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RENDERED: DECEMBER 17, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000572-MR

CHARLES COPASS — APPELLANT

V.

ON APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET CROCKER, JUDGE
NO. 12-CR-00090

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Charles Copass unconditionally pled guilty to murder, fetal homicide, robbery in the first degree, theft, tampering with physical evidence, and to being a persistent felony offender in the second degree. Following his plea, Copass agreed to sentencing by the trial court rather than by a jury. The court conducted a three-day hearing and sentenced Copass to life without the possibility of parole for murder and a total of 70 years for his other crimes, with the sentences to run concurrently. On appeal, Copass argues that the trial court erred when it did not permit him to appear for sentencing unshackled and in "regular" clothes and when it permitted a psychiatrist to testify regarding a hypothetical that was not grounded in fact. For the following reasons, we affirm.

I. BACKGROUND.

Because Copass's guilt is not at issue we do not dwell on the underlying facts, mentioning only what is necessary in order to understand the issues on appeal.

In 2007, Copass was convicted of two counts of rape arising from a relationship he had with a girl, Jane,[1] who was under the age of 16. Copass received two concurrent three year sentences, which he served. While in jail, Copass was severely beaten by fellow inmates.

Upon his discharge in 2010, Copass began a relationship with a different under-aged girl, Joyce,[2] which violated a condition of his release. In early June 2012, this relationship ended when Joyce called Copass a "child molester," and he struck her. Copass became fearful that Joyce or her parents would advise the authorities about the relationship and that he would be returned to prison. Therefore, he wanted to contact Joyce to keep her from telling the authorities. Because Copass did not believe Joyce would take his phone call or meet with him, he devised a plan to meet a friend, Chelsea,[3] at his residence in the hope that he could use her cell phone. Although it is somewhat unclear, it appears that Copass intended to lure Joyce, and perhaps Jane, to some place where he could kill them.

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[1] Jane is a pseudonym employed in this opinion to protect the child's true identity.

[2] Joyce is a pseudonym employed in this opinion to protect the child's true identity.

[3] We note that Chelsea was the half-sister of the girl with whom Copass was involved in 2007.

While Chelsea was at Copass's residence, he got her to explain how to use her cell phone. He then stabbed Chelsea 51 times, killing her and her unborn child. Copass attempted to clean up the blood but could not, so he left Chelsea's body in the residence, took her cell phone, purse, and car, and fled to a friend's home. The next day Copass surrendered to his probation officer.

The Commonwealth charged Copass with multiple crimes and filed notice that it intended to seek the death penalty. Against the advice of counsel, Copass pled guilty and waived his right to be sentenced by a jury. During the sentencing hearing, held before the trial court, Copass presented a number of witnesses who testified that: he, his mother, and his brother were abused by Copass's step-father; his personality and demeanor changed dramatically after his incarceration; and he was a good father to his son. Additionally, Copass presented testimony from Dr. David Walker, a psychiatrist who examined him at the request of defense counsel. Dr. Walker testified that Copass's history of childhood abuse was a risk factor that could have led to development of his anxiety and anti-social personality disorders. He also testified that Copass's fear of returning to jail could have led to heightened anxiety or extreme emotional distress the day of the murder.[4]

Following a three-day hearing, the trial court sentenced Copass as set forth above. We set forth additional background as necessary below.

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[4] Dr. Walker stated that any extreme emotional distress would not have risen to the level necessary to assert that as a defense. However, it might have risen to the level for use as a sentencing mitigator.

II. STANDARD OF REVIEW.

We review the trial court's ruling regarding Copass's attire and shackling for an abuse of discretion. *See* Kentucky Rule of Criminal Procedure (RCr) 8.28(5); *Stacy v. Commonwealth*, 396 S.W.3d 787, 800 (Ky. 2013); and *Deck v. Missouri*, 544 U.S. 622, 629 (2005). We also review a trial court's evidentiary rulings for abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

III. ANALYSIS.

A. The Trial Court Did Not Err By Having Copass Appear in Court in Shackles and Prison Garb.

Copass argues that he was prejudiced by being shackled and in prison attire during the hearing. The Commonwealth argues to the contrary. We address each issue separately below.

1. Copass's Attire.

Prior to the hearing, Copass moved the court to order that he be dressed in "civilian" clothes during the proceedings.[5] The Commonwealth took no position with regard to Copass's attire and the court ruled that Copass could be dressed in civilian clothes, if it could be arranged. Later, the court noted that correctional officers advised that they would need to remove Copass's shackles in order to permit him to change his clothes, and that they were not permitted to remove the shackles while Copass was in their care. The court

[5] Copass, who was being housed at the Green River Correctional Complex, also moved to be housed at the Allen County jail during the proceedings. The court determined that Copass could not be safely housed in the local jail. Copass does not raise any issue with this determination on appeal.

stated that it would not be biased by Copass appearing in prison attire, and refused to order the correctional officers to remove Copass's shackles so that he could change clothes. Defense counsel argued that the request to wear non-prison attire was not because the court might be biased but "to make [Copass] feel as normal as possible during his sentencing" and to decrease his anxiety. Copass reiterates this argument on appeal.

The parties dispute whether the issue of Copass's attire was properly preserved. However, because we believe that Copass's argument is without merit, we need not address preservation.

Copass is correct that "an accused may not be compelled to stand trial before a jury while dressed in identifiable prison clothing, provided such is objected to and timely brought to the attention of the trial court." *Scrivener v. Commonwealth*, 539 S.W.2d 291, 292 (Ky. 1976). The purpose of that rule is to preserve the presumption of innocence. *Id.* However, because Copass had already pled guilty to the charges, there was no longer any presumption of innocence. Furthermore, the sentencing hearing was not before a jury, but before the trial court, which had heard and accepted Copass's guilty plea. Therefore, *Scrivener* has no application herein.

As to any prejudice he may have suffered because of increased anxiety, Copass cites to no law that supports his position. Furthermore, he has put forth nothing other than speculation that he indeed suffered increased anxiety. Copass was examined by a psychiatrist at the request of the Commonwealth and by his own retained psychiatrist. Both psychiatrists indicated that Copass

suffers from an anxiety disorder,[6] and Copass presented evidence from his psychiatrist that he was under stress and suffered from increased anxiety because of the loss of his relationship with Jane and fear of being returned to jail. However, Copass has pointed us to no statements by either psychiatrist indicating that his inability to wear civilian clothes during the hearing increased his anxiety or impeded his ability to put forth a defense. Therefore, we hold that the trial court did not err when it did not order correctional officers to permit Copass to change clothes.

2. Shackling.

Prior to the hearing, defense counsel stated that he had no position regarding whether Copass should be shackled. Therefore, this issue is not properly preserved and we review it for palpable error. When we engage in palpable error review, our "focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013).

Copass argues that being shackled added to his anxiety and that he was prejudiced thereby. However, he has not cited to any evidence that his anxiety increased because he was shackled. Therefore, he has not shown that keeping him shackled caused any injustice, manifest or otherwise, and any error was certainly not palpable.

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[6] We note that the Commonwealth's expert did not testify; however, the trial court indicated that, in his report, the Commonwealth's expert agreed with the diagnosis of anxiety disorder.

B. The Trial Court Did Not Abuse Its Discretion By Permitting the Commonwealth to Ask Copass's Psychiatrist a Hypothetical Question.

As noted above, Dr. Walker testified on direct examination that Copass's breakup with Joyce and his fear of being returned to jail could have led to extreme emotional distress the day of the murder. On cross-examination, the Commonwealth asked Dr. Walker what the symptoms of that distress would be. Dr. Walker stated that such distress would cause rapid speech, sweating, and impulsive behavior. The Commonwealth then asked Dr. Walker if someone in the presence of a person under that amount of stress would notice those symptoms. Copass objected, arguing that there was no evidence regarding what Chelsea had or had not observed. The court ruled that the Commonwealth could ask a hypothetical involving what a person might have observed, which the Commonwealth then did. Dr. Walker then testified that such changes would likely be noted by an observer.

On appeal, Copass argues that the court erred by permitting the Commonwealth to ask and Dr. Walker to respond to the hypothetical question because the question was not grounded in fact. We agree with Copass that, at the time Dr. Walker testified, whether Chelsea noticed or commented about Copass's emotional state was not in evidence. However, we also agree with the Commonwealth that Copass effectively waived his objection when he said in his statement that: Chelsea noticed there was something wrong with him; he was pacing back and forth while talking to her; and Chelsea commented about his sweating. We note that Copass's statement, in conjunction with Dr. Walker's

testimony, was beneficial to Copass's argument that the court should consider his stress as a mitigating factor in sentencing. Therefore, we are somewhat puzzled by Copass's argument that Dr. Walker's testimony was unduly prejudicial to him. Regardless, the court did not mention Dr. Walker's testimony about the hypothetical in its sentencing memorandum. Therefore, for the foregoing reasons, we hold that the court did not abuse its discretion when it permitted the Commonwealth to present the hypothetical to Dr. Walker.

Finally, we note that the parties argue whether the rules of evidence apply to a sentencing hearing before the court. However, because Copass effectively waived his objection and we discern no error in the court's admission of the objected to evidence, we need not address that argument.

IV. CONCLUSION.

For the foregoing reasons, we affirm.

All sitting. All concur.

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