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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000021-MR

CHARLES DWIGHT WATTS — APPELLANT

V.

ON APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
NOS. 09-CR-00041 & 09-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Following a five-day trial, a jury convicted Charles Dwight Watts (Watts) of two counts of murder and one count of first-degree robbery. Watts appeals as a matter of right from the resulting judgment and sentence of fifty-years' imprisonment. Ky. Const. § 110(2)(b). On appeal, Watts argues that the trial court erred when it: (1) instructed the jury; (2) denied his motion for a directed verdict on the first-degree robbery charge; (3) excluded evidence Watts offered to present to the jury; (4) violated his right to a speedy trial; and (5) admitted evidence of prior bad acts. Having reviewed the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On April 18, 2009, Steven Davidson, his son, and his nephew stopped at Kelly Johnson's house to visit. They discovered Johnson's body lying on the floor. The medical examiner determined that Johnson had been shot in the head at close range. Kentucky State Police Detective Clayton Stamper

(Detective Stamper), who investigated Johnson's murder, testified that one of Johnson's pants pockets was partially inside out. He also found an empty key ring lying on the outside of that pocket. Johnson's daughter and one of his neighbors told the police that Johnson always carried a large amount of cash in his pants pocket and Johnson's daughter stated that a key to one of Johnson's all terrain vehicles (ATV) was missing. Based on this information, Detective Stamper determined that Johnson had been robbed.

During the course of his investigation, Detective Stamper learned that a group of people (the Couch group) had been riding ATVs and dirt bikes in the vicinity of Johnson's house the afternoon Johnson was murdered. Members of that group stated that they had seen Watts at Johnson's house, that Watts had been carrying a gun when they approached, and that Johnson had acted strangely. One of the members of the group testified that she heard a gunshot shortly after the group rode away from Johnson's house.

Three days later, on April 21, 2009, Vickie Muncy (Vickie) heard dogs barking sometime after midnight. She looked out the window of her house and saw a dark SUV pulling away from her son's nearby trailer. Vickie called her son, Chad Muncy (Muncy), to see if he was alright but got no answer. Later that morning, Vickie again called Muncy and, when she got no answer, she went to his trailer to wake him up so he would not be late for a court date. Vickie discovered Muncy's body lying on the floor of the trailer. The medical examiner determined that Muncy had died from blunt force trauma to the head and multiple stab wounds, the most serious of which was a ten inch wound

across the neck. The medical examiner also noted that Muncy had multiple blunt force abrasions on his arms and legs.

Later that day, one of Muncy's neighbors, Misty Simpson (Simpson), received a call on her cell phone. The caller ID and ringtone identified the caller as Muncy. When Simpson asked who was calling, the caller said, "My name is Dwight." Muncy's brother, who was with Simpson, took the phone and said, "Dwight, is that you?" After a long pause the caller said that he was "losing signal" and disconnected. Neither Simpson nor Muncy's brother could positively identify the caller as Watts.

The day of Muncy's murder, the police interviewed Watts in connection with that crime and Johnson's murder and robbery. During the interview, Watts first denied being at Johnson's house the day of the murder. However, when advised that witnesses had seen him there, he admitted that he had visited Johnson that day. Watts stated that Johnson was fine when he left, and he explained that he initially lied because he feared the police would suspect him. As to Muncy's murder, Watts stated that he had not seen Muncy the night/morning of the murder. He admitted calling Simpson; however, he said he used his cell phone to do so, not Muncy's. When police examined Watts's phone they determined that the call log had been deleted, and Watts could not explain why Muncy's phone number appeared in the caller ID on Simpson's phone.

While Watts was being interviewed, the police searched Watts's jeep and found a folding knife, as well as blood on and behind the steering wheel, on the

doorframe, on the driver's side seat belt, and on a leaf on the floor board. The blood from the steering wheel and doorframe matched Muncy's, but the other samples did not contain any human DNA. The blade on the folding knife tested positive for human blood, but the sample was too small to determine whose blood it was. Based on the evidence uncovered during the police investigation, the Commonwealth charged Watts with murdering and robbing Johnson and with murdering Muncy.

During trial, the Commonwealth presented the preceding evidence as well as testimony from Irma Jean Muncy (Irma Jean), Muncy's grandmother, that Watts had told her details regarding the crimes. According to Irma Jean, Watts stopped to visit her sometime shortly after Muncy's murder and told her how Johnson had been killed, stating that this is how "the man" did it and that Johnson trembled, jerked a few times, and made a noise that sounded like a "burp" just before he died. Additionally, Irma Jean testified that Watts described to her how the killer had robbed Johnson.

According to Irma Jean, Watts also told her details about Muncy's murder, describing what Muncy was wearing, how he "put up a fight," and how his throat had been slashed. Watts explained to Irma Jean that he knew these facts because the police had forced him to look at crime scene photos. The detective who interviewed Watts testified that they had not shown Watts any photographs during the interview because the photographs had not been developed. We set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

The issues presented by Watts have different standards of review; therefore, we set forth the appropriate standard with the analysis of each issue.

III. ANALYSIS.

A. Jury Instructions.

Watts raises three issues with regard to the court's jury instructions. Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). We address each of the issues raised in turn.

1. Accomplice to Murder Instruction.

Following the close of evidence, the Commonwealth requested instructions on both murder and "murder-accomplice" with regard to Johnson's murder. Watts objected arguing that he had only been indicted for murder, not as an accomplice to murder, and that waiting until the end of the trial to insert a new theory of the case was unfairly prejudicial. In support of its request for the accomplice instruction, the Commonwealth pointed to testimony from a member of the Couch group that he believed some unknown person was in Johnson's house while the group was there. The Commonwealth also argued that the jury could infer another person was present when Johnson was murdered from Irma Jean's testimony that Watts referred to "the man" doing the killing and committing the robbery. The court held that sufficient evidence had been introduced into the record to support an

instruction on accomplice to murder; however, the court did not directly address Watts's argument regarding lack of notice.

During deliberations, the jury sent out a note asking whether it was acceptable for some jurors to vote that Watts was guilty of murder while other jurors voted that Watts was guilty of being an accomplice to murder. The court advised the jury that any vote had to be unanimous. Watts argues that the note from the jury indicated that they were divided and their subsequent unanimous verdict of murder nine minutes later is "almost impossible to imagine."

According to Watts, by providing an instruction on accomplice to murder, the trial court erroneously permitted the Commonwealth to insert a charge that was not part of the indictment, thus constructively amending the indictment. As noted by Watts, this Court held in *Wohlbrecht v. Commonwealth,* 955 S.W.2d 533, 537 (Ky. 1997) that "a defendant has the right to rely on the fact that he would only have to rebut evidence of which he was given notice." In *Wohlbrecht,* three people were charged with murdering and/or conspiring to murder Robert Wohlbrecht. The original indictment indicated that one of the three had actually shot and killed Wohlbrecht. During trial, the Commonwealth moved to amend the indictment to reflect that someone other than the three defendants may have shot and killed Wohlbrecht. The court granted that motion. *Id.* at 536-37. On appeal, this Court held that the trial court erred by granting the motion to amend the indictment because the 11th

hour change "placed the defense in the position of beginning its case totally unprepared on the issue raised by the amended indictment." *Id.* at 537.

While *Wohlbrecht* is instructive, it is not dispositive. Unlike the defendants in *Wohlbrecht*, Watts could not have been completely surprised by the accomplice theory. As Watts admits in his brief, his defense was based, in part, on the theory that the unknown person in Johnson's house killed Johnson after Watts left. Furthermore, as we held in *Commonwealth v. Combs*, 316 S.W.3d 877, 880 (Ky. 2010), an indictment may be amended at any time before verdict if substantial rights of the defendant are not prejudiced; amending an indictment to include a charge of complicity does not constitute charging a new or different offense; and if the evidence will support a conviction of acting either as a principal or an accomplice, instruction in the alternative is appropriate. *Id.* 880-81. Thus, even if the trial court's instruction on accomplice to murder amounted to a constructive amendment to the indictment, there was no error.

2. Failure to Instruct on Whether Murder Sentences Should Run Consecutively or Concurrently.

The jury recommended two twenty-year sentences, one for Johnson's murder and one for Muncy's murder. The jury instructions did not ask the jury whether those sentences should be run concurrently or consecutively, and neither party asked for such an instruction. The Commonwealth concedes that failure to give such an instruction was error. However, the Commonwealth argues that this issue was not preserved. We agree.

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Kentucky Rule of Criminal Procedure (RCr) 9.54(2).

Generally, unpreserved errors may be analyzed under the palpable error standard of review. However, as we noted in *Martin v. Commonwealth*, 409 S.W.3d 340, 345 (Ky. 2013), the parties bear the burden of making "their instructional preferences known to the trial judge." If a party fails to make those preferences known, "RCr 9.54(2) bars palpable error review for unpreserved claims that the trial court erred in the giving or the failure to give a specific instruction." Because Watts did not request an instruction regarding how the two murder sentences should run, he cannot now complain that the instruction was not given.

Furthermore, even if the error was subject to palpable review, we have held that the failure to give an instruction regarding how sentences should run is not palpable because it does not deprive a defendant "of any constitutional right to a fair trial; it [does] not affect any substantive right and it [does] not result in a manifest injustice." *Cobb v. Commonwealth*, 105 S.W.3d 455, 457 (Ky. 2003). This is particularly true in this case because the trial court indicated that it would have run the murder sentences consecutively regardless of what recommendation the jury made.

3. Failure to Properly Instruct the Jury Regarding How the Johnson Murder Sentence and the Robbery Sentence Should Run.

The trial court instructed the jury that it could run the sentences for Johnson's murder and robbery concurrently or consecutively. The jury sentenced Watts to ten years for the Johnson robbery conviction and, as noted above, to twenty years for the Johnson murder conviction. The jury recommended that these two sentences run consecutively. Watts argues that the "trial court failed to give instructions that the jury could recommend the sentences be served partially concurrently." However, he admits that this Court has never held that jury instructions must contain such an option, citing to a footnote in *Davis v. Commonwealth,* 365 S.W.3d 920 (Ky. 2012). Watts now invites us to mandate that instructions contain such an option. The Commonwealth argues that this issue was not preserved for review and, pursuant to *Martin,* should not be given any review, palpable or otherwise.

For the reasons set forth in *Martin,* as noted in Section 2 above, we agree with the Commonwealth. Therefore, we decline to review this alleged error.

B. First-Degree Robbery.

Watts contends that the trial court erred by denying his motion for a directed verdict as to the charge of first-degree robbery. Specifically, he argues that the Commonwealth failed to present any evidence to support such a conviction because the Commonwealth never recovered any of the allegedly stolen property – an unspecified amount of cash and an ATV key.

In order to overcome a motion for a directed verdict, the Commonwealth must present "more than a mere scintilla of evidence." *Commonwealth v.*

Benham, 816 S.W.2d 186, 187-88 (Ky. 1991). When ruling on a directed verdict motion, "the trial court must assume that the evidence for the Commonwealth is true," and must draw all fair and reasonable inferences in the Commonwealth's favor. On appeal, we will reverse a trial court's denial of a directed verdict only if, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." *Id.* at 187.

KRS 515.020(1)(b) provides that:

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> . . . .
>
> (b) Is armed with a deadly weapon[.]

Watts argues that he presented persuasive proof that neither the alleged cash nor the ATV key was missing. Specifically, Watts notes that there was no direct testimony showing that Johnson had cash in his pocket on the day he was killed. Additionally, in an effort to prove that money had not been taken from Johnson, Watts points to a photograph that the police took of a shoeshine box found in Johnson's house that contained "a large wad of money." As to the missing ATV key, Watts argues that he presented evidence that the key was returned to members of Johnson's family by the funeral home along with other personal property collected from Johnson. We note that Johnson's daughter admitted that she received a key from the funeral director; however, she testified that another key remained missing.

As to whether the money had been taken from Johnson, the Commonwealth points to: (1) the testimony of Johnson's daughter that Johnson kept large sums of money in his pocket; (2) the testimony from Johnson's neighbor that Johnson usually carried $2,000 in cash in his pocket and that he sometimes pulled it out and showed it to people; and (3) the testimony of Detective Stamper that, when Johnson's body was found, the lining of his pocket was partially inside-out.

As to whether the ATV key had been taken from Johnson, the Commonwealth points to: (1) the testimony of Johnson's daughter that there were two sets of keys for each ATV and she believed a key was missing; (2) Detective Stamper's testimony that he noticed only the ring part of Johnson's keychain, with no keys attached, was lying on Johnson's pocket; and (3) Irma Jean's testimony that Watts told her how "the man" killed Johnson and how "the man" removed money from Johnson's pocket and took an ATV key.

We agree with the trial court that the evidence of robbery presented at trial was not overwhelming. However, we also agree with the trial court's conclusion that there was sufficient evidence to submit this issue to the jury. Accordingly, we conclude that the trial court did not err in denying Watts's motion for a directed verdict as to the first-degree robbery charge.

C. Exclusion of Evidence/Right to Present a Defense.

Watts argues that the trial court erred by refusing to admit three pieces of evidence, thus depriving him of his right to present a defense. According to

Watts, each piece of evidence was essential to show that alternative perpetrators could have committed the crimes.

The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) and *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). With this standard in mind, we address each piece of contested evidence in turn.

1. Gun Shot Demonstration.

Watts's defense turned, in large part, on a theory that others had been responsible for the crimes. Watts attempted to blame Johnson's murder and robbery on Johnson's neighbors, the Burtons. In support of this theory, Watts presented evidence that Johnson had kept valuable items in a Crown Royal bag. The police did not find any Crown Royal bag in Johnson's house, but they did find one in the Burtons' house. Additionally, Watts presented testimony that, near the time of Johnson's murder, the Burtons were anxious to recover a gun that a family member had lent to a friend. Finally, Watts presented evidence that the police saw blood at the Burton house, but that they had not collected or tested any samples.

During trial, Sharon Burton Begley (Begley) testified that she heard a muffled gunshot the afternoon Johnson was murdered. To refute that testimony and to establish that Begley was attempting to "cover" for a family

member, Watts asked Begley if she had heard a gunshot on July 5, 2012. The Commonwealth objected. At a bench conference, Watts's attorney stated that his investigator fired a gun that day near Johnson's house just before the two visited Begley. The trial court ultimately excluded the proffered evidence noting that it would be impossible for Watts to duplicate the conditions on the afternoon of Johnson's murder.

We agree with Watts that this evidence may have been relevant. However, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Kentucky Rule of Evidence (KRE) 403. The trial court's conclusion that the experimental gunshot could not have duplicated the shot that Begley testified she heard on the afternoon of Johnson's murder was not clearly erroneous or arbitrary. Furthermore, because of that defect, any probative value the evidence may have had was outweighed by the likelihood it would have confused the issues and/or misled the jury. Therefore, the trial court did not abuse its discretion by excluding this evidence.

2. Exclusion of Photographs of Jennifer Muncy's Jeep.

At trial, Watts attempted to inculpate Muncy's sister, Jennifer Muncy (Jennifer) by introducing evidence that Muncy and Jennifer fought, sometimes with their fists, and that she had threatened to burn Muncy's mobile home a year before he died.

As noted above, Vickie, Muncy's mother, testified that she had seen a dark SUV leaving Muncy's trailer the night of his murder. The Commonwealth also presented evidence from Jody Roberts (Roberts), who was driving by Muncy's trailer that night, that he had seen a dark SUV at Muncy's house. At trial, Jennifer testified that she had a "bright blue" Jeep Cherokee during that time period. In an effort to show that the SUV Vickie and Roberts saw was Jennifer's, Watts's investigator testified that the color of Jennifer's jeep appeared dark when in the shade and at night. During his testimony, the investigator referred to photographs he had taken under various lighting conditions, and Watts displayed those photographs for the jury during the investigator's testimony. The Commonwealth objected to the testimony and to the introduction of the photographs arguing that the conditions under which the investigator observed and photographed the jeep were not the same as at the time of Muncy's murder. The trial court overruled the Commonwealth's objection to the investigator's testimony. However, the court did not admit the photographs into evidence.

On appeal, Watts argues that the photographs were crucial to his defense theory that Jennifer could have murdered Muncy. For the reasons set forth above regarding exclusion of the gunshot testimony, we discern no error in the trial court's exclusion of the photographs from introduction into evidence. Furthermore, we note that, even if the trial court's ruling was erroneous, it was harmless error. Watts displayed the photographs to the jury. His investigator testified to what the photographs revealed and to what he

observed when taking the photographs. Thus, while Watts was not permitted to place the photographs in evidence, he was able to put before the jury evidence that Jennifer's jeep appeared dark under certain lighting conditions.

3. Caller ID "Spoofing" Demonstration.

As noted above, the Commonwealth introduced evidence that Simpson received a telephone call after Muncy's murder. Simpson's cell phone identified the caller as Muncy and, when she answered, the caller said that he was "Dwight." In an attempt to show that someone else had murdered Muncy and was attempting to frame him, Watts asked his investigator to demonstrate how a cell phone can be spoofed. The Commonwealth objected to the demonstration, an objection the trial court sustained. In doing so, the trial court noted that Muncy's cell phone was never recovered and there was no evidence regarding what phone was used to make the call to Simpson. Therefore, Watts could not re-create the conditions that existed on the date in question. However, the trial court permitted the investigator to explain that applications are available that permit a caller to program what number he or she wants to appear as the caller ID on the recipient's phone. Watts now argues that the demonstration of spoofing was crucial to this defense. We disagree.

The trial court may exclude evidence that is needlessly cumulative. KRE 403. The demonstration would have been needlessly cumulative of the investigator's testimony about how the technology works. Furthermore, the trial court correctly concluded that, absent the cell phone that was used to

make the call to Simpson, the circumstances could not be re-created. Therefore, the trial court did not abuse its discretion in excluding the demonstration of spoofing.

D. Right to a Speedy Trial.

Johnson was robbed and murdered on April 18, 2009. Muncy was murdered on April 21, 2009. The grand jury indicted Watts for both murders and for robbing Johnson on September 2, 2009. The trial did not begin until November 26, 2012, more than three years after the crimes were committed and Watts's indictment. Watts argues that this delay deprived him of his right to a speedy trial.

The factors to be considered in determining whether a defendant's right to a speedy trial have been violated are: (1) the length of the delay; (2) whether and how the defendant asserted his speedy trial right; (3) the reasons for the delay; and (4) the amount of prejudice suffered by the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). We analyze each element in turn.

1. Length of Delay.

Watts argues that a delay of three years is presumptively prejudicial and that he also suffered actual prejudice by way of an oppressively lengthy incarceration which caused him undue "anxiety and concern." Watts cites to two cases which state that specific periods of delay are presumptively prejudicial. In *Cain v. Smith*, 686 F.2d 374, 381-82 (6th Cir. 1982), the United States Court of Appeals held that eleven and one-half months was presumptively prejudicial delay in a garden variety robbery case. *Cain* is easily

distinguishable as the case herein was not a garden variety case. In *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004), this Court held that eighteen months was presumptively prejudicial in a murder case. Certainly, a delay of more than three years may also be presumptively prejudicial. However, to show that he suffered actual prejudice, *i.e.* undue "anxiety and concern," Watts was required to offer more than "[c]onclusory claims about the trauma of incarceration." *Id.* at 345. Watts has offered no such proof. Therefore, Watts has established presumptive prejudice, which induces us to review the other *Barker* factors; however, he has not shown actual prejudice. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 200 (Ky. 2013), *cert. denied,* 134 S. Ct. 705 (U.S. 2013).

2. Request for Speedy Trial.

Watts first raised this issue in a motion to dismiss filed on October 22, 2012, four weeks before the trial took place. The Commonwealth argues that Watts did not properly raise the issue because his motion to dismiss does not substitute for a motion for a speedy trial. We need not address that argument because Watts tacitly admits that this factor weighs in the Commonwealth's favor. We agree. Watts cannot let his case "languish" on the docket for three years and, on the eve of trial, benefit from failing to complain earlier. However, whether and when a defendant requested a speedy trial is but one factor to be considered, so we must consider the remaining two *Barker* factors. *Barker,* 407 U.S. at 528.

3. The Reasons for the Delay.

> When balancing the reasons for delay to determine if a speedy trial violation has occurred, a reviewing court must first identify the type of delay in order to assign the appropriate weight. A deliberate attempt by the Commonwealth to cause delay in order to hamper the defense will be accorded the heaviest weight in this analysis. Neutral reasons for delay, such as negligence or an overcrowded docket, will be weighed less heavily against the Commonwealth, but will nonetheless tip in the defendant's favor. Finally, a valid reason for delay, such as a missing witness, will not be weighed against the Commonwealth, as valid reasons for delay are appropriately justified.

Goncalves v. Commonwealth, 404 S.W.3d 180, 200 (Ky. 2013), *cert. denied,* 134 S. Ct. 705 (U.S. 2013) (internal citations omitted).

Watts points to the following specific delays: (1) the Commonwealth did not timely obtain DNA test results; (2) the Commonwealth moved to continue a July 2011 trial date because the medical examiner was going to be on vacation and unavailable; (3) Watts moved for a continuance of a November 2011 trial date because he was notified of the "completely new" testimony from Irma Jean; and (4) a July 2012 trial date had to be re-scheduled because the trial judge recused. Watts also notes that there were several motions to consolidate and/or set aside consolidation of the Johnson and Muncy cases and that he filed a motion to compel the Commonwealth to conduct additional forensic testing. However, Watts does not state how those motions acted to delay the trial, if at all.

The Commonwealth argues that it cannot be held accountable for the delay caused by the judge's recusal. Furthermore, it notes that Watts agreed to

the delay in July 2011 because he needed testimony from the medical examiner as much as the Commonwealth did. Finally, the Commonwealth notes that it was as surprised as Watts when Irma Jean came forward with her "new" testimony.

Weighing the preceding, we cannot lay the blame for the delay in bringing this matter to trial entirely at the feet of the Commonwealth. Both parties are equally at fault, if fault there be, for the delay. Therefore, this factor does not weigh in favor of either Watts or the Commonwealth.

4. The Amount of Prejudice Suffered by Watts.

In addition to the anxiety and concern related to incarceration, which we addressed above, Watts argues that: (1) because he was incarcerated, he was unable to adequately prepare a defense; (2) witnesses who previously exculpated him changed their stories; and (3) the lapse of time "solidified the idea that [Watts] was guilty, thus impacting the evidence the jury was able to consider."

As to Watts's ability to prepare for trial, we note, as did the Commonwealth, that Watts engaged the services of his own investigator who performed adequately, if not admirably, in assisting with the preparation of Watts's case. Furthermore, we note that Watts has not specified what evidence or witnesses he would have been able to uncover had he been free while awaiting trial. Finally, we note that Watts has not specified what witnesses changed their stories, how their stories changed, or how any change in witness testimony prejudiced him.

Balancing the *Barker* factors, we agree with the Commonwealth that the trial court did not violate Watts's right to a speedy trial when it denied his motion to dismiss.

E. Improper 404(b) Evidence.

During trial, the Commonwealth played portions of Watts's recorded interviews with the police. In those interviews Watts discussed the fact that he was on probation; that he underwent regular urine testing; and that his fingerprints were on file from a prior arrest. According to Watts, these statements impermissibly placed evidence of prior crimes before the jury.

Watts admits that counsel had the recordings before they were played and that counsel and the Commonwealth agreed to redact the objected to statements. However, as counsel admitted at the close of evidence, he simply missed those portions of the recording, and Watts admits that this issue is not preserved.

Watts now argues that this evidence was irrelevant and should have been excluded under KRE 402, was highly prejudicial and should have been excluded under KRE 403, and was evidence of prior bad acts that should have been excluded under KRE 404(b). Because Watts did not properly preserve this issue, we review it for palpable error. RCr 10.26. "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Allen v.*

Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009) (*quoting Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006)).

We agree with Watts that the unredacted statements should have been excluded pursuant to KRE 404(b) and may have been excludable under KRE 402 and/or KRE 403. However, in light of all of the evidence presented at trial, there is not a reasonable probability that exclusion of Watts's statements would have resulted in a different outcome. Thus, the admission of the unredacted statements was not palpable error.

III. CONCLUSION.

For the foregoing reasons, we affirm.

All sitting. Minton, C.J.; Cunningham, Keller and Scott, JJ., concur. Venters, J., concurs in result in part and dissents in part by separate Opinion which Noble, J., joins. Abramson, J., joins only with respect to the giving of the accomplice instruction.

VENTERS, J., CONCURRING IN RESULT IN PART AND DISSENTING IN PART: I respectfully disagree with the Majority's analysis for two reasons: 1) the trial court erred by allowing the Commonwealth to interject at the last minute the theory that Watts acted as an accomplice to the murder of Kelly Johnson, although the error was harmless and I thus concur in result on that issue; and 2) Watts was entitled to a directed verdict on the charge of robbery, and so I dissent.

Watts was charged with murder in an indictment alleging that on April 18, 2009, he intentionally shot and killed Kelly Johnson. The indictment gives

no hint of accomplice culpability, and during the nearly four-year period leading up to and through the trial there was no indication that a theory of accomplice liability was lurking. It was *after* the presentation of the evidence had been completed that the Commonwealth first suggested a theory of accomplice guilt by its request for a jury instruction on accomplice culpability. Because accomplice liability presents a theory of guilt entirely different from the original charge of being the sole perpetrator of the crime, Watts justifiably complained of unfair surprise. Our decisions in *Wolbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky. 1997) and *Commonwealth v. McKenzie*, 214 S.W.3d 306 (Ky. 2007) require recognition of this error.

Furthermore, there was absolutely no evidence to support the accomplice to murder instruction regardless of when the prosecutor first conceived of it. In this instance, it is rationalized only upon the theory that Watts denied having committed the murder and offered evidence to suggest that someone else murdered Mr. Johnson. Watts's defense does not in any way constitute evidence that he acted in concert with another in killing Mr. Johnson, and no reasonable juror could have so believed. Giving an accomplice instruction was clear error because it was not supported by any evidence presented at trial, and because it was sprung upon the defendant at the last possible moment, resulting in unfair surprise. Nevertheless, because the jury unequivocally rejected that theory of guilt, Watts can claim no prejudice. Furthermore, it would be sheer speculation and conjecture to regard the question submitted by the jury during deliberations as an indication that the erroneous instruction

had sown such confusion or doubt into the process as to undermine the legitimacy of the verdict. Consequently, while I find the accomplice instruction was erroneously given, the error had no prejudicial effect upon Watts.

I also submit that there was insufficient evidence to sustain a robbery conviction because the commission of a theft or an attempted theft is an essential element of robbery, and proof of that element is woefully absent here. Following the indictment, Watts submitted a motion for a bill of particulars to ascertain the particulars of the robbery charge. The Commonwealth responded thusly: **"The victim, Kelly Johnson, was known to carry a large amount of money in his left front pants' [sic] pocket and it appeared that something had been taken from that pocket. The nature or amount thereof is otherwise unknown."**

The only evidence at trial that added to that vague allegation was testimony of the victim's daughter and his neighbor that he "usually" had about $2,000 in his pants pocket, that one of the keys to his ATV was missing, and that Watts had said during the investigation that he had heard that Johnson was robbed of an ATV key. The allegedly missing cash and the missing key were never explained or linked in any way to the events surrounding Johnson's murder. A reputation for carrying cash which family members say they could not find and the apparent loss of an ATV key raise a suspicion of theft which police would be expected to investigate. But that is a far cry from proof sufficient to establish a theft under the reasonable doubt standard and thereby overcome the presumption of innocence accorded to a

defendant in every criminal trial. Our opinion sustaining the robbery conviction upon these flimsy circumstances grossly undermines the faith and confidence in the certainty of a criminal conviction that has been a hallmark of the American system of justice. *Sutton's Adm'r v. Louisville & N.R. Co.*, 181 S.W. 938, 940 (Ky. 1916) (mere speculation or conjecture has never been a sufficient basis for a jury verdict).

For the reasons set forth above, I would affirm all of Watts's convictions except the conviction for the robbery of Kelly Johnson, which I would reverse. Accordingly, with respect to the murder conviction I concur in result, and with respect to the robbery conviction, I dissent.

Noble, J., joins. Abramson, J., joins only with respect to the giving of the accomplice instruction.

COUNSEL FOR APPELLANT:

John Gerhart Landon
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry Thomas Ryan
Assistant Attorney General