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RENDERED: MARCH 23, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000198-MR

DEVONTE LAVAL WEBB — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 14-CR-00354-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Devonte Laval Webb, was tried jointly with co-defendant Ethan King. The two were each charged with five counts of first-degree robbery, and Appellant was also charged with being a second-degree persistent felony offender (PFO). A Fayette Circuit Court jury found Appellant guilty on all counts and recommended fifteen-year sentences for each of the five first-degree robbery counts, enhanced to twenty-seven years by the PFO conviction. The jury recommended all sentences run concurrently. The trial court accepted the jury's recommendation and ran the sentences in the present case concurrently; she also ran twenty years of Appellant's present sentence concurrently with a sentence in a prior, unrelated murder conviction and the remaining seven years consecutive to that sentence. Appellant now appeals as a matter of right, Ky. Const. § 110(2)(b), and raises the following issues: (1) the trial court erred in failing to find a photographic lineup unduly suggestive; (2) the trial court

erred in overruling two motions for mistrial; (3) officer's testimony concerning out-of-court identifications constituted hearsay and bolstered other witnesses' testimony, amounting to palpable error; (4) the trial court erred in denying Appellant's motions for a continuance and to sever his case from King's; and (5) the trial court erred in ordering Appellant pay $500 in restitution to one of the robbery victims. We disagree and affirm Appellant's convictions and their corresponding sentences.

I. BACKGROUND

In October 2012, three individuals robbed six University of Kentucky students at gunpoint in a home shared by four of the six students. The victims included Kyle Stamp, his three roommates, and two of their friends. On the day in question, Stamp had arranged to sell Ethan King four ounces of marijuana and told the other five victims he was expecting King to come to the residence. In spite of the fact Stamp had instructed King to come alone, when King arrived, he was accompanied by two other men. Stamp let the three men into his home to complete the drug transaction. They proceeded to the kitchen, where Stamp had the marijuana and scales out on the kitchen table, ready for the drug deal.

At some point, Stamp left the kitchen to get change from his bedroom. Upon his return, Stamp noticed the three men had removed everything from the table. At this point, one of the men who accompanied King pulled a gun and pointed it at Stamp. The man with the gun told Stamp not to move or make any loud noises—that they were going to rob him. Eventually, the three robbed Stamp's roommates and friends who sat in the living room watching a

football game. The robbers also removed some items (including a flat screen television, MacBook laptop computer, and iHome device) from the bedroom of one of Stamp's roommates. After the completion of the robbery, the three men fled the scene with the marijuana and stolen items.

One of the victims had hidden his cell phone during the robbery and used it to call 911 after the robbers left the house. One of the two victims who did not live in the home left before police arrived, but the other five provided statements to police. The primary officer, Officer Wallace, realized Stamp had more information than the other four victims, and interviewed him separately. Stamp gave Officer Wallace the phone number he had for Ethan King, whom he knew only as "Little E." Wallace put together a photographic lineup including a picture of King and took it to the scene. Three of the roommates identified King from the lineup without hesitation or confusion, and the fourth said that he was "positive, but not 100% sure." The other two victims were not at the home when police presented this lineup.

Approximately three hours after the robbery, police took King into custody at his parents' home. Wallace interviewed King at the jail, and King stated he was too high on narcotics to remember everything he had done. King said he recalled picking up the other two robbers but indicated that he did not know them. He denied recalling any events after that. When confronted with the victims' stories, King said that, in spite of his lack of memory, he must have committed the crime.

Police did not have a good enough description of either of the other two robbers to develop a suspect list at that time. In fact, there were no further leads in the case until a year later when King's attorney gave police Appellant's

name. By this time, Officer Wilson had been assigned to the case and he compiled a photographic lineup. Three of the four prior roommates still lived together, and Officer Wilson individually showed these three the lineup. All three roommates identified Appellant.

As noted above, Appellant was charged with five counts of first-degree robbery and with being a persistent felony offender. A jury convicted him of those crimes and he was sentenced to twenty-seven years' imprisonment. He now appeals to this Court, raising six allegations of error, which we will address in turn. We will develop further facts below as necessary for our analysis.

II. ANALYSIS

A. Photographic Lineup

Appellant filed a motion at trial to suppress the three out-of-court identifications made pursuant to a photographic lineup. The trial court overruled the suppression motion after conducting an evidentiary hearing at which Officer Wilson was the sole witness.

Appellant now appeals the trial court's denial of his suppression motion, arguing the trial court erred in failing to suppress the three witnesses' identifications in violation of his due process rights under both the state and federal constitutions. The standards under which we analyze this issue are well settled. "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' *Dowling v. United States,* 493 U.S. 342, 352 . . . (1990), have we imposed a constraint tied to the Due Process Clause." *Perry v. New Hampshire,* 132 S. Ct. 716, 723 (2012). "A conviction

based on identification testimony following pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is so 'impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Thigpen v. Cory,* 804 F.2d 893, 895 (6th Cir. 1986), quoting *Simmons v. United States,* 390 U.S. 377, 384 (1968).

As this Court has explained,

> [t]he determination of whether the in-trial use of identification testimony violates due process involves a two-step process. First, the court examines the pre-identification encounters to determine whether they were unduly suggestive. If so, "the identification may still be admissible if 'under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.'" *Stewart v. Duckworth,* 93 F.3d 262, 265 (7th Cir.1996), quoting *Neil v. Biggers,* 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

Dillingham v. Commonwealth, 995 S.W.2d 377, 383 (Ky. 1999).

In the case at bar, the trial court found that Appellant failed to demonstrate the photographic array was unduly suggestive and, therefore, did not move on to the second step of the inquiry. In making the determination as to whether a photographic array was unduly suggestive, "[c]ourts use a number of factors . . . including the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves." *United States v. Sanchez,* 24 F.3d 1259, 1262 (10th Cir. 1994).

"The 'clearly erroneous' standard applies to a trial judge's findings of fact on a motion to suppress evidence." *King v. Commonwealth,* 142 S.W.3d 645, 649 (Ky. 2004) (citing *Neil v. Biggers,* 409 U.S. 188, 199 (1972)). A finding of fact is clearly erroneous only if it is manifestly against the great weight of the evidence. *Frances v. Frances,* 266 S.W.3d 754 (Ky. 2008). We review a trial

court's decision on the admissibility of identification evidence for an abuse of discretion. *King*, 142 S.W.3d at 649; *see Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (holding "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings"). "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).

Appellant asks this Court to hold that the trial court abused its discretion in finding that he failed to carry his burden of proving the photographic array was unduly suggestive. He asks that we hold that the trial court should have reached the second *Neil v. Biggers* step (totality of the circumstances). After examining the photographic array Officer Wilson presented to the robbery victims and the process he used in compiling and presenting it, we disagree with Appellant and hold the trial court did not abuse its discretion.

We now turn to the relevant background in Appellant's case. More than a year after the robbery, King's attorney gave Officer Wilson Appellant's name as a suspect. At that point, Officer Wilson obtained Appellant's booking photograph from 2011 and compiled a photographic lineup to present to the robbery victims. Officer Wilson testified that though this particular photograph of Appellant had been taken a year and a half before the robbery, he used it rather than a more recent picture, as he preferred to use photographs pre-dating the crime in case there had been any changes in appearance.

Officer Wilson testified there was no standard method for choosing the pictures of the other individuals in the lineup. He stated he searched for

pictures of men who were close to Appellant's weight and age in the detention center database. He then went through the search results and looked for individuals who looked like Appellant—with similar features such as eyes, complexion, and facial hair. He testified that each of the photographs matched the very general descriptions given by the victims on the night of the robbery and that none of the victims gave any details regarding complexion, so he assumed an average skin color.

Once he had compiled a six-person photographic lineup, Officer Wilson discovered that three of the four original roommates still lived together and set up a meeting with them. (Stamp lived in Louisville by this time, and he and Officer Wilson failed to coordinate a meeting.) When he contacted the roommates, Officer Wilson explained he had a new lead in the case and may have found one of the individuals involved in the robbery. The three roommates consented to look at the lineup, and Officer Wilson arranged to meet them in their apartment.

During the meeting, Officer Wilson used the same procedure in presenting the lineup to each of the three. Specifically, Officer Wilson took each of the roommates into a separate room, while the other two waited in the living room playing video games. Officer Wilson used the same numbered lineup for each of the roommates. He handed each individual roommate the photographs in the lineup one at a time. Each of the three identified Appellant.

At trial, Appellant argued the photographic array was unduly prejudicial, basing his argument in part on the differing complexions of the individuals in the pictures. Officer Wilson admitted that two of the six men in the lineup had differing complexions than Appellant. Defense counsel also argued to the trial

court that the individual in another of the photographs had a different complexion. On appeal, Appellant argues that the complexions of two or three of the men included in the array were "so different as to invite the victims to discount [those photographs] out of hand, virtually [e]nsuring that one of these three men would be chosen as the robber."

In *Oakes v. Commonwealth*, 320 S.W.3d 50, 57 (Ky. 2010), this Court examined a number of cases in which various courts held a photographic lineup was not unduly suggestive, including arrays in which:

> the defendant is the only participant with a "fade" haircut, *Commonwealth v. Silva–Santiago,* 453 Mass. 782, 906 N.E.2d 299, 310 (2009), or if the defendant has a different eye color, *Commonwealth v. Crork,* 966 A.2d 585, 589–90 (Pa. Super. 2009), as long as he has reasonably similar features to the other participants. Similarly, a lineup is not unduly suggestive if "the photograph of the defendant was the most clearly focused," *People v. Sawyer,* 253 A.D.2d 501, 501, 677 N.Y.S.2d 799 (N.Y. App. 1998), if the defendant's "photo is a full length shot while the rest of the photos are bust shots," *United States v. Bell,* 457 F.2d 1231, 1235 (5th Cir.1972), or if the defendant was the only participant depicted in a single, front-view photograph and the only one who was clean shaven, *United States v. Harrison,* 460 F.2d 270, 271 (2d Cir.1972) (per curiam).

We stated, "[t]he key . . . is determining whether Appellant stood out of the lineup so much that the procedure was 'unduly suggestive.'" *Id.*

Just as here, the appellant in *King*, 142 S.W.3d at 650, argued the photographic array police utilized in his case was unduly suggestive. The photographic array in *King* contained six photographs of African-American males, all "pictured in substantially similar surroundings and it is clear that all were in custody at the time the photographs were taken." *Id.* In the case at bar, the photographic array also contained six photographs of African-American males, and all six photographs were taken while the individuals were

in custody with the same background and perspective. The appellant in *King* complained that the photographic array was unduly prejudicial, as he was the oldest individual in the photographs and the only one wearing glasses. However, this Court held, "the ages of the men were not clearly discernible" and the fact that "only King wore glasses . . . did not rise to the level of a due process violation." *Id.*

As for Appellant's argument concerning complexion, this Court addressed a similar argument in *Burrell v. Commonwealth*, No. 2006-SC-000547-MR, 2008 WL 3890049, at *8 (Ky. Aug. 21, 2008). In *Burrell*, "[a]ll of the men pictured in the array [were] African-American and . . . some [were] darker-complected than others . . . ." *Id.* Burrell argued that differences in the men's complexions and hair made the array unduly suggestive. We held that "[t]hese differences, however, do not constitute an unduly suggestive photographic line-up . . . ." *Id.* We noted that the detective in *Burrell* had told the witness that complexions were not always accurately depicted in the photographs. Here, testimony at trial indicated that Officer Wilson went over the instructions on the photographic lineup form which the three victims signed. Those instructions clearly stated, "[p]lease keep in mind that many times, photos fail to accurately depict a person's true complexion or skin color."

Our holding in *Burrell* is instructive here. In that case, the witness picked out the appellant "immediately as the suspect." *Id.* Here, Officer Wilson testified the first of the three victims identified Appellant "very quickly"; the second, "with no hesitation"; and the third, "with no hesitation or confusion." As in *Burrell*, the differences in complexion here did not render the photographic array unduly suggestive.

In addition to his argument regarding complexion, Appellant argued that Officer Wilson told the victims that someone from the lineup might have been involved in the robbery—and that the trial court should have suppressed the identifications on these grounds. It puzzles the Court as to what else the victims could have possibly surmised when a police officer wanted them to look at a lineup. The only reasonable conclusion is that the officer believed it *may* include someone involved in the crime. Otherwise, why else would the officer ask the victims to look at the photographs? Thus, we will delve no further into that portion of Appellant's argument. The officer's words did not create a "very substantial likelihood of irreparable misidentification." *Simmons*, 390 U.S. at 384.

In spite of the slight irregularities in the photographic arrays in the cases discussed above, all of the various courts, including this Court, held that the photographic lineups were not unduly suggestive. Having reviewed the photographic array, we agree and hold that the trial court was not clearly erroneous in its findings of fact concerning the photographic array and did not abuse its discretion in admitting the pre-trial identifications into evidence.

Appellant insists that the "totality of the circumstances here weigh heavily in favor of suppressing these identifications as unreliable." However, as explained above, that determination need not be made, as we are affirming the trial court's finding that the photographic lineup was not unduly prejudicial. Thus, we need not reach the second step of the *Neil v. Biggers* analysis.

B. Mistrial Motions

Appellant next argues the trial court erred in denying two motions for mistrial. This Court has held that "[a] mistrial is an extreme remedy and

should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005) *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). "The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould v. Charlton Co.*, 929 S.W.2d 734, 738 (Ky. 1996). Furthermore, "[i]t is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion." *Woodard v. Commonwealth*, 219 S.W.3d 723, 727 (Ky. 2007), *overruled on other grounds by Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

1. Photographs Obtained from Jail Website

During the Commonwealth's presentation of its case against Ethan King, Appellant's co-defendant, Officer Wallace testified he obtained the photographs in King's photographic array from the jail website. Appellant objected, arguing that the jury would infer that King's picture was on the jail's website because he had committed a crime. Appellant's counsel asserted that the jury would remember that fact when evidence concerning Appellant's own photographic array was presented later in the trial. Appellant further argued at trial that the evidence was irrelevant and prejudicial.

King's defense attorney insisted that an admonition would only emphasize the fact that King had been in jail and moved instead for a mistrial.

He argued the bell could not be "un-rung." Appellant joined that motion. The trial court overruled the mistrial motion and pointed out that just because an individual had been arrested for something did not mean they had done anything wrong. The trial judge went on to instruct the prosecutor to make no further references to the fact that the photographs came from the jail's website. As neither King's counsel nor Appellant's sought an admonition (on the grounds previously noted), the trial court did not instruct the jury to disregard Officer Wallace's statement regarding the origin of the photographs in King's photographic array.

As noted in the previous section, the photographs of the individuals in Appellant's own photographic array were all taken in custody. In fact, in our analysis as to whether a photographic array was unduly suggestive, this Court has used the fact that all of the photographs in various arrays depicted individuals who were all in custody. For example, in *Dillingham,* we noted that the trial court had found that "[t]he individuals in each photo are not only physically similar but are also clearly in custody." 995 S.W.2d at 383. We went on to point out that the picture did "not include any information regarding the crime charged or the date of the crime." *Id.* Furthermore, in *King,* this Court used the fact that all the individuals in the array were "pictured in substantially similar surroundings and it is clear that all were in custody at the time the photographs were taken" in support of our holding that the photographic array was not unduly suggestive. 142 S.W.3d at 650.

However, in spite of the fact that we have held photographic arrays depicting all of the individuals in custody are permissible, Appellant asks this Court to hold that the trial court abused its discretion in failing to grant his

motion for mistrial after Officer Wallace testified he obtained the photographs from the jail's website. Considering this Court's precedent outlined above, we disagree. This occurrence was certainly not "of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould*, 929 S.W.2d at 738.

In spite of the fact that the photographic array in question was King's—not Appellant's—Appellant argues that it violated KRE 404(b)'s general prohibition of evidence of other crimes and that it negated his presumption of innocence in the same way that appearing handcuffed at trial would have. (In fact, Appellant goes so far as to say, "[t]hus, [Appellant] was branded a criminal and his guilt was a foregone conclusion. Its effect on the jury was the same as if [Appellant] had been forced to appear for trial in shackles and an orange jumpsuit.") The analogy between an officer testifying that he obtained photographs for a co-defendant's array from the jail website—particularly when he was not the same officer who prepared Appellant's photographic lineup—and appearing shackled in open court is a bit of a stretch. However, we need not address this portion of Appellant's argument, as he failed to present it to the trial court. It is well settled that "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

2. Juror as Victim of Car Theft

Before court began on the morning of the final day of Appellant's trial, the bailiff informed the trial court that one of the jurors had his car stolen that morning. The court excused the juror, telling him not to discuss anything that

had happened. King's counsel indicated that the juror had been in the room with the rest of the panel and may have been upset and potentially made comments about being the victim of a crime. King's counsel indicated that when the jury was told that one juror had been excused due to a serious personal matter, some of the jurors shook their heads.

King's counsel requested that the trial court question the jurors, and the court consented. When the trial court asked the panel if anyone was aware of what had happened or had any conversations with the juror in question, it is difficult to discern any responses. However, the trial court's next statement indicates an affirmative response: "[s]o, he did come back and tell you what happened this morning?"

Next, the trial court asked the panel for a show of hands if anything about what the excused juror had said about the events of the morning would affect them in any way with respect to the case, any evidence they had heard, and their ability to remain fair and impartial. The trial judge then stated, "no," which appeared to be the answer she discerned from the panel's response.

King's counsel indicated at trial that the show of hands indicated that the juror had talked to the entire panel. He argued that the fact that the excused juror had told the panel that he was the victim of a crime may have influenced the jury. He moved for a mistrial on these grounds and Appellant joined the motion. The Commonwealth argued that an admonition to the jury would suffice.

The trial court ultimately overruled the motion for mistrial and admonished the jury not to allow anything that transpired during their conversations with the excused juror to impact their deliberations in any way.

On appeal, Appellant argues the trial court abused its discretion in overruling his motion for a mistrial.

Appellant points to our precedent and argues a mistrial should have been granted because the potential jury issue in his case was "of such character and magnitude that [he would] be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould*, 929 S.W.2d at 738. He emphasizes that the trial court did not individually question the jurors or ask them what the excused juror had told them. He also points out the trial judge did not ask the jurors what they thought or said in response to the excused juror's statements.

Appellant contends that the loss of a vehicle is a significant property theft and may have resonated with the panel as it recalled the victims' testimony concerning their deprivation of personal property. He indicates "it would be a human response to identify and feel more sympathy . . . because the jurors were sympathetic to one of their own suffering a theft." He insists this created the danger that one or more of those jurors would convict Appellant because they were inflamed by those circumstances, rather than solely based on the evidence presented at trial.

The parties disagree as to whether Appellant acquiesced to the trial court's admonition. However, regardless of whether Appellant agreed to it, "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson*, 105 S.W.3d at 441. This is the case "unless (1) there is an overwhelming probability that the jury will be unable to follow the court's admonition; and (2) a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant."

Alexander v. Commonwealth, 862 S.W.2d 856, 859 (Ky. 1993) (citing *Greer v. Miller*, 483 U.S. 756, 766, n. 8 (1987)), *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997). We see no such "overwhelming probability" here nor do we believe the consequences of the excused juror informing the rest of the panel that his car had been stolen would be "devastating" to Appellant.

Here, apart from both the excused juror and the victims being relieved of their possessions, the crimes were dissimilar. As to the crime of which Appellant was accused, it involved assailants pointing guns at and threatening their victims as they stole from them. In the case of the juror, his car was stolen. However, unlike the armed robbery in the present case, it seems the juror's car disappeared during the night as he slept.

For the aforementioned reasons, we hold the trial court did not abuse its discretion in denying Appellant's motion for mistrial.

Appellant also seems to argue that the panel should have been dismissed. (Actually, his argument is based in law concerning whether a prospective juror should be stricken for cause during voir dire. Considering the context, we assume he is likening, though inartfully, a strike during voir dire to striking the entire panel.) However, he points us to no place in the record where he requested this relief of the trial court. As with Appellant's previous mistrial argument, we will not consider this argument at length, as it was not submitted to the trial court. However, we will pause to point out that "'[t]he trial court has broad discretion in determining whether a jury panel should be dismissed, and its ruling should not be disturbed absent a clear

abuse of discretion.'" *King v. Commonwealth*, 374 S.W.3d 281, 288 (Ky. 2012) (quoting *Tabor v. Commonwealth*, 948 S.W.2d 569, 571 (Ky. App. 1997)).

C. Testimony Concerning Out-of-Court Identifications

Appellant next argues that Officer Wilson's testimony about Appellant's identification by the three victims to whom he presented the photographic array amounted to hearsay and impermissibly bolstered the victims' in-court identifications. At trial, Officer Wilson was the Commonwealth's second witness, and offered his testimony before any of the victims testified as to their in-court and out-of-court identifications of Webb. Officer Wilson testified that the three victims to whom he showed the photographic array all identified Appellant without hesitation or confusion.

Appellant did not object at trial, therefore, this matter is not preserved and we will review only for palpable error under RCr 10.26. "Palpable error affects the substantial rights of the party and results in manifest injustice. Furthermore, an appellant claiming palpable error must show that the error was more likely than ordinary error to have affected the jury." *Boyd v. Commonwealth*, 439 S.W.3d 126, 129-30 (Ky. 2014). "In determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'" *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002) (citing *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983)). This Court has expounded on the *Pace* and *McIntosh* line of cases to hold that the "required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Kentucky Rules of Evidence 801A provides, in pertinent part:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> . . .
>
> (3) One of identification of a person made after perceiving the person.

Appellant acknowledges that KRE 801A(a)(3) permits testimony by both the individual who made the identification and others who heard the identification. However, he points out that since Officer Wilson's testimony regarding the identification came in before that of the victims, a proper foundation had not been laid. *Owens v. Commonwealth*, 950 S.W.2d 837, 839 (Ky. 1997) ("[A]fter the victim had testified that he made the out-of-court identification of appellant, the Commonwealth was entitled to introduce the hearsay statements of the police officers to corroborate the fact of the prior out-of-court identification.").

While Appellant is correct that Officer Wilson's testimony concerning the victims' identification of Webb should have come after the victims themselves had testified as to such, this did not affect Appellant's substantial rights and result in manifest injustice. Moreover, Appellant does not "show that the error was more likely than ordinary error to have affected the jury." *Boyd*, 439 S.W.3d at 129-30. Here, Officer Wilson explained to the jury the factual events surrounding the lineup. He did not provide his opinion as to whether the victims were believable, but only the fact that the three of them identified Appellant as one of the robbers. During the course of the trial, the three

victims did all testify concerning their out-of-court identifications of Appellant—and their testimony was in line with Officer Wilson's. This unpreserved error did not result in a manifest injustice and, therefore, did not amount to palpable error.

D. Motions for Continuance and Separate Trial

Appellant argues the trial court erred in denying his motions for a continuance and for a separate trial, filed on the same day.

1. Continuance

First, in Appellant's motion to continue,[1] Appellant's trial counsel informed the court of "a potential conflict that cannot be resolved without giving [Appellant] an opportunity to consult with other counsel or conflict counsel." This "potential conflict" of interest stemmed from an unrelated case. In that case, Appellant had entered a guilty plea, but had allegedly sent a letter to the trial judge indicating his counsel had misinformed him regarding the possible sentence. According to Appellant's motion for continuance, the letter "indicat[ed] he was misinformed by trial counsel about the possible sentence and indicat[ed] a desire to withdraw his plea in that case." The trial court denied his motion for a continuance, noting that whether Appellant decided to withdraw his plea in that unrelated case had no bearing on the case at bar. Appellant alleges the trial court erred in this ruling.

Appellant included nothing in the record on appeal supporting his contention. He does not allege that he actually filed a motion to withdraw his

[1] At the end of the motion, Appellant also asked for a separate trial. However, that issue was more fully fleshed out in the second motion he filed that day. Therefore, we will address the issues separately.

guilty plea in the murder case, but only purports to have written a letter to the judge. Even assuming this letter exists, we cannot review it as he failed to make it a part of this record. "It is incumbent upon Appellant to present the Court with a complete record for review. . . . When the record is incomplete, this Court must assume that the omitted record supports the trial court." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (Ky. 2008).

Appellant does not contend that he made any motions in the unrelated case for a continuance or to substitute counsel based on a potential conflict. In his motion for a continuance, filed on February 6, 2015, Appellant indicated that final sentencing in the other matter was set for February 27. Sentencing in the matter before us occurred on March 27, 2015. There, Appellant asked that his sentence in the present case run concurrently with his sentence in the murder case, as he had already been sentenced in that matter. Given the short turn-around, and lack of evidence to the contrary in the record, we can only assume that Appellant did not, in fact, actually move to withdraw his guilty plea in the murder case, in spite of what his alleged letter may have indicated to the trial judge in that case. We cannot base our opinion on speculation, however; rather, "we must assume that the omitted record supports the trial court." *Id.*

The cases Appellant cites are inapplicable to the facts of the case at bar. For example, the appellant's motion to withdraw his guilty plea in *Commonwealth v. Tigue*, 459 S.W.3d 372, 381 (Ky. 2015), related to *that case*—and it was clear from the record that he actually made said motion. However, those are simply not the facts of Appellant's case. Here, the plea was in an

unrelated homicide case and Appellant does not allege he actually made a motion to withdraw his plea.[2]

For the foregoing reasons, we hold that, under the facts of this case, the trial court did not abuse its discretion in failing to grant Appellant's motion for a continuance. "The granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge has abused that discretion, this court will not disturb the findings of the court." *Williams v. Commonwealth*, 644 S.W.2d 335, 336–37 (Ky. 1982).

2. Separate Trials

In his other motion, Appellant requested to be tried separately from co-defendant, Ethan King. First, we note that RCr. 6.18 permits offenses to be joined where "the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting part of a common scheme or plan." However, RCr. 8.31 provides, in pertinent part: "If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of . . . defendants . . . for trial, the court shall . . . grant separate trials of defendants or provide whatever other relief justice requires."

In his motion, Appellant argued that he was neither charged nor implicated until King's counsel provided his name to police more than a year

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[2] In his brief, Appellant cites several cases regarding instances in which substitute counsel is necessary in order to protect an individual's Sixth Amendment right to a fair trial. However, the motion Appellant made at trial was not a motion to substitute counsel—it was a motion to continue. Even though the motion indicated that the request for more time was to "giv[e Appellant] an opportunity to consult with other counsel or conflict counsel," Appellant was simply not requesting that the trial court appoint substitute counsel at that time. Therefore, we will not address this portion of Appellant's argument further. The motion at issue was to continue the trial, that is the motion ruled on by the trial court, and we need not address it differently.

after the robbery. Appellant pointed out in his motion that King had been asked on various occasions who accompanied him during the robbery, but had not previously implicated Appellant, and that King's latest statement was contradictory. Appellant asserted that if King did not testify at their joint trial (which he did not), he would be unable to question King concerning his prior inconsistent statements. Appellant insisted in his motion that the cases could be separated easily with no prejudice to the Commonwealth, but if the co-defendants proceeded to trial together, Appellant's right to a fair trial would be compromised. The trial court denied Appellant's motion.

On appeal, Appellant argues the trial court's denial of his severance motion denied Appellant his Sixth and Fourteenth Amendment rights to present a defense, as it kept him from calling King as a witness to either confront him or as a witness on his behalf. Appellant argues that we should review this as a constitutional error under the harmless beyond a reasonable doubt standard. We disagree. This Court reviews a trial court's denial of a motion to sever for an abuse of discretion. "We have expressed a strong preference for such joint trials. The decision as to severance is matter of judicial discretion. We will not reverse on appeal for failure to sever unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 340 (Ky. 2004) (internal quotation marks and citations omitted). This Court has stated that "'prejudice' is a relative term and, in the context of a criminal proceeding, means only that which is unnecessary or unreasonably hurtful, given that having to stand trial is, itself, inherently prejudicial." *Ware*

v. Commonwealth, 537 S.W.2d 174, 176 (Ky. 1976); *Romans v. Commonwealth*, 547 S.W.2d 128, 131 (Ky. 1977). Furthermore, "the burden is on the appellant to show that the denial was in fact unfairly prejudicial." *Peacher v. Commonwealth*, 391 S.W.3d 821, 834 (Ky. 2013) (citing *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky.2011)); *see also Rachel v. Commonwealth*, 523 S.W.2d 395, 400 (Ky. 1975) ("If upon the consideration of the case a trial judge orders a joint trial, we cannot reverse unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion.").

Appellant's argument boils down to the fact that he wanted the severance so that King could be tried first. Then, Appellant insists King would have lost his Fifth Amendment privilege against self-incrimination and Appellant could call him as a witness to question him regarding his prior inconsistent statements. Appellant goes so far as to insist that, even if King were convicted and appealed the conviction, Appellant's trial could be "put off until King's case was resolved." Unsurprisingly, Appellant cites no authority for his argument. We cannot say that a trial court abused its discretion by denying a motion to sever based on Appellant's hope that it would postpone hearing his case for an indeterminate amount of time while his co-defendant was tried, potentially convicted, and had his appeals fully resolved.

Appellant also points out in his brief that "[i]t was also clear that King's defense would be that [Appellant] was the leader and King was only a facilitator." As to this assertion, we have held: "That different defendants alleged to have been involved in the same transaction have conflicting versions

of what took place, or the extent to which they participated in it, vel non, is a reason *for* rather than *against* a joint trial. If one is lying, it is easier for the truth to be determined [i]f all are required to be tried together." *Ware v. Commonwealth*, 537 S.W.2d 174, 177 (Ky. 1976) (emphasis added), *overruled on other grounds as recognized by Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016). We agree with this Court's reasoning in *Ware* and will not address this portion of Appellant's claim further.

Appellant did not bear his burden of demonstrating that any prejudice occurred as a result of the trial court's denial of his motion to sever. Five witnesses and two police officers testified at his trial. Victims identified Appellant as one of the robbers. We do not believe Appellant's inability to question King as to why he had not come forward with his identification sooner prejudiced him at trial. Therefore, we hold that the trial court did not abuse its discretion in denying Appellant's motion to sever his trial from King's.

E. Restitution

Appellant's final argument relates only to his sentence. He admits the issue is unpreserved, but argues the trial court committed palpable error when it ordered him to pay restitution jointly and severally with King in the amount of $500 for the items taken from one of the roommates during the robbery. Appellant states that there was neither a hearing nor proof offered to support the amount of restitution.

In *Jones v. Commonwealth*, 382 S.W.3d 22, 30 (Ky. 2011), the "restitution imposed against Appellant was based upon unsworn and uncross-examined statements." There, the trial judge had merely accepted an unsworn

statement the victim's mother made during sentencing concerning her daughter's medical expenses. The trial judge took the amount given by the mother and, without taking any testimony, multiplied that amount out over a period of forty years to reach the amount of restitution. We held that restitution award amounted to palpable error.

In *Cave v. Commonwealth*, No. 2013-SC-000542-MR, 2015 WL 1544451, at *8 (Ky. Apr. 2, 2015), we stated:

> [R]estitution may be clearly established from the evidence at trial or readily ascertainable from receipts, invoices, estimates, etc. In such cases, the issue of restitution may "be summarily resolved with minimal formality and with practical efficiency." *Jones*, [382 S.W.3d] at 31. In light of [the appellant's] failure to contest the Commonwealth's motion or its proof, we cannot find fault, and certainly we cannot find palpable error, in the court's determination to order restitution.

We believe this case is more like *Cave*, where the restitution did not amount to palpable error, than like *Jones*, where it did. Here, five witnesses testified at trial about the items stolen during the robbery, which included a flat-screen television, a MacBook laptop computer, and an iHome device. Appellant could have objected to the amount of restitution at his sentencing hearing, but he did not. While we agree that it would have been the better practice for receipts or estimates to have been entered into evidence, we do not believe their absence rises to the level of palpable error. This was not a case like *Jones* in which the amount "was based upon unsworn and uncross-examined statements." The trial court informed Appellant that the restitution was for the stolen items and heard the victim's sworn, cross-examined testimony during trial as to what those items were. Therefore, we hold that any error related to restitution was not palpable.

III. CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction and sentence.

All sitting. Minton, C.J., Hughes, Keller, VanMeter, and Wright, JJ., concur. Venters, J., concurs in part and dissents in part by separate opinion, in which Cunningham, J., joins.

VENTERS, J., CONCURRING IN PART AND DISSENTING IN PART: Although I concur with the more significant points of Justice Wright's opinion, I respectfully dissent with respect to the portion of his opinion that orders restitution. The trial court received absolutely no information in the form of evidence or otherwise to establish the value of the items stolen during the robbery. The trial court seems to have plucked the amount of $500.00 purely out of thin air. A factual determination based upon no evidence at all is the epitome of arbitrariness. "[C]onstitutional due process requires . . . the Commonwealth to establish the . . . amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence." *Jones v. Commonwealth*, 382 S.W.3d 22, 32 (Ky. 2011). In *Jones*, we found that ordering restitution in violation of this fundamental constitutional precept was palpable error. *Id.* at 29. I believe it is also palpable error here.

Cunningham, J., joins.

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