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RENDERED: OCTOBER 20, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000191-MR

BRANDON LAMONT BAILEY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 13-CR-00083

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Brandon Bailey of the murder of Anthony Logan and recommended a thirty-year prison sentence, which the trial court imposed.

Bailey appeals the resulting judgment as a matter of right.[1] He contends the trial court erred by (1) not allowing a witness, Tamarcus Lewis, to testify about alleged threats made by Logan to Bailey, (2) failing to grant a mistrial when claims made by the prosecutor in opening statement were not supported by evidence, (3) allowing a photograph of the victim's corpse to be displayed for an excessive amount of time during closing argument, and (4) violating Bailey's

[1] Ky. Const. § 110(2)(b).

right to a speedy trial. Because we hold that none of these alleged errors warrants reversal, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Bailey shot and killed Logan during an argument in the parking lot of an apartment complex. According to Bailey, he shot Logan in self-defense. According to the Commonwealth, Bailey fired the first shot at Logan while Logan's hands were raised in a defensive position. The Commonwealth further contends that when Logan fell to the ground, Bailey stood over him and shot him several more times, execution style.

II. ANALYSIS.

A. Excluding Lewis's Proffered Testimony was Harmless Error.

Bailey argues that the exclusion of Tamarcus Lewis's testimony with regard to alleged threats from Logan to Bailey was error. Before delving into the substance of Bailey's argument, we must first determine the correct standard of review.

We stated in *Henderson v. Commonwealth*, "[t]o preserve a trial court's ruling for appeal ... the substance of the excluded testimony must be provided to the trial court" by an offer of proof "adducing what the lawyer expects to be able to prove through a witness's testimony."[2] Giving an offer of proof "provides the trial court with a foundation to evaluate properly the objection based upon the actual substance of the evidence," and it "gives an appellate

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[2] *Henderson v. Commonwealth*, 438 S.W.3d 335, 339-40 (Ky. 2014) (citing KRS 103(a)(2)).

court a record from which it is possible to determine accurately the extent to which, if at all, a party's substantial rights were affected."[3] Furthermore, "an offer of proof must not be 'too vague, general or conclusory.'"[4]

The Commonwealth asserts that Bailey failed to preserve his objection because of an insufficient offer of proof. If this is the case, we review the alleged error for palpable error under Kentucky Rule of Criminal Procedure ("RCr") 10.26.[5] Otherwise, if we find that the objection is properly preserved, we review the trial court under an abuse of discretion standard.[6]

Bailey intended to use certain testimony by Lewis to bolster his argument of self-defense. Bailey claims that Lewis was present during an argument between Logan and Bailey where Logan allegedly made threatening remarks. In response, the trial court asked what the relevance was.

> Second-chair Counsel: Basically, he has [Logan] making some threatening statements to [Bailey]—more like—sort of like—don't mess-with-us type of statements. Not like a direct "I'm going to come and shoot you"
>
> Lead Counsel: And it goes to [Bailey's] state of mind, your honor. That's how it's relevant.
>
> Second-chair Counsel: Like the buildup to December 1st. So I didn't want to just call him up there and ask him about it.

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[3] *Id.* at 340.

[4] *Id.* at 342 (*21 Fed. Prac. & Proc. Evid.* § 5040.1 (2d ed.)).

[5] Kentucky Rule of Criminal Procedure 10.26

[6] *See Walker v. Commonwealth*, 288 S.W.3d 729, 739 (Ky. 2009); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996).

> Judge: So say [inaudible] what you think the threat was, that he heard?
>
> Second-chair Counsel: I don't want to put—I'm sorry, I just talked to him last night. Something like, "[y]ou've got to be careful around Henry and me." Something like, "[w]e're—" I don't know the slang. It was slang. Like "we're-don't mess with us."

We find that the description of the testimony proposed to be given by Lewis was "sufficient to provide the trial court with a foundation to evaluate properly the ... substance of the evidence," and it "gives an appellate court a record from which it is possible to determine accurately the extent to which, if at all, a party's substantial rights were affected."[7]

Having established that the alleged error was preserved, we move to whether the trial court abused its discretion. "A trial court's evidentiary ruling will not be disturbed unless its ruling was 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'"[8] It appears from the briefs that the trial court based its ruling of inadmissibility on the fact that the threat from Logan to Bailey was not specific enough, noting it was not a direct threat like "I'm going to kill you." The trial court therefore classified the proposed piece of testimony as inadmissible hearsay. We disagree.

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[7] 438 S.W.3d at 340.

[8] *Walker*, 288 S.W.3d at 739 (quoting *English*, 993 S.W.2d at 945(Ky. 1999)).

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted.[9] In Bailey's case, for Lewis's testimony to be classified as hearsay, Bailey must have been introducing the testimony for the truth of the matter, that Logan's comment was in fact a true threat. But this would be an incorrect characterization of the proposed testimony. Bailey's intended purpose was simply to prove that the statement was made, and that it contributed to Bailey's state of mind during the shooting.

"Generally, a homicide defendant may introduce evidence of the victim's character for violence in support of a claim that he acted in self-defense or that the victim was the initial aggressor."[10] Bailey, arguing self-defense, informed the trial court of the substance of Lewis's testimony offered for its nonhearsay purpose: to prove Bailey's state of mind when he shot Logan. "In self-defense cases, fear by the defendant of the victim is an element of the defense and can be proved by evidence of violent acts of the victim, threats by the victim, and even hearsay statements about such acts and threats, provided the defendant knew of such acts, threats, or statements at the time of the encounter."[11] To bolster the credibility of Lewis's purpose in Bailey's self-defense claim, he notes that the trial court determined all the other evidence justified an instruction on self-protection and included the absence of self-protection as an element of the murder instruction.

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[9] KRE 801(c).

[10] *Saylor v. Commonwealth*, 144 S.W.3d 812, 815 (Ky. 2004).

[11] Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.15 at 105-06 (4th ed. 2003).

The Commonwealth argues that Bailey was not aware a threat was ever made by Logan, thereby taking it out of the state-of-mind exception. But as Bailey points out, during the offer of proof, Bailey's counsel made note of the fact that Lewis was to testify to a conversation he witnessed between Logan and Bailey—the Commonwealth did not dispute that statement. The Commonwealth cannot sufficiently refute that Bailey was a witness to Logan's alleged threats.

But the trial court did not allow Lewis to testify to the alleged threats made by Logan because Bailey did not produce testimony concerning a specific threat. Instead, Bailey produced statements that a reasonable person could find threatening. Failure to allow the testimony on the basis that the proposed testimony did not provide a specific threat is an insufficient basis to deny its admission and is an abuse of discretion.[12]

Having decided that the trial court abused its discretion, we must determine if it was harmless or reversible error. To disturb or modify a judgment it must "appear to the court that the denial of such relief would be inconsistent with substantial justice."[13]

Bailey argues conclusively that failure to allow Lewis's testimony was reversible error. On the other hand, the Commonwealth contends that Bailey had a full opportunity to present his case, and the evidence weighed so heavily against Bailey that failure to allow Lewis's testimony was harmless error. We

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[12] *Walker*, 288 S.W.3d at 739 (quoting *English*, 993 S.W.2d at 945)).

[13] RCr 9.24

hold that the failure to allow the specific testimony by Lewis in question was harmless error.

In conducting a harmless error analysis, we ask whether the judgment was substantially swayed by the error.[14] If it appears that the error did substantially influence the verdict, "or if one is left in grave doubt, the conviction cannot stand."[15] Even if Lewis had been allowed to testify to the alleged conversation between Bailey and Logan, we are convinced it would not have swayed the verdict. The Commonwealth presented multiple witnesses, forensic reports, and expert testimony that established its version of the facts leading to a conviction. So we conclude, though it was error not to allow specific testimony from Lewis, the error was harmless.

B. Variance Between Prosecution's Opening Statement and Proof at Trial Was Not Reversible Error.

We use an abuse-of-discretion standard when reviewing a trial court's decision denying a mistrial.[16] "[A] trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion."[17] Both parties recognize that granting a mistrial is an extreme measure. The Commonwealth

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[14] *Meece v. Commonwealth*, 348 S.W.3d 627, 645 (Ky. 2011).

[15] *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010) (quoting *Kotteakos v, United States*, 328 U.S. 750, 765 (1946)).

[16] *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002) (citing *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734 (1996)).

[17] *Id.*

notes, "[a mistrial] should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity."[18]

Bailey asserts the prosecution, during its opening statement, claimed that a medical examiner would testify that Logan's wounds would be consistent with "a person putting up their hands in a defensive way [with physical demonstration]." Bailey further asserts that during the opening statements, the prosecution incorrectly stated the location of the entrance and exit wounds. Because Bailey's argument focuses on the medical examiner's inability to determine the physical position of the body and not that of confusing the location of entrance and exit wounds, we will discuss the first issue in depth. It is undisputed that the medical examiner who testified for the prosecution was unable to testify as to what position the body was in when Logan was shot. When asked by the Commonwealth if the wounds were consistent with an individual with his arms up, the doctor stated that he could not say if that was the case.

After the Commonwealth closed its case, Bailey's attorney moved for a mistrial, arguing that the Commonwealth misled the jury in its opening statement as to what evidence would be presented. The trial court denied the motion but did give an admonition to the jury. The admonition in part stated, "And if you heard something in the opening statements that you did not hear from right here, then you rely upon what you heard right here [Judge is pointing to the witness stand]... Does everyone understand?" When a trial

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[18] *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

court issues an admonition, it is presumed that the jury will follow it.[19] Bailey's argument that this admonition was ineffective because the opening statement was highly inflammatory or highly prejudicial is not persuasive.

Bailey cites *Parker v. Commonwealth* as analogous to his case.[20] In *Parker*, a mistrial was granted after the prosecution played a disk during opening statements purporting to be the voice of the defendant.[21] The prosecution used the lyrics from the disk as evidence that the defendant had committed murder.[22] Ultimately, the disk played by the prosecution could not be authenticated and was not introduced into evidence.

As the Commonwealth notes, this case would be analogous if the Commonwealth never called the medical examiner promised during opening statements. Unlike *Parker*, Bailey had the ability to cross-examine the medical examiner. Furthermore, in Bailey's attorney's closing argument, she reminded the jury that the Commonwealth failed to fulfill its promise of proving Logan's hands were up in a defensive position when he was shot.

Because we review the trial court's ruling for abuse of discretion, and no abuse has been shown by Bailey, we affirm the trial court's ruling.

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[19] *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

[20] *Parker v. Commonwealth*, 241 S.W.3d 805 (Ky. 2007).

[21] *Id.*

[22] *Id.* at 806 – 07.

C. Display of Photograph of Victim's Corpse Was Not Palpable Error.

Both sides agree that Bailey's claim of error on this issue is unpreserved for appellate review. As a result, Bailey requests review under RCr 10.26.[23] Under that rule, one must show "palpable error."[24] Palpable error requires a showing that the alleged error affected the "substantial rights" of a defendant and that relief may be granted "upon a determination that manifest injustice has resulted from the error."[25] And to find manifest injustice, we must conclude that the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable."[26]

Bailey takes issue with the fact that during closing argument the prosecutor displayed on a projector screen an autopsy photograph of Logan's body showing exit wounds to the back. More particularly, Bailey asserts that the length of time the photograph was displayed, approximately thirty-four minutes of the Commonwealth's forty-four minute closing argument, was unduly prejudicial. Bailey argues the display served no legitimate evidentiary purpose but was used only to engender sympathy for Logan and his family.

The Commonwealth rebuts this argument, arguing the photograph was used to draw attention to the Commonwealth's theory of the case. The Commonwealth cites that during closing arguments the prosecutor used the

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[23] Kentucky Rules of Criminal Procedure 10.26.

[24] *Id.*

[25] *Id.*

[26] *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

photograph to bolster its argument that Logan had been lying on his back when he was shot. Furthermore, during the prosecutor's closing, he referred to the picture in conjunction with prior expert testimony.

The Commonwealth correctly notes that Bailey's counsel had the opportunity to object to this image being projected during closing arguments. As a result of failing to do so, he is faced with a very high bar of showing a palpable error. Based on the record and facts, Bailey does not sufficiently show that there was any such error.

D. Bailey's Speedy Trial Right Was Not Violated.

As both parties correctly recognize, the right to a speedy trial is guaranteed under the Sixth Amendment of the United States Constitution.[27] The Sixth Amendment applies to state courts through the Fourteenth Amendment. And Section 11 of the Kentucky Constitution mirrors that of the United States, guaranteeing a criminal defendant the right to a speedy trial.[28]

The United States Supreme Court has developed a four-pronged test when analyzing a claim involving the right to a speedy trial. In evaluating Bailey's argument, this Court must balance four factors: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant.[29]

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[27] U.S. Const. amend. VI.

[28] Ky. Const. § 11.

[29] *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

1. Length of Delay.

Before a full analysis of all four factors is required, a defendant must first meet the threshold of showing presumptive prejudice.[30] As the Commonwealth notes in its brief, "Whether a delay is presumptively prejudicial depends, in part, on the charges involved. That is, 'the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.'"[31] With that in mind, Bailey asserts, and the Commonwealth concedes, just under twenty-six months in a murder case of moderate complexity is sufficient to trigger presumptive prejudice and a full application of the factors.[32]

2. Reason for Delay.

Trial in this matter was continued three separate times, each time at the request of the defense.

The first continuance motion was filed on October 30, 2013. This motion was filed as the result of health issues; Bailey's second-chair counsel and lead investigator were suffering illnesses that prevented them from participating on the originally scheduled date. The trial was reset for June 9-12, 2014.

The second motion was filed because of additional discovery. Bailey asserts that he received a supplemental police report on June 5, just four days before trial was set to begin. The supplemental police report contained contact

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[30] *Smith v. Commonwealth*, 361 S.W.3d 908, 915 (Ky. 2012).

[31] *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001) (quoting *Barker*, 407 U.S. at 531).

[32] *See Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004) (finding an eighteen-month delay in a complex murder case created presumptive prejudice).

information of eleven new witnesses, the majority of which had not been mentioned in prior discovery. Bailey draws our attention to a 911 call given to the defense on June 2, just seven days before trial, which identified two additional witnesses. Bailey moved to have the new evidence excluded, but the trial court denied the motion. The trial court did grant Bailey a continuance, and set the trial date for October 13-16, 2014.

The third continuance motion was once again filed by Bailey's counsel, citing health concerns of Bailey's primary attorney. It is worth noting that Bailey told the trial court that this motion was made against his will.

It is true that the continuances were not solely the fault of Bailey and counsel, but the Commonwealth cites the fact that two of the three continuances were solely for the benefit of Bailey and were in no way connected to the Commonwealth. As noted in the Commonwealth's brief, only four months of the fourteen months of continuances could be attributable to the Commonwealth. While the Court recognizes Bailey's commentary that his counsel's third continuance request was against his will, his attorneys properly acted in their capacity as counsel and therefore agents of Bailey.[33]

3. *Assertion of Speedy Trial Right.*

It is undisputed that on June 28, 2013, Bailey asserted his right to a speedy trial. Bailey's intent was clear when he filed a pro se speedy-trial motion, and defense counsel joined in his motion, requesting a trial within six months. The Commonwealth correctly recognizes that requests by Bailey's

[33] *Vermont v. Brillon*, 556 U.S. 81, 82 (2009) (citing *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

counsel for continuances do not waive Bailey's assertion of his right to a speedy trial. But, as the Commonwealth notes, these requests reduce the weight of this factor. We recognized in *Dunaway v. Commonwealth* that delays attributable to the defendant weigh against his assertion of a speedy trial.[34] In this case, Bailey's acquiescence to two of the three continuances undermines his argument.

4. Prejudice to Defendant.

The United States Supreme Court has outlined a three-part test for determining prejudice.[35] The three interests relevant to a speedy-trial inquiry are: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.[36]

While we recognize that Bailey spent a long period of time awaiting his trial, his brief fails to demonstrate how he was prejudiced by such a delay. As the Commonwealth notes, "speculative and generic claims are insufficient to support a claim of prejudice."[37] The Commonwealth further draws our attention back to *Bratcher*, where we stated, "Conclusory claims about the trauma of incarceration, without proof of such trauma, and the possibility of an impaired defense are not sufficient to show prejudice."[38]

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[34] *Dunaway*, 60 S.W.3d at 571.

[35] *Barker*, 407 U.S. at 532.

[36] *Id.*

[37] *Dickerson v. Commonwealth*, 278 S.W.3d 145, 151 – 52 (Ky. 2009).

[38] *Bratcher*, 151 S.W.3d at 345.

Bailey's complaints are generalized and lacking foundation. To demonstrate his increased anxiety, Bailey cites that his mother passed away while he awaited trial. But, as the Commonwealth notes, Bailey's mother's death did not happen during the time of any continuance. Bailey's conclusory statement that he was unable to offer help to his attorney in his defense is unpersuasive because he has failed to state any factual basis or argument in support of this claim.

Bailey's bare assertions, without any further evidence in the brief or record, do not persuade us that his right to a speedy trial was violated. For the foregoing reasons, we conclude his right to a speedy trial was not violated.

III. CONCLUSION.

For the foregoing reasons, we affirm the trial court's judgment.

All sitting. All concur.

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