IMPORTANT NOTICE

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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-000470-TG

CHARLES EDWARD HENSLEY — APPELLANT

V.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR
00-CR-00187

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Hensley, Jr., was convicted in the Harlan Circuit Court of first-degree murder and was sentenced to life imprisonment. He appeals to this Court as a matter of right.

Appellant was convicted of stabbing Rocky Haywood to death with a knife. The crime occurred beside an automobile parked in a ditch on the side of the road near Appellant's home. The crime occurred on October 19, 2000. Additional facts will be set forth as necessary.

I.

Appellant's first argument on appeal is that the trial court erred when it permitted the Commonwealth to play his taped police statement without redacting the detective's repeated comments stating that he was lying.

Shortly after Haywood's death, Appellant gave a taped police statement. On the tape, as Appellant maintains his innocence and gives his account of the events, the interviewing detective repeatedly makes comments such as "I don't believe you," "what you're telling me does not match the evidence," and "you know how many times people tell me the non-truth because they don't want to get caught." Appellant argues that the detective's comments constitute inadmissible opinion testimony of a witness regarding the truth of the testimony of another witness. Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997).

This Court has recently considered an identical argument to the one made by Appellant in the case Lanham v. Commonwealth, 2005 WL 2043703 (Ky. 2005). In Lanham, the jury heard an audiotape of the defendant's police statement. As the defendant tells his story, the interviewing detective makes at least fifteen comments stating that the defendant was lying and had "better start telling the truth." Id. at *3. The majority opinion examined case law from other jurisdictions to decide this issue of first impression. This Court determined that these comments did not constitute impeachment evidence. Id. at *10. The purpose of the detective's comments was not to convince anyone that the defendant was lying. Rather, the comments were made as a legitimate interrogation technique. Id. As such, the comments were admissible because they were necessary to provide a context for the defendant's answers. Id.

This Court further held that the detective's statements were only admissible for contextual purposes, and were not admissible to prove the truth of the matter asserted (that the defendant was in fact lying). We recognized that the inclusion of such comments would run the risk of causing prejudice to this effect. However, we found that redacting the officer's comments and having the officer give live testimony as to how the

defendant's story progressed in response to questioning was "unworkable." Redacting the tape would fragment the recording and would do little to mitigate the risk of prejudice. This Court held that the best remedy against possible prejudice would be a limiting admonition that informed the jury that the officer's comments are "offered solely to provide context to the defendant's relevant responses." Id. at *11 (quoting State v. Demery, 30 P.3d 1278, 1283 (Wash. 2001)).

Consistent with our ruling in Lanham, we find that Appellant's remedy in the instant case would have been a limiting admonition. Because Appellant did not request an admonition, his objection in this regard was incomplete and thus unpreserved as to this issue. See Lanham, supra, at *11.

II.

Appellant next argues that the trial court erred when it denied his motion to suppress certain statements. First, he alleges that statements made at the crime scene were inadmissible because they were obtained during a custodial interrogation prior to his being Mirandized. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At the crime scene, Trooper Saylor initially asked Appellant several questions while inside Appellant's trailer. Appellant went outside, and Saylor asked him to remain on the porch until someone could take a statement from him. Appellant agreed. Saylor asked Deputy Caudill to keep an eye on Appellant. Saylor testified that his main objective at this point was to secure the crime scene, keep track of witnesses, and preserve the evidence. When Saylor noticed two men talking to Appellant, he asked them to leave, and asked Appellant to bear with him until someone could take his statement. At this point, Appellant volunteered that, during the crime, he had taken the

knife away from Haywood's attacker and had cut his finger in doing so. He also stated that he threw the knife into his yard.

Appellant now claims that the trial court erred in denying his motion to suppress these statements because they were made during a custodial interrogation. The trial court determined that Appellant volunteered his statements, and thus, they were not the product of a custodial interrogation. We find that the facts are consistent with the trial court's ruling on this matter.

Appellant's next argument pertains to his police statement. On the night in question, Appellant was taken to the police station. There, he was subject to an interrogation after waiving his Miranda rights. Appellant argues that the trial court erred in denying his motion to suppress his statement made at the police station for two reasons. His first stated reason, that the statement was an attenuation of a previously unlawful custodial interrogation, is both unpreserved and without merit for reasons discussed above.

His second argument in favor of suppression is that his statement at the police station was involuntarily given due to his need for medical care. This claim is properly preserved for review. Appellant sustained injuries to his mouth, which resulted in two broken teeth. Appellant now argues that, at a suppression hearing, the Commonwealth failed to meet its burden to prove that the statement was voluntarily given. We disagree. The record reveals that Appellant was Mirandized, and that he waived his rights in writing. The officers testified that Appellant did not request medical attention and never asked to stop the questioning. There was no evidence that Appellant's injuries were of the kind that could call into question whether his statement was voluntary. Upon review, a decision to admit evidence is within the discretion of the trial

court and will not be reversed absent an abuse of discretion. Commonwealth v. King, 950 S.W.2d 807, 809 (Ky. 1997). We find no abuse of discretion.

III.

Appellant also alleges that the trial court erred in denying his motion for a new trial. In his motion, Appellant informed the trial court that one juror provided information that another juror had a concealed bias against defendants who exercise their right to not testify during trial, and that this bias was revealed during jury deliberations. Appellant now claims that this bias demonstrates that the juror was not honest during *voir dire*, and as such, he deserves a new trial. This issue is not properly preserved for review because Appellant made no mention of truthfulness during *voir dire* in his motion for a new trial on this matter. Review of a motion for a new trial on appeal is limited to the grounds raised by the motion. RCr 12.04(3). Nevertheless, Appellant's argument is without merit, as RCr 10.04 clearly states, "a juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot."

IV.

Appellant's next arguments pertain to the blood evidence taken from the scene of the crime. He alleges that the trial court erred in allowing the Commonwealth to introduce DNA and blood evidence despite the fact that it failed to protect the integrity of the evidence, that it "lost significant other potentially exculpatory blood evidence," and did not test all of the blood samples recovered.

Appellant first argues that the Commonwealth failed to sufficiently establish a chain of custody for the blood evidence that was introduced. At trial, the Commonwealth put forth testimony regarding the evidence's chain of custody, explaining the history of its possession. Upon review, we find that the chain of custody

was sufficiently established. "It is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material aspect.'" Love v. Commonwealth, 55 S.W.3d 816, 821 (Ky. 2001) (quoting Rabovsky v. Commonwealth, 973 S.W.2d 6 (Ky. 1998)).

Appellant also claims that the police failed to properly maintain the integrity of the crime scene, thereby destroying potentially exculpatory DNA evidence. Absent a showing of bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process. Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997).

Appellant alleges that the police acted in bad faith by failing to preserve potentially useful evidence. Appellant's defense at trial was that a third person had attacked and killed the victim. He claims that the police only collected evidence that strengthened its case against Appellant, and were uninterested in exculpatory evidence. Appellant lists twelve alleged deficiencies in the investigation and collection of evidence, but none of these alleged deficiencies substantiates his claim that the police acted in bad faith.

Appellant also alleges error in the Commonwealth's failure to test all of the blood samples that were collected. We disagree. The samples that were tested were representative samples, and Appellant does not put forth a persuasive reason as to why each and every sample should have been tested.

V.

Appellant argues that he was denied his right to a fair and impartial jury when the trial judge questioned multiple witnesses. Appellant claims that this questioning,

combined with the trial judge's belligerent demeanor towards defense counsel, improperly biased the jury against him.

First, we disagree with Appellant's claim that the trial judge often demonstrated belligerence towards defense counsel. Appellant only cites to one incident where the trial judge allegedly exhibited hostility towards defense counsel in front of the jury through his tone and demeanor.[1] We do not find that Appellant's rights were affected in light of the entire record, which reveals that the trial judge was fair and temperate as a whole. See Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992) (whether defendant's rights were violated by trial judge's intemperate remark must be viewed in light of the whole record), *overruled on other grounds by* St. Clair v. Roark, 10 S.W.3d 482, 487 (Ky. 1999).

We now turn to Appellant's claim of error pertaining to the trial judge's questioning of multiple witnesses. Appellant lists instances where the trial judge questioned witnesses, however, defense counsel only objected to one such incident.[2]

Without delving into the issue of whether one objection sufficiently preserved Appellant's complaint on review, even if all instances of questioning were preserved, we find no error. KRE 614(b) grants the trial court the authority to interrogate witnesses.

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[1] Appellant also cites to a post-trial hearing that involved a heated exchange between the trial judge and defense counsel. We do not believe that this post-trial argument is indicative of any animus of the trial judge against the defense counsel during the trial. The trial judge did not, as Appellant alleges, admit frustration with defense counsel during trial. After this exchange, the trial judge withdrew his rulings on the post-trial motions and recused himself. The trial judge acted providently in this regard.

[2] Appellant acknowledges that there was only one objection, but argues that repeated objections to the trial judge's questions would further highlight the appearance that the trial judge was on the Commonwealth's side. To support this proposition, Appellant cites to United States v. Hickman, 592 F.2d 931, 936 (6th Cir. 1979), a case decided by the Sixth Circuit Court of Appeals and previously cited by this Court as authority (although not on this precise issue).

This Court recently elaborated upon KRE 614(b) in Terry v. Commonwealth, 153 S.W.3d 794 (Ky. 2005). During a lengthy and complex trial, judicial intervention may be effective as a means of clarification. Id. at 803. A trial judge should not ask questions in a manner that indicates "to the jury his opinion as to the credibility of the witness being interrogated or the guilt or innocence of the accused." Id. at 802 (citing Caudill v. Commonwealth, 293 Ky. 674, 170 S.W.2d 9, 10 (1943). In the instant case, the trial judge asked questions to help clarify the testimony of witnesses on complex issues. The trial judge asked questions in an impartial manner; he did not reveal his opinion, nor did he assume the role of prosecutor in his questioning. Id. at 803 ("A trial judge cannot ask questions that place him 'in the role of a prosecutor rather than an arbiter.'" (quoting LeGrande v. Commonwealth, 494 S.W.2d 726, 731 (Ky.1973))). As such, we find no error.

VI.

Lastly, Appellant argues that the trial court erroneously denied his motion for a change of venue. Appellant claims that a change of venue was necessary due to pre-trial publicity surrounding the trial, and in particular, the local media's reporting of hearsay statements at a pre-trial hearing.

"The mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." Brewster v. Commonwealth, 568 S.W.2d 232, 235 (Ky. 1978). Further, "[t]here is no requirement that prospective jurors be completely ignorant of the facts. The real test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of the law

and render a fair and impartial verdict." Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997).

Appellant cites to several instances of pre-trial publicity, including media coverage of a previous mistrial, but he fails to demonstrate a reasonable likelihood that prejudice resulted from it. The trial court has discretion to determine whether to grant a motion for change of venue, and we find no abuse of discretion. Kordenbrock v. Commonwealth, 700 S.W.2d 384 (Ky. 1985).

The judgment and sentence of the Harlan Circuit Court are affirmed.

Lambert, C.J., Graves, Johnstone, Roach, Scott, and Wintersheimer, J.J concur.

Cooper, J, dissents for the reasons stated in his dissenting opinion in Lanham v. Commonwealth, No. 2003-SC-0268-MR (Ky. Aug. 25, 2005).

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