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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0480-MR

SETH ADAM MARSHALL — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 25-CR-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KAREM, AND MCNEILL, JUDGES.

MCNEILL, JUDGE: In 2023, Appellant, Seth Adam Marshall ("Marshall"), physically and verbally abused his partner, Courtney McClure ("McClure"). Marshall and Ms. McClure are parents of a minor child, A.M., and were living together when the underlying abuse occurred. McClure recorded the incident using the audio function of her smart phone. This recording was played for the jury and will be addressed at length herein.

After a two-day trial, a Hickman County jury convicted Marshall of fourth-degree assault, first-degree strangulation, terroristic threatening, menacing, and first-degree wanton endangerment. Marshall was sentenced to eight-years' imprisonment. He appeals to this Court as a matter of right. For the following reasons, we affirm.

ANALYSIS

Marshall raises four issues on appeal: 1) his right to a speedy trial was violated; 2) significant *voir dire* defects violated his right to a fair and impartial jury; 3) prejudicial prior bad act evidence was improperly admitted; and 4) the prosecutor made numerous improper statements to the jury, rendering the trial fundamentally unfair. Each will be addressed in turn.

Speedy Trial

Marshall was released on bond from the time he was indicted until he was convicted. His initial trial date was scheduled for September 30, 2024. Prior thereto, defense counsel sought to introduce expert testimony from Dr. Dustin B. Wygant. Dr. Wygant is a forensic psychologist. During a *Daubert*[1] hearing, he testified regarding Marshall's post-traumatic stress disorder resulting from his service in the United States Marine Corps and how that impacted his behavior surrounding the underlying events. The trial court did not rule on the *Daubert*

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

motion and said that he might permit the testimony at trial but only if Marshall testified. The Commonwealth sought an interlocutory appeal on that issue. According to the Commonwealth's brief in the present case, "[t]he appeal was later dismissed at the request of the Attorney General (and about only two months after it was filed) once it was reviewed in the context of relevant legal authority."

A superseding indictment was issued against Marshall, and his trial was rescheduled for March 4, 2025. During a hearing on January 16, 2025, defense counsel objected to the superseding indictment on both speedy trial and due process grounds. He also filed a motion to dismiss, which was denied.[2] A Hickman County Circuit Court jury ultimately convicted Marshall and recommended a total concurrent sentence of eight-years' imprisonment, which the trial court imposed.[3]

We analyze alleged violations of the right to a speedy trial under the four-factor *Barker* test. *Smith v. Commonwealth*, 636 S.W.3d 421, 441 (Ky. 2021). *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)).

> The four factors under this test are: "(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

[2] It appears that the prior case was dismissed based on the superseding indictment.

[3] The judgment from which Marshall appeals states that he was tried by a jury which returned verdicts on March 6, 2025.

> defendant caused by the delay." *Id.* at 22. "No single one of these factors is determinative by itself." *Id.* (quoting *Gabow v. Commonwealth*, 34 S.W.3d 63, 70 (Ky. 2000)). "We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Stacy v. Commonwealth*, 396 S.W.3d 787, 795 (Ky. 2013) (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. 2182).

Smith, 636 S.W.3d at 441. We begin by "determining if the delay was presumptively prejudicial to the defendant; for if it was not, the defendant's rights were not violated, and the inquiry ends." *Dunaway*, 60 S.W.3d at 569 (citing *Barker*, 407 U.S. at 530). In *Smith*, the Court concluded that "[a] delay of over six years is unquestionably presumptively prejudicial. Approximately two-and-a-half years of that delay is directly attributable to the Commonwealth's interlocutory appeal . . . ." *Smith*, 636 S.W.3d at 441.

In the present case, the delay directly attributable to the Commonwealth's interlocutory appeal was approximately five months. Moreover, Marshall was arrested on December 3, 2023, and ultimately convicted in a trial beginning on March 4, 2025. Thus, his total time from arrest to conviction was fifteen months. *See Dunaway*, 60 S.W.3d at 569 (The length of the delay at issue "is the time between the earlier of the arrest or the indictment and the time the trial

begins.") (citation omitted). The delay here is relatively minimal and, therefore, not presumptively prejudicial.[4]

Jury Selection

Marshall next alleges *voir dire* defects. This issue is unpreserved and Marshall requests palpable error review pursuant to RCr[5] 10.26 as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.
>
> . . . .
>
> For an error to rise to the level of palpable, it must be easily perceptible, plain, obvious and readily noticeable. Generally, a palpable error affects the substantial rights of the party only if it is more likely than ordinary error to have affected the judgment.

Martin v. Commonwealth, 409 S.W.3d 340, 344 (Ky. 2013) (internal quotation marks and citations omitted).

Marshall alleges that as potential jurors were stricken from the initial panel of twenty-eight, replacement prospective jurors were not questioned whether

[4] While we need not address the remaining *Barker* factors, out of an abundance of caution, we note that they also do not weigh in favor of reversal here. The Commonwealth's reason for delay was facially legitimate. And even though Marshall may have properly asserted his right to a speedy trial, we discern no resulting prejudice caused by the delay.

[5] Kentucky Rules of Criminal Procedure.

they had any personal connections with the parties, victim, or attorneys. Marshall specifically alleges that "Jurors #241, #19, and #290 were empaneled on the trial jury while never answering the court's critical questions about foreknowledge of the case, knowledge/bias concerning [Marshall] and his family, and relationships with [McClure], her family, or prosecutors." The Commonwealth counters with the following: "[e]very time a potential juror was dismissed for cause, the judge, prosecutor, and defense counsel would ask the replacement juror, including the three jurors complained of here, if they heard all the previous questions, and if they would have answered affirmatively or raised their hands to any of them." Marshall does not dispute this, although he argues that more was required.

Marshall also cites a brief instance involving one juror who disclosed that the lead officer in the case was his cousin. He was questioned further by the prosecutor and affirmed his impartiality. Defense counsel also questioned him and did not seek a for-cause strike. Neither this, nor the other issue regarding the three replacement jurors, constitutes palpable error requiring reversal.

Evidentiary Errors

Marshall further alleges that prior bad acts evidence was improperly admitted. He specifically claims that playing the audio recording of the altercation between him and McClure at trial revealed inadmissible evidence that he had previously put his hands around McClure's neck, that he cheated on her, that he

cannot maintain relationships, that he does not support his child, and that he is a liar. This issue is properly preserved by objections raised prior to and during trial. We review a trial court's ruling on an evidentiary issue only for abuse of discretion. *Manery v. Commonwealth*, 492 S.W.3d 140, 147 (Ky. 2016). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRE[6] 404(b) is an exclusionary rule that prevents admission of prior bad acts. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). However, in assessing admissibility, we determine whether "the evidence is relevant 'for some purpose other than to prove the criminal disposition of the accused[,]' probative as to the actual commission of the prior bad act, and not overly prejudicial under KRE 403." *Kerr v. Commonwealth*, 400 S.W.3d 250, 260 (Ky. 2013) (alteration in original) (quoting *Meece v. Commonwealth*, 348 S.W.3d 627, 662 (Ky. 2011)).

Marshall claims the court failed to undertake the required analysis, and had it done so, the first forty minutes of the fifty-one-minute recording should have been excluded. During a bench conference concerning the objection, the trial court acknowledged that the recording reflected badly on both Marshall and McClure.

[6] Kentucky Rules of Evidence.

The Commonwealth argues that it was admissible because it was "so inextricably intertwined with other evidence essential to the case" that it's exclusion would have had a "serious adverse effect" on the Commonwealth's case. KRE 404(b)(2). There is no indication that the recording was introduced for any impermissible purpose or was otherwise unduly prejudicial to Marshall. *See* KRE 403. Marshall testified on his own behalf. Thus, the jury was permitted to hear his version of the underlying events. Lastly, editing an audio file like the one at issue here inherently balances KRE 404 and KRE 106, known as "rule of completeness." *See Sykes v. Commonwealth*, 453 S.W.3d 722, 727 (Ky. 2015) (finding that trial court abused its discretion by *not* admitting the portions of defendant's recorded interrogation that would have completed a key statement). In sum, while reasonable minds may differ regarding the need for—and extent of—editing this evidence, we cannot say that the trial court abused its discretion here.[7]

Prosecutorial Misconduct

For his final argument, Marshall alleges prosecutorial misconduct that began at *voir dire* when the prosecutor advised the jury panel that he represented the "citizens of Hickman County," and continued during the guilt phase and penalty phase closing arguments. This issue is unpreserved. To reverse on an

[7] We also note that the court sustained Marshall's objections to other testimony elicited from his former fiancée regarding alleged prior acts of domestic violence.

issue of alleged prosecutorial misconduct, the prosecutor's conduct must be flagrant, thus rendering the trial fundamentally unfair. *Brafman v. Commonwealth*, 612 S.W.3d 850, 861 (Ky. 2020). We use the following four-factor test to determine whether a prosecutor's comments constitute reversible flagrant misconduct: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (internal quotation marks and citations omitted).

The Kentucky Supreme Court has tolerated harsh language used to describe defendants in previous cases. *See Murphy v. Commonwealth*, 509 S.W.3d 34, 53 (Ky. 2017) (referring to the defendant as a "monster"); *Dean v. Commonwealth*, 844 S.W.2d 417, 421 (Ky. 1992) (referring to the defendants as "crazed animals"); *Ferguson v. Commonwealth*, 401 S.W.2d 225, 228 (Ky. 1965) (referring to the defendant as a "beast"). Unlike these cases, no specific pejorative is at issue here. In that vein, however, the contested statements made by the prosecutor during closing arguments described Marshall with distrust, disdain, and as dangerous. This included statements that Marshall was incapable of rehabilitation and was likely to commit similar crimes again. Most concerning is the following statement made by the prosecutor during the penalty phase closing:

"[o]nly option that I can see, the only way forward that I think puts an end to this madness is to sentence him to the maximum on every charge."

A prosecutor's argument that the jury has no other option than to impose the maximum sentence is not automatically reversible error. *Compare Gaines v. Commonwealth*, 283 S.W.3d 243, 244-46 (Ky App. 2008) (holding that prosecutor committed palpable error in urging jury to recommend the maximum sentence in order to send a message to the community), *with Brewer v. Commonwealth*, 206 S.W.3d 343, 350-51 (Ky. App. 2006) (comment by prosecutor during closing arguments of penalty phase in which prosecutor asked the jury to recommend the maximum sentence and to send a message to defendant and community did not rise to the level of palpable error). *See also* Jennifer Brinkman, *Harmless in Name Only: Prosecutorial Misconduct and the Right to a Fair Trial*, 32 Wash. & Lee J. Civ. Rts. & Soc. Just. 467 (2026) (describing the need for reform of harmless and structural error analysis by appellate courts in cases involving alleged prosecutorial misconduct). We recognize the nuance and potential for juror distraction that arises in instances like the ones at issue here. However, we cannot conclude that the conduct in question constitutes "manifest injustice."

CONCLUSION

Based on the foregoing, Marshall's conviction and sentence is AFFIRMED.

ALL CONCUR.

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