father, Harold Wayne Collins, and then-stepmother, April Sizemore Collins. Another friend, Natasha Saylor, was also present. Everyone was on the porch of the home, visiting and drinking, when Stevie Collins pulled into the driveway, exited his vehicle and approached the porch. Stevie Collins extended an invitation for them to accompany him to church, and Appellant's father invited Stevie into the house. Appellant's father then shot Stevie in the face, whereupon Stevie fell to the floor and began pleading for his life. Appellant told his father that they could not let Stevie leave there. Appellant's father agreed and instructed Appellant to finish the job. Appellant retrieved his own gun and shot Stevie seven or eight times more, killing Stevie. A possible explanation for Stevie Collins's murder was revealed at trial when witnesses, including Appellant's uncle, Joe B. Collins, testified that his brother, Appellant's developmentally disabled uncle, had been murdered and dismembered in 1997, and that it was believed that Stevie Collins was responsible for the uncle's murder. After the shooting, the group left in three

different vehicles and met up again at a relative's house in Henry County, where they continued to drink and sleep.

Meanwhile, police were dispatched to the murder scene. Kentucky State Police Sergeant, John Yates, one of the investigating officers, testified that one 9mm round was discovered on the front porch and eight SKS rounds were found in the yard on either side of the porch. Later, when Appellant's father was arrested, a 9mm handgun was retrieved from his vehicle. Ammunition fitting the description of the ammunition retrieved from Stevie Collins's body was found in Appellant's vehicle. However, lab results on the weapons were inconclusive.

Although Appellant's girlfriend, Christa Wilson, Appellant's stepmother, April Sizemore Collins, and Natasha Saylor all repeatedly denied any knowledge of Stevie Collins's murder during the initial police investigation, both Natasha and April testified at trial to a substantially similar version of events, consistent with the factual summary set out hereinabove. Both also testified that they initially lied to the police because they had been threatened not to speak of Stevie Collins's shooting. April had been threatened by her then-husband, Appellant's father, while Natasha had been threatened by both Appellant and his father.

Forty days after Stevie Collins was murdered, the body of Christa Wilson was found face down in a creek. She died from a gunshot wound to the head. Christa had last been seen with Appellant. Paint that was discovered on a rock near Christa's body appeared to have been the result of a vehicle scraping the

rock, and Appellant's vehicle appeared to have been damaged in the rear bumper area. A sample of the paint was compared with a paint sample taken from Appellant's vehicle, the one he was driving when Christa was last seen with him. At trial, a forensic science specialist for the Kentucky State Police (KSP) and a defense expert witness testified concerning the results. The KSP specialist testified that the paint layer from the rock sample was identical to the paint layer from Appellant's vehicle in all areas, i.e., color, type, structure, texture, and elemental composition. The defense expert testified that the substrata of the paint samples differed in thickness and that the bottom layer did not match. For this reason, the defense expert disagreed that the paint samples were identical, but he did admit that the paint samples were extremely similar. Further, the defense expert explained that paint layer thickness varies across each vehicle and, in fact, two samples taken from Appellant's vehicle varied in thickness. He also testified that the difference in substrates could be the result of previous repairs made to the vehicle.

Ultimately, Appellant was tried and convicted for both the murder of Stevie Collins and the murder of Christa Wilson. Appellant had, initially, been indicted for Stevie Collins's murder. While Appellant was awaiting trial on that charge, he was indicted for the kidnapping and murder of Christa Wilson. As a jury was being selected for the Stevie Collins's murder, the Commonwealth moved to consolidate the two cases. Over Appellant's objection, the trial court granted consolidation, but gave Appellant a continuance. The Commonwealth filed a notice of intent to seek the death penalty based upon intentional killing

and multiple deaths. Subsequently, Appellant moved to sever the offenses, arguing that his option to testify at trial was compromised by joinder given his conflicting theories of defense. The trial court denied the motion, concluding that evidence in each case would presumably be admissible in the other. As stated above, when an impartial jury could not be seated in Clay County, the case was transferred to the Warren Circuit Court. Appellant renewed his motion to sever after transfer, but the Warren Circuit Court also concluded that joinder was appropriate, and denied the motion to sever.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion By Refusing to Sever the Two Murder Charges.

Appellant contends that the trial court committed reversible error by refusing to sever the two murder charges against him. This argument was properly preserved by Appellant's timely objection to consolidation of the charges and by his subsequent motions to sever. We review the denial of a motion to sever for abuse of discretion. *Debruler v. Commonwealth,* 231 S.W.3d 752 (Ky. 2007); *Roark v. Commonwealth,* 90 S.W.3d 24 (Ky. 2002), and we will not grant relief unless the refusal to sever prejudiced the defendant. *Parker v. Commonwealth,* 291 S.W.3d 647, 657 (Ky. 2009).

Kentucky Rule of Criminal Procedure RCr 9.12 permits two or more indictments to be consolidated for trial if joinder of the offenses in a single indictment would have been proper under RCr 6.18. That rule permits offenses to be joined where "the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting

part of a common scheme or plan." However, RCr 9.16 requires a trial court to order separate trials "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses[.]" This Court has recognized that "'prejudice' is a relative term" and, in the context of a criminal proceeding, means only that which is unnecessary or unreasonably hurtful, given that having to stand trial is, itself, inherently prejudicial. *Ware v. Commonwealth*, 537 S.W.2d 174, 176 (Ky. 1976); *Romans v. Commonwealth*, 547 S.W.2d 128, 131 (Ky. 1977).

Throughout these proceedings, Appellant has argued a particular manner in which he was prejudiced by joinder of the charges; namely, that his right to testify in his own defense was compromised. While Appellant wished to testify in support of his claim of justification for Stevie Collins's murder, he wanted to invoke his privilege not to testify in Christa Wilson's murder. This issue has not been much addressed in our cases. The federal courts, however, under their similar rules of joinder and severance, have noted that, while courts zealously guard a defendant's Fifth Amendment right not to testify at all, "the case law is less protective of a defendant's right to testify selectively." *United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004). A defendant who argues for severance on the basis of selective testimony "must make a 'persuasive and detailed showing regarding the testimony he would give on the one count he wishes severed and the reason he cannot testify on the other counts.'" *United States v. McCarther*, 596 F.3d 438, 443 (8th Cir. 2010) (quoting *United States v. Possick*, 849 F.2d 332, 338 (8th Cir. 1988)). The United States

Circuit Court for the Sixth Circuit has held that severance is not required unless the defendant "'makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.'" *United States v. Bowker,* 372 F.3d 365, 385 (6th Cir. 2004), *vacated on other grounds,* 543 U.S. 1182 (2005) (quoting U*nited States v. Martin,* 18 F.3d 1515, 1518-19 (10th Cir. 1994)). Otherwise, "severance would be available to a defendant virtually on demand." *Fenton,* 367 F.3d at 23.

This Court reached a similar conclusion in *Owens v. Commonwealth,* 572 S.W.2d 415, 416 (Ky. 1977):

> [Defendant] argues that he was confounded in his defense for the reason he wished to testify as to one charge, but not the others. . . . This argument in the absence of other compelling factors ordinarily is not sufficient to warrant a severance. Otherwise, it would have the effect of nullifying the provisions of RCr 9.12, consolidation of offenses for trial.

Here, Appellant has not made a persuasive and detailed showing of "compelling factors" that would justify his selective testimony. He has not shown that his testimony regarding Stevie Collins's murder was vital, as he was able to assert his justification defense through other witnesses who testified to the victim's alleged involvement in the murder of Appellant's uncle. And he has made no showing of a strong need to refrain from testifying with respect to Christa's murder. *See, e.g., Bowker, supra,* and *McCarther, supra.* The trial court did not abuse its discretion, therefore, by denying Appellant's severance motion on the ground of selective testimony.

Nor was severance required on the ground that the two murders were not sufficiently related. A primary test for determining whether undue prejudice will result from a joinder of offenses is whether evidence necessary to prove one offense would be admissible in a trial of the other offense. *Roark v. Commonwealth, supra.* As noted, a trial court's decision to join offenses related in this way will not be disturbed absent an abuse of discretion. *Debruler v. Commonwealth, supra; Roark, supra.* We agree with the Commonwealth that there was no abuse of discretion here, because the two murders were based on "transactions connected together." RCr 6.18.[1] Clearly, evidence of Stevie

[1] The dissent focuses on the fact that RCr 6.18 authorizes joinder of two offenses only if "the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan," but says nothing about the propriety of joinder hinging on whether it would be prejudicial or not. The dissent's emphasis on RCr 6.18 misconceives our standard of review. If we reviewed severance rulings de novo, then we would indeed begin where the trial court begins and ask anew whether RCr 6.18's conditions had been met. In fact, however, "we may only reverse a trial court's joinder decision upon 'a showing of prejudice and clear abuse of discretion.'" *Parker v. Commonwealth,* 291 S.W.3d 647, 657 (Ky. 2009) (*quoting from Jackson v. Commonwealth,* 20 S.W.3d 906, 908 (Ky. 2000)). This is why our severance cases almost uniformly begin and end with an analysis of prejudice and is likely why the case upon which the dissent relies, *Sebastian v. Commonwealth,* 623 S.W.2d 880 (Ky. 1981), has not been cited a single time in this context in the nearly thirty years since it was decided. Under our standard of review, a trial court's misapplication of RCr 6.18 that did not result in prejudice to the defendant would amount at most to a harmless error. Moreover, when considering the trial court's application of RCr 6.18, the question on review is not whether *we* think the joined offenses "are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan," but rather whether a reasonable person could have so concluded. The dissent thinks not, apparently, but in arriving at that conclusion it errs in asserting that the evidence before the trial court contained nothing to suggest that Appellant's motivation "was in any way connected to the murder of Steve Collins." On the contrary, in making its ruling the trial court had before it the Commonwealth's representations, which the defense did not dispute, that Christa Wilson and two other women witnessed Appellant murder Steve Collins, which fact alone connects the two crimes and permits a reasonable inference of motive. The court also heard that shortly prior to her death Wilson confided to a friend that Appellant had threatened her and warned her not to

Collins's murder would have been admissible in a separate trial of Christa Wilson's murder, since the alleged motive for the second murder was Appellant's desire to cover up the first murder by eliminating one who had witnessed it. KRE 404(b) (evidence of other bad acts is admissible to prove motive.); *Tucker v. Commonwealth,* 916 S.W.2d 181 (Ky. 1996) (evidence that defendant had shot a witness of a prior crime was admissible to show that charged shooting was similarly motivated.). Similarly, evidence of Christa's murder would have been admissible in a separate trial of Stevie Collins's murder, since evidence that one has attempted to cover up a crime is circumstantial proof of one's consciousness of guilt regarding that crime. KRE 404(b) (evidence of other bad acts is admissible to prove intent.); *Major v. Commonwealth,* 177 S.W.3d 700 (Ky. 2005) (evidence that defendant beat a potential witness was admissible as proof of consciousness of guilt.); *Foley v. Commonwealth,* 942 S.W.2d 876, 887 (Ky. 1996) ("Any attempt to suppress a witness' testimony . . . is evidence tending to show [a consciousness of] guilt."). The trial court did not abuse its discretion, therefore, by deeming the two murders sufficiently related to be tried together.

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divulge what she knew and that she was afraid of him. Further, the court heard that after Wilson's murder, another of the women who witnessed Steve Collins's murder was brutally assaulted and left for dead by Appellant's close relatives. The Commonwealth's theory of Christa's murder, therefore, was hardly spun out of whole cloth, as the dissent suggests, and the trial court's conclusion that the two murders were transactions sufficiently "connected together" to satisfy RCr 6.18 was not arbitrary or unreasonable.

II. Natasha Saylor's Statement Concerning a Prior Assault Against Her Did Not Warrant a Mistrial.

Prior to trial, Appellant filed a motion to exclude evidence of Natasha Saylor's assault. Four male relatives of Appellant had attacked Ms. Saylor and slashed her throat. Three of her attackers were convicted and the fourth negotiated a plea. Although Appellant and his father were referenced throughout the assault trial, neither was charged for the offense. Accordingly, Appellant's motion sought to "exclude any mention of or evidence associated with the Natasha Saylor assault trial, as well as the mention of [the four individuals charged with the assault] and their respective convictions."[2]

At a hearing on the motion, the prosecutor stated that he did not have a problem with the request "unless they [defense counsel] were to open a door through their cross-examination . . . we'll stay away from that, we don't have any problem with it." Defense counsel responded that she intended to probe Saylor's mental and physical state and that what she was asking the court to preclude was "her explaining how she got that way . . . I mean I don't know that I can keep her from expressing her opinion as to why she thinks that happened." The Commonwealth responded that if defense counsel's questions resulted in mention of the assault and resulting injuries, he should be able to follow up by asking Saylor how she sustained those injuries. Recognizing that the primary concern was that defense counsel's question would open the door

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[2] Although the parties repeatedly referred to the case as an "assault trial" even though the discussions were outside the hearing of the jury, the charges and resulting convictions consisted of attempted murder and intimidating a witness. *See Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky. 2008).

to the testimony and that the Commonwealth otherwise agreed to the exclusion of the evidence, the trial court denied the motion and cautioned defense counsel not to open the door to the very evidence she wished to exclude.

As anticipated, Saylor referenced the assault at trial in response to one of defense counsel's questions. Specifically, defense counsel asked Saylor, "You indicated that you were scared for your life. Who were you afraid of?" Saylor responded, "To be honest, I was afraid of the whole family. That's why I never told anyone until my throat got cut." Defense counsel immediately moved for a mistrial. The Commonwealth responded that defense counsel's question opened the door, while defense counsel contended that Saylor's answer was not responsive to her question. The trial court denied the request for a mistrial and defense counsel declined an admonition, opining that it would just draw more attention to the testimony. The trial court did rule, however, that Saylor's brief reference to the assault did not open the door for the Commonwealth to pursue the matter. The matter was not mentioned again and it was never revealed that the assault had been committed by relatives of Appellant.

Under these circumstances, we cannot agree with Appellant's contention that Saylor's comment was grounds for a mistrial. "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." *Graves*, 285 S.W.3d 734, 737 (Ky. 2009) (*quoting Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005)). The trial court did not abuse its discretion in refusing to declare a mistrial.

III. The Admission of Hearsay Statements Attributed to Harold Wayne Collins Did Not Constitute Reversible Error

During direct examination, April Sizemore Collins referenced a message that Appellant's father, Harold Wayne Collins, had left on her cell phone voicemail. When she began to repeat the message, "They've already found one body," defense counsel objected on hearsay grounds. Although the trial court overruled the objection, the Commonwealth instructed April to refrain from repeating the contents of any threats and to merely answer whether she had been threatened. On cross-examination, however, defense counsel elicited the content of the voicemail. Specifically, defense counsel asked April, "Harold Wayne told you that they'd already found one body up on Hector, and asked you if you wanted to be next, didn't he?" April responded affirmatively and defense counsel continued, "And that's where Christa Gail Wilson's body was found wasn't it?" Again, April answered affirmatively.

Under these circumstances, we must agree with the Commonwealth that defense counsel on cross-examination opened a door that had been willingly closed by the Commonwealth. Appellant may not argue error in admission of testimony that he intentionally elicited.

IV. Allowing the Victim's Wife to Remain in the Courtroom Did Not Constitute Reversible Error.

Upon the request of a party, KRE 615 mandates that the trial court exclude witnesses from the courtroom except when they are testifying. However, the Rule does not authorize the exclusion of 1) a party; 2) "[a]n officer or employee of a party which is not a natural person designated as its

representative by its attorney;" or 3) "[a] person whose presence is shown by a party to be essential to the presentation of the party's cause." KRE 615. Commonly, a lead detective or investigator is allowed to remain in the courtroom under the second exception. *Justice v. Commonwealth*, 987 S.W.2d 306 (Ky. 1998); *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999). In this case, two primary detectives remained in the courtroom without objection. The Commonwealth also requested that Stevie Collins's widow, Donna Collins, be allowed to remain in the courtroom as a "victim's representative." Although Appellant initially objected, both parties expressed satisfaction when the trial court ruled that Donna Collins could remain in the courtroom only on the condition that the Commonwealth minimize her exposure to other witnesses' testimony by calling her promptly. Although the Commonwealth did not want to call the victim's widow as his first witness, he did agree that she would be his second or third witness. At this point, the record reveals that Appellant waived any objection to Donna Collins remaining in the courtroom.

Subsequently, however, the Commonwealth informed the court that because it did not want to subject Donna Collins to the stress of testifying, it had decided not to call her at all, but offered for the defense to go ahead and do so, in keeping with the previous agreement and ruling that she could remain in the courtroom so long as she testified promptly. Appellant declined to call her "out-of-order," and instead renewed his objection to Donna Collins's remaining in the courtroom, reiterating that KRE 615 provided no exemption for a "victim's representative." While Appellant's counsel expressed a personal

understanding of Donna Collins's desire to remain in the courtroom, she unequivocally objected on the record. Thus, the Commonwealth's contention that Appellant waived any objection is unsupported by the record.

This Court addressed a similar factual scenario in *Hatfield v. Commonwealth, supra*, wherein the victim's grandfather was permitted to remain in the courtroom even though he was a witness for the Commonwealth and did not testify until the end of the Commonwealth's case-in-chief. The Court held that a "victim's representative" may fall within the third exception to KRE 615 in certain circumstances, but there must be a showing that the witness is "essential to the presentation of the party's cause." KRE 615(3). The *Hatfield* Court reasoned that failure to exclude the victim's grandfather from the courtroom was error because the required showing had not been made. Likewise, no such showing was made to justify Donna Collins's presence in the court. However, the *Hatfield* Court proceeded to deem the error harmless. In so doing, the Court distinguished *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky. 2003), the case upon which Appellant relies. *Mills* held that permitting a robbery witness to remain in the courtroom constituted reversible error. However, the witness in *Mills* was the sole witness to the robbery, rendering his credibility of critical importance. In contrast, the testimony of the victim's grandfather in *Hatfield* was largely duplicative and was not "of an indispensable nature to the outcome of the trial." *Hatfield*, 250 S.W.3d at 595. Because the circumstances here are more akin to those in *Hatfield*, Appellant's reliance on *Mills* is unpersuasive.

Donna Collins remained in the courtroom for the entire proceeding and was called as Appellant's first defense witness. She testified that her deceased husband did not carry guns regularly, that she had never heard that Appellant's father blamed Stevie for Appellant's uncle's murder, and that Stevie was right-handed.

Before this Court, Appellant argues that allowing Donna Collins to remain in the courtroom enabled her to conform or adjust her testimony based on the testimony she had heard during the Commonwealth's case-in-chief. Most damning, he argues, was Donna Collins's testimony that Stevie was right-handed, given the prior testimony that gunshot residue was detected on Stevie's left hand. Nevertheless, we are persuaded that any error was harmless. Donna Collins did not witness the murder and her testimony was merely to offer background information on the victim. As the Commonwealth points out, it is highly unlikely that she would have testified differently had she not heard the other witnesses, particularly with regard to her testimony that the victim was right-handed.

CONCLUSION

Appellant has failed to show that he was unduly prejudiced by joinder of the two murder charges. Further, Appellant is not entitled to relief based on Natasha Saylor's brief and vague reference to a prior assault. Nor is he entitled to relief based on hearsay evidence that he elicited. Finally, although the required showing was not made to support the decision to allow Donna Collins

to remain in the courtroom, the error was harmless. Accordingly, Appellant's convictions are affirmed.

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

VENTERS, J., DISSENTING: I respectfully decline to join the Majority opinion because I disagree with its conclusion that Appellant's two murder charges were properly tried together, and therefore I dissent.

The Majority focuses on the question of whether the trial erred in "refusing to sever the two murder charges." In so doing, it fails to give appropriate consideration to the more fundamental issue of whether the two charges were properly joined in the first place. RCr 9.16 requires severance of the charges when a joint trial will be prejudicial. However, RCr 9.16's requirement for a finding of prejudice has no application whatsoever unless the requirements of RCr 6.18 have first been satisfied. Improperly joined charges cannot be consolidated for trial, notwithstanding the presence or absence of prejudice. *Sebastian v. Commonwealth*, 623 S.W. 2d 880, 881 (Ky. 1981).

The inquiry is controlled by RCr 6.18, which in conjunction with RCr 9.12, provides that two or more offenses may be joined for a common trial *only* if they are "of the same or similar character" or "are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." The Majority opinion brushes quickly past the issue, stating simply, "We agree with the Commonwealth that there was no abuse of discretion here

because the two murders were based on 'transactions connected together." (emphasis added).

There is no evidence that the Steve Collins' murder was in any way connected to the murder of Christa Wilson nearly six weeks later. Steve Collins arrived for an unexpected visit at Harold Collins' home and despite his apparently friendly approach, was spontaneously shot and wounded by Harold Collins, whose motivation was alleged to be revenge. Appellant, impelled simply by the desire to finish what Harold had started, obtained a gun and shot Collins several more times, killing him. Everyone present at the scene, including Harold and Appellant, promptly left the area, leaving the body where it fell at Harold's front porch. Christa, Appellant's girlfriend, who had been present when Collins was killed, left the scene with Appellant and continued her relationship with him until her death several weeks later.

While there is sufficient circumstantial evidence to conclude that Appellant killed Christa, the only thing that connects these two crimes is the Commonwealth's supposition, its theory, on why she was killed. There is absolutely no evidence that suggests his motivation was in any way connected to the murder of Steve Collins. The Commonwealth's theory is a mere possible explanation with no evidentiary link that connects together the two murders. The murder of a young woman at the hands of her boyfriend is, unfortunately, an all too common occurrence and the proof that Appellant did it is hardly dependant upon the motivation theorized by the Commonwealth. I am aware of no authority in the form of appellate decisions or otherwise, that condones

the joinder of dissimilar crimes for a common trial simply because it is the Commonwealth's theory, unsupported by any evidentiary link, that the two crimes are "transactions connected together." The only connection between them is that Appellant was charged with both. Thus, by the rationale of the majority opinion, two charges against a single defendant may always be consolidated for a joint trial so long as the Commonwealth's subjective theory, rather than its objective evidence, supplies the connecting link. For the same reasons, the two murders cannot reasonably be seen as parts of "a common scheme or plan."

The Commonwealth's whole theory of the case precludes joinder on the grounds that the two murders were of the "same or similar character." The Steve Collins' murder was an unplanned spontaneous event, instigated by another (Harold) for revenge, in which Appellant subsequently took a subordinate but decisive role. According to the Commonwealth's theory, and not the Commonwealth's evidence, Christa's murder was premeditated to eliminate a witness. No one even suggests that two murders were the result of the "the same acts."

The most frequently stated interpretation of proper joinder under of RCr 6.18 is found in the cases cited in the Majority opinion[3], and it holds that joinder is proper when the two crimes are closely related in character, circumstance and time. The two murders involved here conform to none of

[3] *Debruler v. Commonwealth*, 231 S.W.3d 752, 760 (Ky. 2007) and *Tucker v. Commonwealth*, 916 S.W.2d 181, 184 (Ky. 1996) (reversed on other grounds in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky.2005)).

those factors. Joining them for trial with no evidentiary connection between them was not authorized by the Rules of Criminal Procedure. Moreover, Appellant was deprived of a fair trial by the inherently prejudicial joinder of two crimes that were not closely related in character, circumstance or time.

The premise for the majority's conclusion that Appellant was not prejudiced by the last-minute decision to try him simultaneously for two murders instead of one rests upon its conception that "prejudice is a relative term." It completes the analysis with a circular argument and an illusory justification for the joinder. The majority reasons: Because it was proper to try Appellant for both murders simultaneously, he was not unnecessarily or unreasonably prejudiced; because he was not prejudiced by the trial, the two murder charges were properly consolidated.

Noble and Schroder, JJ., join.

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