IMPORTANT NOTICE

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RENDERD: FEBRUARY 17, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 8-31-05 ELIA GRAVES, D.C.

2003-SC-0869-MR

THOMAS TALLEY III — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
02-CR-1445

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Thomas Talley III, was convicted in Jefferson Circuit Court of reckless homicide, tampering with physical evidence and being a persistent felony offender in the first degree. He received concurrent sentences totaling twenty years. Appellant argues that the trial court committed reversible error in five instances and appeals to this Court as a matter of right.

The central dispute between Appellant and the victim, Tony Gore, concerns a woman, Monique Moore. For seven years, Appellant and Moore had a relationship, during which time, Moore also had a relationship with Gore. As a result, hostility developed among all three, which culminated in the June 22, 2002, shooting death of

Gore. Appellant claims that he acted in self-defense. Additional facts will be presented in addressing each of Appellant's arguments.

I.

Appellant's first claim of error is a violation of his Sixth Amendment right of confrontation by admitting a 911 audiotape recording into evidence. Appellant also claims the recording contains inadmissible hearsay.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. KRE 801(c). Hearsay is not admissible unless it meets one of our well-established exceptions. Wells v. Commonwealth, 892 S.W.2d 299, 301 (Ky. 1995). These exceptions grew from ancient common law, supported by the theory that the character and context of such statement adds sufficient reliability to permit admission. Id. Appellant argues that declarations from an anonymous caller to 911 dispatch stating that a shooting had just occurred, describing the shooter, and his flight from the scene are unreliable hearsay statements and not within any exception. We disagree.

The present sense impression exception to the hearsay rule, KRE 803(1), defines the exception as, "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Bray v. Commonwealth, 68 S.W.3d 375 (Ky. 2002) (satisfying the exception when a statement describes or explains the event prompting the call, the declarant had personal knowledge of the event, and the statement is substantially contemporaneous with the event it described). This rule allows a slight lapse in time between the perceived event and hearsay statement. Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998). Under this exception, the availability of the declarant to testify is

irrelevant. KRE 803. Here, the trial court held that the audiotape recording qualified as a present sense impression exception to the hearsay rule. Upon examination of the recording itself, we also conclude that the call qualifies:

> Operator: Louisville Police, EMT.
>
> Caller: Yes, Ma'am. I'm over here at St. Catherine. . .
>
> Operator: Uh, huh.
>
> Caller:. . .and Preston. A guy has just been shot and the guy is in a car, in a, green truck riding off. He's got a girl with him. The guy is laying on the sidewalk.
>
> Operator: So, the one on the sidewalk has just been shot? What's the address?
>
> Caller: Uh, I don't know (inaudible)
>
> Operator: Is it in front of your house?
>
> Caller: Uh, Yeah. . .
>
> Operator: What's your address?
>
> Caller: It's the apartments across the street. Smoketown Apartments I think is what it's called.
>
> Operator: Okay. Is it, 300 Block of East St. Catherine?
>
> Caller: Yes.
>
> Operator: Okay and give me. . .
>
> Caller: The guy just left in a green, oh, it's kind of like a Bronco, but it ain't, it's a little bit longer.
>
> Operator: Okay. Black male? White male?
>
> Caller: And he's got a girl hostage with him.
>
> Operator: Okay. Black male? White male?
>
> Caller: It's a black male, he's about probably 6'5" or 7'. He's got a black t-shirt on and a pair of, uh, blue jean shorts, I think. The guy's laying over there, I think he's dead.

Operator: Okay, well. Do you know which direction?

Caller: Yeah. He's headed down towards, uh, oh, headed towards First and all that street.

Operator: (Inaudible).

Caller: He had that gun to her head and made her get into the truck with him.

Operator: Okay. I got someone on the way over there.

Caller: All right. Thanks.

Operator: Uh, huh. Bye.

The standard of review for admissibility of evidence is abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The test for abuse of discretion is whether the trial judge's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id. We conclude that the trial judge did not abuse his discretion.

However, Appellant points to the recent United States Supreme Court case of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and contends that this evidence violates his Sixth Amendment right of confrontation. U.S. CONST. amend. VI. In Crawford, the Supreme Court held that the admission of a wife's out-of-court statements to police officers, regarding an incident in which the defendant, her husband, allegedly stabbed the victim, violated the Confrontation Clause. Crawford, supra. The Supreme Court abrogated its previous holding in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980), by holding that a witness's testimonial out-of-court statement is barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statement is deemed reliable by the trial court. Id. at 1364.

The United States Supreme Court applied a stricter standard only to the admission of testimonial hearsay. Concerning nontestimonial hearsay, the Supreme Court noted: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Id. at 1374. The text of the Confrontation Clause applies to "witnesses" against the accused--in other words, those who "bear testimony." Id. at 1364. "Testimony," in turn, is typically, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. The Supreme Court also gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned--namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." Id. at 1374.

We are persuaded that a 911 audiotape recording, admissible under KRE 803(1), is not prohibited by Crawford because it is not a testimonial statement. A 911 call does not implicate the principal evil at which the Confrontation Clause was directed. Leavitt v. Arave, 383 F.3d 809, 830 n.22 (9th Cir. 2004); State v. Forrest, 596 S.E.2d 22 (N.C. App. 2004). Appellant's argument that government officers were involved in its production is misplaced and does not comport with the reasoning of Crawford. Although the Confrontation Clause is not coterminous with the common law hearsay rule, they both "stem from the same roots" and are "designed to protect similar values." Ohio, supra. Thus, a finding that a statement falls within a firmly rooted hearsay exception means that it contains sufficient reliability to satisfy the requirements of the Confrontation Clause. Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1056 (6th Cir.1983).

II.

Appellant's second claim of error is violation of his Constitutional right to counsel by admitting incriminating statements made to another inmate. Appellant argues that Larry Thomas was acting as an undisclosed government agent when Appellant made statements to him pertaining to the instant case. Upon Appellant's motion, the trial court conducted a suppression hearing prior to the beginning of trial on July 21, 2003.

Testimony from inmate Larry Thomas, Detective Gary Huffman, and Assistant Commonwealth's Attorney Shane Young revealed that Thomas was serving a 13-year federal prison sentence. He was brought to Louisville Metro Corrections in July, 2002, to testify in an unrelated state drug case. While at Louisville Metro Corrections, he was housed in the same dormitory with Appellant. Thomas stated that he and Appellant conversed on four separate occasions and that three conversations pertained to the shooting of Tony Gore. The first conversation was in the "day room" and lasted about an hour. Appellant discussed the shooting and the fact that Monique Moore had played him and Gore against each other. On July 26, 2002, Assistant Commonwealth's Attorney Shane Young visited Thomas at the jail to discuss his upcoming testimony in the unrelated state drug case. During this visit, Thomas told Young that he had obtained information concerning a murder and kidnapping from another inmate. Thomas confirmed that he only told Young that he had information, but did not disclose the information. Young stated that he would have the proper authorities contact Thomas. Though Thomas was subsequently moved out of Appellant's dorm, he remained on the same floor.

The second and third conversations were in passing: once when leaving the visitation area and the other when Appellant walked by Thomas' cell. Appellant claimed

that Moore's brother had assured him that Moore would not testify against him. Detective Gary Huffman met with Thomas on two occasions. During these meetings, Thomas provided information detailing the relevant statements. Both Huffman and Young testified that they neither told Thomas to interrogate Appellant, nor told anyone to tell Thomas to interrogate Appellant. There was no promise of any consideration for Thomas' statements or any arrangements for placing Thomas near Appellant in the jail. Thomas testified that Appellant volunteered the information and that he had made no deal with his federal prosecutor.

Appellant argues, however, that Thomas knew from prior experience and conversations with his federal prosecutor that any information he could provide in other cases would be looked upon favorably and could result in a sentence reduction. In fact, Thomas had provided information in other cases. Furthermore, following Thomas' meeting with Huffman, the Assistant Commonwealth's Attorney said he would write a letter to his federal prosecutors to inform them that Thomas had cooperated by testifying. Lastly, Appellant cites that Thomas induced Appellant to talk by implying that he did not like Tony Gore. Thomas boasted that Appellant had no idea he was informing police.

The trial court, after hearing arguments from counsel, and upon review of United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) and Thurman v. Commonwealth, 975 S.W.2d 888 (Ky. 1998), concluded that Thomas was a voluntary informant and that the arrangement was not deliberately designed by the government to elicit statements. Larry Thomas was permitted to testify. Appellant now argues that the trial court failed to properly apply Henry and Thurman and that Massiah v. United

States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and its progeny require reversal.

RCr 9.78 provides the procedure for conducting suppression hearings and sets the standard for appellate review. On review, appellate courts use a two-part analysis to inquire as to: (1) whether the findings of fact made by the trial court are supported by substantial evidence and (2) if so, whether the trial court applied the appropriate legal analysis. Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998). "If supported by substantial evidence the factual findings of the trial court shall be conclusive." RCr 9.78. Both briefs agree as to facts underlying the trial court's decision allowing Thomas to testify. We find the trial court applied the appropriate legal analysis.

The rule expressed in Massiah and its progeny, apply to interrogations by the government or agents acting on its behalf. Thus, the primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Therefore, to establish a Sixth Amendment violation, Appellant must show that Thomas was acting as a government agent. "The role of the government in the deliberate elicitation of such statements is of crucial importance, for 'the Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached.'" United States v. Love, 134 F.3d 595, 604 (4th Cir. 1998). Appellant has failed to establish this connection.

"[A]n informant becomes a government agent for purposes of [Massiah] only when the informant has been instructed by the police to get information about the particular defendant." United States v. Johnson, 338 F.3d 918, 921 (8th Cir. 2003).

There is no evidence of any agreement between Thomas and the government. Because there is no evidence of Thomas acting on behalf of the government when listening to Appellant's jailhouse statements, the Sixth Amendment claim lacks merit.

Although Thomas had previously cooperated with the government in other cases, there was neither evidence that such cooperation extended in any manner to the investigation of Appellant nor any suggestion that Thomas was intentionally placed by the government near Appellant. When Thomas spoke with Appellant, he had not received any instructions from the government. Thomas was not paid for providing information concerning Appellant. The mere fact that Thomas knew from prior experience and conversations with his federal prosecutor that any information he could provide in other cases may be looked upon favorably, the fact that the Assistant Commonwealth's Attorney said he would write a letter to his federal prosecutor and inform them that Thomas had cooperated and had testified after learning of Thomas' conversations, and the fact that Thomas used various tactics to engage Appellant in conversation, collectively, does not rise to the level of government facilitation prohibited by the Sixth Amendment. Entrepreneurs and volunteers are not agents of the government. United States v. Watson, 894 F.2d 1345 (D.C. Cir. 1990). An informant's initiating contact with an indicted defendant--whether because of conscience, curiosity, or even potentially to curry an unpromised future favor from the government--cannot be attributed to the government. Thomas v. Cox, 708 F.2d 132, 136 (4th Cir. 1983). Accordingly, Appellant's Sixth Amendment and Section 11 claim is rejected.

III.

Appellant's third claim of error is that the trial court admitted evidence of his using cocaine after the shooting. Appellant states this evidence not only is irrelevant and

prejudicial, but also a violation of his rights to due process and a fair trial by jury, as guaranteed by the 6th and 14th Amendments of the United States Constitution and Sections 2, 7, and 11 of the Kentucky Constitution.

Prior to trial, Appellant moved to exclude any evidence of his cocaine use on the day of the shooting. The trial court granted Appellant's motion, but stated that the ruling would be modified if Thomas testified or if Appellant otherwise opened the door to such evidence. The cocaine issue was raised twice during trial.

First, during opening statements, counsel told the jury about an incident where Appellant had taken the victim's cocaine from Monique Moore's apartment. In an effort to establish his self-defense claim, Appellant argued that this incident led to an altercation with Gore and that Appellant had feared for his life. Based upon this reference to cocaine, the Commonwealth moved to introduce evidence of Appellant's cocaine use on the day of the shooting because Appellant had opened the door. The trial court reserved its ruling.

On cross-examination, Moore testified that Appellant flushed some of Gore's cocaine down the toilet. Moore explained that he did not want her around the cocaine. She further added that Gore was very upset and that Gore and Appellant had "gotten into it" over the cocaine. The Commonwealth moved to introduce evidence of Appellant's cocaine use because this evidence had given the jury an incorrect impression, namely that Appellant was not involved in drugs and was protecting Moore. The trial court found that Appellant had attempted to portray himself as a "knight in shining armor." Accordingly, Moore was asked whether Appellant had used cocaine following the shooting. Because she was unable to recall, Moore was impeached by the testimony of Detective Huffman. Detective Huffman testified that Moore stated to

police on July 8, 2002, that Appellant had either inhaled or snorted cocaine sometime during the afternoon of June 22, 2002, but that she did not know the amount or number of times.

Appellant argues that the admitted evidence violates the KRE 404 prohibition on character evidence and evidence of other crimes, wrongs, or acts.

The relevant question is 'why did Appellant introduce evidence concerning the cocaine?' As previously mentioned, the trial court found that Appellant had attempted to portray himself as a "knight in shining armor." The standard of review for admission of evidence is whether there has been an abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The test for abuse of discretion is whether the trial judge's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id. Under the circumstances, we cannot say that the ruling was arbitrary, unreasonable or unfair. Contrary to Appellant's position, it is obvious that Moore not only testified regarding Appellant's state of mind toward Gore, but also as to the motive behind his actions. Appellant elicited this testimony through a series of leading questions and could have prevented these extraneous statements through witness preparation and more narrowly tailored questions.

When a defendant opens the door, the Commonwealth may introduce evidence of bad acts that might otherwise be inadmissible. Muncy v. Commonwealth, 132 S.W.3d 845, 848 (Ky. 2004); Commonwealth v. Higgs, 59 S.W.3d 886, 894 (Ky. 2001) ("[A] Defendant pays a price for attempting to show his good repute by opening "the entire subject which the law has kept closed for his benefit and [thus making] . . . himself vulnerable where the law otherwise shields him."). Further, we find there was no abuse of discretion on the part of the trial judge. The probative value of the cocaine

use was not substantially outweighed by any undue prejudicial effect. See KRE 403. Under the circumstances, we believe it was necessary to present the evidence of the cocaine use so the jury could consider the entire case, specifically as it relates to evidence of Appellant's virtuous intentions.

In our view, it is obvious that Appellant opened the door to the information related to the cocaine use, if only slightly, when he elicited testimony from Moore that he flushed Gore's cocaine down the toilet to keep it away from her. We find no error.

IV.

Appellant's fourth claim is that the trial court erred by improperly instructing the jury regarding his constitutional right to remain silent and not testify during the trial. More specifically, Appellant requested, pursuant to RCr 9.54(3), that the jury be instructed, as follows, in the second paragraph of his tendered Instruction No. 4--Right to Remain Silent. The tendered instruction appears to be formed partly from the language employed in RCr 9.54(3) and partly from the language employed in 1 Cooper, Kentucky Instructions to Juries (Criminal) §2.04B (1999):

> Thomas Talley did not testify at this phase of the trial, as was his absolute right. You shall not draw any inference of guilt from this choice. You shall not allow this choice to prejudice him in any way.

The trial court stated that it would instruct the jury on the right to remain silent, but did so as part of Instruction No. 11--Presumption of Innocence, by stating:

> The defendant is not compelled to testify, and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.

Appellant claims that the submitted instruction is an inaccurate statement of law. He argues that the language used by the trial court that "the defendant is not compelled to testify" improperly suggests that the prosecutor wanted Appellant to testify, but could

not force him to do so. Additionally, Appellant argues that the trial court's instruction only told the jury that Appellant's decision not to testify "should not prejudice" him, when it should have ordered the jurors that they "shall not" allow this choice to prejudice him. Consequently, Appellant argues that the instructions deprived him of his right to remain silent and to have his decision create no adverse inference at his trial.

The instruction given in this case mirrors the model instruction set forth in 1 Cooper, Kentucky Instructions to Juries (Criminal) §2.04A (1999). The constitutionality of this instruction was implicitly affirmed in Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), and we believe that the holding therein is dispositive of this issue. In Carter, a trial judge refused a defendant's request to instruct the jury that, "[t]he defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." Id. at 289. Carter held that a judge is required to give such an instruction, when requested by the defendant, and that the given instruction must "minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." Id. at 305.

Appellant fails to recognize that the trial judge can only use the unique power of the jury instruction to reduce the speculation to a minimum of why a defendant chooses not to testify, but cannot entirely prevent jurors from doing so. Id. at 303. There is no magic language that a trial judge must use in carrying out this duty and Carter does not require that the trial court use the exact wording proposed by a defendant. United States v. Ladd, 877 F.2d 1083, 1089 (1st Cir. 1989). A jury instruction is not rendered unconstitutional merely because a trial judge does not employ the exact wording used in RCr 9.54(3). RCr 9.54(3) explicitly states that the tendered instruction use wording that is "to the effect" of that used in the rule. See United States v. Headspeth, 852 F.2d 753,

756 (4th Cir. 1988) ("[s]ince the district court gave an instruction on testimonial privilege that accurately and adequately stated the governing law . . . its failure to give the precise instruction requested by Headspeth was not reversible error.") *rev'd on other grounds,* Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The trial court's instruction in this case satisfied the Carter and RCr 9.54(3) mandate and we therefore find no error.

V.

Lastly, Appellant alleges that the trial court erred when it failed to conduct an evidentiary hearing regarding the jury's possible use of a Bible during deliberations. Appellant states that, after the combined PFO and penalty phase had concluded and the jury had returned its verdicts, defense counsel spoke to four of the jurors. Appellant states that one juror commented that another juror had broken a tie during the PFO-sentencing phase deliberations by referring to a passage in the "Good Book." Appellant states that it appeared to counsel that the juror was holding a book covered by a magazine, which may have been a Bible. Finally, Appellant states that days later the prosecutor received a phone call from a juror who stated that a specific Bible passage had been referenced when deciding to impose the forty year sentence. Appellee does not discuss this assertion in his brief.[1] Nevertheless, shortly after trial, Appellant filed a written motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial pursuant to RCr 10.02(1) and RCr 10.24. The motion contained the information concerning the jury's possible use of a Bible. At final sentencing on

[1] However, in Appellee's response to Appellant's motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial he discusses the issue. Therein, Appellant states that a juror told him how another juror quoted a passage from the Bible to help break the deadlock over whether to impose a thirty or forty year sentence.

September 24, 2003, Appellant moved the trial court to conduct an evidentiary hearing to examine jurors in order to determine if a Bible was, in fact, used during deliberations. The trial court denied the motion, finding an insufficient basis to conduct such a hearing. We find no abuse of discretion.

"The granting of a new trial is a matter of judicial discretion, and unless there has been an abuse of that discretion, we will not reverse." Jillson v. Commonwealth, 461 S.W.2d 542, 545 (Ky. 1971). RCr 10.04 states that a juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot. RCr 10.04. Moreover, when reviewing a trial court's denial of a motion to alter or amend or vacate a judgment (judgment notwithstanding the verdict), we are to consider the evidence in the light most favorable to the Commonwealth and give it every reasonable inference that can be drawn from the record. See Brewer v. Hillard, 15 S.W.3d 1, 9 (Ky. App. 1999). In addition, we are to affirm the trial court's denial of the motion, "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985). Finally, a finding of fact by a trial judge will not be disturbed unless clearly erroneous. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998).

Our decisions prohibit the use of the Bible by jurors and witnesses. See e.g. Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988) (reversing on other grounds, but ordering the trial court to not allow jurors to take Bibles with them into the deliberation room upon remand); Brown v. Commonwealth, 983 S.W.2d 513 (Ky. 1999) (finding of prejudicial error to allow witness to testify while holding a Bible). Jurors should only consider the evidence presented at trial, and extraneous materials, whether they be

dictionaries, law books, or Bibles, unless properly received in evidence, are not allowed in the jury room for use by a deliberating jury. McNair v. State, 706 So. 2d 828 (Ala. Crim. App. 1997).

However, no *per se* rule requires the trial court to investigate the internal workings of the jury whenever a defendant asserts juror misconduct. United States v. Barshov, 733 F.2d 842, 851 (11th Cir.1984). "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." United States v. Cuthel, 903 F.2d 1381, 1383 (11th Cir. 1990). To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show " 'clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred.'" United States v. Ianniello, 866 F.2d 540 (2d Cir. 1989). Appellant's reliance upon Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed2d 654 (1954), and Smith v. Commonwealth, 645 S.W.2d 707 (Ky. 1983) is misplaced. Furthermore, Appellant's interpretation of Cuthel, supra, is misguided.

In this case, Appellant's motion is primarily conjecture and unsupported by evidence. It does not appear as though the Bible was consulted as an extra-legal source of authority. Appellant offered no affidavits, conceded that it was unknown whether or not a Bible was ever taken to the jury room, and failed to allege that the book was actually a Bible, but rather that it "may" have been a Bible. Appellant states that no further action was taken to inquire whether or not a Bible was used. Conscientious people who are faced with a decision often resort to their religious scruples in making such decisions. Such deep introspection does not prejudice the defendant. A defendant will not be allowed to engage the trial court in post verdict inquiries of, "jurors

merely to conduct a fishing expedition." United States v. Moten, 582 F.2d 654, 667 (2d Cir. 1978) (collecting cases). As such, we find no error in the trial court's decision.

Accordingly, the judgment and sentence of the Jefferson Circuit Court are affirmed.

Graves, Johnstone, Keller, Scott, and Wintersheimer, J.J. concur.

Lambert, C.J., and Cooper, J., concur in result only.

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