

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000605-MR

NICHOLAS LEE SIMPSON

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 11-CR-02889

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Nicholas Simpson appeals as of right from a Judgment of the Jefferson Circuit Court convicting him of first-degree burglary and sentencing him in accord with the jury's recommendation to a maximum term of twenty years in prison. Simpson was accused of having unlawfully entered the Shively, Jefferson County home of Eugene French, of having murdered French in the course of the break-in, and of having tampered with physical evidence of those crimes. The trial court ultimately dismissed the tampering charge for lack of evidence, and the jury acquitted Simpson of murder. Simpson contends (1) that the burglary charge should have been dismissed for lack of evidence, (2) that the charges should have been dismissed because of an unlawful delay in bringing the matter to trial, and (3) that the trial court undermined the fairness of the trial's penalty phase when it refused to admonish the jury not to consider evidence of the alleged murder. Convinced that the jury's burglary

verdict is supported by sufficient evidence and that Simpson is not otherwise entitled to relief, we affirm the trial court's Judgment.

RELEVANT FACTS

On March 16, 2005, Eugene French's friend and neighbor E.C. Wells was concerned because mail and newspapers had accumulated on French's porch. Wells entered French's house and found French's dead body in a kneeling position with the torso slumped over face down on the living room couch. Wells immediately called his daughter, Diana Osborne, who was also a neighbor. Diana and her husband, James Osborne, came promptly to the French residence and, soon after their arrival, Diana called 911. Because James Osborne recalled having seen French on March 14, and because the newspaper from that day lay on the couch beneath French's body, it appeared that French had been killed between late March 14 and early March 16. The medical examiner eventually reported and testified at trial that French had suffered anywhere from six to twelve blows to his face and the front of his head and had died as a result of that blunt force trauma. According to the examiner, French's injuries were consistent with having been beaten with a baseball bat, a cane, or a thick curtain rod. Investigating officers found a back bedroom window open and its screen torn and bent back. They collected numerous apparently blood spattered items from the living room and kitchen, a pair of gloves from the living room, and items, such as an empty cigarette pack and empty beverage cans, which were tested, without success, for

fingerprints. They also canvassed the neighborhood. Neither the physical evidence nor the neighborhood interviews led to an arrest.

About two months after the killing, a home owner reported having found a wallet containing French's driver's license and social security card in a room once occupied by a Victor Thomas, a person James Osborne testified was from French's neighborhood and whom Osborne had known for twenty-five or thirty years. Investigators interviewed Thomas, but did not regard him as a suspect. By October of 2005, when the detective assigned to lead the investigation retired, the investigation had stalled and the case was deemed "cold."

In 2007, another investigator reviewed the case, had a DNA sample collected from Thomas and had that sample compared with a DNA analysis of French's fingernail clippings and the crime scene gloves. The comparison proved negative, however, and again the investigation was suspended.

In January of 2010, the case was assigned to a third detective. He reinterviewed several of French's neighbors and acquaintances, but came upon no new leads and again the case stalled, until May 2011, when the detective was informed that one Shannon Sego, a probationer who had provided information in another of the detective's cases, had information concerning French's killing. Sego, a distant relative of Simpson and a former friend, told the detective, and later testified at trial, that in May 2011, as he was being processed into a detention facility following the revocation of his probation, he encountered Simpson in a hallway. Simpson told him, Sego testified, that he, Simpson, and a friend, Christopher Wright, had broken into French's house

intending to steal a large amount of cash French was rumored to have accumulated through his fence-installation business. Simpson had unexpectedly encountered French, who he and Wright believed was not at home, and had killed him, according to Segó, by hitting him with a lamp.

The detective located Wright, who was then on probation, and Wright confessed to the detective and later testified at trial that in early 2005 he and Simpson, whom Wright had known for two or three years at the time, had agreed to break into French's house to steal things. Wright claimed he did not enter the house, but only helped pry open a back screen door and then served as a look out. When he heard a loud "pop" from inside, he began to run away, but having run a short distance he changed his mind, came back, and saw Simpson emerging from around the side of the house. He testified that he at no time saw Simpson with a weapon.

In August 2011, Simpson and Wright were both charged with murder and burglary. Simpson, who was incarcerated at the time on unrelated matters, was indicted in September of that year. The charges against Wright were eventually reduced in exchange for his testimony. As the case was developing, the Commonwealth took DNA samples from both men in hopes of matching their DNA to DNA found on certain crime scene items. The frame of the torn window screen was analyzed for that purpose, as were a drop of blood found on French's television set and the inside of the belt French had on when his body was found. The window screen yielded no DNA. The blood drop and

the belt did yield DNA, but upon comparison analysis it was determined that that DNA could not have come from Simpson, Wright, or Victor Thomas.

A sheriff's deputy testified that prior to trial, as he was escorting Simpson from a hearing in the courtroom back to the holding facility, Simpson caught sight of Wright in another cell and "went off." He screamed, cursed, and threatened, "I'm going to kill you for ratting me out."

Finally, another of Simpson's former friends, Brittany Franklin, whose family had lived just across the street from French, testified that within a week of French's killing she had heard rumors of Simpson's involvement and so asked him if that was true. He said, "Yes," Franklin testified, but then immediately laughed and said that he was only kidding.

Simpson did not testify, but he mounted a three-pronged defense. He vigorously sought to impeach Sego and Wright with their criminal records and their deals with the Commonwealth. He emphasized the utter lack of any physical evidence linking him to French's residence or the crime, pointing out in particular his being excluded from the latest round of DNA analysis and French's wallet's being associated with Victor Thomas. He also sought to suggest the possibility of an alternate perpetrator. He based this possibility largely upon testimony elicited during cross-examination of James and Diana Osborne. As the Commonwealth established on redirect of James, he and Diana were neighbors and long-time acquaintances of Simpson and his family. James testified that late in the afternoon two days before French's body was found, he overheard a loud argument in French's backyard between French

and his partner in the fencing business, Bobby Bales. Osborne described Bales as a large man with a short temper. The very heated argument was over money, Osborne testified, and continued for at least thirty minutes. Osborne also testified, as his wife confirmed, that two days after French's body was found, he saw a car pull into French's driveway from which emerged Victor Thomas. Thomas proceeded to pound on French's door until Osborne and his wife told him that French had been killed. According to the Osbornes, Thomas immediately got back into his car and sped away. Simpson argued that the police had been lax in failing to give closer scrutiny to Bales and Thomas.

As noted above, Simpson's defense succeeded in large measure when the jury acquitted him of murder. He contends before us that the lack of physical evidence connecting him with the crime and inconsistencies in the testimonies of Sego and Wright entitled him to the dismissal of the first-degree burglary charge. We disagree.

ANALYSIS

I. The Trial Court Did Not Err By Refusing to Dismiss the Burglary Charge.

As Simpson concedes, a directed verdict is required if, but only if, construed favorably to the Commonwealth the evidence would not permit a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty. *Jackson v. Commonwealth*, 392 S.W.3d 907 (Ky. 2013) (citing *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991)). In pertinent part, the first-degree burglary statute provides that

[a] person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he . . .

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Kentucky Revised Statute (KRS) 511.020.¹ In this case, construing the evidence favorably to the Commonwealth, a rational juror could have been convinced beyond a reasonable doubt by accomplice Wright's testimony that Simpson entered French's residence unlawfully with the intent to commit a theft, and that the "pop" Wright heard from within the house was Simpson using a dangerous instrument against French and causing him physical injury. As Simpson acknowledges, and as the trial court noted when it denied Simpson's directed verdict motion, under our rules, "[a] conviction can be sufficiently supported even by the uncorroborated testimony of an accomplice." *Hodge v. Commonwealth*, 17 S.W.3d 824, 841 (Ky. 2000). Wright's testimony, moreover, was not without corroboration, since a rational juror could have believed Simpson's confessions to Segó and Franklin and his angry outburst against Wright in the holding area confirmed Wright's account of the break-in.

To be sure, construed favorably to Simpson, the lack of corroboratory physical evidence, Wright's and Segó's account of entry through the back door with no mention of the seemingly forced open bedroom window, and Segó's

¹ The instructions the trial court gave the jury followed closely the statutory terms, although in (b) and (c) the name "Eugene French" was substituted for the phrase "any person who is not a participant in the crime."

claim that Simpson admitted hitting French with a lamp while Wright recalled no such weapon are all details that might give a jury pause and that apparently did give the jury pause with respect to the murder charge. The directed verdict standard, however, is not what the evidence looks like construed favorably to the defendant, but what it looks like construed favorably to the Commonwealth, leaving questions of evidentiary weight and witness credibility to the jury. *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005). Under that standard, the trial court did not err by deeming the evidence of first-degree burglary sufficient for jury consideration.

II. Simpson Was Not Denied a Speedy Trial.

Simpson next contends that the trial court's Judgment should be vacated and the charges against him dismissed because he was denied his statutory and constitutional rights to a speedy trial. Again, we disagree.

As noted above, an arrest citation charging Simpson with burglary, murder, and tampering was filed in the Jefferson District Court in mid-August 2011. Simpson was then an inmate at the Eastern Kentucky Correctional Complex (EKCC), where, in 2009, he began serving consecutive five-year sentences for a 2006 controlled substance conviction and a 2009 second-degree-assault conviction.² Because the crimes regarding Eugene French were committed in 2005, while Simpson was still a juvenile, he was initially brought before the district court, which conducted a transfer hearing and then waived

² Apparently Simpson was probated following the 2006 conviction, and his probation was revoked in conjunction with the 2009 conviction.

the matter to the grand jury. The grand jury indicted Simpson on September 26, 2011. Four days later, on September 30, Simpson, invoking the federal and the Kentucky Constitutions and KRS 500.110, gave notice of his motion for a “fast and speedy trial.” That motion was formally entered at Simpson’s arraignment on October 3, 2011. When the matter was addressed during a December 16, 2011 status hearing, the Commonwealth indicated that it had no objection to a trial within the 180-day period called for under KRS 500.110, and trial was scheduled for March 26, 2012, three days before March 29—the 180th day following Simpson’s September 30, 2011 assertion of his statutory right.

At a pre-trial conference on March 21, 2012, the Commonwealth sought a continuance. It explained to the court that it hoped to compare DNA recovered from items collected at the scene of the crime with Simpson’s DNA, but that delays both in processing the crime-scene evidence and in collecting a DNA sample from Simpson made it impossible for the comparison to be completed in time for the March 26 trial. Emphasizing that the trial date had long been set, the trial court initially decided against postponing the trial, but upon a renewal of the Commonwealth’s motion on the day trial was to commence, the trial court reconsidered. The court faulted itself for initially denying the Commonwealth’s motion without a finding that the Commonwealth had been lax in some way, and granted a continuance of slightly less than three months until June 18, 2012. By then, as noted, the lab results were back and showed that Simpson’s DNA did not match the crime-scene DNA

evidence. Simpson contends that an unjustified continuance beyond the “drop dead” March 29, 2012 statutory deadline violated his KRS 500.110 right to a speedy trial and that the trial some ten months after his mid-August 2011 arrest violated his speedy-trial rights under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. Because Simpson has not properly invoked KRS 500.110 and because his trial was not unconstitutionally delayed, there is no ground for the relief he seeks.

A. Simpson Has Not Properly Invoked KRS 500.110.

Beginning with Simpson’s statutory claim, KRS 500.110 provides in its entirety as follows:

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this state any untried indictment, information or complaint *on the basis of which a detainer has been lodged against the prisoner*, he shall be brought to trial within one hundred and eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

KRS 500.110 (emphasis added). Simpson maintains that because he was imprisoned at EKCC when the current charges were brought against him, he was entitled to the statute’s 180-day post-notice trial limitation.

As the emphasized portion of the statute indicates however, KRS 500.110 is not a general speedy-trial provision; it is rather a provision meant to protect

incarcerated persons against the detrimental effects of detainers. As this Court explained in *Rosen v. Watson*, 103 S.W.3d 25 (Ky. 2003), “[t]he purpose of [KRS 500.110] is not to ensure the speedy disposition of every charge . . . Its purpose is to provide for the speedy disposition only of such charges as have actually resulted in a detainer being lodged.” 103 S.W.3d at 29 (quoting *Huddleston v. Jennings*, 723 S.W.2d 381, 383 (Ky. App. 1986)). Accordingly, in *Donahoo v. Dortch*, 128 S.W.3d 491, 494 (Ky. 2004), we held that a defendant who “has failed to prove that a detainer was lodged against him . . . has not demonstrated his entitlement to the [KRS 500.110] relief he seeks.” As in *Donahoo*, the record now before us contains no evidence that Simpson was ever subject to a detainer, and Simpson has not shown that he was. KRS 500.110, therefore, does not apply. Where, as here, a speedy trial demand inaptly invokes KRS 500.110, the demand “is treated as an assertion of the right to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution and Section 11 of the Constitution of Kentucky.” *Gabow v. Commonwealth*, 34 S.W.3d 63, 69 (Ky. 2000). We turn, therefore, to Simpson’s constitutional claims.

B. Simpson’s Constitutional Right to a Speedy Trial Was Not Violated.

We begin with a word about our standard of review. Ordinarily, of course, we review a trial court’s continuance rulings under the abuse of discretion standard. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006) (citing RCr 9.04 and *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991)). But as with alleged speedy-trial violations in other contexts, we review the trial

court's grant of a continuance in the face of a speedy-trial objection under a dual standard. We accord deference to the trial court's factual findings, disturbing them only for clear error, *see Doggett v. United States*, 505 U.S. 647, 653 (1992) (declining, in the absence of any showing of error, to "revisit the facts" underlying the trial court's speedy-trial ruling), but, as our cases demonstrate, we review the trial court's application of constitutional standards to those facts *de novo*. *See, e.g., Smith v. Commonwealth*, 361 S.W.3d 908, 914 (Ky. 2012); *Goncalves v. Commonwealth*, 404 S.W.3d 180 (Ky. 2013); *Dunaway v. Commonwealth*, 60 S.W.3d 563 (Ky. 2001).

Under both the Kentucky and the federal constitutional provisions, to determine whether a criminal defendant has been deprived of his right to a speedy trial "we consider four factors: (1) the length of delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant." *Smith*, 361 S.W.3d at 914 (citing *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972), and *Bratcher v. Commonwealth*, 151 S.W.3d 332, 334 (Ky. 2004)). These are related factors no one of which alone is either necessary or sufficient to establish a constitutional violation. They must, rather, be considered together along with any other relevant circumstances and in light of the fact that the right to be protected is a fundamental one. *Id.* Here, although Simpson promptly asserted his right to a speedy trial at arraignment and reasserted it in opposing the Commonwealth's motion for a continuance, the other factors, particularly the first and the last weigh decisively against his claim.

With respect to the first *Barker* factor, the length of the delay, we note that for constitutional purposes, the speedy-trial clock begins to run at the earlier of the defendant's arrest or his indictment and continues until the trial begins. *Dunaway*, 60 S.W.3d at 569 (citing *Dillingham v. United States*, 423 U.S. 64 (1975)). In this case, there was approximately ten months between Simpson's arrest in mid-August 2011 and the beginning of his trial on June 18, 2012. Of course, criminal charges are not prosecuted overnight. As the Supreme Court has observed, a defendant has not been denied a "speedy" trial if the government "has, in fact, prosecuted his case with customary promptness." *Doggett*, 505 U.S. at 652. Customary promptness will depend to some extent on the seriousness of the charges and the complexity of the evidence, but absent substantial complications, courts have found post-accusation delay "presumptively prejudicial," for speedy-trial purposes, "as it approaches one year." *Doggett*, 505 U.S. at 652 n.1. "Presumptive prejudice" does not entitle the defendant to relief, but it does require that the post-accusation delay be further analyzed under *Barker* to determine whether relief is called for.

In *Dunaway*, 60 S.W.3d at 569, a robbery case in which there were two co-indictees, this Court held that a thirteen-and-a-half month post-accusation delay was "presumptively prejudicial" so as to require a full *Barker* analysis. On the other hand, in *Gerlaugh v. Commonwealth*, 156 S.W.3d 747 (Ky. 2005), a single-defendant robbery case, and in *Brown v. Commonwealth*, 934 S.W.2d 242 (Ky. 1996), a case in which a single defendant was charged with two

murders and two assaults, the Court held that nine and ten-month post-accusation delays, respectively, were not “presumptively prejudicial,” and so, “absent some other claim of prejudice,” *Gerlaugh*, 156 S.W.3d at 750, did not necessitate further analysis under *Barker*.

The murder, burglary, and tampering charges against Simpson are comparable in seriousness and complexity to the charges in *Gerlaugh* and *Brown*, and thus any presumption of prejudice arising from the ten-month post-accusation delay in this case must be deemed marginal, at most. That faint shadow of presumptive prejudice vanishes, moreover, in the light of *Barker*’s other factors. Here the Commonwealth had a legitimate interest in pursuing what was potentially corroborative DNA evidence, and there is not any suggestion that the prosecution prolonged the delay so as to impede Simpson’s defense. Additionally Simpson has utterly failed to identify any way in which the DNA continuance either interfered with his defense (the negative DNA comparison ultimately aided Simpson’s defense) or subjected him to pretrial oppression and anxiety given that he was already incarcerated pursuant to his prior convictions. In light of all relevant factors, it is apparent that the DNA continuance, even were it necessitated to some degree, as Simpson claims, by the Commonwealth’s failure to develop the DNA evidence as efficiently as possible, did not deprive Simpson of a constitutionally expeditious trial.

This result is not at odds, as Simpson would have it, with our discussion in *Smith*, 361 S.W.3d at 915-16, weighing against the Commonwealth for

Barker purposes a nine-month continuance for DNA comparison analysis where, only one month prior to the scheduled trial, the Commonwealth belatedly moved to take a DNA sample from a defendant who had been in custody for over eight months. Although ultimately not grounds for speedy-trial relief, the Commonwealth's negligence made it solely responsible for the nine-month delay and might have justified relief had the defendant not, in effect, waived his speedy-trial claim by absconding from pre-trial release and delaying trial even beyond the DNA continuance.

Here, by contrast, the Commonwealth moved to take a DNA sample from Simpson on the day Simpson was arraigned, October 3, 2011, nearly six months prior to the day Simpson was initially scheduled to be tried. Owing to scheduling problems for which Simpson was in part responsible—Simpson's counsel moved to be present for the sampling, and after his arraignment Simpson moved to be returned from the Jefferson County Jail to EKCC, both factors that limited Simpson's availability for sampling—the sample was not collected until January 27, 2012. Two weeks later, the Commonwealth initiated testing by submitting the crime scene evidence to a regional lab for DNA screening. On March 16, 2012, ten days before trial was to commence, the Commonwealth learned from the screening lab that DNA was present on two of the crime scene items. At that point the Commonwealth moved for a continuance to allow for the submission of the positive crime scene items along with Simpson's DNA sample to the central forensic laboratory in Frankfort for DNA comparison.

In opposing the motion to continue, Simpson argued, as he also argues before us, that the Commonwealth could have initiated the testing months before it did had it made use of a DNA sample collected from him in 2009 in conjunction with his incarceration at that time. The Commonwealth explained to the trial court, however, that in addition to requiring that the crime scene evidence be accompanied, even at the screening stage, by the sample with which it is to be compared, laboratory protocol requires a fresh sample. Thus, the lab would not accept the sample Simpson submitted in 2009. Simpson also argued that the Commonwealth could and should have hastened the process by collecting the sample from him on December 16, 2011, when he appeared at a pre-trial hearing—the very hearing at which his attorney’s motion to be present for sampling was addressed and granted. The trial court rejected those arguments and expressly found that the Commonwealth had not been negligent in its pursuit of the DNA evidence.

On the record before us, reflecting what can reasonably be understood as ordinary institutional delays, that finding cannot be said to be clearly erroneous. Thus this case is unlike *Smith* in at least two important respects: the delay in coming to trial cannot be attributed to the Commonwealth’s lack of diligence and, also unlike *Smith*, where the nine-month DNA continuance pushed the trial date to some eighteen months post-accusation and thus well beyond *Barker’s* “presumptive prejudice” threshold, the two-and-a-half month postponement here did not prevent Simpson’s being tried in well under a year, a speedy trial under *Barker’s* standard absent some compelling showing of

governmental bad faith or actual prejudice to the defense. Neither of those factors is remotely suggested here, much less compellingly shown. *Smith*, in other words, does not alter our conclusion that Simpson received a speedy trial.

III. The Trial Court Properly Refused to Admonish the Jury at Sentencing to Disregard Acquitted Conduct.

Finally, Simpson contends that the sentencing portion of his trial was rendered unfair when the trial court refused to admonish the jury not to consider the guilt-phase evidence of murder in its penalty-phase deliberations. As noted, the jury acquitted Simpson of murder, but convicted him of burglary. Simpson maintains that, unadmonished, the jury might have allayed lingering doubts about its murder verdict by punishing him more severely for the burglary than it otherwise would have done.

As the Commonwealth points out, however, our standard felony trial procedure contemplates a “bifurcated trial where the guilt phase and punishment phase follow in close proximity of time and are both heard by the same jury.” *Boone v. Commonwealth*, 821 S.W.2d 813, 814 (Ky. 1992) (discussing KRS 532.055). Under this system, this Court has held, “[w]hen the same jury sits in both parts of a bifurcated proceeding, all evidence introduced in the guilt phase of the trial is admissible in the sentencing phase,” *Caldwell v. Commonwealth*, 133 S.W.3d 445, 454 (Ky. 2004), including evidence of acquitted conduct. *Caldwell*, 133 S.W.3d at 453. This is so, the Court has explained, because an acquittal is “not tantamount to an adjudication that in fact the defendant had not [engaged in the acquitted conduct. Rather] [t]he

adjudicated fact was merely that the evidence . . . was not sufficient to support a finding beyond a reasonable doubt that he had.” *Trowel v. Commonwealth*, 550 S.W.2d 530, 532 (Ky. 1977).

These cases are consistent with the United States Supreme Court’s holding that, because an “acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt[,] . . . a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.” *United States v. Watts*, 519 U.S. 148, 155-56 (1997) (rejecting contention that a sentencing court’s consideration of acquitted conduct violates the Fifth Amendment’s Double Jeopardy Clause) (citations and internal quotation marks omitted). Simpson’s assertions to the contrary notwithstanding, the evidence of murder in this case—testimony by an accomplice placing Simpson at the scene, and testimony by two witnesses that Simpson confessed to the killing—was sufficient to allow submission of that charge to the jury, and thus the trial court did not deny Simpson due process when it correctly held that that evidence was also properly before that same jury when it came to consider Simpson’s sentence for burglary.³

³ Simpson also asserts, without argument or reference to authority, that the trial court’s refusal to admonish the jury somehow violated his right to present a defense. The trial court’s correct ruling, however, did no such thing.

CONCLUSION

In sum, Simpson was timely and fairly tried, convicted, and sentenced. The ten-month delay between Simpson's arrest and his trial has not been shown to have implicated the detainer statute, and it did not, under constitutional standards, deny Simpson a speedy trial. The testimony by Simpson's former friends implicating him in the burglary adequately supports the jury's verdict. And Simpson's sentencing was not rendered unfair when the jury that found him guilty of burglary was allowed to recommend a sentence for that crime without having been admonished not to consider evidence of the acquitted murder charge. Accordingly, we hereby affirm the Judgment of the Jefferson Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Daniel T. Goyette
Executive Director/Chief Public Defender

Cicely Jaracz Lambert
Assistant Appellate Defender

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David Bryan Abner
Assistant Attorney General