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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000714-MR

DENNIS LEE CALLOWAY APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 12-CR-00177

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

CLAYTON, JUDGE: Dennis Lee Calloway appeals from the judgment of the Logan Circuit Court finding him guilty of first-degree robbery, complicity to first-degree unlawful imprisonment, first-degree burglary, first-degree criminal mischief, and third-degree terroristic threatening. Upon careful review of the record, the arguments of the parties, and the applicable law, we affirm.

In the early morning hours of September 11, 2012, Bennie[1] Bryant was at his residence watching television when an unknown white male came through his door wielding a baseball bat, followed by an unknown black male. Both of the intruders had their faces covered with bandanas and wore gloves. After the white male informed Bryant that they were there to rob him, he and the black male took turns beating Bryant with the baseball bat while the other searched the house for money and drugs. At one point, Bryant informed the intruders that he had drugs outside in his van. The black male, upon hearing this information, duct taped Bryant and led him outside in an effort to find where the drugs were hidden. During this time, the white male continued to search the house. While outside, Bryant was able to loosen the duct tape, obtain a gardening hoe, and chase both of the intruders from his residence.

Upon arriving at the scene, officers interviewed Bryant who informed the officers that, while he did not know the identity of the white male, the black male's bandana slipped off during the robbery and he was pretty sure he recognized the black male known to him as Dennis Lee, which is the name Calloway was called. Susan Smith, who lived across the street from Bryant, told detectives that she witnessed two men running by her home and identified Calloway in a photo line-up as being one of those individuals.

Calloway was subsequently indicted by the Logan County Grand Jury and a trial took place ending on the 18th of February, 2013. On that date,

[1] Mr. Bryant's first name is spelled differently by the parties. The appellant spelled it "Bennie" and the appellee spelled it "Benny."

Calloway was found guilty of the crimes relating to the events that took place on September 11, 2012, and sentenced to ten years for first-degree robbery, two years for complicity to first-degree unlawful imprisonment, ten years for first-degree burglary, ninety days for first-degree criminal mischief, and twelve months for third-degree terroristic threatening, to run concurrently for a total of ten years' imprisonment. It is from this judgment and sentence that Calloway appeals to this Court as a matter of right.

On appeal, Calloway alleges four specific evidentiary errors by the trial court that occurred during his trial that require reversal. As errors of admission, he challenges the Commonwealth's use of improper bolstering, asking him to characterize the testimony of other witnesses as lying, introduction of prejudicial text messages, and introduction of irrelevant DNA evidence. Calloway further contends that the cumulative effect of these errors requires reversal. Some of Calloway's alleged errors were properly preserved for appellate review while others were not.

We review a trial court's evidentiary rulings for an abuse of discretion. *Childers v. Commonwealth*, 332 S.W.3d 64, 68 (Ky. 2010). Under this standard, a trial court's evidentiary ruling will not be disturbed unless it "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). If a party has not preserved the question he is asking an appellate court to review, it can only be reviewed for palpable error on appeal, which requires a finding of manifest

injustice to prevail. Kentucky Rules of Civil Procedure (CR) 61.02. Palpable error is an error "so egregious that it jumps off the page." *Alford v. Commonwealth*, 338 S.W.3d 240, 251 (Ky. 2011).

As his first basis for appeal, Calloway argues that the trial judge abused his discretion when the Commonwealth was permitted to improperly bolster its case by recalling the victim to the witness stand on the last day of trial just prior to the close of the Commonwealth's case in chief. We disagree.

In the Commonwealth's case in chief, Bryant testified that he knew Calloway prior to September 10, 2012, and identified Calloway as the black man that robbed and threatened to kill him. Upon recall, but before the close of the Commonwealth's case in chief, the following examination of Bryant took place:

> Commonwealth: Mr. Bryant, is the gentleman seated at the defense table, uh the individual you knew prior to September 10th, 2012, as Dennis Lee?
>
> Mr. Bryant: Yes.
>
> Commonwealth: Did you have any ill will towards Dennis Lee before September 10th, 2012?
>
> Mr. Bryant: No.
> Commonwealth: Is it the same man um, that in addition to a white gentleman forced his way into your home without permission on September 11, 2012?
>
> Mr. Bryant: Yes.
>
> Commonwealth: Is it the same man that?
>
> Mr. Bryant: Threatened to shoot me?

Calloway objected to this testimony as repetitive and cumulative. The court agreed and instructed the Commonwealth to move on to its next line of questioning:

> Commonwealth: Mr. Bryant did you have ill will towards Dennis Lee after the events of September 11, 2012?
>
> Mr. Bryant: Yes.
>
> Commonwealth: Were you angry with Dennis Lee after that incident?
>
> Mr. Bryant: You could say that, yes.
>
> Commonwealth: Were you angry when you got to the hospital that night?
>
> Mr. Bryant: Yes.
>
> Commonwealth: Are you a 100% sure today that it was Dennis Lee Calloway in your house?
>
> Mr. Bryant: Positive.
>
> Commonwealth: A hundred percent?
>
> Mr. Bryant: One hundred percent?
>
> Commonwealth: Now Mr. Bryant this is going to seem like an odd question, but you didn't consent or allow either of these individuals to duct-tape you that night did you?
>
> Mr. Bryant: No.
>
> Commonwealth: And you weren't um volunteering to stay in your home that night were you?
>
> Mr. Bryant: No.

The Commonwealth continued to question Bryant for another six minutes and no further objections were made to the testimony. Because no further

objections were made, admission of the testimony that followed the sustained objection is not properly preserved for appellate review and Calloway does not request palpable error review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. Therefore, this court declines review for palpable error regarding this issue.

Assuming, for the sake of argument, that this issue was properly preserved, we believe that, while the testimony was indeed cumulative, it did not amount to improper witness bolstering by the Commonwealth. The admission of cumulative testimony is left to the sound discretion of the trial judge.

Calloway does not claim that a police officer or any other witness attempted to strengthen the victim's credibility by repeating his testimony; he claims that because the witness was permitted to repeat his prior testimony, improper bolstering occurred. "The trial judge has…broad discretion to control interrogation of witnesses and production of evidence and decisions made in the exercise of this discretion have not been disturbed without a clear showing of abuse and prejudice." *Metcalf v. Commonwealth*, 158 S.W.3d 740, 748-49 (Ky. 2005). (Citation omitted). Kentucky Rules of Evidence (KRE) 403 provides that the trial court, *in its discretion*, can exclude testimony as being cumulative of other properly admitted testimony. The trial court, in its discretion, permitted the recall of Bryant and the admission of the cumulative testimony. We refuse to disturb the trial court's decision absent a showing that it was "arbitrary, unreasonable, unfair,

or unsupported by sound legal principles." *Commonwealth v. English* at 945. That showing has not occurred in this case.

With regard to Calloway's second claim of improper bolstering, Appellant contends that Deputy Tyler Harvey and Detective Kevin Bibb impermissibly repeated hearsay statements of other witnesses. Calloway did not object to this testimony, therefore the issues are not preserved. Calloway requests, and we grant, review for palpable error pursuant to RCr 10.26.

The disputed testimony of both officers follows:

> **Deputy Tyler Harvey**:
>
> Commonwealth: What did Mr. Bryant tell you happened to him that night?
>
> Deputy Harvey: Uh, Mr. Bryant advised that he heard someone beat on his door. Uh, as he went to turn the door knob uh to see who was at the door a white male forced his way into the residence. Uh, the only clothing description that he could remember about the white male was that he was wearing what appeared to be a round soccer cap with a bandanna and appeared to be in his thirties.
>
> ….
>
> Deputy Harvey: The other man that entered the residence Bryant described black male subject to be in his late thirties to early forties, wearing something with a dark hood. Uh, that is when Mr. Bryant stated the male subject, appeared to be a subject that he knew that goes by the name Dennis Lee.
>
> ….
>
> Commonwealth: Ok, Deputy Harvey, I am going to back up just a little bit. Um, when you were able to get, when you spoke with Ms. Smith at her home, what did she tell you that she had seen?

Deputy Harvey: She stated um, that she heard somebody screaming outside. When she looked out she seen a black male who she basically looked eye to eye and was not sure if the subject had seen her. She then described the subject that she had seen as a black male with a bald head, approximately 5'10" to 6' tall wearing black clothing.

Detective Kevin Bibb:

Commonwealth: Did you obtain a statement from Ms. Smith.

Detective Bibb: Yes, I did.

Commonwealth: What did she tell you that she had seen?

Detective Bibb: According to Ms. Smith, she gave a rough description, meaning the height, some clothing description. She said upon looking out she observed a tall black male, which appeared to be 5'10" or 6' in height running on the side of her residence. She stated the black male got stopped by the fence which borders her property and the property to the right. At that moment, Ms. Smith stated that she was able to see the black male who was dressed in black. The black male had on a zipped hoodie and stated it didn't, he didn't have a hood on his head at the time that she saw him. Uh, Ms. Smith also said the black male was thin, and stated she saw a possible gold tooth on the upper row of his teeth.

Calloway claims that the preceding testimony from the officers was inadmissible hearsay and was used to bolster each of the witnesses' credibility. In support of his argument, Calloway cites *Alford v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011), in which the Kentucky Supreme Court held that it was palpable error for the trial court to allow into evidence the hearsay statements of the alleged

victim of sexual abuse as she related them to a police officer. The Court found that there was no hearsay exception to the statements by the officer and that the testimony did not meet the criteria for admissibility under KRE 801A(a)(2) (prior consistent statements). Because the victim's in-court and out-of-court statements were the only evidence linking the appellant to the evidence of sexual contact, the Court found that the testimony was highly prejudicial, serving only to bolster the victim's credibility, and was manifestly unjust.

In this case, we do not agree that the testimony of the police officers regarding the statements given to them by Bryant was inadmissible hearsay. Unlike the testimony in *Alford*, the statements by the police officers in this case were admissible under KRE 801A(a)(2), which permits the admission of a prior consistent statement if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper motive."

Bryant was impeached on cross-examination regarding inconsistencies in his statement with respect to the identification of Calloway as one of the perpetrators of the crime. Specifically, Calloway attacked Bryant's trial testimony that he was 100% sure the black male that entered his house was Calloway. During cross-examination of Bryant, Calloway played a tape in which Bryant is heard stating, in an interview given while he was in a hospital, that he could not be 100% sure that his assailant was Dennis Lee Calloway. Once this attack was made on Bryant's credibility, evidence of what he described to the

police officers at the scene of the crime was proper to rebut the charge of recent fabrication and uncertainty, and was competent for corroborative purposes.

In *Whalen v. Commonwealth*, 205 S.W.3d 238, 241-42 (Ky. App. 2006), this court addressed KRE 801A(a)(2). The Court determined and held,

> [a]ccording to the federal courts, testimony of a prior consistent statement may be elicited from someone other than the declarant if the person testifying has personal knowledge of the prior consistent statement and if the declarant testifies at the trial and is subject to cross-examination about the prior statement… we conclude that the unanimous opinion of the federal courts regarding the admissibility of statements like the one at issue in this case is a correct statement of the law.

Thus, unlike *Alford*, the credibility regarding the victim's identification of the Appellant was impeached, making it proper for the Commonwealth to show that Bryant had identified the perpetrator as Calloway on a prior occasion. The testimony of the officers was elicited to reinforce the accuracy of Bryant's identification and rebut Calloway's assertion that Bryant had only recently became sure of the identity of the perpetrator, not to prove the facts told to them by the victim.

We agree that the hearsay statements repeated by Deputy Harvey at trial regarding the witness Susan Smith were improperly admitted; however, we find that the error in admitting these statements was harmless and does not rise to the level of palpable error.

Similar to the testimony in *Alford*, there was no hearsay exception to the statements by the officer nor did the statements meet the criteria for admissibility under KRE 801A(a)(2). Deputy Harvey testified prior to Smith. Repeating at trial what Smith told the officers on the night in question only served the purpose of bolstering her credibility at trial before her credibility had been attacked. The Kentucky Supreme Court in *Alford*, based on the improper testimony being the only evidence that linked the defendant to the crime, found palpable error. However, unlike *Alford*, the witness's credibility in this case was subsequently attacked. The Supreme Court of Kentucky has held that this type of testimony, though inadmissible when admitted into evidence, does not prejudice the defendant when the witness's testimony is subsequently impeached. *Reed v. Commonwealth*, 738 S.W.2d 818, 821 (Ky. 1987). Calloway subsequently attacked the accuracy and credibility of Smith's testimony, making evidence of how she described Calloway on the night in question competent for corroborative purposes. In fact, Calloway initially objected to the testimony, but during a bench conference withdrew his objection, stating that he was going to end up impeaching Smith anyway. We hold that while it was initially error to admit the testimony of the officers regarding statements made to them by Smith, because Calloway subsequently impeached the witness, the error was cured.

Calloway's second basis for appeal was not objected to at trial; therefore, we will grant his request for review using the palpable error standard pursuant to RCr 10.26. Calloway claims that while being cross-examined,

questions concerning two witnesses violated the Kentucky Supreme Court's holding in *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), that "a witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying."

Before Calloway testified in his own defense, the Commonwealth called Salonda McCoy and Bernice Gatewood to testify in its case in chief. McCoy testified that Calloway was at her house on the night of the robbery, arriving between 11:00 p.m. and 12:00 a.m. Bernice Gatewood testified that Calloway was at her house and she took him home to McCoy's after 2:00 a.m. on September 11, 2012. During the cross-examination of Calloway, the following exchange occurred:

> Commonwealth: So if Salonda McCoy said that you went into her house at 12 o'clock on September 10th, or I guess that would have officially made it September the 11th would that be true.
>
> Mr. Calloway: She could be right. I mean she could be right.
>
> Commonwealth: And if Nicee Gatewood testified that she didn't even take you home until 2 o'clock in the morning that night would that be right?
>
> Mr. Calloway: She could be right.
>
> Commonwealth: So they could all be right?
>
> Mr. Calloway: I mean….
>
> Commonwealth: Could they all be wrong?

Mr. Calloway: Nah.

Commonwealth: Somebody has got to be right if they all can't be wrong.

Mr. Calloway: I wasn't down here September 11th; I was in Bowling Green from Sunday to Tuesday. I was in Bowling Green.

Calloway insists this line of questioning violated the holding in *Moss* on the grounds that he was being badgered into calling a witness a liar. We disagree.

In *Moss,* the appellant was asked, *inter alia,* whether Officer Wiley is lying. "So you think Officer Wiley is lying if he says he didn't see anyone but you come out of that fence?" *Moss v. Commonwealth* at 583. The Court's reasoning behind holding such questioning improper was that, "[s]uch a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony." *Id*. Calling a respected policeman a liar could potentially cause the jury to disfavor the witness, leading them to disregard the rest of the witness's testimony. The Court in that case refused, however, to find palpable error.

More akin to the issue in the case as hand is *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010), in which the Kentucky Supreme Court was asked to hold that the Commonwealth's questioning of a witness as to whether another witness was "wrong" amounted to palpable error. The appellant in that case maintained that characterizing the witness as wrong was the same as characterizing the witness as a liar. The Kentucky Supreme Court, citing the United States Court of Appeals for the Second Circuit, distinguished between the

two types of questions; "[a]sking a witness whether a previous witness who gave conflicting testimony is 'mistaken' highlights the objective conflict without requiring the witness to condemn the prior witness as a purveyor of deliberate falsehood, *i.e.*, a 'liar.'" *Id*. at 88. (quoting *United States v. Gaind*, 31 F.3d 73, 77 (2nd Cir. 1994). In declining whether the use of the word "wrong" would suffice in all cases the Court cited the United States Court of Appeals for the First Circuit's decision in *United States v. Gaines*, 170 F.3d 72, 82 (1st Cir. 1999), in which that court concluded, "[w]hether this avoidance [of the "L" word] would suffice in all situations, we need not decide now. As [the defendant] did not object in the district court to these questions ... our review is limited to plain error. Clearly that standard was not transgressed."

Here, the Commonwealth did not badger the witness into characterizing either witness's testimony as "lying." Calloway was simply asked by the Commonwealth if the testimony given by two witnesses could both be true, and if they both could not be true, which one was correct. This does not rise to the level of reversible error as there was no danger in Calloway being cast in an unflattering light, such as was the case in *Moss*, in which the appellant was asked to characterize a respected law enforcement officer as a "liar."

As his third basis for appeal, Calloway claims that the trial court abused its discretion when it permitted the introduction of certain highly prejudicial text messages through Detective Gibb's testimony, for which he had no personal knowledge, some of which were sent from unknown individuals.

Calloway's basis for this argument is lack of foundation, lack of relevancy, hearsay, and violation of the confrontation clause. Again we are unpersuaded.

At trial, the Appellant objected to the admissibility of the text messages, thus preserving the issue for appellate review. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE 901. Circumstances associated with writing may be sufficient to support a finding that it is what it is claimed to be. *Apple v. Commonwealth*, 296 S.W.2d 717 (Ky. 1956).

Here, the Commonwealth proffered sufficient evidence that the messages came to and from Calloway. Detective Bibb testified that the phone was in Calloway's property at jail; Calloway told the detective that his cell phone number was the number associated with the phone; Calloway testified that the phone in evidence was the phone he was using at the time and that the text messages were from his phone; and Salonda McCoy testified that the number associated with the phone was Calloway's number and he sent text messages from that number. Though Calloway denied writing the text messages, the circumstances surrounding the messages and the phone were enough to support a finding that the messages came from Calloway. After proper foundation is laid, it is for the jury to determine whether or not they believe Calloway actually wrote the messages. *Id.* at 721.

Calloway also argues that Detective Bibb lacked the minimum qualifications to testify about the messages. KRE 601(b) provides that: "[a] person is disqualified to testify as a witness if the trial court determines that he: (1) [l]acked the capacity to perceive accurately the matters about which he proposes to testify[.]" As part of his investigation, Detective Bibb took pictures from Calloway's phone at the time of his arrest. Since Detective Bibb located and documented the evidence, he was the most qualified person to testify regarding the photo evidence. The trial court did not err when it allowed the detective to testify regarding the contents of these photos, nor did it abuse its discretion by finding that the proper foundation was laid in order to introduce the text messages into evidence.

Calloway claims that the text messages were not relevant, were unduly prejudicial, and without merit. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. All relevant evidence is generally admissible and evidence which is not relevant is not admissible. KRE 402. "Relevancy is established by any showing of probativeness, however slight." *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). Even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice…." KRE 403. The messages were relevant to the alleged crimes.

Further, we do not accept the appellant's claim that the text messages are unduly prejudicial and that the probative value of the messages are substantially outweighed by their prejudicial effect. "All relevant evidence is prejudicial to the party against whom it is offered." Robert G. Lawson, *Kentucky Evidence Law Handbook*, § 2.10(4)(b) at 89 (4th Edition 2003). Evidence that is unduly prejudicial "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *Id.* (quoting *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980)). Calloway claims prejudice because the jury is required to draw "inference upon inference" out of context to get any meaning from the text messages. However, at trial, Calloway requested, and the judge agreed, that all the text messages from the relevant period to the relevant recipient should be admitted into evidence so as not to confuse the jury, and also to aid them concerning the context of the messages. Calloway does not specifically allege any undue prejudice. He notes nothing that would appeal to the jury's sympathies, arouse their sense of horror, or provoke their instinct to punish. Moreover, whether the undue prejudice outweighs the probative value of KRE 403 evidence is a matter entrusted to the circuit court's sound discretion, and we do not believe that the trial court abused that discretion. *Parson v. Commonwealth*, 144 S.W.3d 775, 781(Ky. 2004).

Regarding Calloway's argument that the text messages were inadmissible hearsay, we agree with the Commonwealth that the messages were

admissible because they were Calloway's own statements. Hearsay is an out of court statement used to prove the truth of the matter asserted. KRE 801(c). "A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is…[t]he party's own statement…." KRE 801A(b)(1). As stated above, there was sufficient proof for the jury to infer that the messages sent from the cell phone were made by Calloway. Because they are his own statements, the messages are not excluded by the hearsay rule.

With respect to the two messages allowed into evidence that were to Calloway from other numbers, these statements were properly admitted into evidence because they were non-hearsay. Hearsay is an out of court statement offered for its truth. KRE 801. Here, the message from "Rio" that states, "Call me got a way we can make 3-4 racks[,]" is not offered for its truth. The second statement to Calloway, which was sent from an unknown sender, asked Calloway to "come outside." This statement was a command and not assertive speech offered for its truth. "[I]f the statements [are]…commands, they could not – absent some indication that the statements were actually code for something else – be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false." *U.S. v. Rodriguez-Lopez*, 565 F.3d 312 (6th Cir. 2009). The statement "come outside" is a command offered to show that the statement was made and is not a proposition that can be

proven true or false. Neither statement sent to Calloway violated the rule against hearsay.

Calloway further claims that admitting the messages from the unavailable senders violated his right to confront witnesses against him. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1355, 158 L.Ed.2d 177 (2004), the Supreme Court held that the testimonial statement of a witness who does not appear at trial is inadmissible unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness. *Crawford* applies to testimonial hearsay statements meant to be used in future criminal prosecutions. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The statements admitted into evidence that were sent to Calloway's phone are non-testimonial in addition to being non-hearsay; consequently, there was no *Crawford* violation.

As his fourth basis for appeal, Calloway claims that the trial court abused its discretion when it admitted irrelevant evidence and testimony regarding DNA evidence. Specifically, Calloway argues that the trial court erroneously allowed the testimony of forensic biologist Sally Edwards regarding DNA evidence collected from a bandana left at the scene of the crime. Edwards testified that Calloway could not be excluded from the mixture of DNA that she found on the bandana, and that an estimated one person in six hundred and sixty random unknown individuals could be a contributor to this mixture, based on relevant United States populations. Believing the evidence to be irrelevant, unduly

prejudicial, and confusing to the jury, Calloway insists that reversal is required. We disagree.

The evidence that Calloway could not be excluded as a possible contributor of the DNA on the bandanna found at the crime scene was relevant evidence as defined by KRE 401. "Relevancy is established by any showing of probativeness, however slight." *Springer*, 998 S.W.2d at 449. The fact that Calloway could not be excluded as a contributor of the DNA on the bandanna makes it slightly more probable that he committed the crime than it would be if he were excluded as a contributor. In order to avoid undue prejudice and confusion, the trial court gave the following admonition to the jury:

> I am going to give you an admonition about how you can use this evidence. You may use the testimony and evidence that is presented only to the extent that it tends to prove that it is *possible* that Dennis Lee Calloway's DNA is on the red bandanna. (Emphasis added).

The trial court's admonition to the jury adequately overcame any danger of undue prejudice associated with the evidence. The jury is presumed to have followed the admonition, curing any error with regards to any confusion the jury may have had on how to use the evidence. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Calloway gives no evidence to rebut that presumption. Because the evidence was relevant and the trial court admonished the jury as to avoid undue prejudice and confusion, there was no error in allowing the DNA evidence to be admitted.

Finally, Calloway asserts that the cumulative effects of the preceding errors require reversal of his conviction. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). The doctrine is only implicated "where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Id.* Having decided that the trial court made no error in its evidentiary rulings, there is consequently no cumulative error.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason A. Hart
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Frankfort, Kentucky