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RENDERED: OCTOBER 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000517-MR DATE 11-10-05 ELA Grayhpd.

DARRELL THACKER — APPELLANT

V.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 2003-CR-000197

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Darrell Thacker, was charged and convicted of the offense of murder and sentenced to 25 years in the state penitentiary. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b). As grounds, he argues that the trial court erred, (1) in overruling Appellant's Motion for Change of Venue due to pretrial publicity, (2) by failing to grant Appellant a continuance on the morning of trial, since his half-sister had recanted on a portion of her testimony which would have been advantageous to the Appellant, (3) in failing to strike jurors Archer, Rowe and Sawyer for cause, (4) by granting the parties an additional peremptory strike each upon disclosure of one juror's bias to the court after the initial peremptory strikes had been completed, (5) by failing to grant Appellant's Motion for Mistrial upon his half-sister's statement that she believed he was lying about the murder, (6) by allowing irrelevant and inflammatory victim impact evidence during the guilt phase of the trial, (7) in allowing improper arguments by the

prosecution, vilifying the Appellant, (8) by allowing the bailiff to take charge of the jury for deliberation without being sworn as required by RCr 9.68, (9) excluding the press from the courtroom when the jury returned to review select evidence of witnesses, during its deliberations, (10) in improperly charging the jury when it was allegedly deadlocked, (11) in denying Appellant's Motion for New Trial based upon undisclosed juror bias and (12) in that all the aforementioned errors were cumulative in nature, the Appellant was denied a fair trial.

For the reasons hereinafter set out, the Appellant's conviction is hereby affirmed.

FACTS

Michael Chapman, 29 years of age, was last seen alive, in Pike County, Kentucky on October 10, 2002. Ms. Craft, his mother, had seen Michael with the Appellant, Darrell Thacker, and his half-brother, Kevin Fleming, on October 10, 2002, on three separate occasions; the last time being between 9:00 p.m.-10:00 p.m. that night. Several days later she filed a missing persons report with the Kentucky State Police. His body wasn't located until July, 2003, when Kevin Fleming took officers to the location of an "old fishing hole," where, according to Fleming, Appellant had told him he had disposed of Chapman's body.

The autopsy of Chapman revealed he was killed by two .20 gauge shotgun blasts - one in the head and one in the back. However, as no shell casings were ever found, no ballistic match with available weapons was possible.

According to his mother, Michael was going to quit his job and move to Georgetown, Kentucky to live with his father. Ms. Craft had taken Michael to pick

up his last paycheck from the mining company he worked for just prior to his meeting with his friends: the Appellant, Darrell Thacker, and Thacker's half-brother, Kevin Fleming. On one of the three occasions she saw Michael later that night, he told her he was waiting on the Appellant and Fleming to come back. They had gone to the residence of Kenny Johnson to buy some drugs. He couldn't go up to Kenny's house because they did not get along – so he was waiting at the bottom of the hill by the road. She saw Michael one more time later that evening with Thacker and Fleming.

When Thacker was first interviewed by the Kentucky State Police on October 14, 2002, he stated he had last seen Chapman around 10:00 p.m. on October 10, when he dropped him off at the "recreation area" near his grandparents' home on Feds Creek, in Pike County, Kentucky. He stated then that Chapman had taken four Oxycontin pills and needed to sober up. He also indicated that when he left Chapman at the recreation area, Chapman had a shotgun that he had purchased earlier that day at a pawn shop, with the intent to rob a mine that evening for more money for drugs.

Later, on October 16, 2002, the State Police were contacted by Kenny Johnson, the alleged drug dealer, who came to the State Police post and turned in a Winchester model 370 20- gauge single-shot shotgun, serial number 350605.[1] Johnson said the shotgun had been brought to him by Kevin Fleming and Darrell Thacker. In fact, Chapman had purchased such a shotgun (serial number 350005) from the Ace Pawn Shop on October 10, 2002.

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[1] The "6" in the serial number was hard to read and could have been a "0."

On the same day, the State Police learned that Fleming had an active bench warrant, having absconded from a compulsory drug treatment program. Fleming was then arrested and later interviewed at the Kentucky State Police post. At some point during the interview, they told him that Kenny Johnson had turned in the shotgun. Fleming then became very emotional, started crying and changed his story.

According to Fleming, he, Thacker and Chapman had cashed Chapman's last paycheck and bought some beer. They then went to Kenny Johnson's to buy cocaine and pills. Chapman didn't go up to Kenny's, but stayed at the bottom of the hill, while he and Thacker bought the drugs. Next, they went to the Ace Pawn Shop and bought a shotgun. The plan according to Fleming was to rob a mine that night to get more pills and stuff. They then went to an old strip job to shoot the shotgun a couple of times. Once they arrived (the area was known as "Beaver Mountain"), Chapman and Thacker went around the hill, out of sight to shoot the gun. Fleming heard two shots and saw Thacker running toward him with the shotgun. Thacker told him to run and he did - going home on foot. Thacker showed up at home the next morning around 10:00 a.m.

The next day, the State Police took Fleming to the site where he alleged the events had occurred. The area was thoroughly searched, but no shell casings, blood or other evidence was found. On two other occasions, October 18, 2002 and November 7, 2002, the State Police took search dogs, then later cadaver dogs, to search the area. Yet, no evidence was found to corroborate this story by Fleming.

In November of 2002, Trudy Skeens, Fleming's and Appellant's half-sister, were interviewed by detectives. She told police she knew nothing about Chapman's disappearance. Detectives also interviewed Chandra Massner. Massner was a local college professor and a girlfriend of the Appellant. She related to detectives what she had learned from Thacker - that he had dropped Chapman off at the "camp" near his grandfather's house near Feds Creek. According to her, Thacker did not believe that anything bad had happened to Chapman, but thought he had gone into hiding since some people harbored "ill will" towards him.

Ms. Skeens would be the first to change her story. On January 20, 2003, she told the detectives that she had been to visit Appellant in Indiana, where he was then incarcerated. He had been returned to Indiana for a parole violation shortly after Chapman's disappearance, and in fact, had failed a drug test which led to the parole revocation, just prior to Chapman's disappearance. She admitted she hadn't been completely truthful in her previous discussions and indicated that Fleming had come to her house in the middle of the night, the night Chapman disappeared. He was dirty, covered in mud and sand, and would not come inside the house. He was crying and said, "he was the cause of Chapman's death." She gave him a change of clothes. She had also found a pair of Fleming's shoes, which appeared to have blood and/or red sand on them. These were given to the detectives.

Coincidentally, (or maybe not), just after being visited by Ms. Skeens, the Appellant contacted the authorities in Indiana and gave them a sworn statement

in which he detailed how Ms. Skeens had recently told him of the middle-of-the night visit from Fleming. He stated then that after he and Fleming had dropped Chapman off at the recreation area to sober up around 10:00 p.m. they went fishing on Feds Creek. Then about 11:00 p.m., Fleming said he was going to check on Chapman and left. When he did not return, Thacker went on home. Fleming showed up at the residence around 1:30 a.m., the next morning. When Thacker had asked Fleming where he had been, Fleming replied he had been to his mother's to get something to eat. Thacker also noted in his statement that Fleming had a 20-gauge shotgun in his possession in the days prior to Chapman's disappearance. He also described taking the shotgun to Kenny Johnson's the next day, saying that Fleming wanted to trade the gun for Oxycontin. He speculated that Kenny Johnson might be involved, and told the police that Kenny Johnson had previously said that he "had a grave ready" for Chapman.

Still the police had no witnesses, no confession, no shell casings and no body. Fleming remained in custody on his prior charges and the Appellant was back in prison in Indiana for his parole violation.

Then, in May of 2003, the Pike County Commonwealth's Attorney, Rick Bartley, made an offer to Fleming for his full cooperation with the police investigating the case and finding Chapman's body. In exchange, provided Fleming was "not involved in the murder," Fleming would receive a one-year sentence for "facilitation to murder." In the event Fleming was charged with murder, Bartley agreed that nothing Fleming said in the interim could be used

against him.

After the agreement was reduced to writing and executed, Fleming indicated that he had seen the shooting take place and knew where Chapman's body was. He persisted however, in his story that he, Chapman and the Appellant had gone to "Beaver Mountain" to fire the shotgun. He said that Chapman fired the gun once and gave it to the Appellant, who turned and shot Chapman in the chest. The Appellant then told Fleming to run, which he did, but he heard the gun go off a second time as he left the scene. He indicated that he did not return home that night, but spent the night walking towards home - reaching the Feds Creek bridge early in the morning. Thacker drove by then and picked him up. He then asked Thacker what happened to Chapman and Thacker told him that he put him in an "old fishing hole," next to some trash beside the road. Fleming then gave the police the directions to the scene. However, upon investigating the scene, they could not find the body. Later, in July of 2003, Fleming was released from jail to accompany the officers and lead them to the body.

Thereafter, on August 18, 2003, the Appellant was indicted by the Pike County Grand Jury for the murder of Michael Chapman. His case was tried before a Pike County Jury on April 26th - 28th, 2004. At that trial, Kevin Fleming testified Appellant shot, killed and disposed of Michael Chapman. Appellant was convicted and sentenced to 25 years in the penitentiary.

I. APPELLANT'S MOTION FOR CHANGE OF VENUE

On November 18, 2003, Appellant, through counsel, filed a Motion for

Change of Venue, pursuant to KRS 452.210, which provides "when a criminal...action is pending...,the judge thereof shall, upon application of the defendant...order the trial held in some adjacent county to which there is no valid objection, if it appears that the defendant cannot have a fair trial where the prosecution is pending." Attached to the Memorandum were several newspaper articles, as well as, references to various T.V. and radio coverages of the murder, plus two affidavits of Pike County residents offering conclusions, "that it is relatively impossible to empanel a jury that does not have a preconceived opinion, as to the guilt of said defendant."

On December 18, 2003, the court heard evidence regarding the issue. At the conclusion, the court denied Appellant's motion on the grounds it did not believe Appellant could not get a fair trial in Pike County.

A trial judge's decision regarding the impact of media coverage upon the fairness of a trial must be given deference, "unless it appears with reasonable certainty that there has been an abuse of discretion." Claypoole v. Commonwealth, 355 S.W.2d 652, 653 (Ky. 1962). Indeed, whether to grant a change in venue is a question committed to the trial court's discretion and, when pretrial publicity does not impede the trial court's ability to empanel a fair and impartial jury, the trial court does not abuse its discretion in denying a change of venue. See Gill v. Commonwealth, 7 S.W.3d 365, 369-370 (Ky. 2000). The trial judge "is present in the county and presumed to know the situation." Nickell v. Commonwealth, 371 S.W.2d 849 (Ky. 1963).

Under KRS 452.210, a change of venue is only appropriate when "it

appears that the defendant cannot have a fair trial in the county wherein the prosecution is pending." Bowling v. Commonwealth, 942 S.W.2d 293, 298 (Ky. 1997); Brewster v. Commonwealth, 568 S.W.2d 232 (Ky. 1978). "That prospective jurors merely have heard about the case is not sufficient to sustain a motion for a change of venue. Rather, the test is whether the jurors have heard something that causes a preconception concerning the defendant. Even though a juror may have heard about the case in the past, he is still qualified if the court is assured and satisfied that he will put aside that prior knowledge and decide the case in accordance with the testimony heard in the courtroom and on instructions given by the court.' Bowling at 298, 299. Neither does the amount of publicity surrounding the crime determine whether a change of venue is appropriate. Kordenbrock v. Commonwealth, 700 S.W.2d 384, 387 (Ky. 1985), cert. denied, 476 U.S. 1153, 106 S.Ct. 2260, 90 L.Ed.2d 704 (1986). A defendant must show that due to publicity in any amount, "public opinion is so aroused as to preclude a fair trial." Id. at 387. The evidence introduced at the hearing simply did not compel such a finding.

As was later evidenced in voir dire, several of the jurors admitted to having heard, or read something about the case. However, their memory dealt primarily with the search for the victim's body. Few knew anything about Appellant, or had formed any opinion regarding his guilt or innocence.

Thus, the record in this case clearly does not establish an abuse of discretion on the part of the trial court. Thus, there was no error.

II. DENIAL OF APPELLANT'S REQUEST FOR A CONTINUANCE

The Appellant argues that the decision of his half-sister, Trudy Skeens', to recant her January 20, 2003 statement to the police unfairly prejudiced the Appellant in his defense and necessitated a continuance. We disagree.

On January 20, 2003, Ms. Skeens, after returning from a prison visit with Appellant in Indiana, called the State Police, requested a meeting and then advised them that she had withheld information in her earlier interview to the effect that her other half-brother, Fleming, had come to their parent's home the night Chapman disappeared. He was dirty, covered in mud and sand, and was crying; he said he was the cause of Chapman's death. She had given him a change of clothes. Coincidently, Appellant contacted the police in Indiana just after this visit and gave them a taped statement in which he detailed how Skeens "had just told him" about the middle-of-the night visit from Kevin.

However, early on the morning of trial, Ms. Skeens went to the Commonwealth's Attorney's office, met with him and advised that the January 20, 2003 statement about Kevin was false. Her brother, the Appellant, had concocted that story and she had given the story to the police at his direction. Upon arriving at court, Appellant and his counsel were immediately advised of this change by the Commonwealth's Attorney and they then requested a continuance.

The hearing established that, (1) the prosecution had just been advised of the information that morning, (2) the witness, Ms. Skeens, would testify that the original story was concocted at the request of Appellant, (3) the prosecution had

not offered any deals or leniency prior to, or in regards to, the recantation, and (4) only four persons were involved with, or the subject of, either of the statements, i.e., the Appellant, his half-sister, Ms. Skeens, the Appellant's girlfriend, Chandra Massner (who had been asked by Appellant to bring Ms. Skeens to see the Appellant when she originally "broke down and told what she knew"), and the Appellant's half-brother, Fleming, who was the subject of the first story. All were available and would appear and testify at the trial. Prior to its ruling, the court recessed the hearing and made arrangements for Appellant and his counsel to speak with Ms. Skeens. Once the hearing reconvened, the motion for continuance was denied.

"RCr 9.04 allows a trial to be postponed upon the showing of sufficient cause. The decision to delay the trial rests solely within the court's discretion. Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534, (Ky. 2001), see also Eldred v. Commonwealth, 906 S.W.2d 694, (Ky. 1994), abrogated on other grounds by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003) and Woodall v. Commonwealth, 63 S.W.3d 104, 129 (Ky. 2001); see also

Wilson v. Mintaes, 761 F.2d 275, 281 (6th Cir. 1985).

As to the length of the delay, the Appellant's request was to pass the case to the alternate trial date of June 10, 2004. There had been one previous continuance at Appellant's request. No extraordinary inconvenience was shown, although we should always remain cognizant of the time lapse between the crime and trial, which was approximately 18 months.

As to the cause of the requested delay, if one accepts Ms. Skeens' testimony as truthful (which she gave at trial), then the Appellant was requesting a continuance for purposes of investigating a deception he had planned, but which had just unraveled. Other competent counsel was not an issue and, as to the complexity of the case, even though it was a murder trial, there were only a limited number of witnesses and a limited number of exhibits. The severity of the punishment was high, but the complexity was not. It was not a death penalty case. And no prejudice was specifically identified by the defendant at the hearing; even after discussions with the recanting witness, Ms. Skeens, no prejudice could be identified – other than Appellant wanted additional time to investigate her reasons for the recantation

On the other hand, as the court noted, only four possible persons were involved in the stories, whichever you believed; all of these persons were known, related to, or dating Appellant and had been disclosed by the prosecution from its inception. The Appellant, himself, was the reported mastermind of the deception, if it were true. His girlfriend brought Ms. Skeens to him, and was there when she allegedly disclosed the original information to Appellant. Ms. Skeens was the

half-sister of the Appellant and Appellant's half-brother, Kevin Fleming. Other than having to go to trial knowing that his half-sister was going to recant her original statement and finger him for the fabrication, there was nothing identifiable as prejudice established at the hearing **which the continuance would prevent.**

What else could he discover about his half-sister that he did not already know? There was no deal with the prosecution on the recantation that was disclosed at the hearing. The prosecution didn't even know of the outstanding warrants on Ms. Skeens - but Appellant did and disclosed it at the hearing.

Having reviewed the factors considered, and noting that all the witnesses involved in the question, were related to, or dating, the Appellant – and that no specific prejudice was identified which the continuance would cure - we do not find an abuse of discretion by the trial court in this instance.

III. FAILURE TO STRIKE JURORS FOR CAUSE

During voir dire, the Appellant challenged prospective jurors Archer, Rowe and Sawyer for cause. Archer acknowledged that she had read about the case in the paper when it first happened; remembering it was "supposed to be done at one place and they took it to another, I thought it was so sad that somebody could do that -- move him from once place to another." She had no opinion on guilt, or who committed the crime, just acknowledged that it was "so sad." She said she would be able to set aside her feelings and make a fair decision. When asked, by Appellant's counsel, if she could listen to the evidence and disregard what she had learned prior to the trial, she acknowledged "yes, I think I could."

Prospective juror Rowe remembered reading past articles about the case and remembered that the body had been missing for awhile and then being found. He recalled being sad that they had not found the body. However, he knew no names and his feelings weren't such as would interfere with his determination as to what was right or wrong.

Prospective juror Sawyer worked with Chapman's aunt at the local hospital. Although the two did occasionally speak, they were not close enough to share meals at the hospital if they happened to be working the same shift, and they were not likely to visit each others' homes. Other than being aware of the missing body, she had not learned anything about the case from the victim's aunt. Although at one point, she stated she would not have a problem returning a not guilty verdict "as long as it were [sic] a fair trial and all the evidence showed that he wasn't guilty...," she specifically acknowledged to Appellant's counsel, that she would not have a problem acquitting the Appellant if the Commonwealth failed to meet its burden of proof and wouldn't be embarrassed by it.

The court then denied Appellant's motion to strike Sawyer for cause, as it did in regards to jurors Archer and Rowe. Ultimately, each was stricken from the panel by Appellant with peremptory strikes.

The determination of whether to exclude a juror for cause lies within the sound discretion of the trial court and will not be reversed absent a showing that the exercise of such discretion was clearly erroneous. Grooms v. Commonwealth, 756 S.W.2d 131, 134 (Ky. 1988); Simmons v. Commonwealth, 746 S.W.2d 393, 396 (Ky. 1988). Although the ultimate issue - - whether the

prospective juror possesses a mental attitude of appropriate indifference - - is to be determined from the totality of the circumstances, and is not limited to the juror's response to any magic question. Montgomery v. Commonwealth, 819 S.W.2d 713, 718 (Ky. 1991). This court has given due deference to the opportunity of the trial court to observe the demeanor of the prospective jurors and understand the substance of their answers. Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994).

"This Court's recent decision in Montgomery, provides the foundation for our analysis of the qualifications of these jurors and the correctness of the trial court's rulings. Montgomery directs attention to the totality of the evidence on voir dire with the comprehensive question being whether the juror has a mental attitude of 'appropriate indifference.' Montgomery rejects the idea that a magic question may be asked which can rehabilitate a juror whose answers to voir dire questions demonstrate a pervasive prejudice. On the other hand, Montgomery does not eliminate trial court discretion or absolve the trial court of its duty to evaluate the answers of prospective jurors in context and in light of the juror's knowledge of the facts and understanding of the law." Mabe at 671, citing Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1991). Thus, Montgomery plainly stands for the proposition that there is no "magic question" to rehabilitate or to excuse.

"It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective

jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine the competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." Patton v. Yount, 467 U.S. 1025, 1039, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847 (1984).

Appellant's motion to strike jurors Archer and Rowe was premised on the fact that both recognized that the circumstances of the death and disappearance were "sad." One wonders, as did the trial judge in this case, "who wouldn't find the murder of another person sad?" However, being "sad" about the circumstances of a murder, does not indicate any pre-disposition to the guilt, or innocence, of a particular defendant.

The challenge to prospective juror Sawyer was based not only on the fact that she worked in the same hospital as Chapman's aunt but on the additional ground that at one point in voir dire she stated she would not have a problem returning a not guilty verdict if "the evidence showed that the [Appellant] wasn't guilty." **However, subsequent to this comment, she acknowledged to Appellant's counsel that the Appellant did not have to prove his innocence and if the Commonwealth did not prove his guilt she could find him not guilty and would not feel embarrassed about it.** The court also questioned

Ms. Sawyer and was satisfied as to her impartiality.

Considering the jurors' voir dire from the totality of the circumstances, and considering all their answers, we do not find an abuse of discretion on the part of the trial court in failing to strike jurors Archer, Rowe and Sawyer for cause.

IV. ADDITIONAL PEREMPTORY CHALLENGE

Following the completion of voir dire, court was recessed for the parties to make their peremptory strike selections. During this recess, juror Boggs approached the trial court and disclosed that although he had previously sat on a criminal trial, it was very difficult for him to consider and recommend a sentence of imprisonment. Instead of immediately calling the attorneys back into the courtroom, the trial court waited until the resumption of court, by which time the parties had already turned in their peremptory strikes. The jury however, had not been sworn.

Upon disclosure of the comment to counsel, the Commonwealth requested permission to rethink its peremptory strikes. Following discussion with counsel, the trial court assigned each party one additional peremptory strike. The prosecution then struck juror Boggs, while the Appellant struck Sawyer. In arriving at the additional allocation, the court considered both the Appellant's previous objections to Sawyer, as well as the circumstances arising from the late disclosure by juror Boggs to the court.

The powers of a trial court flow from its primary purpose, and that is to insure that all parties receive a fair trial, and in jury trials, that the jury is, in its best judgment, fair and impartial. **"The purpose of the peremptory challenges**

is to afford the parties a fair trial on the issues to be tried." Penker Construction Company v. Finley, 485 S.W.2d 244, 249 (Ky. 1972).

It is this guiding light which allows a trial court to exercise common sense in the implementation of this most basic obligation. Our criminal rules are constructed with this result in mind. Particularly, RCr 9.36(3) permits the court, in circumstances such as this, where "good cause" is shown to alter the allotment and timing of peremptory strikes.

"RCr 9.36(3) makes an exception in that the trial court may permit challenges until the jury is sworn. In this case the trial court could have permitted a late challenge of [Boggs] under RCr 9.36(3), and the question is whether it abused its discretion, to the prejudice of the Appellant, in refusing to do so....**As it is, we are of the opinion that a peremptory challenge should have been permitted, but, that its denial was a nonprejudicial error."** (emphasis added) Abernathy v. Commonwealth, 439 S.W.2d 949, 951 (Ky. 1969), modified on other grounds by Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983), see also Tamme v. Commonwealth, 973 S.W.2d 13, 26 (Ky. 1998). "What constitutes 'good cause' and whether the court will permit such challenge are matters within the discretion of the trial court." Rowe v. Commonwealth, 394 S.W.2d 751, 753 (Ky. 1965) (internal citations deleted).

We cannot accept the defendant's argument that RCr 9.36(3) should be limited to "for cause" strikes. To accept such an argument in this case, would deprive RCr 9.36(3) of the very purpose it serves in this instance. Nor do we agree that Kentucky Farm Bureau Mut. Ins. Co. v. Cook, 590 S.W.2d 875 (Ky.

1979) is applicable in this instance, abrogating the court of any discretion. Kentucky Farm Bureau dealt with an inappropriate misallocation of the strikes between the parties, not an appropriate allocation, as occurred here.

In resolving the dilemma created, we do not find that the trial court abused its discretion, given under RCr 9.36 (3). Even had we so found, any error in this instance would be harmless. RCr 9.24, as each party benefited equally.

V. TESTIMONY OF MS. SKEENS, THAT SHE THOUGHT APPELLANT WAS LYING WHEN HE SAID HE DIDN'T KILL MICHAEL CHAPMAN

The Appellant filed a motion in limine to prohibit his half-sister, Trudy Skeens, from testifying that when she came to see him in prison in Indiana and asked him, if he had killed Michael, "he couldn't look me in the eyes and tell me, no he didn't, - so I thought he was lying...." The trial court sustained the motion in limine. However, during her testimony at trial, she blurted out this very testimony in a non-responsive rambling answer to a question from the prosecution. The prosecutor immediately caught it and stopped her, while the Appellant moved for a mistrial. After argument of counsel, the court overruled the motion and admonished the jury to disregard the witness' "last statement."

It is improper for a witness to give lay opinion testimony as to what another person meant or by what he said. Tamme v. Commonwealth, 973 S.W.2d 13, 34-35 (Ky. 1988). This is especially so where the witness purports to give an opinion as to another's guilt or innocence. Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982) ("The issue of guilt or innocence is one for the jury to determine and an opinion of a witness which intrudes on this function is

not admissible....").

It is universally agreed however, that a mistrial is an extreme remedy and appropriate only where the record reveals "a manifest necessity for such an action." Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1995); see also Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000); Kirkland v. Commonwealth, 53 S.W.3d 71, 76 (Ky. 2001); Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002). For a real or urgent necessity to exist, "the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Maxie at 863. Moreover, the propriety of a mistrial is determined on a case by case basis. Scott at 684. And it is well recognized that the trial court has "broad discretion" in determining whether a mistrial is necessary. Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000). As often is the case, the trial judge "is best situated intelligently" to determine whether or not "the ends of substantial justice cannot be obtained without discontinuing the trial...." Id. Thus, a trial court's decision regarding whether a mistrial is warranted "should not be disturbed, absent an abuse of discretion." Neal v. Commonwealth, 95 S.W.3d 843, 852 (Ky. 2003). To prevail in this argument, Appellant must show that the court's failure to declare a mistrial was "clearly erroneous or an abuse of discretion." Scott at 684.

Moreover, it is well recognized that a prompt, clear admonition to the jury to disregard an improper comment "cures the error" created by improvident remarks. Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky. 2001). Additionally,

it is normally presumed that the jury heeds an admonition. Huddleston v. Commonwealth, 251 Ky. 172, 64 S.W.2d 450, 452 (1933).

Even a singe comment does not equally create the level of prejudice necessary to warrant an order of reversal. Cf., Brown v. Commonwealth, 934 S.W.2d 242, 248 (Ky. 1996); Secondly, given the other evidence, Ms. Skeens' one inappropriate comment cannot fairly be considered to have been devastating to Appellant. See Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). She pointedly testified that the Appellant was the one that concocted the scheme and statements designed to blame his half-brother and that he directed her to deliver the fabricated testimony to the investigators in the case. Moreover, Fleming, the half-brother, testified he witnessed the Appellant murder Michael Chapman.

Given our opinion that the non-responsive comment by Ms. Skeens was harmless error within the context of the totality of the evidence in this case, we cannot say that the court's failure to declare a mistrial in this case was an abuse of discretion or "clearly erroneous."

VI. MS. CRAFT'S EVIDENCE AS TO "HOW IT WAS" NOT KNOWING WHERE YOUR BOY WAS.

During the "guilt phase" of the trial, Ms. Craft was asked "how was it, not knowing where your boy was?" Appellant's counsel immediately objected. It was overruled. Ms. Craft then testified, "It was awful. Part of my blood, part of me was laying out there and I didn't know where to go look for him at – didn't know what to do --didn't know -- we'd run around, run around, run in circles...." Being overwrought with emotion, she did not complete the sentence.

Victim impact evidence is inadmissible during the guilt phase of the trial. Bennett v. Commonwealth, 978 S.W.2d 322, 325 (Ky. 1998); see also Ice v. Commonwealth, 667, S.W.2d 671, 676 (Ky. 1984), cert. denied, 469 U.S. 860, 105 S.Ct. 83 L.Ed. 2d 125 (1984). "[S]uch evidence 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 at 325. Thus, the introduction of this evidence in this case was error.

However, "no error in either the admission or the exclusion of evidence..., is grounds for granting a new trial or for setting aside a verdict...unless it appears to the court that denial of such relief would be inconsistent with substantial justice. The court in every stage of the proceedings must disregard any error...that does not affect the substantial rights of the parties." RCr 9.24.

In this light, a review of Ms. Craft's testimony indicates that for several minutes prior to the question and answer under consideration, Ms. Craft, without objection, detailed and described everything she was going through, missing her son, waking up in the middle of the night and going to look for her son, even reacting to neighbor's comments about possible places to search, and getting up in the middle of the night and driving with a spotlight to look in an old car next to the road. She was very emotional during this testimony also. Although she didn't state during previous testimony that it felt "awful" not knowing where her son was, the sense of this statement was already there from the previous evidence without objection. In fact, the additional question and answer could not have added anything to the case considering her preceding testimony and did

not in our opinion affect the substantial rights of the parties.

Thus, in our opinion, though error, in the context of the evidence in this case, it was harmless.

VII. THE PROSECUTOR'S CLOSING ARGUMENTS

In this argument, the Appellant asserts that the prosecutor's references to Appellant as being "cold-hearted," "just pure evil" and a "cold-hearted killer," constitute improper prosecutorial vilification of the accused in light of Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988); Johnson v. Commonwealth, 302 S.W.2d 585 (Ky. 1957). As no objection was made to the argument at trial, Appellant argues "palpable error" as the basis for review.

First, however, we should note that Sanborn is distinguishable from the case at hand. Sanborn was more properly a case involving prosecutorial vilification of defense counsel, which no court would tolerate. Nor were the comments condemned in Sanborn shown to be necessary segments of the prosecutor's logic and argument in the case. In Johnson, supra, the comment complained of again involved defense counsel, in that he was said to have been "arrogant."

In Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987), we commented "complaint is made that the prosecutor made reference to defendant as a 'bit of evil.' We have held it permissible to refer to a defendant as a 'beast' [citing Koonce v. Commonwealth, 452 S.W.2d 822 (Ky. 1970)] and as a 'desperado' [citing Holbrook v. Commonwealth, 61 S.W.2d 644 (Ky. 1933)]. It

has also been held proper to describe a particular defendant as being 'worse than all the convicts and traders in hell.'" [citing Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979)].

"Great leeway is allowed to both counsel in a closing argument. It is just that - - **an argument.** A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter at 412. "We have said repeatedly that, in making...arguments, counsel had the right, and it was his duty to present to the jury the facts as testified to by the witnesses, and to deduce therefrom all conclusions legitimately to be drawn from the testimony, to the end that the guilty might be punished and the enforcement of the law upheld and produced. At the same time we have emphatically said, likewise repeatedly, that it was no part of the duty of the prosecuting counsel to vilify and abuse a defendant on trial, nor counsel representing him; nor did such counsel have the right to argue facts for which there was no testimony to sustain, and which could in no sense be deduced therefrom;..." East v. Commonwealth, 249 Ky. 46, 60 S.W.2d 137, 139 (Ky. 1933).

The distinction to be made here is that the Commonwealth's characterization in this case of the defendant and his moral or mental state were necessary parts of the logic of the Commonwealth's arguments, for the reasons that no clear motive for this murder was to be found in the evidence. Thus, it was a fair comment by the Commonwealth, that the defendant then must have been the kind of person - "cold-hearted" - as could kill without reason. Comments drawn or driven by the evidence do not constitute improper vilification, nor are

they accepted as being "demeaning." They are just part of the structure of an argument. Demeaning comments not driven by the evidence are another matter – a matter that we are not called upon to address here today.

The foregoing notwithstanding, following the tests set out in Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002), we do not find the comments made in this case to be "flagrant misconduct;" nor does it meet the other standards for "palpable error" set out in RCr 10.26. There was simply no error here.

VIII. FAILURE TO SWEAR THE BAILIFF

RCr 9.68 requires the trial court to swear the bailiff to "keep the jurors together, and suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so themselves." The bailiff was not so sworn in this case. Reversal was argued upon "palpable error," as the matter was not pointed out to the court at anytime during the alleged failure.

Pursuant to RCr 10.26, this court may address an alleged error not properly preserved for review only if the alleged error is "palpable" and affects the "substantial rights" of a party. Further, relief may be granted only upon a determination that the alleged error has resulted in "manifest injustice." Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997). Such a showing requires that "the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. at 28; United States v. Olano, 62 F.3d 1180, 1188 (9th Cir. 1995), stated differently, "[e]rror rises to this level only when it is so shocking that it seriously affected the fundamental fairness and basic integrity of the

proceedings conducted below." United States v. Tutiven, 40 F.3d 1, 7-8 (1st Cir. 1994).

In Cole v. Commonwealth, 553 S.W.2d 468 (Ky. 1977) and Mason v. Commonwealth, 463 S.W.2d 930 (Ky. 1971), this court held that it was not reversible error for a trial court to fail to administer the oath required under RCr 9.68, so long as the officer actually performs his duty with regards to the jury.

In this case, Appellant has provided no evidence to support any conclusion that the bailiff was derelict in his duties. Thus, given this court's holdings in Cole and Mason, supra, there being no proof, or allegation of any specific misconduct, we cannot, in good faith, find any violations or failures which would affect the substantial rights of the parties or which suggest the fairness and integrity, or public reputation, of this proceeding was seriously affected. We simply find no error that was harmful or palpable.

XI. EXCLUSION OF THE PRESS FROM THE COURTROOM WHEN THE JURY RETURNED TO REVIEW EVIDENCE DURING ITS DELIBERATIONS

Here the Appellant complains of the press being ordered out of the courtroom when the jury returned to review certain parts of the evidence during its deliberations. Appellant argues he was deprived of a right to a public trial under the United States Constitution, 6th Amendment through the 14th Amendment, and Section 11 of the Kentucky Constitution. No objection having been made at the time, review is suggested under RCr 10.26.

Here, the press was excluded from the proceedings for the short time when the jury was reviewing evidence in the courtroom, during its deliberations.

Because the jury was still performing its deliberations, it was within the discretion of the trial court to exclude the press. The trial court's actions for this short period, during deliberations, in no way deprived the Appellant of any right to a public trial. This is especially true in that the press had been present when all of the original testimony had been presented. Given this short exclusion during its deliberative session, this was still a public trial within the meaning of the Constitutional guarantee. Tinsley v. Commonwealth, 495 S.W.2d 776, 780 (Ky. 1973). See also Johnson v. Simpson, 433 S.W.2d 644 (Ky. 1968).

In that the Appellant has failed to demonstrate that the absence of the press during the jury is viewing of this testimony seriously affected the fairness, integrity or public reputation of the proceeding, a review under RCr 10.26 is unavailable.

X. IMPROPERLY CHARGING THE JURY WHEN IT WAS DEADLOCKED

Here the Appellant argues that the court's answer to the jury's inquiry was violative of RCr 9.57, which limits the instructions a trial court may give to a "deadlocked" jury. Violations of RCr 9.57 always result in error, but are subject to a harmless error analysis. Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999). However, after having reviewed the matter we are of the opinion that the court's answer to the jury's inquiry, in this instance, was not an RCr 9.57 matter; nor was it an impermissible charge to the jury in that regard.

Here, the jury, during its deliberations, sent the court a question asking, "what happens if we cannot come to a unanimous vote?" The court then brought the jury back into the courtroom and gave the following answer, "the instructions

that you have read require the verdict be made by all twelve of you – and if all twelve of you cannot come to a verdict then you shall notify the court in writing." The court then asked if there were any questions about the answer and there being none, the jury returned to the jury room for continuing deliberations.

At no time did the jury inform the court that it had reached a point in the deliberations that it was "unable to reach a verdict;" nor did the court make this finding, or even inquire whether "further deliberations may be useful." Being very cautious, the court only told the jury what the instructions said (which it had in its possession), but did ask the jurors, to return to the courtroom to notify the court in writing, if they "cannot come to a verdict." This was not a substituted "Allen charge" as spoken to in RCr 9.57.

RCr 9.57 only comes into play once the court is notified that the jury is (1) deadlocked, (2) that further deliberations may be useful, and (3) and the court then makes a determination that the RCr 9.57 charge may be sufficient to induce the jury to reach a verdict and thus conclude the case, but only when given within the safeguards set out in the rule.

There is a significant difference between answering an inquiry from a jury as to what happens if we can't come to a unanimous vote and making a determination that the jury is "deadlocked" and that further deliberations would be helpful under the charges authorized under RCr 9.57. "Here the trial court merely responded to a legitimate question from the jury." Mills at 494. There was no error here in giving a truthful answer to the jury's inquiry. Cf., Commonwealth v. Mitchell, 943 S.W.2d 625 (Ky. 1997) and Mills v. Commonwealth, 996 S.W.2d

473, 493 (Ky. 1999). Thus, we find no error on this issue, "palpable" or otherwise.

XI. DENIAL OF MOTION FOR NEW TRIAL

Here the Appellant asserts error on part of the trial court in overruling its motion for new trial based upon alleged undisclosed juror bias.

When reviewing a trial court's denial of a motion for a new trial, a trial court is vested with broad discretion in granting and refusing a new trial, and an appellate court will not interfere unless it appears that there has been an abuse of discretion. Fister v. Commonwealth, 133 S.W.3d 480 (Ky. App. 2003); see also Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997).

The primary focus at the hearing was whether or not Appellant had presented sufficient evidence of previously undisclosed juror bias to warrant a new trial. The trial court thought not. The witness supporting Appellant's motion was his mother, Lou Skeens. She testified that she worked at Mountain Top Bakery through October 2003. At that time, both jurors Sherry Webb and Michael Chapman's aunt, worked at Mountain Top Bakery. She "believed" that both worked the first shift and that they worked on the same job. According to Lou Skeens, a "missing persons flyer" had been put up in the building, as had been at other places in the area. Yet, no evidence was offered, that (1) juror Webb had seen the flyers or (2) that she knew she worked with the witness, the Appellant's mother, or an aunt of Michael Chapman.

"To obtain a new trial because of juror mendacity, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire

and then show that a correct response would have provided a valid basis for a challenge for cause." Adkins v. Commonwealth, 96 S.W.3d 779, 796 (Ky. 2003).

Here the record is deficient and would require the court to speculate as to the existence of bias in order to sustain the Appellant's position. Even if defense counsel's suspicions had been proven, it is not clear that such would have required the juror's excusal for cause. Copley v. Commonwealth, 854 S.W.2d 748, 750 (Ky. 1993), Derossett v. Commonwealth, 867 S.W.2d 195, 197(Ky. 1993), Sanders v. Commonwealth, 801 S.W.2d 665, 669 (Ky. 1990); Key v. Commonwealth, 840 S.W.2d 827, 830 (Ky. App. 1992).

Thus, we find no abuse of discretion on the part of the trial court in denying the Appellant's motion for new trial on this ground.

Having found no harmful error, the Appellant's argument of "cumulative error" is moot and the judgment of conviction and sentence of the trial court is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Christopher N. Lasch
Goodwin & Lasch, PSC
6008 Brownsboro Park Blvd.
Louisville, KY 40207

COUNSEL FOR APELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, KY 40601-8204