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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000479-MR

JIMMY CORNETTE, JR. — APPELLANT

V.

ON APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
NO. 10-CR-00116

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On June 23, 2002, Patrick Blackburn was discovered unconscious in the backseat of his car. The vehicle was lodged against a tree, preventing it from going down the side of a small hill. Blackburn suffered severe, blunt force trauma to the head and died four days later. His death was declared a homicide.

For eight years, the crime went unsolved, partly because the car in which Blackburn was found contained no valuable physical evidence. However, in 2010, Appellant, Jimmy Cornette, Jr., was indicted for Blackburn's murder, along with David Jude and Jerry Stepp. The three men were tried separately.

The Commonwealth's evidence at trial established that Blackburn was a cocaine user who had purchased the drug on credit from Appellant shortly before his death. Appellant became increasingly angry as the debt remained

unpaid for some time. The victim's brother witnessed Appellant threatening physical harm to Blackburn if he was not repaid.

Days later, Blackburn and his wife encountered Appellant's uncle, who informed Blackburn that David Jude had cocaine to sell. Blackburn contacted Jude to purchase the cocaine. Appellant learned of this and was infuriated that Blackburn was buying more cocaine instead of repaying his debt. Again, witnesses overheard Appellant threaten to kill and "whip" Blackburn.

Evidently unaware of these threats, Blackburn went to property belonging to Appellant's father to obtain cocaine from Jude. Appellant, Jude and Stepp were present. There was testimony that, among others, Appellant's wife and sister were also present.

Blackburn was viciously attacked when he arrived. Stepp testified that Appellant and Jude together assaulted Blackburn as soon as he exited his vehicle. Jude, however, testified that Stepp was not present at the time and that his friend, Paul Gibson, had participated in the attack. After the fight, Appellant ran over Blackburn's head with an ATV and then loaded the victim into the trunk of Blackburn's car. Appellant drove the victim's car while Stepp and Jude followed in a van. They moved Blackburn to the backseat of the car and pushed it over a hill.

In defense, Appellant's mother and sister testified that they were with him on the night Blackburn was attacked. Further, the defense theorized that a man named James Harless killed Blackburn. Harless was the ex-husband of Blackburn's wife, Darlene. Darlene and Harless were still involved in a

romantic relationship, even after her subsequent marriage to Blackburn. For this reason, the relationship between Harless and Blackburn had long been acrimonious.

Harless's then-wife, Barbara, told police that on the night Blackburn was attacked, Harless had left the house for several hours. This contradicted Harless's own statements to police that he had been home the entire evening, except for a thirty-minute period. The defense also presented testimony that, after Blackburn's death, Harless and Darlene reconciled. In response to this theory, the Commonwealth presented testimony that Harless was in Pike County on the night Blackburn was killed. Harless suffered a stroke in 2009 which apparently resulted in severe memory loss, rendering him unable to testify at Appellant's trial.

The jury convicted Appellant of murder and recommended a life sentence. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

Continuance

Appellant first argues that he was improperly denied a continuance. Defense counsel moved the trial court for a continuance on the morning of the first day of trial, Monday, June 20, 2011. There seems to have been two grounds for the request, both arising from the fact that David Jude had reached a plea agreement the previous Friday.

Jude was also scheduled to go to trial on June 20. However, the Commonwealth reached a plea agreement with Jude on Friday, June 17. As part of the agreement, he provided a statement implicating Appellant and also

agreed to testify against Appellant. The statement was substantially similar to a statement he had given to investigators in 2004, except for one detail. In his 2004 statement, Jude alleged that a man named "Paul" was present when Blackburn was attacked. In the subsequent statement given on June 17, 2011, Jude identified Paul Gibson by his full name.

It should be noted that another witness, Harrison Messer, had provided a statement to the Commonwealth in 2010 referencing Gibson. Messer told investigators that someone named "Paul" from Ohio was present when Blackburn was attacked and identified him as "the boy who hangs around with [Jude]." These statements were tendered to defense counsel during discovery.

In requesting a continuance, defense counsel argued that he had inadequate time to prepare for Jude's testimony, as he had not contemplated Jude as a witness. He also complained of the recent identification of Paul Gibson as a potential eye-witness and requested time to locate Gibson. The trial court denied the continuance without articulating its reasons for doing so.

RCr 9.04 allows the trial court to postpone a trial upon a showing of sufficient cause. However, the decision whether to grant a continuance lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Montgomery v. Commonwealth*, 320 S.W.3d 28, 47 (Ky. 2010). In making its decision, the trial court must consider the "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case;

and whether denying the continuance will lead to identifiable prejudice." *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)).

Appellant's motion was defective on its face. Defense counsel received Jude's statement on Friday, but did not indicate that he had attempted to locate Paul Gibson over the prior weekend. And though Jude and Messer previously identified Gibson only as "Paul," there is no indication that defense counsel had attempted to ascertain Gibson's full name or identity at any time prior to trial. "Where the alleged circumstances involve the unavailability of a known witness, RCr 9.04 requires a moving party make its motion upon affidavit showing the court the materiality of the evidence of the absent witness as well as the diligence exercised to procure the witness or evidence." *Gray v. Commonwealth*, 203 S.W.3d 679, 688 (Ky. 2006). "[I]t is not an abuse of discretion for the trial court to deny a continuance of a trial for the appearance of a witness when there is no indication that the witness will ever appear." *Farris v. Commonwealth*, 836 S.W.2d 451, 455 (Ky. App. 1992) (overruled on other grounds by *Commonwealth v. Day*, 983 S.W.2d 505 (Ky. 1999)). Thus, the trial court did not abuse its discretion in denying the continuance to allow defense counsel to locate Paul Gibson.

The fact that Jude agreed, three days before trial, to testify against Appellant also did not warrant a continuance. Most importantly, there is no identifiable prejudice resulting from this development. As early as April, 2011, it is abundantly clear that counsel and the trial court anticipated the

possibility that Jude would reach a plea agreement and testify for the Commonwealth. Given that Jude had continually implicated Appellant in his prior statements to police, the substance of his testimony was hardly surprising. In fact, the statement Jude provided the Commonwealth on Friday was in substantial conformity with the statement he had provided in 2010. Looking to the *Snodgrass* factors, we also note that the case was finally going to trial nearly ten years after Blackburn's death, and that twenty-two witnesses and a jury panel had been assembled for the proceedings. There was no abuse of discretion.[1]

Hearsay Testimony

Billy Perry ("Perry") testified on behalf of the Commonwealth regarding a conversation he had with Appellant and two other men, John Paul Perry ("John Paul") and Lacy Fletcher. During this conversation, Appellant allegedly admitted running over Blackburn with a four-wheeler and spinning the tires on his head. He also recounted how he put Blackburn's body in a car in an attempt to make the homicide appear accidental. Appellant told the men that his wife and sister helped him clean up the area where Blackburn was attacked.

On cross-examination, Perry was questioned about the present whereabouts of John Paul and Fletcher. He responded that they were both deceased. On re-direct, the Commonwealth elicited that Fletcher died "by a

[1] To the extent that Appellant argues, in his brief to this Court, that he had inadequate time to prepare for trial due to Jude's eleventh-hour plea agreement, we find this argument unpreserved for appellate review. These circumstances were not presented to the trial court as grounds for a continuance.

pipe bomb, as far as I know." He also said he "was told" that John Paul died of a drug overdose while partying with Appellant.

Defense counsel did not object. Instead, on re-cross examination, defense counsel inquired how Perry knew that John Paul died by a pipe bomb. When Perry responded that he heard this information from John Paul's wife, defense counsel adeptly exposed the fact that Perry could not recall when this conversation occurred or even the name of John Paul's wife.

The Commonwealth referenced Perry's testimony in its closing argument, offering the fate of John Paul and Fletcher as the reason why Perry was reluctant to testify against Appellant. There was no objection to this statement.

Appellant acknowledges that this issue is not preserved for appellate review due to the lack of any contemporaneous objections. RCr 9.22. Instead, he requests palpable error review pursuant to RCr 10.26. However, it is apparent from the record that defense counsel purposefully abstained from objecting to any portion of Perry's testimony or the Commonwealth's closing argument. Instead, counsel elected to expose the weakness of Perry's disclosure through re-cross examination and did so very ably. We can only conclude that the failure to object was an element of defense counsel's trial strategy. There can be no reversible error where "the defendant permits the introduction of such evidence without objection for the purpose of trial strategy." *Tamme v. Commonwealth*, 973 S.W.2d 13, 32-33 (Ky. 1998).

Venue

Appellant complains that the trial court improperly denied his motion for a change of venue. On Friday afternoon, before the Monday trial, Appellant moved the trial court to change venue. A hearing was held immediately before jury selection began. In the motion, defense counsel argued that "extensive pretrial publicity and discussion of the case among the citizens of Martin County" precluded a fair trial. Though defense counsel attached the affidavits of four Martin County residents to the motion, as required by KRS 452.220(2), no examples of the prejudicial pretrial publicity were provided.

KRS 452.210 requires the trial court to change venue when it "appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending." However, KRS 452.220(2) requires that the Commonwealth be given "reasonable notice" of the petition. A challenge to venue is waived by failure to make a timely motion. KRS 452.650. This Court has found that a petition for a change of venue filed on the day of trial does not provide the Commonwealth with the requisite reasonable notice. *Bryant v. Commonwealth*, 467 S.W.2d 351 (Ky. 1971). A change of venue motion filed two days before trial was similarly untimely, where defense counsel was well-aware of existing public sentiment and pretrial publicity. *Thompson v. Commonwealth*, 862 S.W.2d 871, 874 (Ky. 1993) (overruled on other grounds by *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004)).

In this case, Blackburn was murdered nearly eight years before Appellant, Jude and Stepp were indicted. A period of about eighteen months

passed between the indictment and Appellant's trial. Yet, in his motion to change venue, there was no allegation that the alleged prejudicial conditions or publicity was of recent origin. Accordingly, the request to change venue was untimely and the trial court did not abuse its discretion in denying the motion. *Gill v. Commonwealth*, 7 S.W.3d 365, 369 (Ky. 1999).

Mistrial

Detective Mike Goble testified on behalf of the Commonwealth regarding his investigation of Blackburn's death. Detective Goble had taken over the investigation in 2005 and subsequently transferred the case to another detective when he retired in 2010. Acting on a tip that James Harless had beaten Blackburn to death with a hammer, Detective Goble interviewed Harless and obtained the hammer in question. Detective Goble performed Hemastix testing on the hammer to determine if it had any traces of blood. When the tests did not indicate the presence of blood, Detective Goble discarded the hammer and the tests. The hammer was not sent to the state crime lab for analysis, nor did Detective Goble document his own testing.

Though Detective Goble was scheduled to testify at Appellant's trial, the Commonwealth only learned about the hammer and Hemastix testing after the first day of trial. The following morning, on the second day of trial, defense counsel was informed of the development. A motion for a mistrial was made and denied. Appellant argues that the trial court erred.

Mistrials are an extreme remedy to be granted only when there is a manifest necessity. *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002).

The error must be of such magnitude that the defendant would otherwise be denied a fair trial and the prejudicial effect of the error can be removed in no other way. *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009). The decision to grant a mistrial rests within the sound discretion of the trial court and will only be reversed upon showing of an abuse of discretion. *Id.*

The defense theory at trial was that Harless had killed Blackburn. Had the hammer evidence been revealed prior to trial, Appellant argues, defense counsel might have hired a trace evidence expert or prepared a more effective defense incorporating this information. Notwithstanding this possibility, we do not believe a manifest necessity for a mistrial existed.

Detective Goble testified that he had discarded the hammer several years before trial. Even if these circumstances had been brought to light prior to trial, the hammer would not have been available for defense testing. Thus, the only real opportunity Appellant lost was the chance to present expert testimony challenging the Hemastix test performed by Detective Goble.

More importantly, Appellant was still able to thoroughly question Detective Goble about the hammer. Defense counsel capitalized on its opportunity to cross-examine Detective Goble about the hammer, how it was tested, why he failed to submit the hammer to the state crime lab for more detailed testing, and why he discarded it. The trial court did not abuse its discretion in denying the request for a mistrial. *See Slone v. Commonwealth*, 382 S.W.3d 851, 858 (Ky. 2012) (mistrial not warranted where Commonwealth

failed to provide defense counsel updated version of sexual assault nurse examiner's report prior to trial).

Penalty Phase Testimony

Appellant's mother, Helen Spence, testified during the penalty phase of the trial. The Commonwealth questioned her about recorded conversations she had with Appellant while he was incarcerated. In one conversation, Spence and Appellant discussed the sale of an AK-47 firearm and the value of the weapon. The Commonwealth intimated that the weapon belonged to Appellant. In response, Spence explained that the weapon belonged to her, not her son, and that she was asking his advice on pricing the gun for sale.

Defense counsel objected to this line of questioning and approached the bench. He argued that the recording of this jailhouse conversation had not been disclosed prior to trial. The trial court overruled the objection. On appeal, Appellant now argues that this testimony is improper character evidence of a witness, in violation of KRE 608. Because this theory was not presented to the trial court, this argument is not properly preserved for appellate review. *Barnett v. Commonwealth*, 317 S.W.3d 49, 59 (Ky. 2010).

Nonetheless, Appellant requests palpable error review pursuant to RCr 10.26. Assuming *arguendo* that error occurred, reversal is not required. Spence's testimony about the firearm was extremely brief. She offered a very plausible explanation for the conversation. Given the fact that Blackburn was not killed by a gunshot, Spence's testimony concerning the firearm bore little relevance. Even if Spence's testimony was excluded, we do not believe that

there is a substantial possibility that the jury's recommended sentence would have been any different. For this reason, no manifest injustice occurred.

Prosecutorial Misconduct

In his final claim of error, Appellant argues that the Commonwealth engaged in misconduct during *voir dire* by asking the jurors to commit to a verdict in advance. He also complains that the Commonwealth improperly advised the jury panel that Stepp and Jude had pleaded guilty. The argument is not preserved, and Appellant requests palpable error review pursuant to RCr 10.26.

Our review of the record reveals no error. Referencing the well-known maxim that "loose lips sink ships," the Commonwealth first informed the panel that Jude and Stepp had "ratted out" Appellant. He then inquired whether any of the panel members would disbelieve the testimony of Jude or Stepp by virtue of the fact that they had accepted plea agreements. Defense counsel explored the same potential bias during voir dire, asking the panel if anyone would automatically believe Jude or Stepp because they were testifying on behalf of the Commonwealth. Defense counsel repeatedly referred to Jude and Stepp as "rats" and "liars."

The Commonwealth's comments did not exceed the wide latitude that is afforded counsel during *voir dire*. When there is no objection to the alleged misconduct, we reverse only where the misconduct was flagrant and of a quality to render the trial fundamentally unfair. *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). When viewed in context, we do not believe the

Commonwealth's statements were designed to have jurors commit in advance to certain ideas or views. *Woodall v. Commonwealth*, 63 S.W.3d 104, 116 (Ky. 2001).

We acknowledge that it is ordinarily improper for the Commonwealth to show that a co-indictee has already been convicted under the indictment. *King v. Commonwealth*, 276 S.W.3d 270, 277 (Ky. 2009). However, reversible error does not occur when the defendant does not object to such evidence and uses it as part of the defense trial strategy. *Id.* It is evident that, here, defense counsel failed to object to the Commonwealth's statements and instead used Stepp and Jude's plea agreements to explore potential bias and to disparage both men. Having found no error, review pursuant to RCr 10.26 is not warranted.

Conclusion

The judgment of the Martin Circuit Court is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur except Venters, J., who dissents by separate opinion.

VENTERS, J., DISSENTING: I respectfully dissent because the trial court abused its discretion by refusing to grant Appellant the continuance he requested. On the eve of Appellant's trial, his co-defendant, David Jude agreed to plead guilty and testify at Appellant's trial. He then, for the first time, disclosed the full name of an eyewitness to the murder: Paul Gibson. Prior to that moment, Appellant and the Commonwealth knew only that someone from Ohio named "Paul" had allegedly been present. Given the untold thousands of

individuals named "Paul" in Ohio, a state with a population of more than 11.5 million people, there was no feasible way to locate this material witness. That suddenly changed when they learned that Paul's last name was "Gibson."

With knowledge of both a first and last name, finding this eyewitness becomes a very feasible undertaking. For example, WhitePages Inc. lists thirty-three persons in Ohio named "Paul Gibson."[2] In fact, while finding this eyewitness to the crime and ascertaining the probative value of his testimony should have been an obligation of the Commonwealth, it was at least a reasonable pursuit for Appellant. No one familiar with trial court practice would doubt for an instant that had the Commonwealth needed this witness, a continuance on the eve of trial would not have been denied. It took years for the Commonwealth to gather the evidence needed to make its case against Appellant; a few more months to locate an eyewitness to the crime is, in the broad perspective, a minor inconvenience to the Commonwealth, and to the accused, an essential component of his Constitutional right of Due Process and a fair trial.

The trial court abused its discretion in failing to grant Appellant a continuance.

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[2] *See* WhitePages, http://www.whitepages.com/name/Paul-Gibson/Ohio (last visited Feb. 12, 2013).

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