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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-13-03 ELA Grauth, D.C.

2001-SC-0457-MR

STEVEN BERRY — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
99-CR-1312

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Steven Berry, was convicted by a Fayette Circuit Court jury of murder, tampering with physical evidence, first-degree stalking, and two counts of violating an emergency protective order (EPO). He was sentenced to life imprisonment without the possibility of parole for twenty-five years for murder, one year each for tampering with physical evidence and stalking, and twelve months for each EPO conviction, with each sentence to run concurrently with the others. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), contending that (1) he was entitled to a dismissal with prejudice on double jeopardy grounds after his first trial resulted in a mistrial because a Commonwealth's witness violated an in limine order; (2) he was entitled to a second mistrial because of testimony by a Commonwealth's witness that violated a discovery order; (3) three jurors should have been excused for cause because of their prior

exposure to domestic violence; (4) the Commonwealth was permitted to introduce the videotaped testimony of two witnesses without proving their unavailability in violation of his constitutional right to Confrontation; (5) a government witness should not have been allowed to testify that the victim's mother suffered from chest pains following the murder; and (6) the instruction on first-degree manslaughter should have explicitly required the jury to find the presence of extreme emotional disturbance. Finding no error, we affirm.

I. FACTS.

The facts in this case are essentially undisputed. Appellant confessed to killing Patricia Searcy but claimed he did so under the influence of mental illness or extreme emotional disturbance. Sometime during the summer of 1998, Appellant moved into a residence on the same street where Searcy lived. They became romantically involved, ultimately living together in a third residence with Searcy's daughter. Several months later, the relationship soured.

In April 1999, Searcy and her daughter moved out of the residence and Searcy obtained a fourteen-day emergency protective order from the Fayette District Court. KRS 403.740(4). That order expired without further action. On June 6, 1999, Searcy obtained a second emergency protective order and this time sought more permanent protection. Following a hearing held on June 15, 1999, the district court issued a one-year domestic violence restraining order. KRS 403.750.

On June 23, 1999, a warrant was issued for Appellant's arrest for violating the restraining order. A second warrant was issued on June 26, 1999. Appellant was arrested and jailed later that day, and, on July 7, 1999, he was convicted of violating a

protective order, KRS 403.763, and sentenced to time served. Upon his release, the violence escalated. Appellant began repeatedly calling Searcy's residence. He twice slashed the tires on her car. Several new warrants were issued for Appellant's arrest and a "crimestoppers" advertisement featuring Appellant appeared in the Lexington Herald-Leader on July 27, 1999.

Appellant became enraged over the "crimestoppers" advertisement. He knew that Searcy typically worked until 3:00 a.m. Thus, beginning in the evening of July 27, 1999, and into the morning of July 28, 1999, Appellant waited outside Searcy's residence until she returned home. When Searcy arrived, an argument ensued that awoke Searcy's sister and daughter who had been asleep inside the residence. They went to the door and saw Appellant and Searcy arguing near the sidewalk in front of the residence. Searcy's sister picked up the telephone and called "911" for emergency assistance. Before the police could arrive, Appellant shot Searcy several times and killed her. Searcy's daughter and sister witnessed the shooting.

Appellant was arrested on July 29, 1999, and questioned by Detective Billy Richmond of the Lexington Police Department. In a videotaped confession, Appellant admitted to lying in wait for Searcy and then killing her. Appellant explained his reason for the murder as follows:

> I thought I could get her to come with me. But she wouldn't. And so, I said, f--- it, and I turned around and was getting ready to walk away, because her sister was getting ready to get on the phone. And then I thought about it, and I was like, well hell, you know, this ain't nothing but another charge I'm getting ready to get on myself, so I oughta go on and kill her.

The murder weapon was never recovered.

On September 28, 1999, the Fayette County Grand Jury indicted Appellant for murder in violation of KRS 507.020, tampering with physical evidence in violation of KRS 524.100, first-degree wanton endangerment in violation of KRS 508.060, first-degree stalking in violation of KRS 508.140, three counts of violating a protective order in violation of KRS 403.763, and harassing communications in violation of KRS 525.080. A superseding indictment sought the death penalty and identified the violation of a domestic violence order as the aggravating circumstance. KRS 532.025(2)(a)8. The Commonwealth later dismissed the wanton endangerment count, one of the three counts of violating a protective order, and the harassing communications count.

The first trial began in Fayette Circuit Court on February 5, 2001. On the third day of trial, a prosecution witness testified to evidence that had previously been suppressed by an in limine order. Appellant's motion for a mistrial was granted and the case was reset for trial on March 26, 2001. On March 21, 2001, Appellant petitioned this Court for a writ to prohibit the retrial on double jeopardy grounds and accompanied the petition with a motion for intermediate relief pursuant to CR 76.36. This Court denied the motion for intermediate relief and the petition for a writ was later denied as moot.

The second trial began as scheduled on March 26, 2001. On April 5, 2001, the jury returned verdicts of guilty on all counts and sentences of twelve months in jail on the two counts of violating a protective order.[1] Following a sentencing hearing on the murder conviction, the jury recommended a sentence of life imprisonment without the

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[1] The case was tried before rendition of Commonwealth v. Philpott, Ky., 75 S.W.3d 209 (2002).

possibility of parole for twenty-five years. Appellant then waived jury sentencing on the tampering and stalking convictions, and, pursuant to the Commonwealth's recommendation, the trial court imposed one year sentences for both of those convictions to run concurrently with the sentence for murder.

II. DOUBLE JEOPARDY.

The Double Jeopardy Clauses of Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution only rarely preclude retrial after a mistrial is granted pursuant to the defendant's request.

> Retrial is . . . permissible where a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, unless the motion is intentionally provoked by the government's actions. Ordinarily, such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.

Sattazahn v. Pennsylvania, 537 U.S. 101, ___, 123 S.Ct. 732, 745, 154 L.Ed.2d 588 (2003) (internal quotations and citations omitted). The defendant's mistrial motion is deemed to be "provoked by the government's actions" only upon a finding of "bad faith" by the prosecutor or judge. United States v. Dinitz, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976); Commonwealth v. Deloney, Ky., 20 S.W.3d 471, 474 (2000); Tinsley v. Jackson, Ky., 771 S.W.2d 331, 332 (1989); Commonwealth v. Lewis, Ky., 548 S.W.2d 509, 510 (1977).

The United States Supreme Court has explained that "bad faith" exists for purposes of double jeopardy only when the prosecutor or judge deliberately intends to "subvert the protections afforded by the Double Jeopardy Clause" by "'goad[ing]' the defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667, 676 , 102

S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982); see Deloney, supra, at 474. Thus, the question presented is whether the prosecutor or judge at Appellant's first trial attempted to subvert the protections of the Double Jeopardy Clause by goading Appellant into moving for a mistrial. If not, the retrial was not precluded by the proscription against double jeopardy.

The mistrial resulted from the testimony of Angela Harris, a close friend of the victim. The prosecution called Harris, in part, because she had listened in on a telephone conversation between Appellant and Searcy during which Appellant threatened to slash the tires on Searcy's automobile. The objectionable testimony came during cross-examination by defense counsel.

Q: So she was talking to him on the phone?

A: Yes.

Q: Now what date was this?

A: It was a Sunday, it was a Sunday. I don't know what date . . . .

Q: What month?

A: . . . it was. The date that she was going to file the complaint with him. Where he drew the gun on her. Me and her had went out to eat at Applebees and we came home and I dropped her off, and a friend stopped by to see us, long-time friend. And he came down and drew a gun on her. She called me and I told her I would come over and take her down to the municipal building and I came over to get her and a police officer was out there and he said we couldn't go up because it was a Sunday. We had to wait until the next day, which was Monday, to go. So, whatever day she filed the complaint, that was the day that it happened on. I'm not clear on those dates.

During a pretrial hearing, the trial court had ruled that Harris's testimony regarding the gun incident would be inadmissible. Defense counsel thus moved for a mistrial. The

Commonwealth protested that it had instructed Harris not to testify about the gun incident.

> Your honor, she was admonished. She was told there were several things not to get into. I spoke with her last night. I said, you can't get into the gun . . . . And, she did not get into it with me. I told her we would not be asking about it and that was not to be discussed or brought up.

The trial court granted the motion for a mistrial, but accepted the Commonwealth's explanation.

> As I stated in chambers, I think considering the testimony itself, and just for the record I don't think, I think the Commonwealth, as they stated, they advised the witness not to discuss that and some other issues that were not discussed. I don't think the witness Ms. Harris intended to say something she had been told not to. I don't think it crossed her mind. She was trying to just reference the date that was asked.

Thus, the trial court held that Harris's slip was unintentional and not caused by the Commonwealth.

We review a trial court's determination of factual questions, such as whether the conduct giving rise to the motion for a mistrial was accidental, for clear error. Deloney, supra, at 474; see also Young v. Commonwealth, Ky., 50 S.W.3d 148, 167 (2001); Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506, 509 (1983). The trial court's finding was not clearly erroneous. No evidence suggested that the Commonwealth encouraged Harris's violation of the in limine order. When asked for the date in question, Harris struggled and could remember only that it was the day before the victim filed the gun complaint – a date that Harris likely assumed was known to defense counsel. The trial court's finding of mistake was thus well supported by the record.

Moreover, as we noted in Deloney, supra, "bad faith" conduct by a prosecution witness alone will not trigger the double jeopardy bar against a second prosecution. Id.

at 475. The bar is triggered only by "bad faith" conduct on the part of the government, itself, i.e., by the prosecutor or judge. Id. Harris did not become an agent of the Commonwealth simply by testifying on its behalf. Thus, even if, contrary to the trial court's finding, Harris had acted in bad faith when she mentioned the gun incident, her misconduct would not have barred the retrial. Id.

III. DISCOVERY VIOLATION.

Appellant admitted to killing Searcy. His defense was that he was acting under the influence of mental illness or extreme emotional disturbance. Accordingly, he filed a pretrial notice of intent to introduce evidence of mental illness or defect. KRS 504.070(1). The trial court ordered him committed to the Kentucky Correctional Psychiatric Center (KCPC) for evaluation. KRS 504.070(3). Dr. Victoria Yunker, a staff psychiatrist at KCPC, testified at trial that even though Appellant may have had an abusive childhood and suffered from alcoholism and other ailments, at the time of the offense he possessed the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

Appellant twice objected and moved for a mistrial during Dr. Yunker's testimony on the ground that she testified to discoverable evidence that had not been provided to him by the prosecutor. First, Dr. Yunker testified that Appellant had threatened to harm two other patients at KCPC.

> Q: During the time that he was there, did he display to you any active mental illness?
>
> A: His speech was, during the time that he was at KCPC, his speech was consistently logical and relevant. He complained of having nightmares, of seeing visions of his former girlfriend. And the staff repeatedly noted that, other than what he reported, he was never

observed to have any signs or symptoms consistent with a psychosis. There were incidents at one point where he had to be warned about inappropriate behavior. He was complaining about two other patients and made comments that he wanted to harm them.

Appellant objected because the Commonwealth had not provided discovery of the emphasized portion of the statement pursuant to RCr 7.24(1). He requested that the jury be admonished that "there is no evidence whatsoever that Mr. Berry intended to harm anyone at KCPC," or, if that admonition was refused, a mistrial.

The prosecutor protested that there was no violation of RCr 7.24(1) because "I didn't know anything about it, judge." The trial court sustained the objection but refused to give the requested admonition or to declare a mistrial. Instead, the trial court admonished the jury "[t]o disregard the statement that the witness just stated that the defendant made. It is not to be considered as evidence."

Later in her testimony, Dr. Yunker suggested that Appellant had exhibited "homicidal ideation" while at KCPC.

Q: Did you find him to be clinically, severely depressed?

A: No I did not. And if I may elaborate on why I didn't?

Q: Alright.

A: He said he was having problems sleeping, his sleep patterns. He was addressed about this. It was that he started sleeping all through the day and then would stay awake all night. And the staff approached him, we all approached him about helping him perhaps get on a schedule, get to sleep at night. And he wanted to sleep that way. He would sleep for several hours without any difficulty. He complained of having nightmares but the staff that observed him didn't see any external symptoms of him experiencing nightmares. He always appeared to have a restful sleep. His appetite was good. He did not engage in any self-harm gestures. He did exhibit and he did express himself as having some homicidal ideation in the context of our facility. Can I elaborate on that?

Again, defense counsel objected that she had not been provided any discovery about "homicidal ideation" and requested a mistrial. The prosecutor again claimed that this testimony was unanticipated.

> It's not, none of this, this is not in her report. What I know, all I can say is that what I know about what she has to say is on that report and I have provided that to them. And I don't think I'm required to provide any more.

Obviously, Dr. Yunker believed that Appellant's threat against the two other patients was important to her diagnosis. A full explanation of the incident emerged during a hearing outside the presence of the jury. Apparently, Appellant had asked the nurses at KCPC what the consequences would be if he committed an act of violence against the two aforementioned patients. Rather than giving Appellant the advice he sought, the nurses searched his room and found a toothbrush that had been filed down to a sharp point.

When questioned about the incident, Dr. Yunker admitted that the KCPC nurses had recorded Appellant's threat in their notes or records. Dr. Yunker had examined those notes prior to making her diagnosis. Unfortunately, she omitted to mention the incident in her report. Nor had she informed the prosecutors of the incident. Thus, Dr. Yunker's testimony about the threat and her characterization of it as a "homicidal ideation" surprised both the prosecutor and defense counsel.

As with the first mention of the threat, the trial court sustained the objection but denied the motion for a mistrial. Instead, the trial court admonished the jury as follows:

> At this time I want to read to you an admonishment. I would ask that you listen to this admonishment. The court had a hearing concerning Dr. Yunker's statement that a staff member at KCPC reported to her that the defendant exhibited homicidal ideations. During the hearing the court heard testimony concerning the factual basis for that statement and it is the ruling of the court that the statement should not be considered by the

> jury in any way regarding the defendant's guilt in this case. The statement is to be completely disregarded by the jury.

Appellant now claims that neither of the admonitions sufficed to cure the prejudice caused by the discovery violation.

We disagree. The trial court's handling of both incidents was flawless. First, he correctly ruled that there had been a discovery violation. At first glance, one might think that prosecutors are not required to provide defendants with notes and records of which they are unaware. Wagner v. Commonwealth, Ky., 581 S.W.2d 352, 355 (1979) ("The only materials discoverable under the rule are those within the possession, custody and control of the Commonwealth."), overruled on other grounds by Estep v. Commonwealth, Ky., 663 S.W.2d 213, 216 (1983). However, we have subsequently clarified that RCr 7.24 applies as well to "records actually in the hands of . . . agencies of the state." Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 702 (1994); see also Anderson v. Commonwealth, Ky., 864 S.W.2d 909, 914 (1993). KCPC is an "agency of the state" and the notes referring to Appellant's threat to harm patients at KCPC were in the hands of KCPC. Thus, the prosecutor's failure to furnish copies of those notes to defense counsel was a discovery violation.

Nevertheless, the trial court's admonitions cured the violation. RCr 7.24(9) provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances. (Emphasis added.)

Here, the violation was not discovered until the jury had already heard the evidence, so an order of discovery, continuance, or suppression was unavailable. While it sometimes "may be just under [such] circumstances" to grant a mistrial, more often an admonition will suffice.

The admonitions given here properly directed the jury not to consider the testimony as evidence. Indeed, the second admonition went further and implied that there was no "factual basis" for the testimony that Appellant exhibited "homicidal ideation." "Absent bad faith, an admonition given by the trial judge can cure a defect in testimony." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997); see Jacobs v. Commonwealth, Ky., 870 S.W.2d 412, 419 (1994) (admonition to disregard cured any error resulting from asking defendant's psychiatric expert whether she was formerly employed as a belly dancer); Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 552-53 (1985) (admonition in trial for rape and sodomy cured any prejudice resulting from witness's reference to unrelated bomb threat); Wilson v. Commonwealth, Ky., 403 S.W.2d 705, 707 (1966) (admonition in trial for burglary cured prejudice caused by evidence that defendant had previously killed a man in unrelated circumstances); Huddleston v. Commonwealth, 251 Ky. 172, 64 S.W.2d 450, 452 (1933) (jury presumed to follow court's admonition to disregard incompetent evidence).

We have identified only two circumstances in which the presumptive efficacy of an admonition does not apply: (1) when there is an "overwhelming probability that the jury will be unable to follow the court's admonition" and there is "a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant,"

Alexander, supra, at 859, or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial." Derossett v. Commonwealth, Ky., 867 S.W.2d 195, 198 (1993); Bowler v. Commonwealth, Ky., 558 S.W.2d 169, 171 (1977). Neither exception applies here. Dr. Yunker was not permitted to elaborate on the nature of either the threat or Appellant's "homicidal ideation," and the trial court's admonitions were forceful. Moreover, Appellant admitted to killing the victim, so the jury was unlikely to have been further prejudiced by evidence that he had exhibited "homicidal ideation." Thus, there was no "overwhelming probability" that the jury would be unable to follow the trial court's admonition. Second, there was a factual basis for the evidence. Therefore, the discovery violation did not mandate a mistrial.

IV. JUROR BIAS.

Both Section 11 of the Kentucky Constitution and the Sixth Amendment of the United States Constitution guarantee an accused the right to a speedy and public trial "by an impartial jury." Domestic violence was an issue in this trial, and the trial court excused for cause several members of the jury panel who had an intimate connection or experience with domestic violence. However, it refused to excuse for cause three members of the panel whose experience either was less intimate or was remote in time.

Juror No. 125 was the only unexcused member of the panel who had been personally subjected to domestic violence.[2] She stated that she had been subjected to domestic violence during a previous marriage approximately thirty years ago. She

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[2] A fourth juror who had been subjected to domestic abuse, Juror No. 174, was excused for cause because she could not consider the death penalty.

suffered no injuries but her ex-husband did push her and rammed his fist through a wall. They had no children and she had not had any contact with him since their divorce. She stated that her own experience would not affect her impartiality in this case and that she would not automatically find Appellant guilty or impose a harsher penalty because of her experience but would consider the full range of penalties. Juror No. 125 sat on the jury that convicted Appellant.

Juror No. 107 also sat on the jury that convicted Appellant. She was not personally subjected to domestic violence, but her daughter had been harassed and stalked by a man while in college in the mid-to-late 1980s. Her daughter ultimately obtained an EPO and "that pretty much settled it." Juror No. 107 stated that her daughter's experience would not affect her impartiality as a juror on this case.

Juror No. 110 had been sprayed with pepper spray when he intervened in a domestic dispute between a female friend of his wife and the friend's former domestic partner against whom an EPO had been entered The juror explained that he was only slightly acquainted with his wife's friend and had never met the man who pepper-sprayed him. The event occurred "last Wednesday" when he observed his wife's friend trying to drive away in her automobile and her former domestic partner leaning in through the window of the vehicle to prevent her from leaving. The juror was assaulted when he tried to pull the man away from the car. He had subsequently filed a criminal complaint for fourth-degree assault against his assailant. When asked whether this experience would affect his ability to serve impartially as a juror, Juror No. 110 replied "No, not at all." Appellant used one of his peremptory strikes to excuse Juror No. 110.

The issue with respect to each of these three prospective jurors is one of "implied bias." None of the three was related or connected, directly or indirectly, to the defendant, the prosecution, or any of the witnesses. E.g., Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 546-47 (1988). Nor did they have any prior knowledge of the conduct giving rise to the criminal charges. E.g., Paenitz v. Commonwealth, Ky., 820 S.W.2d 480, 481 (1991). Each answered the so-called "magic question" in the affirmative, believing that they could be impartial and fair to the defendant despite their personal experiences. Of course, that is not the determining factor. Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 717-18 (1991).

The issue is whether their personal experiences were such that, despite their disclaimers, they must be considered impliedly biased as a matter of law against a person standing trial for an offense involving domestic violence. The standard of review of a trial court's decision not to excuse a juror for cause is whether the failure to do so was an abuse of discretion. Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 373 (2002). The burden is on Appellant to show that the jurors were unconstitutionally partial. Key v. Commonwealth, Ky.App., 840 S.W.2d 827, 830 (1992) ("It is incumbent upon the party claiming bias or partiality to prove the point.") (quotation omitted).

Appellant has not met that burden. Only Juror No. 125 had actually been a victim of domestic violence. But that violence occurred approximately thirty years before Appellant's trial. "[T]he mere fact that a person has been the victim of a similar crime is insufficient to mandate a prospective juror be excused for cause." Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997). See Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 670 (1990) (juror permitted to sit on capital murder and robbery

case despite fact that juror had once been robbed at gunpoint); Stark v. Commonwealth, Ky., 828 S.W.2d 603, 608 (1991) (jurors permitted to sit on robbery trial despite having been robbery victims), overruled on other grounds by Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 448 (1996); Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987) (juror permitted to sit on trial for robbery of store despite fact that her home had been burglarized on two previous occasions). The trial court did not abuse his discretion by refusing to excuse Juror No. 125 for cause.

Juror No. 107 was only indirectly connected to an EPO through her daughter. The incident was one of stalking and harassment rather than physical abuse. Moreover, the problem occurred approximately fifteen years prior to Appellant's trial and the juror's memory of it was hazy. When asked whether her daughter had any further problems after the EPO was issued, she answered, "I honestly can't remember." When a juror's connection to a similar crime is only indirect, an excusal for cause is rarely necessary. See Stoker v. Commonwealth, Ky., 828 S.W.2d 619, 625-26 (1992) (juror not disqualified in prosecution for sexual abuse of four children despite fact that juror's best friend's granddaughter had been abused and killed). The trial court did not abuse his discretion in refusing to excuse Juror No. 107 for cause.

Juror No. 110 had recently been personally assaulted while attempting to render aid to a victim of domestic violence. However, the perpetrator was essentially a stranger and was not subjecting his former domestic companion to physical injury but was only attempting to prevent her from leaving. We have often held it was not an abuse of discretion to permit jurors to remain on a panel even though they had been the victims of a recent crime. Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 838 (2000)

(juror permitted to remain on case involving burglary, robbery, and murder despite having recently been the victim of burglary and theft); Butts v. Commonwealth, Ky., 953 S.W.2d 943, 945 (1997) (juror permitted to sit on home burglary and assault case despite having been raped in her home three months prior to trial). The trial court did not abuse his discretion by refusing to strike Juror No. 110 for cause.

V. CONFRONTATION CLAUSE.

Two police officers who testified at Appellant's first trial, Officer Chad Martin and Officer Brian Roberts, moved away from Fayette County before the second trial. At the time of the second trial, Martin was living in northern Kentucky and Roberts was living in Georgia. During a pretrial conference, the Commonwealth moved that the videotaped testimony given by both witnesses at the first trial be presented at the second trial in lieu of their personal appearances, as both were allegedly unavailable because they were beyond the court's subpoena power. The court granted the motion and the testimony of Martin and Roberts was introduced by videotape over Appellant's objections.

The Commonwealth now concedes that this was a violation of Appellant's constitutional right to Confrontation. Northern Kentucky is within the court's statewide subpoena power and the attendance of an out-of-state witness can be procured by the procedures outlined in the Uniform Act to Secure Out of State Witnesses. KRS 421.250. Our only task is to determine whether the error was so prejudicial as to require reversal. Our inquiry focuses on Martin's testimony because Appellant does not assert that he was prejudiced by Roberts's testimony. Roberts only testified that he helped put up crime scene tape and question neighbors, but discovered no information

useful to the investigation. Martin's testimony was similar in most respects, but Appellant claims prejudice from one aspect of his testimony, viz:

> On my first arrival, I checked in with Sergeant Green, who was the supervisor at the scene at the time. And he asked me just to assist with the family, if I could. I located the victim's mother and stood by with her, tried to calm her. She began having chest pains and was getting faint so I called for another paramedic unit to come out, and they ended up transporting her to the hospital.

Violations of the Confrontation Clause are considered "trial errors," and are, therefore, subject to harmless error analysis. Coy v. Iowa, 487 U.S. 1012, 1021, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986); Barth v. Commonwealth, Ky., 80 S.W.3d 390, 395 (2001). An error is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We are required to examine a number of factors in a harmless error analysis, including: (1) "the importance of the witness' testimony in the prosecution's case;" (2) "whether the testimony was cumulative;" (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;" (4) "the extent of cross-examination otherwise permitted;" and (5) "the overall strength of the prosecution's case." Van Arsdall, supra, at 684, 106 S.Ct. at 1438; see Caudill v. Commonwealth, Ky., 777 S.W.2d 924, 926 (1989).

Examining these factors, we conclude that the error in this case was harmless beyond a reasonable doubt. The second and third factors weigh in Appellant's favor, as the testimony concerning the victim's mother was not cumulative and was neither contradicted nor corroborated. However, the remaining factors weigh heavily against

Appellant. The testimony was unimportant. It was essentially window dressing, helping the jury to understand the crime scene and the events that unfolded just after the commission of the crime, but adding little substantively to the Commonwealth's case. In addition, Martin was subjected to a full cross-examination at the first trial and the jury was able to observe same at the second trial. Finally, the prosecution's case was strong. The jury watched Appellant confess to the murder and explain his motive in extremely disturbing language: "[T]his ain't nothing but another charge I'm getting ready to get on myself, so I oughta go on and kill her."

The only question the jury had to consider in the guilt phase of the trial was whether Appellant was mentally ill or acting under extreme emotional disturbance at the time of the murder. Neither of those determinations was affected by evidence that the victim's mother developed chest pains at the scene of the crime. As the Commonwealth points out, the jury heard testimony that the victim was murdered in the presence of her daughter and sister, and heard the daughter's screams in the background when the "911" call was played. Presumably, the jurors were not surprised to hear that the victim's mother became physically ill upon viewing her murdered daughter's body at the crime scene. We conclude that this evidence could not possibly have affected the verdict.

VI. VICTIM SYMPATHY.

In the alternative, Appellant argues that the testimony regarding the mother's chest pains was admitted solely to create sympathy for the victim and should have been

excluded under KRE 403.[3] Of course, even if this argument were persuasive, it would not require reversal since we have already held that the testimony was harmless. Nevertheless, the argument is also meritless.

We have held on numerous occasions that the Commonwealth may present evidence showing that the victim is not a mere statistic, including testimony that the victim had a family that may have suffered tangibly from the murder. E.g., Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 794 (2003) (approving the admission of testimony regarding, inter alia, "the emotional state of the victim's family after the homicide"); Furnish v. Commonwealth, Ky., 95 S.W.3d 34, 49-50 (2002) (finding no error in permitting victim's friend "to testify about their growing relationship, [the victim's] love for her children and grandchildren, and about her hobbies and charity work"); Rogers v. Commonwealth, Ky., 60 S.W.3d 555, 560 (2001) (holding that photograph of victim with his wife and three children was admissible). In this case, the jury was entitled to know that the victim would be missed and that the victim's mother was distraught over her death. Although victim impact evidence should be reserved for the penalty phase, Bennett v. Commonwealth, Ky., 978 S.W.2d 322, 325-26 (1998), the testimony as to the mother's chest pains was brief and, as noted above, not prejudicial to the guilt-phase determination in view of the overwhelming evidence of guilt. See Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 303 (1997) ("the prosecutor's reference to the victims' families briefly during the guilt phase closing argument did not deprive the appellant of a fair trial"); Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 707 (1994)

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[3] At the first trial, Appellant also objected to this evidence as hearsay. He does not renew the hearsay objection on appeal.

(affirming despite prosecutor's argument that "if, in the future, someone should cry a tear, cry one for [the victim]").

Moreover, we have often held that a jury is entitled to a clear picture of the crime scene. Young v. Commonwealth, Ky., 50 S.W.3d 148, 169-70 (2001); Fields v. Commonwealth, Ky., 12 S.W.3d 275, 279 (2000). Here, Martin testified as to the state of the crime scene as he found it. Cf. McKinney v. Commonwealth, Ky., 60 S.W.3d 499, 508-09 (2001) (approving admission of videotape of crime scene "depicting the burned bodies of the victims, as well as numerous photographs of the scene and the victims"). The admission of this testimony during the guilt phase does not require reversal.

VII. JURY INSTRUCTIONS.

The final issue is whether the jury instruction on the lesser included charge of first-degree manslaughter should have explicitly referenced the presence of extreme emotional disturbance. The trial judge instructed the jury on the definition of extreme emotional disturbance as required by McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-69 (1986), then gave the standard instructions on murder and manslaughter in the first degree:

INSTRUCTION NO. 2

Murder

You will find the Defendant, Steven T. Berry, guilty of Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A: That in Fayette County, Kentucky, on or about July 28, 1999 and before the finding of the indictment herein, he killed Patricia Searcy by shooting her;

AND

B. That in so doing, he caused the death of Patricia Searcy intentionally and not while acting under the influence of extreme emotional disturbance.

. . .

INSTRUCTION NO. 3

First-Degree Manslaughter

If you do not find the Defendant, Steven T. Berry, guilty of Murder under Instruction Number 2, you will find the Defendant guilty of First-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A: That in Fayette County, Kentucky, on or about July 28, 1999 and before the finding of the Indictment herein, he killed Patricia Searcy by shooting her;

AND

B. That in so doing, he intended to cause the death of Patricia Searcy.

. . .

The trial court overruled Appellant's motion to include in Part B of Instruction Number 3 the requirement that the jury find that Appellant intended to cause the death of Patricia Searcy "while acting under the influence of extreme emotional disturbance." He asserts that the trial court's refusal to include that element in Instruction Number 3 deprived him of Due Process and a fair trial.

He is incorrect. In fact, we specifically held in Baze v. Commonwealth, Ky., 965 S.W.2d 817 (1997), that it was error for the trial court to give the very instruction requested by Appellant.

> "[I]t was error to require the Commonwealth to prove the presence of extreme emotional disturbance as an element of the offense of first-degree manslaughter. The inclusion of this additional element required the Commonwealth to prove the absence of extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of murder. . . and to prove the presence of extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of first-degree manslaughter. Theoretically, the jury could have found by a preponderance of the evidence, but not beyond a reasonable doubt, that

> Baze was or was not acting under the influence of extreme emotional disturbance. If so, the jury would have been required to acquit Baze of both charges.

Id. at 823. Moreover, by finding Appellant guilty of murder under Instruction Number 2, the jury found beyond a reasonable doubt that he was not "acting under the influence of extreme emotional disturbance" when he intentionally killed Patricia Searcy. Haight v. Commonwealth, Ky., 938 S.W.2d 243, 248-49 (1996).

Accordingly, the judgment of conviction and the sentences imposed by the Fayette Circuit Court are affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., concurs in result only.

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