IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 22, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE June 12, 03 E11A Grau, H, D.C.

2001-SC-0814-MR

DONALD RAY HALL — APPELLANT

V.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
00-CR-00059

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART; VACATING AND REMANDING, IN PART

Appellant, Donald Ray Hall, was convicted in Letcher Circuit Court of first-degree assault, first-degree burglary, first-degree stalking, first-degree wanton endangerment, kidnapping accompanied by serious physical injury, theft by unlawful taking and possession of a firearm by a convicted felon. The convictions stem from Appellant's brutal attack upon Melissa Hall, his former wife. The jury recommended that each sentence run consecutively, whereupon the trial court fixed the total sentence at 80 years imprisonment. Appellant now appeals to this Court as a matter of right.

On the morning of June 18, 2000, an intruder alarm awakened Melissa Hall and her children. Arming herself with a handgun, she investigated the disturbance, only to discover Appellant entering through her kitchen door. Ms. Hall fired a warning shot in the air, but was soon overpowered by Appellant. Ms. Hall testified that a violent assault

ensued, in which Appellant struck her repeatedly with her gun as he dragged her by the hair out of the house, ominously stating "we're going to the graveyard."

Ms. Hall's efforts to defend herself were unsuccessful, and at trial she related numerous details of the malicious battery inflicted upon her by Appellant as he forced her outside of the house and down a gravel road. The physical attack upon Ms. Hall concluded only after Appellant shot her in the leg as she lay collapsed on the ground. However, Appellant attempted to coerce Ms. Hall to further accompany him by placing the gun to the head of their five-year-old son, the child having unwittingly followed them outside. Appellant did not shoot, but instead left the scene, later turning himself in to the police.

Ms. Hall had, in fact, sought to prevent the violent encounter with her former spouse, with whom she maintained a stormy on-again, off-again relationship following their divorce. In early June 2000, the Letcher District Court entered an uncontested Domestic Violence Order (DVO) restricting Appellant's contact with Ms. Hall. The order required Appellant to remain at least 500 yards away from Ms. Hall at all times, and to vacate their shared residence. To further protect herself, Ms. Hall acquired a handgun, installed alarms on her doors, and nailed her windows shut.

I. Allegations of Prosecutorial Misconduct

Appellant claims he was denied due process and a fair trial because of two alleged incidents of prosecutorial misconduct. The first claim involves the prosecutor's statement during voir dire that he is "responsible for representing crime victims," specifically mentioning by name the victims in this case, Appellant's ex-wife and her son. The second allegation concerns the seating of Ms. Hall inside the bar at the

prosecution counsel table, where she stayed throughout the guilt phase of the trial, except when testifying. Although no objection was made at trial to either matter, Appellant now asserts these actions improperly lent the credibility of the court and the Commonwealth to Ms. Hall's testimony and influenced the jury to base its decision on sympathy for the victim rather than on the evidence presented in court.

When prosecutorial misconduct is alleged, "the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor." Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 866 (2002). A fair trial is not denied simply because a prosecutor states that he represents the victims of crime. Appellant correctly points out that a prosecutor "represents all of the people of the Commonwealth, including the defendant; he should in an honorable way use every power that he has, if convinced of a defendant's guilt, to secure his conviction, but should always remember he stands before the jury clad in the official raiment of the commonwealth, and should never become a partisan." Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306, 308 (1931). However, a statement by a prosecutor that he represents crime victims does not necessarily mean that he has abdicated his responsibility to represent all constituents within the Commonwealth, including the accused. Nor could such a statement alone be considered so inflammatory in nature as to cause a "jury to base its decision on guilt or innocence, or on the appropriate punishment, on who is victim." Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 542 (1988), citing Moore v. Zant, 722 F.2d 640, 651 (11th Cir. 1984).

Appellant also argues that the seating of the victim at counsel table inflamed the passions of the jury, resulting in an unfair trial. Prior to voir dire, the trial judge ordered all witnesses sequestered outside of the courtroom. Ms. Hall remained behind, inside

the rail with the prosecution, the trial record showing her seated directly adjacent to the jury box.

This Court addressed a similar situation in Brewster v. Commonwealth, Ky., 568 S.W.2d 232 (1978). In Brewster, a victim was permitted to sit at counsel table in order to "confer from time to time" with the Commonwealth's Attorney. Id. at 236. We noted that:

> "[t]his practice is neither new nor unusual. It is so well established that there is no need for a citation of authority and, as a matter of fact, it has been the law of this Commonwealth for so long that the mind of man runneth not to the contrary that in a criminal case the trial judge, in his discretion, may allow one witness to remain in the courtroom to aid the Commonwealth's Attorney."

Id.

Generally, victims who are also witnesses may be excluded from the courtroom upon the motion of the court or a party. The complementary provisions of RCr 9.48 and KRE 615 govern the separation of witnesses, the latter rule stating:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's case.

Therefore, according to the mandatory language of this rule, upon the request of a party the trial court must separate all witnesses unless one of the three enumerated exceptions applies. See Mills v. Commonwealth, Ky., 95 S.W.3d 838, 840-841 (2003); Justice v. Commonwealth, Ky., 987 S.W.2d 306, 315 (1998).

Prior to the adoption of the Kentucky Rules of Evidence in 1992, trial judges enjoyed discretionary authority to allow a witness familiar with the facts of the case to remain in the courtroom, despite a sequestration order, so that the witness could assist counsel during trial. See Brewster, supra, at 236; Robertson v. Commonwealth, 275 Ky. 8, 120 S.W.2d 680, 684 (1938); Johnson v. Clem, 82 Ky. 84, 87, 5 Ky. L. Rptr. 793, 795-796 (1884). KRE 615(3) codifies this earlier practice, allowing witnesses "shown by a party to be essential to the presentation of the party's case" to remain in the courtroom notwithstanding a sequestration order. See generally R. Lawson, The Kentucky Evidence Law Handbook, § 11.30, p. 631 (3rd ed. Michie 1993).

Appellant made no request to exclude witnesses, therefore it is unnecessary to determine if Ms. Hall's presence in the courtroom falls within the exception described in Brewster or articulated in KRE 615(3). Furthermore, Appellant does not contend that Ms. Hall adapted her testimony to conform to that of others, which application of the sequestration rules is designed to prohibit. See Mills, supra, at 840-841; Jacobs v. Commonwealth, Ky., 551 S.W.2d 223, 225 (1977). Finally, by not raising the issue at trial, Appellant cannot now complain that the prosecution and trial court erred by allowing the victim to sit at counsel table, particularly since this practice is permitted under the Kentucky Rules of Evidence and has been approved by prior decisions of this Court.

II. Voir Dire

Appellant asserts that a statement by a potential juror tainted the entire panel, necessitating a mistrial. At the outset of voir dire, the prosecution asked if anyone recognized Appellant. One prospective juror, before the entire panel, said that he "might know him," adding "I used to be deputy jailer in Whitesburg." During the bench

conference that immediately followed, out of the hearing of other panel members, the prospective juror revealed that Appellant was a former inmate at the jail. Appellant successfully challenged the potential juror for cause. The trial court, however, denied Appellant's motion for mistrial, offering instead to make a curative admonition, which Appellant declined.

Appellant contends the potential juror's remark labeled him as an individual with a criminal past. At trial, "[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 United States Supreme Court, discussing the common-law tradition, provides some rationale for the rule: "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475-76, 38 S.Ct. 213, 218-219, 93 L.Ed. 168, 173-174 (1948). Appellant argues that an inference of prior criminal activity so biased the venire as to deny him the constitutionally protected right to a trial by an impartial jury. U.S. Const. amends. VI, XIV; Ky. Const. §§ 7, 11.

The threshold question for this Court is whether the potential juror's statement necessarily implied that Appellant had previously run afoul of the law. Appellant relies heavily on the Court of Appeals' decision in Tabor v. Commonwealth, Ky. App., 948 S.W.2d 569 (1997). In Tabor, a prospective juror, who believed she recognized the defendant, asked if he was in "West Kentucky Correctional Center." Id. at 570. The Court of Appeals held that this response tainted the entire venire, opining:

> While [the prospective juror's] reference to the penal institution in the case at bar was not evidence and while her reference only inferred

> imprisonment, the fact that this juror was excused by the trial court following a conference outside the hearing of the remaining prospective jurors leads to only one conclusion: the excused juror was correct in her suspicion that she may have met Tabor at a correctional institution. Any argument that [the juror] could have been excused from jury service for some other reason, or that Tabor's presence at the correctional institution could have been for some other reason than his incarceration as a felon, defies common sense.

Id. at 572.

We find the reasoning in Tabor unpersuasive in the present matter. As far as the other venire members were concerned, any number of non-prejudicial explanations could account for the former deputy jailer's acquaintance with Appellant. For instance, Appellant may have been considered a former co-worker at the jail or a member of law enforcement who frequented the institution or perhaps a third party who furnished goods or services to the jail. Likewise, the potential juror's dismissal would not necessarily lead others to surmise that Appellant had previously been jailed. Jurors are dismissed for numerous reasons, including biases which may be implied "from any close relationship, familial, financial or situational, with any party, counsel, victim, or witness." Sholler v. Commonwealth, Ky., 969 S.W.2d 706, 709 (1998), citing Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985). For all the other members of the venire knew, the dismissal stemmed from the potential juror's acquaintance with Appellant, rather than a specific knowledge of Appellant's former incarceration.

The trial court offered a curative admonition following the potential juror's dismissal, which Appellant declined. While an admonition cannot rehabilitate jurors who should otherwise be disqualified, Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1991), there is a presumption such admonitions will be followed by a jury. Maxie, supra, at 860; Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993),

overruled on other grounds, Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied, 523 U.S. 1052 (1998). In Maxie, we held "a detailed curative admonition given by the trial court provided a legally sufficient remedy" after a potential juror stated before the entire venire his belief that those charged with crimes are guilty. 82 S.W.3d at 863.

Although we cannot say what effect an admonition would have had on this jury, Appellant's decline of a curative instruction left the trial court with the decision of whether or not to declare a mistrial. A court will consider a mistrial only in the most extreme situations, "when there is a fundamental defect in the proceedings which will result in a manifest injustice." Gould v. Charlton Co., Ky., 929 S.W.2d 734, 738 (1996). Based on the fact that the potential juror's statement and subsequent dismissal can be interpreted in a number of non-prejudicial ways, coupled with Appellant's decline of an admonition, we find the trial court did not abuse its discretion in denying a mistrial.

III. Post-Arrest Silence and the Privilege Against Self-Incrimination

During the Commonwealth's case-in-chief, Detective Claude Little of the Kentucky State Police described various events surrounding Appellant's arrest, including the following:

Prosecution:	Once [Appellant] turned himself in, what did you do after that?
Detective Little:	I met with Donald Ray down at the sheriff's office. Went downstairs to the jail and processed him. Attempted to take a statement from him. He requested to speak with his attorney.
Defense counsel:	Objection

The trial court sustained the objection, but denied Appellant's motion for mistrial. Appellant contends that Detective Little's testimony improperly referred to his Fifth Amendment privilege against self-incrimination, protected as well by Section Eleven of the Kentucky Constitution. The Commonwealth effectively concedes that the testimony did refer to Appellant's right to remain silent, but argues that the error is harmless.

Even an indirect comment can refer to an accused's right to remain silent. "[S]ilence does not mean only muteness; it includes the statement of a desire to remain silent as well as of a desire to remain silent until an attorney has been consulted." Wainwright v. Greenfield, 474 U.S. 284, 295 n.13, 106 S.Ct. 634, 640, 88 L.Ed.2d 623, 632 (1986). For example, in Hall v. Commonwealth, Ky., 862 S.W.2d 321, 323 (1993), the Commonwealth admitted error when a prosecutor inquired if "no statements were made" by a defendant. Likewise, the Sixth Circuit Court of Appeals, in Coyle v. Combs, 205 F.3d 269, 279 (6th Cir. 2000), found the statement "talk to my lawyer" to be "properly analyzed as a comment on prearrest silence." Detective Little's testimony that Appellant chose not to make a statement, coupled with an immediate request for an attorney, was "reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent." Sholler, supra, at 711.

The substantive use of a defendant's post-arrest silence during the prosecution's case-in-chief is prohibited in Kentucky courts. Hall, supra, at 323; Green v. Commonwealth, Ky., 815 S.W.2d 398, 400 (1991). The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Acknowledging that the privilege is lost if its invocation can be used as evidence of the commission of a crime, the United States Supreme Court stated that "it is impermissible to penalize an individual for exercising his Fifth

Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." Miranda v. Arizona, 384 U.S. 436, 465 n.37, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966).

The privilege against self-incrimination does not prevent the introduction of all evidence regarding a defendant's silence. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf." Raffel v. United States, 271 U.S. 494, 499, 46 S.Ct. 566, 70 L.Ed. 1054 (1926). By taking the stand, a defendant waives his "cloak of immunity," allowing cross-examination on prior silence. Id. at 497. Subsequent decisions have more carefully defined the parameters regarding when pre- and post-arrest silence may be used to impeach a defendant's trial testimony. See Wainwright, supra; Fletcher v. Weir, 455 U.S. 603; 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982); Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 222 (1980); Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). However, as this Court noted in Green, supra, outside of the impeachment context, no authority "flatly allows comment upon post-arrest silence as evidence of guilt." 815 S.W.2d at 400.

Although Detective Little's reference to Appellant's post-arrest silence violated the privilege against self-incrimination, the error was harmless. To determine if this error is prejudicial, we must determine, in considering the case as a whole, if there is a substantial possibility that the result would be any different had the error not occurred. Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969). Two factors for consideration are the weight of the evidence and the severity of punishment imposed by the jury. Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218, 222 (1976). Based on

the record before us, we find the jury's determination of guilt adequately supported by the evidence presented at trial. Furthermore, although Appellant received the maximum sentences on all charges but two, the sentences were justifiable in light of the severity of the crime.

In addition, the single inadvertent reference to Appellant's silence did not deprive him of a fair trial. See Bills v. Commonwealth, Ky., 851 S.W.2d 466, 472 (1993). Appellant's timely objection, combined with the fact that the prosecution made no further mention of the matter, minimized the prejudicial effect of this testimony. See Greer v. Miller, 483 U.S. 756, 764-65, 107 S.Ct. 3102, 3108, 97 L.Ed.2d 618, 629-630 (1987). Appellant's contention that the Commonwealth intentionally elicited testimony regarding Appellant's post-arrest silence is unfounded. The prosecution's broadly phrased question, "what did you do after that," could have brought any number of responses unrelated to Appellant's privilege against self-incrimination. We conclude that the inadvertent testimony of Detective Little was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

IV. Victim Impact Testimony

During the guilt phase of trial, the prosecution queried Ms. Hall regarding the effect the night of the offenses had on her children "physically, emotionally, or otherwise." Over defense counsel objection, the trial court allowed Ms. Hall to detail the changes she had observed in her children since the attack by Appellant. The jury learned, for example, that the oldest child now carefully checks the locks at night, while the youngest stays right at his mother's side.

We have often stated that "a certain amount of background evidence regarding the victim is relevant to understand the nature of the crime." Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 113 (1994), cert. denied, 513 U.S. 1174 (1995). The prosecution need not portray the victim as a mere statistic, "as long as the victim is not glorified or enlarged." Bowling v. Commonwealth, Ky., 942 S,W.2d 293, 302-03 (1997), cert. denied, 522 U.S. 986 (1997). However, victim impact evidence is inappropriate during the guilt phase of trial. Bennett v. Commonwealth, Ky., 978 S.W.2d 322, 325 (1998); Ice v. Commonwealth, Ky., 667 S.W.2d 671, 676 (1984), cert. denied, 469 U.S. 860 (1984). Such evidence goes beyond placing a human face on the victims of crime, and "is generally intended to arouse sympathy for the families of the victims, which, although relevant to the issue of penalty, is largely irrelevant to the issue of guilt or innocence." Bennett, supra, at 325.

It is unnecessary for us to determine whether Ms. Hall's testimony was prejudicial, for despite the impropriety of introducing victim impact evidence during the guilt phase of trial, Appellant effectively waived any objection on this ground by asserting that the children, rather than the mother, could appropriately offer such testimony. Moreover, at trial, Appellant's sole contention was that Ms. Hall could not competently describe the effect of the attack upon her children. On appeal, Appellant for the first time now argues that her testimony encompassed prejudicial victim impact information. Once the grounds for objection are stated at trial, Appellant cannot offer a different theory on appeal. Rupee v. Commonwealth, Ky., 821 S.W.2d 484, 486 (1991); Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). We therefore find no error in the trial court's decision to overrule Appellant's objection at trial.

V. Juror Excusal

Following voir dire, Appellant objected to the composition of the venire because thirteen prospective jurors did not appear for jury service. The trial court, noting that absent panel members often have varying reasons for not showing up for jury duty, overruled the objection, holding that there were sufficient members of the venire present from which to select a jury. Appellant contends that the trial court violated Kentucky law by failing to record the names and reasons for excusing the absent venire members, and that this unwritten manner of excusal deprived Appellant of his right to be present at all stages of trial.

As an initial matter we note that Appellant's objection to the venire was untimely. All objections to "an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors." RCr 9.34. Because the objection followed rather than preceded voir dire, any alleged error is not preserved for review. When such an error is unpreserved, Appellant must show "actual prejudice" resulted from any irregularity in the jury selection process. Bowling, supra, at 304, citing Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990), cert. denied, 502 U.S. 831 (1991).

A trial judge who excuses a juror "shall record the juror's name, as provided in KRS 29A.080, and his reasons for granting the excuse." KRS 29A.100. The referred-to provision in KRS 29A.080 directs the judge to record the reasons for excusal "on the juror qualification form and on the list of names drawn from the juror wheel." Several of our decisions have criticized the failure to comply with these rules, although we have not yet gone so far as to hold that non-compliance, by itself, is reversible error. Sanborn, supra, at 548; Ward, supra, at 406; Ice, supra, at 683 (Leibson, J., concurring). Nonetheless, we again "emphasize the importance of substantial

compliance with jury selection procedures mandated in an effort to provide an impartial jury." Sanborn, supra, at 548.

Nothing in the record supports Appellant's claim that the trial judge actually excused the thirteen individuals who failed to appear for jury service. The missing venire members were likely "no shows" who had no prior approval to miss jury duty. Appellant failed to inquire whether the trial court subsequently ordered the absent venire members to appear and show cause for their absence, nor did Appellant ascertain if the court initiated contempt proceedings against these individuals as provided in KRS 29A.150. In Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 83 (2000), we reviewed a similar unsubstantiated assertion, holding that a claim of error under RCr 9.34 "must have a factual basis." Lacking supporting facts, Appellant cannot show he was prejudiced, nor can he demonstrate that the trial court erred in overruling his objection to the composition of the jury panel.

VI. Maximum Aggregate Sentence

Appellant asserts that at eighty years, the combined length of his consecutive sentences exceeds the statutory limits set forth by KRS 532.110(1)(c), which states:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

The statute utilizes the sentencing scheme set forth in KRS 532.080 as a "yardstick" to calculate the maximum term of incarceration allowed for an offender's consecutive sentences. See Bedell v. Commonwealth, Ky., 870 S.W.2d 779, 783 (1993). Under no circumstances may a consecutive sentence exceed seventy years, despite the fact that

an offender's "highest class crime" may authorize a longer period of incarceration under KRS 532.080.

Appellant's highest class crime, a Class A felony, is subject to a maximum penalty under KRS 532.080 of "fifty (50) years, or life imprisonment." Appellant contends that because fifty years is the longest "term of years" possible under KRS 532.080 for his crimes, a longer consecutive sentence should not be allowed. Appellant overlooks the fact that the consecutive sentencing provision of 532.110(1)(c) does not refer to "terms of years," but rather utilizes the longest applicable "extended term" in KRS 532.080 to establish the upper limit for consecutive sentences. In Bedell, supra, we held that life imprisonment is the longest "extended term" authorized by KRS 532.080. Therefore life imprisonment, not fifty years, serves as the uppermost limit for Appellant's consecutive sentences, subject of course to the seventy year cap. P

However, we agree with the Commonwealth that Appellant's eighty year sentence exceeds the seventy year maximum imposed by KRS 532.110(1)(c). We therefore remand this matter to the Letcher Circuit Court for re-sentencing within the limits provided by law.

Appellant's convictions are hereby affirmed. The matter is remanded to the Letcher Circuit Court for sentencing in accordance with this opinion.

All concur.

COUNSEL FOR APPELLANT:

Randall L. Wheeler
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Matthew D. Nelson
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204