

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000081-MR

DOUGLAS CAMPANELL

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE RODNEY BURRESS, JUDGE  
ACTION NO. 09-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, LAMBERT, AND THOMPSON, JUDGES.

ACREE, JUDGE: Douglas Campanell appeals his conviction for receiving stolen property, enhanced by a second-degree persistent felony offender (PFO)

conviction, claiming the conviction resulted from a series of erroneous rulings by the Bullitt Circuit Court. On appeal, Campanell argues that: (1) the circuit court

abused its discretion by admitting evidence of a previous criminal conviction; (2)

the jury should have been instructed additionally regarding the offense of

misapplication of entrusted property; and (3) he was entitled to a mistrial because of the prosecutor's misconduct. Because we are not persuaded by Campanell's arguments, we affirm.

### **I. Background**

In December 2008, Arthur Knore<sup>1</sup> reported to police that various items, including aluminum rollers, a condenser, and other piping material, had been stolen from his property. The matter was assigned to Detective Buddy Stump of the Mount Washington Police Department. Detective Stump's investigation of the theft revealed that the disappearance of Knore's property appeared to coincide with the frequent and unexplained appearance of a city water truck. Stump knew Campanell worked for the city water department and drove a city water truck. More significantly, he also knew Campanell was a "scrapper" (one who earns income from the sale of scrap metal to a recycler) because Stump had previously arrested Campanell for stealing scrap material, resulting in his conviction; he also knew Campanell was on probation from another conviction in a different county at the time of Stump's investigation of the Knore theft.<sup>2</sup>

Detective Stump went to Campanell's apartment building, located an outbuilding shared by the apartment residents and looked inside. From the open door of the outbuilding, and by looking through a window, Detective Stump was

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<sup>1</sup> The Commonwealth and Campanell have spelled this witness's name differently in their briefs. Our review of the record has not revealed the correct spelling.

<sup>2</sup> Stump testified to these underlying investigatory facts during the suppression hearing on the morning of trial, outside the hearing of the jury.

able to see items which fit the description of stolen property that Knore had provided. Detective Stump called Knore to the site where Knore identified the items as his missing property.

Detective Stump and Detective Mike Cook contacted Campanell and obtained his written consent to search the outbuilding. After documenting the recovery of Knore's stolen property, Detective Stump saw additional items including water valves and meter sets – specialized equipment which, because of Stump's own previous employment as a security officer for the water department, he knew to be used by the department and not readily obtainable by the public at large. Campanell admitted the equipment did belong to the department.

Detective Stump then contacted Joseph Thicke, Campanell's supervisor, and requested his presence at the site. Thicke confirmed the items in question were the property of the water department, and informed the detectives that the items should not have been in Campanell's possession in the outbuilding.

For his possession of Knore's property, Campanell was indicted in district court for receiving stolen property under \$300, an offense prohibited by Kentucky Revised Statutes (KRS) 514.110(3).<sup>3</sup> He pleaded guilty.

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<sup>3</sup> At the time of Campanell's arrest and conviction, KRS 514.110, Receiving stolen property, stated in pertinent part as follows:

- (1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.
- (2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.

For his possession of the water department's property, Campanell was charged with receiving stolen property over \$300, an offense described in KRS 514.110(3)(a), and second-degree PFO in circuit court, based on his prior felony convictions. He pleaded not guilty and the case was tried before a jury.

At trial, the Commonwealth presented evidence that Campanell's admitted removal and disassembly of water department property from the truck indicated he intended to permanently deprive the department of its property in order to sell the metal parts for scrap.

Campanell's defense was that he intended to restore the property to the owner – the water department. He testified that he was permitted to possess the equipment in the outbuilding because it had been among the equipment on his department-issued truck. Campanell admitted he took the items off the truck for use on a personal project not related to his employment, which he also admitted was impermissible, but he testified that it was his intention to return the water company property to the truck and that he had no intention to permanently deprive the water company of the property.

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(3) Receiving stolen property is a Class A misdemeanor unless:

(a) The value of the property is three hundred dollars (\$300) or more, in which case it is a Class D felony . . . .

The statute has since been amended to make receipt of stolen property a misdemeanor if its value is less than five hundred dollars (\$500). 2009 Kentucky Laws Ch. 106 (HB 369), Section 13.

The Commonwealth's evidence convinced the jury and Campanell was convicted. He was sentenced to one year's imprisonment for receiving stolen property, enhanced to seven years by the PFO conviction. This appeal followed.

## **II. Pertinent procedure and evidentiary rulings**

Because the specifics of the circuit court's evidentiary rulings are critical to our analysis, we describe those rulings in some detail, beginning with two pre-trial rulings.

Before trial, the Commonwealth filed a motion giving notice that it intended to introduce at trial "other crimes" evidence in accordance with Kentucky Rules of Evidence (KRE) 404(b). Specifically, the Commonwealth wanted to admit evidence relating to how the Knore investigation led to the discovery of city water department property in the storage building under Campanell's control. At the hearing, the Commonwealth offered several reasons for admitting the evidence, including the commonality of Campanell's use of the city water department vehicle in both crimes, a common plan or scheme, and as rebuttal to any claim of mistake Campanell may have asserted regarding the removal of the city's property from the city's truck. The Commonwealth was not, at that time, seeking to admit Campanell's conviction for the Knore theft or any previous crime.

The circuit court entered an order stating, in pertinent part:

The Commonwealth seeks to introduce evidence that [Knore's stolen property] was recovered in the same location as the [city's] plumbing fittings involved in this case.

. . . [T]he [Knore] items were found in the same building and area as the items in this action [and] Defendant utilized his work vehicle . . . in the thefts alleged in both cases.

Based on the common use of the truck, and the fact that introduction of evidence in this case will require an explanation of how the police officers came to be in the Defendant's residence, it is hereby ORDERED the Commonwealth's motion is GRANTED subject to any objections relating to proper foundation, authentication or other matter.

On the morning of trial, Campanell filed a motion *in limine* to exclude evidence of his prior convictions, including his conviction upon his plea of guilty to stealing Knore's property. The Commonwealth informed the court that it did not intend to introduce evidence of Campanell's prior convictions except to rebut any contradictory testimony Campanell might offer. The court granted Campanell's motion subject to that condition. The trial then commenced.

Detective Stump was the fourth witness to testify in support of the Commonwealth's case-in-chief. The Commonwealth initially elicited no testimony relating to Campanell's prior convictions. Stump simply stated the fact that he met Detective Cook at Campanell's residence, looked in the outbuilding, and recognized property fitting the description of property Knore reported stolen.

When Campanell's counsel cross-examined Stump, he attempted to call into question whether Stump had a legitimate reason being at Campanell's residence. He solicited an admission from Stump that he was on the premises without a warrant to search the outbuilding. The Commonwealth objected to the obvious

implication that Stump had engaged in an improper search. At the sidebar, the Commonwealth reminded the circuit court of a previous ruling *in limine* that Stump's observation of suspected stolen property in the outbuilding, through an open door and window, was constitutional, and that the subsequent search of the outbuilding was conducted with Campanell's written consent. When the court asked Campanell's counsel to state the relevance of the testimony he sought from Stump, counsel stated he believed it went to "the officer's bias towards the defendant." When asked what evidence he had of the officer's bias, Campanell's counsel had no response. The court sustained the Commonwealth's objection.

Returning to his cross-examination of Detective Stump, Campanell's counsel continued his attempts to elude testimony from which the jury could infer an unwarranted bias against Campanell. For example, Stump was asked whether he knew Campanell before conducting the Knore theft investigation and whether he opposed Campanell's employment at the water department. Stump responded affirmatively to both questions. Campanell's counsel ended his cross-examination without affording Stump the opportunity to explain the circumstances of his prior acquaintance with Campanell, why he opposed Campanell's employment, and why he suspected Campanell of the Knore theft.

The Commonwealth then asked for another sidebar and sought to introduce evidence that would reveal why Stump was suspicious of Campanell, *i.e.*, that he had once arrested Campanell for stealing scrap metal for salvage resulting in Campanell's conviction, and that at the time of the Knore investigation Campanell

was on probation for a separate theft conviction in another county. Campanell's counsel objected, reminding the court that it had already ruled that the convictions could not be admitted. The Commonwealth responded that

The detective has been impeached as having a bias toward this defendant and it's been suggested by these questions that [such bias] is unrelated to the evidence in this particular case and the [police] report reflects that Detective Stump knew that he was a convicted felon for theft and [Campanell] was on probation at that time. That's why he was suspicious.

The Commonwealth argued that Campanell had opened the door to the only evidence that could rebut or explain Campanell's assertion of Stump's bias.

The Commonwealth's argument persuaded the court which permitted a line of questioning that allowed Stump to explain that he was "familiar with Campanell through [his] duties as a detective with the City of Mt. Washington [and was] aware that he had been previously involved in stealing copper and selling it for scrap." Stump was also allowed to testify that he knew Campanell worked for the city water department, and to explain that he first suspected Campanell of the theft of Knore's property when Knore informed him that the theft of salvageable metal (an activity Stump knew Campanell had engaged in) coincided with the otherwise unexplained presence of a water department truck (which Stump knew Campanell drove). This led Detective Stump to Campanell's outbuilding where Knore's property was located. It was then and there that Detective Stump recognized city water department property (with which Stump was familiar based on his own



employment by the department) and called Campanell's supervisor, Mr. Thicke (whom Stump personally knew).

When Campanell's counsel resumed cross-examining Detective Stump, he again focused on Stump's bias against his client. He attempted to marginalize Stump's prior history with Campanell as a basis for suspecting him on the date in question by asking Stump whether he had been to Campanell's property "several times" for the purpose of "just checking on him"; Stump replied that he had and counsel announced no further questions.

The Commonwealth again asked for a sidebar. To respond to Campanell's continued assertion of bias and implication that there was no just reason for "checking on" Campanell that day, the Commonwealth sought to admit proof of Campanell's guilty plea and conviction for the theft of Knore's property to establish the legitimacy of Stump's police work in solving the Knore theft. The court was amenable to the Commonwealth's request and explained its reasoning as follows:

To this point, information relating to Mr. Knore . . . was relevant inasmuch as it related to a pattern or practice in that the use of the water truck was involved – the other issues that we've gone through in the previous hearing under the [KRE] 404(b) admissibility. At the time, the Commonwealth did not seek to introduce a conviction relating to the fact that it was stolen property. The defense has, however, brought into question, through this witness [Detective Stump], the issue of bias on the part of the witness and, specifically, has asked him about his determination that the [water company's] property was stolen. This conviction [for the theft of Knore's property] constitutes follow-up and an explanation as to

that determination and that the defendant clearly knew that at the time the questions were asked. So, I'm going to allow it.

Later in the trial, the circuit court was even clearer about its reasoning, stating,

As to the issue of [KRE] 404(b) evidence, you're right, we are far afield here of what was originally designated as [KRE] 404(b) evidence, but it's because of the door that was opened by the defense in their position that Detective Stump has manufactured these allegations.<sup>[4]</sup>

Campanell's counsel objected to admission of the certified record of the conviction itself; the Commonwealth suggested redacting the record of irrelevant but prejudicial references relating to the penalty. The circuit court rejected the Commonwealth's suggestion and sustained Campanell's objection to the admission of the record. The Commonwealth then laid a proper foundation and offered proof, but only through Detective Stump's testimony (whose memory was refreshed by reference to the misdemeanor conviction record), that Campanell pleaded guilty and was convicted of receiving stolen property belonging to Knore. Upon Campanell's counsel's subsequent motion, the circuit court also admonished the jury that it should limit its consideration of the evidence of Campanell's misdemeanor conviction to the issue of whether Detective Stump harbored a bias against Campanell.

Campanell argues that admitting evidence of his conviction for taking Knore's property was an abuse of the circuit court's discretion. We disagree.

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<sup>4</sup> The circuit court made this statement after Campanell denied scrapping during the previous six years and in response to the Commonwealth's motion to introduce evidence through cross-examination of Campanell's other, recent, criminal activity and convictions for stealing scrap metal for scrapping purposes.

### **III. There was no abuse of discretion in admitting of prior bad acts evidence**

As a general matter, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” KRE 404(b). “The fundamental purpose of KRE 404(b) is to prohibit unfair inferences against a defendant[,]” *i.e.*, to prevent a jury from convicting a defendant of the charged offense solely on the basis of his past conduct. *Anderson v. Commonwealth*, 231 S.W.3d 117, 120 (Ky. 2007). In determining the admissibility of other prior bad acts evidence, three inquiries need to be separately addressed: (1) relevance, (2) probativeness, and (3) prejudice. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005) (citations omitted). We will not disturb a trial court’s decision to admit such evidence in the absence of an abuse of discretion.

To meet the relevance requirement, the Commonwealth must show the proffered evidence “is relevant to prove something other than propensity to commit crime[.]” Robert Lawson, *The Kentucky Evidence Law Handbook* § 2.25[3][b], 126 (4<sup>th</sup> ed. 2003 & 2010 Supp.). Those purposes include proving a defendant’s “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” KRE 404(b)(1). Given the circumstances of a particular case, there may be other permissible uses of this type of evidence not specified in the Rule. Lawson, §2.25[2], 125. Additionally, “the Commonwealth is allowed to

present a complete and unfragmented picture of the circumstances surrounding how the crime was discovered.” *Clark v. Commonwealth*, 267 S.W.3d 668, 681 (Ky. 2008).

Detective Stump needed to explain to the jury why he arrived at Campanell’s residence and how he came to discover the water department’s property. This was especially important in light of the fact that, as Campanell pointed out at trial, no one had ever reported that property stolen. In the words of KRE 404(b)(2), the evidence of the Knore investigation was “inextricably intertwined with other evidence essential to the case” that could not be omitted without “serious adverse effect” to the Commonwealth’s case. That evidence was therefore relevant for the purposes stated in KRE 404(b)(2).

Campanell, of course, “ha[d] the right to present a complete and meaningful defense [including] the right to confront the witnesses against him with evidence reasonably suggestive of bias[.]” *Brown v. Commonwealth*, 313 S.W.3d 577, 624-25 (Ky. 2010) (citations omitted). When Campanell exercised that right in his case, he was effectively proposing that the jury believe Detective Stump had no reason to be at Campanell’s residence, and no reason to suspect him of stealing the water department’s property, except an unwarranted bias against him. To maintain that impression in the minds of the jurors, Campanell effectively sought to limit the Commonwealth’s response at trial to Detective Stump’s denial of such bias. Such a limitation is not justified in light of the existence of evidence that Stump’s suspicion – that Campanell had stolen Knore’s property – was correct, and that

Stump's police work, not his bias, put him in a position to see the water department's property in the outbuilding.

This issue of the admissibility of other crimes evidence to refute allegations of a police officer's bias is similar to one addressed by a sister appellate court in Vermont. In *State v. Muhammad*, 927 A.2d 769 (Vt. 2007), the defendant was charged with one count of selling cocaine. He argued that the officers had no reason to suspect him of the crime other than bias. *Id.* at 772. The prosecution sought to admit evidence of other similar activity to rebut that defense.

The trial court allowed the State to introduce testimony about defendant's March 24 drug activity to rebut the inference created by defense counsel that the officers had no reason to suspect defendant other than some bias against him. Likewise, the court allowed testimony that the April 18 search was pursuant to an [investigation of a different crime], to counter the suggestion that the officers were merely on a fishing expedition . . . . The trial court was entitled to use its discretion in admitting the evidence under Rule 404(b), ***not to show a propensity for criminality, but to correct the misimpression of bias created by the defense.***

*State v. Muhammad*, 927 A.2d 769, 772-73 (Vt. 2007) (emphasis added).

As did the defendant in *Muhammad*, Campanell attempted to paint an incomplete picture of an officer's bias. We conclude that Stump's testimony that Campanell was convicted on a guilty plea of receiving Knore's stolen property was relevant to the issue of whether Stump's bias alone is what led him to suspect Campanell of the Knore theft, which then led him to suspect that he also intended to deprive the water company of its property as well.

We also conclude that the evidence of Campanell's receipt of Knore's stolen property was probative. Evidence of prior bad acts is probative if "the jury could reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts." *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997). In this case, evidence of Campanell's conviction possessed strong indicia of reliability and was therefore highly probative of the fact that Campanell was in receipt of Knore's stolen property. Lawson, § 2.25[3][c], 130 ("Evidence offered under the 'other crimes' rules occasionally consists of a judgment of conviction, making it easier to assume that the accused in fact committed the uncharged crime."). Under *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994), the proper analysis is whether the evidence is sufficiently probative of the other crime to warrant its introduction. "As a part of the trial court's analysis of probativeness, it must decide whether the . . . other crime possesses a sufficient factual background to indicate reliability, not whether it is probative of the current charge before the court. . . . [C]onvictions . . . possess strong indicia of reliability." *Finch v. Commonwealth*, 2011 WL 1104096, \*3 (Ky. 2011) (No. 2010-SC-000267-MR). Though it was not admitted, the circuit court had an opportunity to review the certified record of the misdemeanor conviction to be assured that Stump's testimony was probative evidence that Campanell committed the crime related to Knore's property.

We also conclude that, under the balancing required by KRE 403, the probative value of the evidence was not substantially outweighed by the danger of

undue prejudice.<sup>5</sup> A circuit judge may reduce the prejudicial effect at trial by carefully limiting its use to serve the needs of the Commonwealth. Lawson, §2.25[3][d], 135-36. This may require the trial court to carefully monitor presentation of the Commonwealth's case or cross-examination or to issue an admonition. *Id.* In Campanell's case, the circuit court clearly did both. Particularly, the trial court mitigated any undue prejudice Campanell may have suffered by granting his request for an admonition to the jury. The trial court admonished the jury that the evidence involving the Knore conviction was only to be considered to the extent it reflected upon Detective Stump's bias. As our Supreme Court stated in *Berryman v. Commonwealth*, "A jury is presumed to follow an admonition; and [there is] nothing to show that the jury in the case at hand could not, or did not, follow the trial court's limiting admonition." 237 S.W.3d 175, 180 (Ky. 2007).

Furthermore, Campanell himself took the stand as the first witness for the defense and, in response to the first question presented to him by his counsel, admitted being a convicted felon. He also admitted taking Knore's property without Knore's permission, and with the intention to sell it, along with "a lot of scrap in the shed[.]"

Clearly, the circuit court's decision to allow evidence that Campanell was in wrongful possession of Knore's property was a cautious one; we consider the

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<sup>5</sup> In its entirety, KRE 403 reads as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

evolving series of the circuit court's decisions, as well as the clear admonition to the jury, to have been calculated to assure that on balance the evidence remained more probative than prejudicial.

A circuit court's decision to admit evidence such as that at issue here is subject to reversal only after a finding that the decision amounted to an abuse of discretion. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). "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) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)). We cannot find that the decision to admit the evidence in question amounted to an abuse of discretion.

#### **IV. Campanell was not entitled to a jury instruction on misapplication of entrusted property**

Whether the circuit court issued proper jury instructions is a question of law which we review *de novo*. *Howell v. Commonwealth*, 296 S.W.3d 430, 432-33 (Ky. App. 2009) (citing *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006)).

Campanell's defense was that he had appropriated the items from his employer, admittedly without permission, to use at a side job with the intention of returning them. His own testimony supported that defense. In light of that



evidence, Campanell requested that the jury be instructed on misapplication of entrusted property, an offense defined in KRS 517.110.<sup>6</sup> He argues before this Court that the circuit court's refusal to so instruct the jury constitutes reversible error because the offense described in KRS 517.110 is a lesser included offense of that offense with which he was charged under KRS 514.110. *See Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (Where evidence supports it, trial court's denial of request for separate instruction on lesser included offense constitutes reversible error.).

Because misapplication of entrusted property is not a lesser included offense of the crime of receiving stolen property, we disagree with Campanell.

A lesser included offense is one which "is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" KRS 505.020(2)(a). "[I]f the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense." *Cecil v. Commonwealth*, 297 S.W.3d 12, 19 (Ky. 2009), *citing Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000). When we compare the elements of the separate

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<sup>6</sup> The full text of 517.110, Misapplication of entrusted property, is as follows:

(1) A person is guilty of misapplication of entrusted property when he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution in a manner which he knows is unauthorized and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.

(2) Misapplication of entrusted property is a Class A misdemeanor.

offenses, we see the offense of misapplication of entrusted property requires proof of facts not required to prove receipt of stolen property.

The elements of the offense of receiving stolen property, KRS 514.110, include proof that the defendant retained stolen property, and that defendant knew or should have known that the property was stolen; the value of the property determines whether the offense constitutes a misdemeanor or a felony. Unlike the offense of misapplication of entrusted property, the relationship between the defendant and the owner of the property, and the circumstances surrounding its theft are not controlling elements in the crime of receiving stolen property. Rather, “knowledge of the property’s dishonest origin, without any necessity of a further particularity in relation thereto, is the gist of this crime.” *Decker v. Commonwealth*, 303 Ky. 511, 198 S.W.2d 212, 214 (1946); *see also Magruder v. Commonwealth*, 281 S.W.2d 716, 719 (Ky. 1955) (noting that knowledge that the property was stolen is the controlling element).

The elements of the offense of misapplication of entrusted property, KRS 517.110, include proof of a relationship of trust between the perpetrator and the owner of the property, an unauthorized application or disposition of the property, which involves substantial risk of loss or detriment to the property. None of these elements is required to be proved to establish the offense of receiving stolen property.

Misapplication of entrusted property is not a lesser included offense of receiving stolen property.

## **V. Campanell was not entitled to a mistrial for prosecutorial misconduct**

During the Commonwealth's cross-examination of Campanell, the prosecutor asked the defendant to assess the credibility of the testimony of two of the Commonwealth's witnesses. More precisely, Campanell was asked to state whether he believed his former supervisor, Joseph Thicke, would testify falsely against him and whether he believed Knore had testified mistakenly. Campanell's trial counsel objected to the line of questioning, contending it was inappropriate pursuant to the holding of *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997) ("A witness should not be required to characterize the testimony of another witness . . . as lying. Such a characterization places the [defendant] in such an unflattering light as to potentially undermine his entire testimony."). The circuit court agreed and sustained Campanell's objections. Campanell did not answer the two prohibited questions.

Although Campanell correctly argues the Commonwealth should not have asked questions, that fact alone did not require the circuit court to declare a mistrial. "Whether to grant a mistrial is within the sound discretion of the trial court, and "such a ruling will not be disturbed absent . . . an abuse of that discretion." *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). 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. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985), *habeas corpus granted on other grounds by Skaggs v. Parker*, 235 F.3d 261, 275 (6th Cir. 2000).

The error 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 [except by grant of a mistrial].” *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).” *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

In *Moss*, the defendant “was asked and badgered into stating that Officer Wiley, a leading witness for the Commonwealth, was lying.” *Moss*, 949 S.W.2d at 583 (Nevertheless, “Appellant’s failure to object and our failure to regard this as palpable error precludes relief.”). The case before us presents an entirely different set of facts. Because the circuit court sustained his counsel’s objection, Campanell did not answer the questions. Campanell has cited no authority, and we have found none, justifying a mistrial or reversal under circumstances in which the defendant was *not* required to answer the question. A mistrial was not required in this case and we find no error justifying reversal.

## **VI. Conclusion**

We find no abuse of discretion in the admission of prior bad acts evidence; Campanell was not entitled to a lesser included offense instruction; and the circuit court did not err in denying a motion for mistrial based on prosecutorial misconduct. Finding no error, we affirm.

ALL CONCUR.

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