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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000612-MR

DESMOND J. SNORTON — APPELLANT

V.

ON APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARANCE A. WOODALL, III, JUDGE
NO. 07-CR-00035

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Desmond Snorton, was found guilty by a Caldwell Circuit Court jury of murder, first-degree wanton endangerment, and possession of a handgun by a convicted felon. For these crimes, Appellant was sentenced to thirty years imprisonment. He now appeals his convictions as a matter of right. Ky. Const. § 110(2)(b).

I. Background

The events that led to the death of Marty McKinney occurred on November 23, 2006. McKinney and his girlfriend, Tara Brown, spent the prior days consuming or injecting cocaine (among other drugs) at Brown's apartment in Princeton, Kentucky. Around midday, McKinney called and invited his childhood friend, Eric Morris, and his girlfriend, Rebecca Baker, to join him at

the apartment. Morris had been drinking heavily that morning and testified that his recollection of the day's events was hazy. He did, however, remember that when he arrived at the apartment, McKinney, Brown, and Brown's friend, Leah Starnes, were present.[1]

After Morris and Baker had arrived, McKinney wanted to continue using drugs but noted that they were out of money. Earlier in the day, McKinney and Brown had stolen an automatic handgun from McKinney's mother and the group evidently agreed to sell it. Although testimony differed on exactly who participated, many, if not all, members of the group drove around town in Starnes' vehicle in an effort to sell the handgun. At least two or three stops were made, but no one would purchase the weapon due to the fact that it did not have its accompanying magazine or clip. Baker testified that the last house the group visited in their attempt to sell the handgun was that of a man she later learned to be Appellant.

Unsuccessful, the group returned to Brown's apartment. Still in need of money, McKinney suggested that he and Morris simply rob Appellant. The two left and later arrived at Appellant's residence, again driving Starnes' vehicle. In order to effectuate the robbery, McKinney wanted Morris to hit Appellant with the gun, but Morris testified that he refused and the handgun was left in the vehicle during the robbery. Morris explained that McKinney rushed through Appellant's front door, immediately placing Appellant in a headlock on his

[1] Starnes testified that she had been smoking crack cocaine for "weeks" and had consumed a large amount of cocaine on the morning of November 23.

sofa.[2] McKinney asked Appellant where his money was and Appellant, who called McKinney by name,[3] pointed to the money's location. Morris stated that McKinney then grabbed a can full of money and crack cocaine before the two fled to Brown's apartment.

Once back at the apartment, Morris and McKinney split the proceeds of the robbery. Morris testified that they left the handgun in the vehicle, though he had previously stated that McKinney "might" have taken the handgun into the apartment with him. Afraid that Appellant would discover their location, Morris and Baker left the apartment where McKinney, Brown, and Starnes remained.

At some point thereafter, Purvis Parks, a friend of Brown's, stopped by the apartment. Once inside, he received a phone call and became visibly nervous. According to Brown, someone then knocked on the door and either Starnes or Parks opened the door before Parks abruptly fled. Brown testified that Appellant entered through the door with a gun drawn and, without speaking, began firing the weapon. After Appellant fired the second shot, Brown stated that McKinney jumped up from the couch, threw up his empty hands and said "whoa, whoa, whoa" before moving towards Appellant and engaging in a struggle. At this point, both Brown and Starnes fled the

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[2] Appellant later claimed that McKinney had also placed a knife to his neck and that a second unknown individual remained by the door armed with a handgun. Morris testified that he did not see a knife in McKinney's hand at the time. Starnes testified that she later found McKinney's pocketknife on the counter in Brown's apartment.

[3] The two had previously met while in jail together.

apartment separately. At trial, Starnes' testimony was essentially the same,[4] though adding that she did not witness any altercation because McKinney was still approaching Appellant at the time of her flight.

Upon returning to the apartment, Brown found McKinney lying face-down on the floor and Appellant was no longer there. McKinney died from multiple gunshot wounds.[5] After Starnes placed a call to 911, the police arrived at the scene within minutes. The police thoroughly searched the apartment but found no firearms.[6] Shortly thereafter, police located Appellant in a Hopkins County hospital where he was being treated for a gunshot wound to his arm that he claimed he sustained when two unidentified men jumped out of the woods and shot him.

Police interviewed Appellant three days after McKinney's death. During the interview, Appellant initially stated that he followed McKinney to the apartment after the robbery and that Appellant was unarmed when McKinney

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[4] The testimony of Brown and Starnes was impeached at trial by defense counsel, as it significantly differed from their prior statements to police. For example, neither Brown nor Starnes recalled telling Detective Sholar that no shots were fired until after McKinney jumped from the couch; Brown did not recall telling the detective that she did not know whether McKinney drew a handgun when Appellant entered; Starnes did not recall telling the detective that Appellant did not immediately begin shooting when he entered but said, "Where's my shit?" to which McKinney responded, "What are you talking about?"; Starnes did not recall telling the detective that she saw Appellant exit the apartment grasping his arm as though it were injured; and, Starnes did not recall telling the detective that she found McKinney's pocketknife underneath his body.

[5] McKinney had been shot nine times in several locations all over his body, with some at close range. Gunshot residue was also found on his right palm.

[6] Oddly, Brown later claimed that she discovered a handgun as well as two spent shell casings in a box in the vicinity where McKinney's body had been found. While police never recovered the shell casings, Brown testified that it was the stolen handgun that the group had tried to sell. When the police recovered the handgun, its clip was missing.

shot him in the arm. Specifically, Appellant stated that he entered the apartment, advised McKinney that he knew he had robbed him, and demanded his money. According to Appellant, McKinney then approached him and began firing shots from a handgun. Appellant explained that the two struggled, that McKinney shot him in his arm, and that he heard four to five shots before removing himself from McKinney and fleeing the apartment.

About halfway through the interview, however, Appellant paused and stated, "I'll tell you what happened," and proceeded to offer a more detailed account. Because his previous encounters with police were not favorable, Appellant explained that he decided to try to recover the stolen money himself. Appellant admitted that he did bring a gun to Brown's apartment, but he claimed that it was merely a precautionary measure and that he did not intend to use it. When Appellant arrived at the apartment, he recognized Parks' vehicle parked nearby and called Parks' cell phone to confirm that McKinney was inside. Appellant then knocked on the door and entered after it was opened for him. After Appellant demanded that McKinney return his money, McKinney allegedly sprang from the couch armed with a handgun. In response, Appellant explained that he immediately drew his handgun and began backing away from McKinney. When McKinney charged at Appellant, Appellant fired a warning shot toward the floor that he believed may have struck McKinney in the leg. Appellant stated that McKinney proceeded to fall into him, knocking him down, where the two struggled on the floor. During the

struggle, Appellant claimed that several shots were fired, one striking him in the arm. Once Appellant managed to release himself from McKinney, he fled, leaving his handgun behind.

At trial, the Commonwealth's theory of the case was that McKinney's death represented a "revenge killing," whereby Appellant entered Brown's apartment and simply gunned down an unarmed McKinney. Appellant's defense was that he acted in self-defense. Though admitting that he followed McKinney to Brown's apartment in order to recover his money, Appellant maintained that he did not intend to use his handgun but was only forced to draw the weapon after McKinney, in a show of aggression, sprang from the couch with a handgun and began to charge at him.

At the conclusion of trial, the jury found Appellant guilty of murder, two counts of first-degree wanton endangerment, and possession of a handgun by a convicted felon. The jury fixed his punishment at twenty-four years imprisonment for the count of murder, one year for each wanton endangerment offense, and five years for the handgun offense. The jury recommended that the wanton endangerment sentences run concurrently for one year and that all of the remaining sentences run consecutively.

On appeal, Appellant raises three principal allegations of error in his underlying trial: 1) that the trial court erroneously limited his ability to impeach the Commonwealth's witnesses; 2) that the trial court erroneously denied his petition for a change of venue; and 3) that the prosecutor engaged in

misconduct during closing argument. For the reasons that follow, we reverse Appellant's convictions.

II. Analysis

A. Limited Impeachment of Prosecution Witness

Appellant argues that that the trial court erroneously denied him the opportunity to impeach the testimony of Brown, Starnes, and Morris with their prior inconsistent statements given during videotaped interviews with Detective Sholar. Specifically, he argues that he was entitled to impeach the witnesses at trial by playing their prior videotaped interviews for the jury. We must agree. Because the trial court's error cannot be deemed harmless, we reverse Appellant's convictions.[7]

Brown, Starnes, and Morris testified for the Commonwealth. On cross-examination, defense counsel inquired whether the witnesses recalled making certain conflicting statements to Detective Sholar in their respective interviews, all of which were videotaped. Each witness repeatedly stated that they could not remember making the prior statements. After their denials, defense counsel attempted to impeach the witnesses by playing segments from their videotaped interviews with Detective Sholar, but the attempts were denied by the trial court. In sustaining the Commonwealth's objection to the recordings, the trial court cited the fact that the witnesses did not categorically deny making their prior statements but simply could not recall whether they made

[7] Because our conclusion is dispositive of the issue, we do not reach the merits of Appellant's related arguments.

them or not. Without an express denial, the court reasoned, there was no inconsistency to impeach. The trial court, nevertheless, urged defense counsel to later pursue the witnesses' inconsistent accounts through the testimony of Sholar.[8]

In Kentucky, it is well-settled that a prior inconsistent statement may be used to assail the credibility of a witness and may also be received as substantive evidence. *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); KRE 801A(a)(1); *see also Askew v. Commonwealth*, 768 S.W.2d 51, 56 (Ky. 1989) ("This Court's decision in *Jett* [] expanded the permissible use of prior inconsistent testimony from mere impeachment to use as substantive evidence. It was our position that the trier of fact was entitled to be informed of prior inconsistent statements made by the witness and permitted to weigh both versions to determine where the truth lay."). In order to sustain their admission, the statements must be "material and relevant to the issues of the case" and a proper foundation must be established so that "the witness whose testimony is to be contradicted, supplemented, or otherwise affected by the out-of-court statement may have a proper and timely opportunity to give his version or explanation of it." *Jett*, 436 S.W.2d at 792; *see also* KRE 613 ("Before 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

[8] In order to refresh Sholar's recollection, the trial court did allow defense counsel to play a single twenty-second clip from Starnes' videotaped interview. No other portions of the interviews were played.

circumstances of time, place, and persons present, as correctly as the examining party can present them.").

In determining whether a statement is inconsistent, this Court has held that "[a] statement is inconsistent . . . whether the witness presently contradicts or denies the prior statement, *or whether he claims to be unable to remember it.*" *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997) (emphasis added) (*citing Wise v. Commonwealth*, 600 S.W.2d 470, 472 (Ky. App. 1978)); *see also Young v. Commonwealth*, 50 S.W.3d 148, 169 (Ky. 2001) ("We have held that when a witness at trial professes not to remember making a prior assertion, he/she can be impeached by introducing a prior statement of the witness wherein the assertion *was* made.") (emphasis in original). Underlying our policy in this respect is the belief that "[n]o person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" *Wise*, 600 S.W.2d at 472; *see also Burgess v. Taylor*, 44 S.W.3d 806, 815 (Ky. App. 2001) ("[T]he 'forgetful' witness is not new to Kentucky courts.").

Though "a trial judge has broad discretion" in deciding whether to admit a witness' prior inconsistent statements, *Wise*, 600 S.W.2d at 472, here we must conclude – and the Commonwealth does not contest – that the trial court erred in preventing Appellant from impeaching the witnesses by playing their earlier, videotaped statements. That the witnesses' prior statements regarding the chronology of events were highly material and relevant to Appellant's claim

of self-defense cannot be questioned. Similarly, the record shows that defense counsel repeatedly asked the witnesses about the statements and established a proper foundation for impeachment. To the extent the trial court may have felt that the statements were inadmissible by virtue of being videotaped, this is an increasingly common and appropriate mode of impeaching a witness and, indeed, may be preferable so that the jury may not only discern the witness' demeanor, *see Muse v. Commonwealth*, 779 S.W.2d 229, 230 (Ky. App. 1989) ("[I]t can be argued that a videotape of the actual statement is preferable to having a second witness testify as to what the first witness said previously because the jury would be able to discern more of the first witness's demeanor and the exact statement made on the videotape."), but also because it may allow defense counsel to more effectively confront the forgetful witness with his contradictory statements. Where the trial court erred was in ruling that the witnesses' inability to recall making their prior statements did not constitute an inconsistent statement. This Court's holding in *Brock* clearly repudiated that notion.

Yet, because the trial court did subsequently allow Detective Sholar to testify to the witnesses' prior videotaped statements, much of our discussion must now center on whether the error was harmless, pursuant to RCr 9.24.[9] In *Winstead v. Commonwealth*, we observed that

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[9] RCr 9.24 reads:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for

> [a] non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750 . . . (1946). The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765.

283 S.W.3d 678, 688-89 (Ky. 2009). Though we conclude that Detective Sholar testified to much of the witnesses' prior videotaped statements, thus accomplishing their impeachment, we, nevertheless, hold that the trial court's error was not harmless because Appellant was denied crucial evidence going to his self-defense claim at a highly important time in trial.

As the Commonwealth points out, many of the witnesses' prior statements that Appellant complains were erroneously excluded were, in fact, admitted, albeit through the testimony of Detective Sholar. As Appellant admits, the jury heard Detective Sholar testify to the following: Starnes' statement that Appellant did not begin shooting immediately, but rather asked McKinney, "[w]here's my shit?" to which he responded, "what are you talking about?"; Starnes' statement that Appellant only drew his weapon after McKinney rose from the couch; Brown's statement that no shot were fired until after McKinney rose from the couch; Brown's statement that she did not "know really" whether McKinney drew a handgun after Appellant entered; and,

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> setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Brown's statement that Appellant did not enter the apartment firing but first shot at the ground.

However, the Commonwealth concedes that *not all* of the witnesses' prior statements were admitted through Detective Sholar's testimony. Significantly, he was not able to remember Starnes' prior statement that McKinney acted "aggravated" when Appellant entered Brown's apartment, nor was he able to recount that Starnes first stated that McKinney's actions in rising from the couch "was like a threat. [McKinney] is pretty tough." Moreover, Starnes had also stated that she, at some point, heard Appellant say that he "did not mean for it to go down like that." Though the Commonwealth argues that the thrust of these omitted statements was inferred from the totality of the other statements admitted, we cannot agree.

None of the other statements that Detective Sholar testified to suggested that McKinney's actions and demeanor were threatening in nature after Appellant entered the apartment. Indeed, we think Starnes' statements actually served to rebut the usual inference: under circumstances where a recent victim arms himself and seeks out and finds his assailant in a dwelling, it seems that the most likely meaning in the assailant rising to his feet upon discovery is that he is preparing to immediately flee from any encounter with the victim, *not* provoke one.

For this reason, and though the credibility of the witnesses was undermined at trial, we cannot help but acknowledge that Appellant was

prejudiced by the trial court's error. By virtue of *Jett*, Appellant was deprived of substantive evidence that would have lent significant support to his claim of self-defense during the critically important time of cross-examining witnesses against him. In *Brock*, this Court held that "[e]ven an uncommunicated threat by the deceased against the defendant is admissible to show the deceased's state of mind prior to the killing and as evidence to prove who was the aggressor." 947 S.W.2d at 29 (*citing Wilson v. Commonwealth*, 551 S.W.2d 569 (Ky. 1977)). To be sure, in the context of the evidence presented at trial, Starnes' statement represented the only direct evidence corroborating Appellant's defense both before and during trial that McKinney was the aggressor in a case where no individual witnessed how McKinney was shot and killed. In addition, we also note that Appellant was prohibited from actually confronting the witnesses against him with their inconsistent statements during cross-examination, *see Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.") (citation omitted), with a type of evidence that, unlike hearsay testimony, would have allowed the jury to discern the witnesses' demeanor at the time. *See Muse*, 779 S.W.2d at 230; Peter Miene, et al., *Juror Decision*

Making and the Evaluation of Hearsay Evidence, 76 Minn. L. Rev. 683, 686 (1992) (concluding that "mock juror subjects clearly distinguished between the testimony provided by the eyewitness and the hearsay witness and, as expected, weighed the eyewitness testimony more heavily in their verdict decisions."). Thus, we remark that the timing and context, including the jury's opportunity to view the demeanor of the accusatory witness, of evidentiary introduction at trial is a factor that should be considered. That the prosecutor later argued in closing that Detective Sholar's testimony was unreliable "hearsay" only strengthens our belief that defense counsel was entitled to impeach the Commonwealth's witnesses with their videotaped statements without resorting to second-hand testimony and that the trial court's erroneous limitation thereof had a "substantial influence" on Appellant's convictions. *Winstead*, 283 S.W.3d at 689.

Having found cause for reversal, we will consider such other issues as are capable of repetition.

B. Change of Venue

Next, Appellant argues that the trial court abused its discretion in denying his change of venue motion because there was, in his words, "substantial evidence of widespread publicity and racial animosity surrounding the case." Having reviewed the record, we find no error in this matter.

Prior to trial, Appellant filed a petition seeking to move his trial venue from Caldwell County. In his petition, Appellant expressed concern over the

fact that he was African-American while the victim was white. Therein, he asserted that

> Caldwell County, Kentucky is a largely rural county, containing a small, minority, black population. The white and black races in Caldwell County remain largely segregated, in that the black citizens, for the most part, live in different areas, attend different churches, are buried in different cemeteries, and generally do not socialize with the white citizens. Although mostly subtle, a good bit of racial prejudice remains present in Caldwell County.

To his petition, Appellant attached several affidavits from members of the local community in support of his claim that he could not receive a fair trial in Caldwell County because it had generated an inordinate amount of attention due to the differing races of Appellant and McKinney. In addition, he also attached a copy of a handwritten flyer that was briefly posted in the county. It lamented the Commonwealth's allegedly slow and unproductive investigation of McKinney's death and was purportedly created by his family.[10]

The Commonwealth opposed the motion and, in its response, noted that none of the affiants had seen the flyer and, in any event, that its contents suggested that the Commonwealth – and not the Appellant – would be denied a fair trial in Caldwell County. As to the remainder of Appellant's argument, the

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[10] On the flyer was a picture of the victim and handwriting, which read:

> Martin Wyatt McKinney was a 32 yr old Son, brother, and father. He was loved tremendously and is missed everyday by all who knew him. He was murdered on this day (Nov 23) one year ago. Sadly only one of the five people involved in his death has been jailed and charged. The 2 girls who robbed him after he was dead havent even been charged. Where is the Justice in Princeton? The legal system tells citizens not to take the law into your hands. We have been shown by the "law" that is our only option. I think the "law" is scared! I can assure you we (the family) are not!!! The family of Marty McKinney

Commonwealth argued that the case had not received an unusual amount of attention, discussion, or publicity. Finally, the Commonwealth requested the court to hold the motion in abeyance pending the commencement of trial so as to afford the parties the opportunity to question the prospective jury panel regarding potential racial bias and media exposure.

The trial court held a hearing on the matter. There, Appellant introduced three newspaper articles and testimony regarding television coverage of the shooting. He also presented the testimony of three witnesses, all of which were his acquaintances and African-American. The first was Ashley Riley, the girlfriend of Appellant, and she described hearing publicity about the shooting on television and radio, seeing it in the newspaper, hearing talk about it in the community, and seeing the flyer. Kayla Wilson, who knew Appellant through Ashley Riley, similarly testified and added that she saw the flyer posted on a telephone pole and heard about other flyers being posted, though admitting that she only heard discussion in the area where she lived. Charmika Riley, a cousin to Ashley Riley and a friend of Appellant, also described the media coverage, seeing the flyer in more than one location, hearing talk about the flyer, and hearing a racial epithet directed at Appellant in her work place. All three claimed that Appellant could not receive a fair trial in Caldwell County due to racism.

The Commonwealth presented the testimony of two local law enforcement officers. Detective Brian Ward testified that he interacted with the

community on a frequent basis and was knowledgeable regarding public sentiment but had not heard any public discussion about Appellant's case within the past three to four months. Ward did not see any of the flyers or hear any related discussion, though he generally admitted that whites and African-Americans lived and socialized separately in Caldwell County. Caldwell County Sheriff Stan Hudson also testified and was familiar with the case. Hudson stated that did not recall any discussions about the case during his interactions with the public, did not remember any specific publicity, nor did he see the flyers posted or hear discussion about them. Hudson added that he had lived in the county for over forty years and had not seen any extraordinary evidence of racial tension since becoming sheriff.

The trial court denied Appellant's motion in a written order. As to Appellant's claim of racism, the trial court concluded that it was a "societal evil" inherent in all communities and that Caldwell County was no more plagued by its prejudice than any other county in the region. As to the issue of publicity, the trial court found that there had been no recent media attention and that the newspaper articles that Appellant submitted were objective and not inflammatory in nature. Similarly, the trial court dismissed the allegations of "community talk," finding that the discussion centered primarily within the African-American neighborhoods familiar to Appellant's witnesses. Finally, as to the effect of the flyer, the trial court concluded that it was fair to assume that it referred to Appellant but that it had been posted for less than a day at a

local business with no proof as to the number of flyers which may have been posted. The trial court thus found no facts which would have prevented Appellant from receiving a fair trial in Caldwell County, though holding that the issue could be revisited should difficulties arise with respect to "seating a fair and impartial panel of jurors."

"In determining the proper venue for a criminal trial, the central concern is necessarily to afford the defendant a fair trial, and a change of venue is appropriate when it appears that the defendant cannot receive a fair trial in the county of prosecution." *Wood v. Commonwealth*, 178 S.W.3d 500, 513 (Ky. 2005) (*citing Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997)); *see also McCleskey v. Kemp*, 481 U.S. 279, 310 n.30 (1987) ("Widespread bias in the community can make a change of venue constitutionally required.") (*citing Irvin v. Dowd*, 366 U.S. 717 (1961)).

This Court has held that a "change of venue may be granted upon a showing that: [1] there has been prejudicial news coverage; (2) the coverage occurred prior to trial; and (3) the effect of the news coverage is 'reasonably likely to prevent a fair trial.'" *Wood*, 178 S.W. 3d at 513 (*citing Wilson v. Commonwealth*, 836 S.W.2d 872, 888 (Ky. 1992)). "[T]he central concern . . . is not simply the amount of pretrial publicity but whether a fair trial is possible," *id.* at 513-14 (*citing Kordenbrock v. Commonwealth*, 700 S.W.384, 387 (Ky. 1985)), which turns on "whether the jurors have heard something that causes a preconception concerning the defendant." *Bowling v. Commonwealth*, 942

S.W.2d 293, 298 (Ky. 1985). "Furthermore, a change of venue may be warranted when prejudice is so pervasive that it may be clearly implied from the totality of the circumstances." *Wood*, 178 S.W.3d at 513 (*citing Jacobs v. Commonwealth*, 870 S.W.2d 412, 416 (Ky. 1994)).

In reviewing the matter, this Court has held "wide discretion is, and should be, vested in the trial court when determining a change of venue question," as "the judge is present in the county and presumed to know the situation." *Stopher v. Commonwealth*, 57 S.W.3d 787, 796 (Ky. 2001) (*citing Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994); *Nickell v. Commonwealth*, 371 S.W.2d 859 (Ky. 1963)).

Here, we do not believe the trial court erred because there was no evidence that Appellant could not receive a fair trial in Caldwell County due to adverse publicity. All of the testimony Appellant presented came from the county's minority community and, indeed, the Commonwealth's witnesses dispelled any idea that the shooting garnered any special attention in the local media or discourse in the public at large which could have affected the views of potential jurors. As to the flyer, its contents did not appear to prejudice Appellant and the trial court, in a thorough hearing, rightly concluded that its effect was never shown to be anything but extremely acute.

As for Appellant's more general argument that Caldwell County was so tainted with racism that a fair and impartial jury could not be empanelled, a review of voir dire undercuts such a charge. Four days prior to trial, the trial

court granted – over the Commonwealth's objection – Appellant's motion to conduct individual voir dire "regarding the issue of race and racial prejudice." As a result, Appellant was able ask all thirty-three potential jurors specific and pointed questions on their attitudes of race. Ultimately, and significantly, each juror stated that race would play no part in his or her consideration and decision of Appellant's case.

III. Conclusion

Therefore, for the above stated reasons, we hereby reverse Appellant's convictions and remand this matter to the trial court for proceedings consistent with this opinion.

Minton, C.J., Noble, Schroder, Scott, and Venters, JJ., concur. Abramson, J., concurs in result only. Cunningham, J., concurs in part and dissents in part by separate opinion.

CUNNINGHAM, J., CONCURRING IN PART AND DISSENTING IN PART: I respectfully agree with the majority on all issues except the reversing of the conviction due to error regarding the impeachment of prosecution witnesses. Any error the trial court may have made in denying the playing of prior recorded statements of some of the prosecution witnesses was harmless.

It appears to me that the majority loses perspective of the total incriminating evidence against Appellant in analyzing the trial court's error. The majority concedes that "many of the witnesses' prior statements that Appellant complains were erroneously excluded were, in fact, admitted, albeit

through the testimony of Detective Sholar," and that "Detective Sholar testified to much of the witnesses' prior videotaped statements, thus accomplishing their impeachment."

Although the prior video statements were not played for the jury, I believe that Detective Sholar provided sufficient impeachment testimony of those witnesses. The totality of the evidence, including the fact that the victim was shot seven times, made any error of the trial judge harmless. The verdict would have been the same, even if the videotaped statements had been played. Therefore, I would confirm the conviction.

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