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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001873-MR

RANDY LEINENBACH

APPELLANT

v. APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
INDICTMENT NO. 00-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY AND MINTON,¹ JUDGES; HUDDLESTON,² SENIOR JUDGE.

MINTON, JUDGE: A Hancock Circuit Court jury convicted Randy Leinenbach³ of first-degree rape and first-degree unlawful imprisonment for which he received a sentence of 15 years'

¹ Judge John D. Minton concurred in this opinion prior to his resignation to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

³ Leinenbach is alternately spelled "Leinenback" at various places in the record.

imprisonment. This is his direct appeal from the judgment of conviction and sentence. We affirm.

In August 2000, Leinenbach and his roommate, Steve Wilcox, drove to Indiana where they saw Leinenbach's estranged wife, Pamela, walking down a street. According to Pamela, Leinenbach jumped from his vehicle, grabbed her by the back of her head, and threw her into the passenger seat of her car. Leinenbach then drove the car across the Ohio River into Hancock County, Kentucky. According to Pamela, Leinenbach ripped at her clothes with his bare hands while he drove.

According to Pamela, Leinenbach told her that he was taking her to a lake where he knew someone who had a gun, which he planned to use to shoot her in the head. Leinenbach drove Pamela to a remote part of Hancock County where he allegedly raped her in the front seat of her car. Then, Leinenbach drove Pamela to the home of Julie Nix, his daughter. When they arrived at Nix's home, Leinenbach refused to let Nix or her husband return Pamela to her home in Indiana. Instead, Leinenbach drove her to his Hancock County residence.

When he arrived at his residence, Leinenbach told Wilcox that he wanted to be alone with Pamela, so Wilcox left. Leinenbach dragged Pamela into the house, placed her in a recliner, ordered her not to flee, and began sharpening a knife in front of her. Leinenbach then jumped on top of Pamela, stuck

the knife to her throat, and raped her. Afterwards, Pamela again sat in the recliner while Leinenbach verbally berated her and poked the point of the knife into her arms and legs. Leinenbach raped Pamela again. Leinenbach then told Pamela that he was going to cut off her head.

Eventually, Pamela put on some clothes that were in Leinenbach's home, before being thrown into the recliner yet again. Leinenbach jumped on top of Pamela while holding a knife. At that point, Nix opened the door and called for her husband to help. Remarkably, Leinenbach was then permitted to drive Pamela to her home in Indiana. Pamela later went to the local sheriff's office, and a rape kit was collected at a local hospital. The rape kit revealed the presence of semen in and near Pamela's vagina and anus. Due to the possibility that Leinenbach's conduct constituted interstate crimes, an agent of the Federal Bureau of Investigation interviewed Nix, her husband, and Wilcox. Those interviews were not recorded; the FBI agent made written summaries of them.

In November 2000, the Hancock County grand jury charged Leinenbach in an indictment with first-degree rape and first-degree unlawful imprisonment. At a hearing a month later, the case was set for trial on July 26, 2001. For reasons that are not fully explained in the record, Leinenbach's trial was rescheduled several times over ensuing years. Finally, the case

was tried in August 2005, nearly five years after the indictment.

Although the indictment against Leinenbach appears to charge him with only one count of rape, the jury was instructed on two counts of rape, one for the alleged rape in Pamela's car and one for an alleged rape in Leinenbach's residence. The jury acquitted Leinenbach of raping Pamela in her car but convicted him of raping her at his residence. The jury also convicted Leinenbach of first-degree unlawful imprisonment. Leinenbach was ultimately sentenced, in accordance with the jury's recommendations, to concurrent terms of fifteen years' imprisonment for his first-degree rape conviction and five-years' imprisonment for his unlawful imprisonment conviction. Leinenbach then filed this appeal.

Leinenbach raises three issues in his appeal. First, he contends that the trial court erred by denying his motion for a directed verdict. Second, he contends that the nearly five-year delay in bringing his case to trial violates his constitutional right to a speedy public trial. Last, he contends that the trial court erred by permitting the Commonwealth to refresh the memories of Nix and her husband using the FBI agent's interview summaries. We reject all of Leinenbach's arguments.

The familiar standard for ruling on a motion for directed verdict is as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.⁴

Leinenbach's argument that he was entitled to a directed verdict is meritless.

Our review of the record shows that counsel's motion for a directed verdict at the close of the Commonwealth's case and his renewal of it at the close of all the evidence was broadly stated and non-specific. Kentucky Rules of Civil Procedure (CR) 50.01 requires a party moving for a directed verdict to state with particularity the reasons a directed verdict is appropriate, and "Kentucky appellate courts have steadfastly held that failure to do so will foreclose appellate

⁴ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

review of the trial court's denial of the directed verdict motion."⁵

But even if we were to review the matter for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26, Leinenbach's argument would fail. For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable."⁶ A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]"⁷ A palpable error must be so serious in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.⁸ Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error.⁹ If not, the error cannot be palpable.

The Commonwealth presented evidence that Leinenbach penetrated Pamela's vagina with his penis while holding a knife to or near her throat. Thus, the jury was presented with ample

⁵ Pate v. Commonwealth, 134 S.W.3d 593, 597-598 (Ky. 2004).

⁶ Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1997) (citing BLACK'S LAW DICTIONARY (6th ed. 1995)).

⁷ Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005).

⁸ *Id.*

⁹ Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969)).

evidence to conclude that Leinenbach engaged in sexual intercourse with Pamela by forcible compulsion, which is what is required to commit the offense of first-degree rape under KRS 510.040(1)(a).¹⁰ Similarly, the Commonwealth presented evidence that Leinenbach forced Pamela into her car; told her if she tried to flee, she "wouldn't make it[;]" sharpened a knife in Pamela's presence while threatening to cut off her head; repeatedly poked Pamela with the point of the knife; and, when found by Nix, was holding a knife while straddling Pamela. Thus, the jury clearly had enough evidence to reasonably conclude that Leinenbach knowingly and unlawfully restrained Pamela under circumstances that exposed her to a risk of serious physical injury, which is what is required to commit the offense of first-degree unlawful imprisonment under KRS 509.020.¹¹

¹⁰ KRS 510.040 provides in relevant part that:

"(1) A person is guilty of rape in the first degree when:

(a) He engages in sexual intercourse with another person by forcible compulsion[.]"

In addition, forcible compulsion is defined at KRS 510.010(2) as "physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]"

¹¹ KRS 509.020(1) provides that "[a] person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully

Leinenbach argues that Pamela was not a credible witness because her recitation of the events in question allegedly varied at times; and, furthermore, her version of the events was physically impossible. However, any potential variances in Pamela's description of the alleged rapes, as well as Leinenbach's contention that Pamela's testimony about the rapes "was physically inconceivable[,] " were factors the jury could take into account in assessing her credibility. Indeed, it is obvious that the jury closely considered Pamela's credibility and found portions of her testimony to lack credulity by virtue of the fact that it found Leinenbach not guilty of raping Pamela in her car. However, despite any inconsistencies, the fact remains that Pamela testified that Leinenbach raped her. And it was the function of the jury, not of the court, to decide if Pamela's accusation was credible. So we utterly reject Leinenbach's contention that the trial court's denial of his motion for a directed verdict rises to the level of palpable error.

Leinenbach's next argument is that his right to a speedy trial was denied by the nearly five-year delay between his indictment and trial. Leinenbach admits that he failed to

restrains another person under circumstances which expose that person to a risk of serious physical injury."

raise this issue before the trial court but urges us to consider it under the palpable error standard found in RCr 10.26.

When faced with a claimed speedy trial violation, a court must "consider four factors: (1) the length of the 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."¹² We begin our analysis by noting the obvious: the nearly five-year delay between Leinenbach's indictment and trial is presumptively prejudicial and weighs against the Commonwealth.¹³ But the presumption of prejudice attached to the delay in this case does not foreclose an analysis of the remaining prongs of the speedy trial factors.¹⁴

The record is largely silent as to the reasons for the delay, and there is no indication that the delay was due to misconduct by either Leinenbach or the Commonwealth. Rather, the Commonwealth insists that the delay was the result of an overcrowded docket. Accepting the Commonwealth's statement as true, such regrettable circumstances cannot be attributable to Leinenbach. In fact, contrary to the Commonwealth's assertion that it bears no responsibility for the overcrowded courts, it is well settled that "negligence or overcrowded courts should be

¹² Bratcher v. Commonwealth, 151 S.W.3d 332, 344 (Ky. 2004).

¹³ *Id.* (holding that an eighteen month delay between indictment and trial was presumptively prejudicial).

¹⁴ *Id.*

weighted less heavily but nevertheless should be considered since *the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.*"¹⁵ Thus, in the absence of any conduct by either Leinenbach or his attorney that caused the delay, the reason for the delay—the caseload in the four-county 38th judicial circuit that includes Hancock County—must weigh slightly against the Commonwealth.

We now turn our attention to whether Leinenbach asserted his right to a speedy trial. Clearly, he did not. A defendant's "assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."¹⁶ And Leinenbach's failure to assert his right to a speedy trial weighs heavily against him because a defendant's "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."¹⁷ Having determined that one factor weighs heavily against Leinenbach, one factor weighs slightly in his favor, and one factor weighs more heavily in his favor, we turn our attention to whether Leinenbach can demonstrate any specific prejudice stemming from the delay.

¹⁵ Barker v. Wingo, 407 U.S. 514, 531 (1972) (emphasis added).

¹⁶ *Id.* at 531-532.

¹⁷ *Id.* at 532.

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."¹⁸ In the case at hand, Leinenbach was free on bond virtually the whole time between his indictment and trial. Thus, he did not suffer "oppressive pretrial incarceration." Furthermore, Leinenbach has not demonstrated any specific anxiety or concern that he suffered between his indictment and trial. Doubtless, he suffered some anxiety and concern due to the serious nature of the charges against him; but he has not shown that he suffered any anxiety or concern greater than that borne by any defendant in similar circumstances. Therefore, Leinenbach's prejudice argument is entirely premised upon the alleged impairment to his defense engendered by the delay. More specifically, Leinenbach contends that the passage of time caused Nix's, her husband's, and Wilcox's memory of the events to fade to such an extent that the Commonwealth needed to refresh their recollection with the FBI agent's notes.

A review of the testimony of Nix, her husband, and Wilcox reveals that, in fact, they were unable to recall certain

¹⁸ *Id.*

aspects of the events that gave rise to the charges against Leinenbach and, furthermore, that the Commonwealth filled the gaps with the notes the FBI agent made following his interviews with them several years earlier. But our review of the trial shows that the dimmed memory of the witnesses was not so severe, pervasive, and egregious as to undermine the overall fairness of the trial. Furthermore, the record also reflects that the witnesses' memories were not as impaired when Leinenbach's attorney questioned them. Finally, because these witnesses were generally hostile to the Commonwealth, their diminished memories could be construed as being helpful to Leinenbach.

Considering all of the factors, we find that Leinenbach has not shown that his right to a speedy trial was violated. We are concerned that it took five years to bring Leinenbach to trial. At the same time, we agree with the United States Supreme Court's statement that "barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right [to a speedy trial] on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial."¹⁹ Leinenbach has not demonstrated extraordinary circumstances. Thus, his failure to request a speedy trial, combined with the minimal prejudice he suffered as a result of the delay in bringing him

¹⁹ *Id.* at 536.

to trial, causes us to conclude that the delay in bringing Leinenbach to trial is not so egregious to rise to the level of palpable error.

Leinenbach's final argument also involves the use of the FBI agent's summaries to refresh the memories of Nix and her husband. Like the previous two issues, this one is unpreserved. So we may review it only for palpable error.²⁰

The crux of Leinenbach's argument is that the Commonwealth violated Kentucky Rules of Evidence (KRE) 613(a) by not showing the summaries to Nix and her husband before using those summaries to refresh their memories. KRE 613(a) provides in relevant part that "[b]efore other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it."

According to Leinenbach, the Commonwealth's failure to show the summaries to the witnesses before inquiring about whether those summaries were correct is reversible error.

²⁰ Leinenbach's attorney did object to the usage of the summaries to refresh Wilcox's memory. The trial court sustained the objection and permitted Wilcox to review the summary before being questioned about it. Thus, the usage of the summary to refresh Wilcox's memory is not at issue.

Since the Commonwealth does not argue to the contrary, we will assume, for purposes of this appeal, that the summaries in question constitute prior inconsistent statements within KRE 613(a)'s purview. Thus, it follows that the Commonwealth should have permitted Nix and her husband to see the summaries before asking them if the contents of the summaries were correct. Accordingly, had Leinenbach's counsel contemporaneously objected, and had that objection been overruled, we *might* have found reversible error. But taking into account the entirety of the case against Leinenbach, we cannot find that the mere failure to show Nix and her husband the summaries before asking questions about them is such an obvious, egregious, overwhelming error that jeopardized the fundamental fairness of the trial. There is no indication that the Commonwealth misrepresented the content of the summaries to Nix and her husband. Indeed, both Nix and her husband stated that they believed the content of the summaries to be correct. Furthermore, Leinenbach's counsel must have had copies of the summaries because the record shows that he asked Nix and her husband about the content of the summaries without first showing them to the witnesses. We are reluctant to find that a mutual mistake by both the Commonwealth and defense counsel rises to the level of palpable error. Thus, in summary, we do not believe that the result of this case would have been any different if KRE 613(a) had been scrupulously

followed. Accordingly, we reject Leinenbach's claim of palpable error in the Commonwealth's usage of the summaries.

For the foregoing reasons, the judgment of the Hancock Circuit Court is affirmed.

ALL CONCUR.

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