RENDERED: AUGUST 30, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000705-MR

JOSEPH EARL RATLIFF — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 11-CR-00115

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MAZE, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Joseph Earl Ratliff appeals from his conviction of arson in the second degree, burglary in the first degree, and felony theft by unlawful taking following a jury trial in Pike Circuit Court. Ratliff was sentenced to a total of fifteen years in prison. After a thorough review of the parties' arguments, the

record, and the applicable law, we agree with Ratliff that reversible error occurred; accordingly, we reverse and remand this matter for further proceedings.

On March 9, 2006, Ishmal Ratliff's house burned down. At that time, the Appellant, Joseph Earl Ratliff (not related to the victim) and his grandfather[1] lived across the road from Ishmal. Ishmal's father, Bobby Ray Ratliff, lived approximately a quarter of a mile up the road above Ishmal and was one of the first people to reach the house when it was on fire. Bobby Ray later testified that he could see flames in the living room of the house, and that he met Ratliff and his grandfather in the driveway to Ishmal's house.

Kevin Alden, the owner of Matrix Investigation Group, conducted an investigation of the fire at Ishmal's house at the request of Kentucky Farm Bureau Insurance. Alden accessed the scene seven days after the fire; the scene had been unsecured during that time. Alden concluded that the cause of the fire was "undetermined," although he did observe a high energy arcing event in the breaker panel. Alden testified that an arcing event could be caused by a short, by the wires fusing together, a loose wire, or due to faulty equipment. Ishmal had wired his house himself and testified that he was certified in "low, medium, high voltage" for industrial purposes. The inspector who approved his residential work was deceased at the time of the trial. As a part of the report, Alden took statements

[1] Joseph's grandfather was deceased at the time of the trial.

from Ishmal and Bobby Ray. Ishmal apparently checked the breaker panel for heat by feeling with the back of his hand a couple times per week. Bobby Ray told Alden that he "unlocked front door, smoke and fire, about knocked him down" and "he saw fire in the living room."

Five years after the fire Ratliff was indicted for arson, burglary, and felony theft by unlawful taking. The Commonwealth's initial theory of the case was that Ratliff burglarized and then burned down Ishmal's home in revenge for Ishmal's involvement in the prosecution of Ratliff's brother, Todd. Todd had been convicted of receiving stolen property which had been taken from an outbuilding on Ishmal's property. The Commonwealth later theorized that the burglary had been in revenge but the arson had been motivated by fear that Ishmal had security cameras.

The Commonwealth began its case with Ishmal's testimony. At the time of trial, Ishmal alleged that guns, a game system, and a blue Black and Decker drill had been taken from his house. Ishmal noticed these things missing the day after the fire. He did not inform his insurance company or the police about the missing items. Instead, about three months after the fire, he informed Mr. Burchett, the Commonwealth's prosecutor in this case.

On June 30, 2006, Ishmal went to reclaim his guns; he had been told the guns were at Howard Conn's house and he was accompanied by Kentucky

State Police officer Melissa Hampton. At the time of trial, Ms. Hampton had retired from KSP. She testified that Ishmal told her about a burglary and house burning when they went to the Conn's house, but she did not make a report. Ishmal testified that he told the previous KSP investigator, Don Parker, that he believed items were stolen but did not tell him any specifics. Parker did not testify at trial. Ishmal later stated that he could not remember what he told Parker at the time. The subsequent KSP investigator, Gary Sykes, testified that the case file he inherited from Parker was an arson investigation with no mention of burglary in the original case file.

Ishmal explained that he kept the information about what was stolen closely guarded because he wanted to ensure that if any information came back that it was true. Ishmal conducted his own investigation into the crimes and used "informants." He also sat in on the police interviews with two witnesses, Kayla Kelly and Brooke Ratliff.

Brooke was Ratliff's stepmother. She testified that Ratliff had stopped by her house and when she asked him where he got his money he told her it was from selling some guns to Howard Conn that he had obtained from Ishmal's house. Brooke informed Ishmal of Ratliff's statement.[2] Brooke left Ratliff's father, Ricky, in July of 2010 but they were still married at the time of trial.

[2] At trial Brooke did not remember asking Ishmal if there was reward money; she asserted that she called him because it was the correct thing to do.

Brooke and Ricky had a child together and Brooke did not know the location of the child was because Ricky had custody, but she knew he had recently been arrested for trafficking cocaine. At the time of Ratliff's trial, Brooke was also being prosecuted by the same Commonwealth Attorney's office. In her case, she was set for a bond revocation hearing but before the hearing gave a statement regarding Ratliff to KSP; subsequently her bond was not revoked.

Kayla Kelly, Ratliff's ex-girlfriend, testified that she heard him say that "he burnt the house and stole stuff out of it." On another occasion Kayla heard Ratliff say "[Ishmal] was lucky to have his vehicle and his clothes." Kayla was a convicted felon and was subject to being revoked for absconding from drug court at the time she gave her statement implicating Ratliff in April 2010. She was instead placed on supervised probation. Kayla never saw any guns or tools. She and Ratliff have a child together. Detective Sykes asked Kayla if the possibility that Ratliff was going to try to come take care of the baby gave her some motivation in this case and she said "yup."

Kayla's mother, Sherry Kelly, testified that she knew that Ratliff had sold a blue Black & Decker drill to her husband James Kelly. James Kelly did not testify at trial because he suffered from dementia. Sherry testified that she heard Ratliff say on two or three occasions that he burnt the house. Kayla and her daughter lived with Sherry and James at the time of trial.

Jeffery McCoy, the brother-in-law of Ratliff also testified. He denied having told Ishmal that Ratliff had confessed to him. He denied having any conversations about Ratliff confessing with Bobby Ray or Clay Ratliff. McCoy said he felt pressure to testify from Ishmal. He was impeached by several witnesses: Ishmal, Bobby Ray, Ishmal's son Clay, and two KSP officers, Sykes and Merlow. Ishmal testified that McCoy was one of the lead informants who kept him updated during his own investigation.

After hearing the aforementioned testimony, the jury convicted Ratliff of arson in the second degree, burglary in the first degree, and felony theft by unlawful taking and was sentenced to fifteen years' imprisonment. It is from this conviction that Ratliff now appeals. Additional facts will be discussed as warranted.

On appeal, Ratliff presents four alleged errors which he argues mandate reversal. First, Ratliff argues that the trial court erred in denying his motion for a mistrial when the Commonwealth presented testimony from two witnesses with no personal knowledge of the event in dispute and in violation of his rights to confront the witness against him. Second, the trial court erred in refusing to instruct on his requested lesser-included offense of burglary in the second degree. Third, Ratliff was prejudiced by the prosecutor's misconduct. Fourth and last, Ratliff was unduly prejudiced when the trial court abused its

discretion and allowed his brother to be called as a witness against him while shackled and dressed in prison clothing. The Commonwealth disagrees with Ratliff's arguments and asserts that the trial court did not err. With these arguments in mind we turn to the first issue presented.

First, Ratliff argues that the trial court erred in denying his motion for a mistrial when the Commonwealth presented testimony from two witnesses with no personal knowledge of the event in dispute and in violation of his right to confrontation. In support thereof, Ratliff argues that the testimony of Howard Conn, Jr. and Tammy Conn violated his constitutional right to confrontation of a witness because neither had personal knowledge as to where Howard Conn, Sr. had obtained the guns and instead simply testified to hearsay. The trial court overruled Ratliff's multiple motions, including that for a mistrial based on the lack of personal knowledge and the violation of Ratliff's confrontation right under *Crawford, infra*, and overruled Ratliff's motion for an admonition to the jury to disregard any testimony as to what Howard Conn, Sr. may have said. The Commonwealth argues that the testimony was not hearsay.

Whether or not to grant a mistrial is within the sound discretion of the trial court, and the trial court's ruling will not be disturbed unless its ruling constitutes an abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004). Moreover, a mistrial is an extreme remedy and should be utilized only

when there appears in the record a manifest necessity for such action. *Clay v. Commonwealth,* 867 S.W.2d 200 (Ky. App.1993). 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 granting a mistrial]." *Gould v. Charlton Co., Inc*., 929 S.W.2d 734, 738 (Ky. 1996).

We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition. A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial judge is "best situated intelligently to make such a decision." Ultimately, the trial court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion. *See Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)(internal citations omitted).

At trial, the Commonwealth attempted to show the jury how Howard Conn, Sr. had obtained the guns, which Ishmal testified were his and stolen from his house. Howard Conn, Sr. passed away prior to trial. Ishmal testified that he learned that his guns were at the Conns's residence so he and Trooper Hampton

went to retrieve them. Ishmal testified that when he went to the Conns's residence and confronted Howard Conn, Sr., Ishmal stated that Howard Conn, Sr. "started hemming and hawing around." Trooper Hampton accompanied Howard Conn, Jr. into the home and returned outside with "a bunch of guns." Ishmal identified one of the guns as his, based on the engraving and scratches on it. Ishmal testified that the gun had been present in his home prior to the fire. Ishmal then testified that about a year after this event at the Conns's residence, he received more of his missing guns from the Conns in an arranged transaction at the law office of Larry Webster.

Then the Commonwealth called Howard Conn, Jr. and Tammy Conn as witnesses. Howard Conn, Jr. recalled the day that Ishmal and Trooper Hampton came to their home. He testified that the one Ishmal identified as his was a gun Howard Conn, Sr. had given him. Howard Conn, Jr. testified that he did not tell Trooper Hampton that the gun came from Ratliff. The Commonwealth then asked "if [Trooper] Hampton comes in here and says you told her that gun came from Joe Ratliff, that you bought it from Joe Ratliff, you or your father, that would be a lie?" Howard Conn, Jr. then stated that "Dad bought the gun from Joe, I didn't." Through more testimony it was established that Howard Conn, Jr. did not purchase the gun from Ratliff, was not present to see anyone else make a purchase of guns

from Ratliff, never saw Ratliff with the guns, and was stopped just short of saying that his Dad told him that he bought the gun from, presumably, Ratliff.

Tammy Conn testified that she had signed an affidavit at Larry Webster's office and that this was the same one that her deceased husband, Howard Conn, Sr., had signed. Tammy testified that the affidavit stated that the guns came from Ratliff. When questioned further, Tammy replied that where the guns came from was "as far as my knowledge it is." She stated that she did not know for sure, that her knowledge came from what her husband had said.

Larry Webster then testified that the Conns had signed the affidavits evidencing where they had gotten the guns.

Ratliff argues that this testimony effectively brought in testimonial hearsay, and that he was unable to cross-examine the source of the information, Howard Conn, Sr. The Commonwealth contends that the testimony was not hearsay since Howard Conn, Jr. had stated in the presence of Trooper Hampton that the gun was bought from Ratliff and that Tammy had signed a sworn affidavit that the guns came from Ratliff. We agree with Ratliff that, contrary to the Commonwealth's position, this testimony was clearly in violation of *Crawford*, *infra.*

Our Kentucky Supreme Court addressed the impact of the United States Supreme Court decisions in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct.

1354, 158 L.Ed.2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), in *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007), and *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky. 2007). Both *Heard* and *Rankins* necessarily reached the same conclusion: that our courts must vigilantly protect a defendant's Sixth Amendment right to confrontation by applying *Crawford*. As held in *Heard, supra*:

> We begin with a discussion of the Confrontation Clause and relevant jurisprudence and focus upon two recent decisions of the Supreme Court of the United States. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In a landmark decision overruling settled precedent, the United States Supreme Court held in *Crawford v. Washington* that where testimonial evidence is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination, and that the admission of testimonial statements against an accused without an opportunity to cross-examine the declarant is alone sufficient to establish a violation of the Sixth Amendment.... While *Crawford* declared statements made during a police interrogation to be testimonial in nature, it did not elaborate on the definition of "interrogation," nor upon when or under what circumstances such out-of-court statements may be admitted. Davis provided the elaboration as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the

> interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Heard at 243-244 (internal citations omitted).

Our Kentucky Supreme Court went on to further hold in *Rankins*, *supra*:

> *Crawford* held that the Sixth Amendment prohibits the admission of the testimonial statement of a declarant who does not appear at trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford* referred to "testimonial" statements, because it is statements of a testimonial character, as opposed to other hearsay, which cause the declarant to be a witness against the accused for purposes of the Confrontation Clause.... [t]he Court clarified, however, that, "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." Where statements recount potentially criminal past events, the declarant is, for Confrontation Clause purposes, acting as a witness against the accused. More simply, statements that tell "what is happening" are nontestimonial, while statements that tell "what happened" are testimonial.

Rankins at 131(internal citations omitted).

In applying *Heard, supra,* and *Rankins, supra,* to the case *sub judice*, we must conclude that the testimony of both Howard Conn, Jr. and Tammy Conn were testimonial in nature and lacked personal knowledge. Fundamentally, the source of knowledge as to where the guns came from was Howard Conn, Sr., whose statements the Commonwealth attempted to introduce through Howard

Conn, Jr. and Tammy. Ratliff was not able to cross-examine Howard Conn, Sr.; the statements of his family about "what happened" are testimonial in nature. As to the Commonwealth's contention that the sworn affidavit rendered any statements non-hearsay we find *Barnes v. Commonwealth*, 794 S.W.2d 165, 168 (Ky. 1990), to be dispositive:

> Moreover, it is of little significance that the hearsay evidence was in the form of an affidavit. We are unaware of any rule of law whereby inadmissible hearsay is rendered admissible by virtue of the fact that it is sworn. At most a statement made under oath might be regarded as possessing a greater degree of trustworthiness, but such is not sufficient to overcome the general rule elaborated herein.

Id.

Clearly the statements in the affidavit met the definition of hearsay. *See* Kentucky Rules of Evidence (KRE) 801.[3] Under KRE 802,[4] in order to admit the statements at trial, an exception to the prohibition against hearsay must be

[3] (a) Statement. A "statement" is:
(1) An oral or written assertion; or
(2) Nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

[4] Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.

found. *See* KRE 803[5] and 804.[6] In light of these statements being hearsay and our jurisprudence of *Crawford, Rankins, Heard,* and *Barnes* we must conclude that the

[5] The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
> (4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.
> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> > (A) Foundation exemptions. A custodian or other qualified witness, as required above, is unnecessary when the evidence offered under this provision consists of medical charts or records

of a hospital that has elected to proceed under the provisions of KRS 422.300 to 422.330, business records which satisfy the requirements of KRE 902(11), or some other record which is subject to a statutory exemption from normal foundation requirements.

(B) Opinion. No evidence in the form of an opinion is admissible under this paragraph unless such opinion would be admissible under Article VII of these rules if the person whose opinion is recorded were to testify to the opinion directly.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or other data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(A) Investigative reports by police and other law enforcement personnel;

(B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and

(C) Factual findings offered by the government in criminal cases.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements or law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with KRE 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationships by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
(13) Family records. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty (20) years or more the authenticity of which is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs

affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.
(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment under the law defining the crime, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[6] (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
(3) Testifies to a lack of memory of the subject matter of the declarant's statement;
(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) Statement under belief of impending death. In a criminal prosecution or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.

trial court erred in admitting this evidence, mandating our reversal and a remand for a new trial. Having found reversible error, we shall briefly address the remaining arguments in the event that these issues reoccur on retrial.

Ratliff next argues that the trial court erred in refusing to instruct on his requested lesser-included offense of burglary in the second degree. He contends that a juror may have believed that he had stolen the drill without stealing the guns and, thus, he would be entitled to a burglary in the second degree instruction since the burglary in the first degree instruction was premised on his being armed with the stolen guns taken during the burglary from Ishmal's house. Ratliff argues that the jury may have believed the lesser charge given the different

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(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statements of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

witness for the guns and for the drill. The Commonwealth argues that the trial court correctly determined that it was an all or nothing proposition.

We note that our review of a trial court's rulings with respect to jury instructions is for abuse of discretion. *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009), citing *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006). 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)).

As stated in *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000):

> A trial court is required to instruct on every theory of the case reasonably deducible from the evidence. *Ragland v. Commonwealth*, Ky., 421 S.W.2d 79, 81 (1967); *Callison v. Commonwealth*, Ky.App., 706 S.W.2d 434 (1986) (In a criminal case, it is the duty of the court to prepare and give instructions on the whole law. This general rule requires instructions applicable to every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony.)

Manning at 614.

However, the trial court's duty to instruct "does not require an instruction on a theory with no evidentiary foundation." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (internal citations omitted); *Neal*

v. Commonwealth, 303 S.W.2d 903 (Ky. 1957). *See also* RCr 9.54. Moreover, "An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense." *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995), citing *Luttrell v. Commonwealth*, 554 S.W.2d 75, 78 (Ky. 1977).

At issue, KRS 511.020 states:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.
>
> (2) Burglary in the first degree is a Class B felony.

KRS 511.030 states:

> (1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.
> (2) Burglary in the second degree is a Class C felony.

At trial, one witness discussed the drill and that Ratliff sold it to her husband. The jury could certainly have believed that Ratliff had stolen the drill and not the guns; thus, he would not have been armed per KRS 511.020. Therefore, we find that Ratliff was entitled to the lesser-included instruction of burglary, second-degree, pursuant to KRS 511.030, and we reverse and remand on this issue.

Third, Ratliff argues that he was prejudiced by the prosecutor's misconduct. At trial, the prosecuting attorney elicited the testimony of his own advice from Ishmal:

> Commonwealth: As far as telling people in the community what items had been stolen, you believed were stolen and not lost in the fire, who did you tell that to?
>
> Ishmal: Well, actually, you're the only man who knew exactly what was taken from the house, uh, I wouldn't even tell Kentucky Farm Bureau what was all taken from the house. I didn't want anybody to know.
>
> Commonwealth: Why is that?
>
> Ishmal: Because I figured that if I was the only one that knew, what was taken from the house and had an itemized list, as those items turned up, I would know that they were telling me the truth what was taken. And that's what occurred-that's what happened.
>
> Commonwealth: And that was really upon my advice also.
>
> Ishmal: Yes. You advised me not to tell anyone.

Defense counsel objected that the prosecuting attorney was "making it real close to himself becoming a witness in the case." The Commonwealth replied

that, "you can call me if you want to." Defense counsel expressed doubt in the propriety of calling the prosecuting attorney as a witness. The trial court overruled defense counsel's objection. The Commonwealth then proceeded to reinforce what advice he had given Ishmal with further questioning on the same grounds. This error was perpetuated when the Commonwealth asked Detective Sykes to testify that the advice given by him to Ishmal was a good idea; closing argument also reinforced this error. The trial court eventually agreed with defense counsel that it was improper for the prosecutor to tell the jury what advice he gave people. The court overruled the motion for a mistrial, and a motion to disqualify the prosecuting attorney.

We believe *Holt v. Commonwealth*, 219 S.W.3d 731, 737-38 (Ky. 2007), to offer guidance on this issue:[7]

> The foregoing authorities leave no doubt that assertions of fact from counsel as to the content of prior conversations with witnesses have the effect of making a witness of the lawyer and allowing his or her credibility to be substituted for that of the witness. Such a practice also violates KRE 603 and KRE 802. Any such practice is improper and, subject to harmless error review, is an appropriate basis for reversal.

[7] In *Holt*, the Kentucky Supreme Court found that it was reversible error for a prosecuting attorney to ask questions of a witness which effectively implied that the defendant had confessed to the crime. *Holt*, 219 S.W.3d at 739. The prosecutor asked the witness multiple leading questions trying to get him to testify that the defendant had in fact confessed to him. *Id*. This was considered reversible error because the long stream of questioning inevitably was not "harmless beyond a reasonable doubt." *Id*. at 738. Thus, *Holt* held that there was a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Id*. at 738 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)).

. . . .

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

We agree with Ratliff that the Commonwealth's repeated placement of his advice before the jury effectively made him a witness in the case, serving to bolster the testimony of the prosecution's other witnesses. Such practice was improper, erroneous, and correctible on retrial. Additionally, Ratliff takes issue with the Commonwealth's comment in closing argument regarding Clay's testimony: "I thought it had the ring of reliability when he said [McCoy] flicked his cigarette and said he knew who did it." Ratliff argues that the Commonwealth inserted its own personal opinion on the credibility of a witness.

The law in Kentucky is clear that:

> If this Court (first) determines that a prosecutor engaged in misconduct in closing argument, reversal is required where the misconduct is 'flagrant' or if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury….The four factors to be considered in determining whether the prosecutor's misconduct was "flagrant" are: (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.

Hannah v. Commonwealth, 306 S.W.3d 509, 518 (Ky. 2010)(internal citations omitted).

We decline to find prosecutorial misconduct in closing argument *sub judice* as "A prosecutor may comment on the veracity of witnesses." *Chumbler v. Commonwealth*, 905 S.W.2d 488, 503 (Ky. 1995).

Fourth and last, Ratliff asserts that he was unduly prejudiced when the trial court abused its discretion and allowed his brother to be called as a witness against him while shackled and dressed in prison clothing. The Commonwealth argues that there was no error because the first questions asked by the Commonwealth of their witness, Ratliff's brother, were whether he was presently incarcerated, where he was incarcerated, and for what crimes, thereby mitigating any perceived error of the witness wearing shackles and prison garb because it was explained. After our review of the record we agree with Ratliff that the trial court's denial of his motion, without stated reasons, to permit his brother to testify without shackles and prison garb was error; however, we find such error to be harmless.

Barbour v. Commonwealth, 204 S.W.3d 606, 612-13 (Ky. 2006), while not directly on point to the facts *sub judice*, offers this Court guidance:

> Shackling of a defendant in a jury trial is allowed only in "the presence of extraordinary circumstances." *Peterson v. Commonwealth*, 160 S.W.3d 730, 733 (Ky.2005). Our long-standing practice has been to limit shackling to

specific types of "exceptional cases, ...cases where the trial courts appeared to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials." *Tunget v. Commonwealth*, 303 Ky. 834, 836, 198 S.W.2d 785, 786 (1947).

There have been a few such exceptional cases in which we have upheld the practice of shackling, and in each case the trial court based its decision on specific findings of extraordinary circumstances. In *Tunget*, our predecessor court upheld the trial court's decision to shackle the defendant because of his history of violent escape attempts. The defendant, who was serving a life sentence for a murder conviction, obtained a gun while in jail and used it to trap four prison guards in his cell. The defendant then shot and killed an associate warden. 303 Ky. at 836, 198 S.W.2d at 786. Applying the *Tunget* standard, we have allowed a defendant to be shackled throughout trial because he had fled the courtroom and courthouse during arraignment, thus "the trial judge had good reason to believe that [the defendant] was a man of sufficiently 'demonstrated desperation' that he might make a similar attempt during trial ...." *Commonwealth v. Conley*, 959 S.W.2d 77, 78 (Ky.1997). Similarly, we have held that the trial court did not exceed its discretion in ordering a defendant to remain in leg shackles throughout the trial where his "belligerent conduct prior to trial certainly raised a serious issue of courtroom security," and he refused "to assure the trial court that he would not engage in any physical or violent outbursts during trial." *Peterson v. Commonwealth*, 160 S.W.3d 730, 734 (Ky.2005). We have also held that shackling was justified where a defendant, who was skilled in martial arts, had successfully escaped once before, and had planned several escape attempts in the past. *Hill v. Commonwealth*, 125 S.W.3d 221, 235–36 (Ky.2004). These cases illustrate the sort of limited circumstances, *complete with specific trial court findings*, that have

> justified allowing a defendant to remain shackled before the jury.

Barbour at 612-613. (Emphasis supplied).

Given that *sub judice,* the defendant's brother took the stand as a witness for the Commonwealth in prison garb and shackles, trial counsel's fear that the jury may perceive the entire family as criminal has some basis. We believe that the better course of action would be for the trial court to articulate the facts upon which it believed the defendant's brother should appear shackled before the jury. *See Barbour*. Ultimately, this error was harmless to the defendant because any prejudice would align with the Commonwealth's case and not that of the defendant. Moreover, our review of the record during Ratliff's brother's testimony shows that it is unclear whether the jury would know who was related to whom or for that matter if there was any relation at all because both the victim and the defendant shared the same last name.[8] *See* RCr 9.24. Accordingly, the error was harmless and does not require reversal on this ground. *Barbour*, 612-13.

In light of the aforementioned, we reverse and remand this matter for further proceedings.

[8] Unfortunately, the attorneys' questions to Ratliff's brother are all but inaudible on the video record.

THOMPSON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART AND CONCURS IN RESULT ONLY IN PART.

MAZE, JUDGE, CONCURRING: While I concur with my colleagues on three of the issues raised in this case, on a fourth, I must concur in result only.

Regarding my colleagues' conclusion on the matter of Ratliff's brother's appearance in prison clothing, I am compelled to disagree with, and strongly urge against, any suggestion that a witness for the state is cloaked in the same presumption of innocence as Ratliff. The law of our Commonwealth simply does not support such a contention.

While there seems to be no authority directly relating to a state's witness who is also a relative of the defendant, we can reasonably impute from our courts' handling of other circumstances what the law is. Our Supreme Court has very recently held that four witnesses for the defense did not prejudice the defendant's defense by appearing in prison clothing. *See Stacy v. Commonwealth*, __ S.W.3d __ (Ky. 2013), 2012-SC-000065-MR (March 21, 2013).[9] *Barbour v. Commonwealth*, 204 S.W.3d 606 (Ky. 2006), to which my colleagues primarily cite, concerned the appearance of a *defendant* clothed in prison garb and shackled

[9] I understand this case was unavailable for reference or use by the parties during the pendency of this appeal, as it only recently became final on May 13, 2013. Nonetheless, it proves relevant, as well as helpful, for the limited purpose of determining where the current law in Kentucky stands, especially given the lack of authority which is factually on-point with the present case.

before the jury – a practice almost unanimously recognized as "intrinsically prejudicial." Indeed, *Barbour* provides some general tenants concerning under what limited circumstances defendants may appear before a jury in prison garb. However, the distinction between a defendant and a witness for the prosecution is too important to ignore and too great for *Barbour* to prove authoritative over the present facts.

Rather, I feel the Supreme Court's rule in *Stacy* is more on-point with this case. Accordingly, if the Supreme Court believes that no constitutional deprivation occurs when a witness for the defense wears prison garb, certainly it would not find that such a deprivation occurred when a witness for the *prosecution* did the same. My colleagues are correct that any damage to the witness's credibility would seem to prejudice only the prosecution; however, I submit that this, as well as the above analysis, require the conclusion that the "harmless error" my colleagues find to have occurred here was no error at all.

While it may have been more ideal for the trial court to explain its reasoning in denying the defense's motion, Ratliff's motion asserted a constitutional right which I believe does not apply under these facts. Hence, the trial court's decision to overrule the motion, even while failing to explain that decision, cannot be error.

In sum, while I concur with the result to which my colleagues ultimately reach on this point, I express my hope that their opinion was not intended, and will not be read, to expand a defendant's right to a fair trial beyond that very important right's established limits.

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