# IMPORTANT NOTICE
## NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: APRIL 27, 2017
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2015-SC-000325-MR

KENON ANDREWS — APPELLANT

V.

ON APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
NO. 12-CR-00131

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Kenon Andrews, appeals from a judgment of the Graves Circuit Court convicting him of two counts of murder and one count of attempted murder. Consistent with the jury's recommendation, Appellant was sentenced to life imprisonment without benefit of parole on each murder charge and to twenty years' imprisonment on the attempted murder charge with the sentences running concurrently. Appellant asserts the trial court erred by 1) failing to declare a mistrial when an officer's testimony implied a prior bad act; 2) failing to declare a mistrial upon discovery that trial counsel had not been informed prior to trial about two potential witnesses; and 3) giving penalty-phase instructions which improperly curtailed the jury's punishment choices. For the reasons stated below, we affirm Appellant's convictions.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant and his friend, Jacob Carder, gave Ashley Lambert $750 for a methamphetamine purchase. She promised to deliver the drugs promptly but that did not happen. Apparently unable to procure the drugs, Lambert promised to refund their money. After waiting several days for a refund that never came, Appellant and Carder decided to visit Lambert's home.

Lambert was renovating her home at the time. Her friends, Jonathan Cagle, Whitley Moore, and April Pettigrew were there cleaning and painting when Appellant and Carder drove up to the house in Carder's car. Lambert saw them coming and ran to the attic to hide. Carder and Appellant, with pistol in hand, entered the house. Pettigrew was in another room, apparently unseen.

When Cagle and Moore told them Lambert was not home, Appellant became irate. He began yelling, turning over furniture, and roughing-up Cagle. Hearing the commotion, Lambert came down from the attic to face Appellant and Carder. At the same time, Pettigrew ran from the adjacent room and escaped to the attic. She called 911.

Lambert conferred with Carder and they agreed that as collateral for her debt, Carder would hold the keys to her vehicle until she delivered the meth or refunded their $750. Carder and Appellant turned to leave, but just before exiting the residence, Appellant raised his gun and shot Cagle in the head. He then shot Moore in the forehead. Lambert screamed and Appellant shot her

through the mouth. Carder and Appellant then left in Carder's vehicle. Cagle and Lambert died; Moore survived the shooting.

During the shooting, Pettigrew remained on the phone with the 911 operator. She identified Carder by name but could only provide a physical description of Appellant. One of the police officers heading to the scene of the shooting recognized Carder's vehicle going the opposite direction and so he turned around to follow it. Speeding to make good their escape, Carder crashed his car. He and Appellant fled on foot. Appellant was apprehended a few hours later, and Carder was arrested the next day.

Carder entered into a plea agreement. He testified for the Commonwealth at Appellant's trial after pleading guilty to two counts of facilitation to murder, one count of facilitation to attempted murder, and one count of fleeing or evading. He received a twenty-year sentence. Appellant was convicted for the murders of Jonathon Cagle and Ashley Lambert and for the attempted murder of Whitley Moore. He appeals as a matter of right.

## II. ANALYSIS

### A. The witness's implied reference to Appellant's previous incarceration did not compel a mistrial.

Appellant asserts that he was denied a fair trial because the jury was improperly informed of his incarceration on a previous occasion, evidence generally prohibited by KRE 404(b). During the direct examination of Deputy Halsell, a chief investigating officer on the case, the Commonwealth inquired about the steps taken to ascertain Appellant's identity. Deputy Halsell

explained that, based upon Pettigrew's description of the gunman, he showed her a photograph of Appellant. He testified, "Knowing that [Carder] and [Appellant] were good friends, I pulled a picture [of Appellant] up on my phone. At the time, the jail website had a . . . ." Before he completed the sentence, Appellant objected and moved for a mistrial based upon the reference to the "jail website." The trial court declined to grant a mistrial and instead, admonished the jury to disregard the statement.

Recognized as an extreme remedy, a mistrial "should be resorted to only when there appears in the record a manifest necessity for such an action." *Gray v. Commonwealth*, 480 S.W.3d 253, 273 (Ky. 2016) (citation omitted). A manifest necessity is determined upon consideration of the totality of the circumstances, *id.*, and the error complained of must be "of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect" cannot be cured by an admonition, *Gould v. Charlton Company, Inc.*, 929 S.W.2d 734, 738 (Ky. 1996). The trial court's decision to deny a mistrial will stand unless shown to be an abuse of discretion. *Gray*, 480 S.W.3d at 273 (citation omitted).

Although an admonition to the jury ordinarily cures an accidental admission of prior bad acts, *Boyd v. Commonwealth*, 439 S.W.3d 126, 132-133 (Ky. 2014) (citation omitted), Appellant argues from *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), that there was, in this instance, an "overwhelming probability that the jury [was] unable to follow the court's admonition *and* there [was] a strong likelihood that the effect of the

inadmissible evidence [was] devastating" to a fair trial.[1] Appellant argues that in judging the efficacy of an admonition to cure an evidentiary violation, the court must consider the stature and reliability of the witness from whom the prejudicial information emanated. Appellant theorizes that the prejudicial impact of testimony from a witness as esteemed and credible as an experienced and successful police officer cannot be wiped clean by a generic admonition to disregard the improper comment. He cites *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002), as an example of the kind of curative admonition needed to undermine the credibility of an improper comment during a trial.

In *Maxie*, a prospective juror stated during voir dire for all to hear that "if the Commonwealth of Kentucky and the investigating officers didn't have proof we wouldn't be here today." *Id.* at 863. Instead of granting the defendant's motion for a mistrial, the trial court discredited the juror by telling the jury panel:

> I have never seen [the juror] in any trial, never seen him involved in any criminal case, so I don't want you to think he is an insider that knows how this works, because I don't believe that he is. You should put out of your mind anything that he said pertaining to whether someone is guilty or innocent of these charges.

*Id.*

Appellant argues that unlike the juror's comment in *Maxie*, the prejudicial taint of Deputy Halsell's comment cannot be so readily discredited

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[1] The other circumstance in which the presumptive efficacy of an admonition falters is when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial." *Id.* (citations omitted).

because he is a law enforcement professional of good repute, and because of that fact, a jury is unlikely to disregard his comment. Appellant also notes that given Halsell's professional status, his attempt to interject obviously impermissible evidence cannot be regarded as accidental or innocent.

Regardless of how the jurors may have perceived Deputy Halsell, we adhere to "the presumption that the jury will heed such an admonition." *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005). Halsell's comment was not a significant reference to any prior bad acts of Appellant. At worst, it implied that he found Appellant's photograph on the jail's website. The trial court's admonition was sufficient to cure the prejudicial implication of Halsell's comment. We see no reason in this case to doubt the jury's ability to heed the admonition.

Police officers regularly appear as witnesses in criminal cases and some may indeed enjoy a high level of credibility simply because they are police officers. We do not agree, however, that as a general rule police officers are such persuasive witnesses that they overwhelm the jury's ability to obey a trial court's admonition. Admonitions are frequently and, we believe, satisfactorily used to cure improper testimony of police officers. For example, in *St. Clair v. Commonwealth*, 455 S.W.3d 869, 891-892 (Ky. 2015), an Oklahoma State Bureau of Investigation agent testified that St. Clair was a danger to his own friends. We held that any prejudice induced by that error was cured by the admonition to disregard the statement.

Moreover, we reject Appellant's premise that the credibility of the witness diminishes the effectiveness of the admonition. The typical admonition directing a jury to disregard certain testimony does not challenge the witness's credibility. The admonition does not tell the jury that it must *disbelieve* the improper testimony; it tells the jury to *ignore* the testimony. We have long acknowledged the difficulty in "unring[ing] the bell" of flagrant and grossly prejudicial testimony,[2] but we nevertheless continue to believe that in all but the most serious violations, jurors are quite capable of putting improper testimony outside the evidentiary calculus upon which they decide the verdict.

Here, the deputy's curtailed reference to the "jail website" implies, but does not directly impute to Appellant, a prior unspecified criminal offense. We are convinced this brief, incomplete remark was not so devastatingly prejudicial as to lie beyond the curative effect of an admonition, regardless of the high level of credibility the witness may enjoy. Consequently, the trial court's denial of a mistrial was not an abuse of discretion.

**B. The trial court did not err by refusing to declare a mistrial upon trial counsel's discovery of an undisclosed police report.**

During Deputy Halsell's testimony, Appellant's trial counsel learned for the first time that Halsell had prepared a supplemental report identifying two potential witnesses: a news reporter who was at the crime scene during part of the police investigation and a nurse who was present when the shooting victim,

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[2] *Dickerson v. Commonwealth*, 174 S.W.3d 451, 466 (Ky. 2005) (quoting *Foster v. Commonwealth*, 827 S.W.2d 670, 683 (Ky. 1991)).

Whitley Moore, identified Appellant from the photo array shown to her by Halsell. Pursuant to RCr 7.24 and the trial court's reciprocal discovery order, the Commonwealth was obligated to provide trial counsel with police reports. Appellant moved for a mistrial based upon the apparent discovery violation arguing that prior knowledge of the two witnesses might have provided helpful information. In the alternative, counsel requested a continuance to investigate the potential witnesses.

The trial court denied both forms of relief after determining that no discovery violation had occurred. The trial court found that the Commonwealth had furnished Halsell's report to Appellant's original trial counsel, who later had to withdraw because of a conflict. Apparently, the newly-appointed conflict counsel did not receive the report that had been provided to former counsel. Appellant and his former counsel were otherwise aware of the existence of the reporter and the nurse as potential witnesses because both were identified in pretrial evidentiary hearings.

Despite the trial court's finding that the Commonwealth was not to blame for trial counsel's lack of awareness of the two potential witnesses, Appellant nevertheless contends that the trial court abused its discretion by failing to declare a mistrial. As noted above, when deciding whether to declare a mistrial, the trial court exercising its sound discretion must consider whether the "occurrence complained of [is] such character and magnitude that [the] 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. We review such rulings for an abuse of discretion. *Gray*, 480 S.W.3d at 273.

Having considered all of the relevant circumstances, we are not persuaded that Appellant's inability to interview the reporter and the nurse, regardless of the reason for the failure, impaired his ability to present a defense. Given the limited nature of the events witnessed by the reporter and the nurse, the potential impact of any information they might have added is extremely limited.

After conducting an in camera hearing to review the issue, the trial court noted that Appellant offered nothing to indicate that either witness had any useful evidence. Appellant now concedes that "it may not be likely" that their testimony could have impacted the guilt-phase verdict, but he maintains that it could have made a difference in the penalty phase.

Neither the nurse nor the reporter witnessed an event relating to the commission of the crime itself and neither appears to have been in a position to provide information pertinent to Appellant's penalty. Appellant offers no hint of any conceivable evidence that either witness might have contributed, and none is otherwise apparent to us. The vague possibility that counsel's awareness of these individuals at an earlier time might somehow have produced probative evidence is simply too remote to justify the declaration of a mistrial. We, therefore, conclude the trial court did not abuse its discretion in denying a mistrial.

**C. The penalty-phase instructions fairly and properly presented the jury's sentencing options.**

Appellant argues on appeal that the penalty phase murder instructions did not adequately inform the jury that it could impose a sentence of imprisonment for life or a term of years even though it might also believe that an aggravating circumstance existed.[3] He specifically complains that the phrasing of the verdict form induced the jury to believe that if an aggravating factor existed, it had no choice but to impose a sentence of life without the benefit of parole or probation (LWOP) or life without the benefit of parole or probation for twenty-five years (LWOP/25). No objection was raised at trial so Appellant seeks relief for palpable error under RCr 10.26.[4]

We proceed upon the well-established principle that, when reviewing the adequacy of jury instructions, including the verdict forms, we must consider the instructions as a whole, taking into account the evidence and closing argument of counsel. *Epperson v. Commonwealth*, 197 S.W.3d 46, 60 (Ky. 2006). We have addressed in previous cases substantially the same question now raised by Appellant. We concluded in *Caudill v. Commonwealth*, 120 S.W.3d 635, 674 (Ky. 2004):

> There was no need to instruct the jury that it could impose a life sentence even if it found an aggravating factor beyond a reasonable

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[3] The applicable aggravator here was the intentional killing of more than one person.

[4] RCr 10.26 states: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

> doubt. Instruction No. 19, "Authorized Sentences," read together with the verdict forms and as further explained during closing arguments, adequately apprised the jury of the available range of penalties and the role of the aggravator in the sentencing scheme.

The "Authorized Sentences" instruction provided for each of Appellant's murder charges plainly informed the jury that it could choose *any* of the four authorized punishments: imprisonment for a term of years, imprisonment for life, LWOP/25, and LWOP, subject to one condition: the jury could not fix the sentence at LWOP/25 or LWOP unless it further found beyond a reasonable doubt the existence of the aggravating circumstance.

In *Meece v. Commonwealth*, 348 S.W.3d 627, 721 (Ky. 2011), we considered a nearly identical instruction and rejected the same argument Appellant now presents. We are satisfied, as we were in *Caudill* and *Meece*, that when the instructions were read as a whole, the jury was fairly apprised that the existence of the aggravating circumstance did not limit its sentencing options. And, as in those cases, any ambiguity about that was addressed by trial counsel's closing argument directly informing the jury that it was not compelled to impose LWOP despite the presence of the aggravating circumstances. The verdict form was not misleading; it was structured to assure that a sentence of LWOP or LWOP/25 could not be imposed unless an aggravating circumstance had been found. Considering the instructions as a whole, taking into account the evidence and closing argument of counsel, the instruction was neither erroneous nor misleading.

## III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Graves Circuit Court.

All sitting. All concur.

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