IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0408-MR

DATE 12-14-05 ELIA Grant P.C.

HARRY ALLEN WATERBURY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
02-CR-2896

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On December 18, 2002, Appellant, Harry Allen Waterbury, shot and killed Jerry Moore in the living room of Appellant's residence. A Jefferson Circuit Court jury subsequently convicted Appellant of murder for which he was sentenced to twenty years in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting that the prosecutor, during closing argument, commented on his failure to testify, thus violating his Fifth Amendment privilege against compelled self-incrimination.

It is undisputed that Appellant killed Moore. The only issue at trial was Appellant's culpable mens rea, if any. The trial court instructed the jury on both intentional and wanton murder, KRS 507.020(1)(a) and (b); on manslaughter in the first degree, KRS 507.030(1)(a) (unintentional killing with intent to cause serious physical injury); on manslaughter in the second degree, KRS 507.040; and on reckless

homicide, KRS 507.050. Appellant did not request or tender an instruction on self-protection.

Moore was a childhood friend of Appellant's son. He had lived at Appellant's home, along with Appellant's wife and two daughters, periodically for the preceding fifteen years. Appellant and Moore were at home alone when the shooting occurred. Since Appellant did not testify at trial, the only testimonial evidence of the events preceding the shooting consisted of recorded statements Appellant made to an emergency services (911) operator immediately after the shooting and to detectives during a subsequent interview. In his statements, Appellant claimed that he aroused Moore on the morning of December 18, 2002, to confront him about the alleged resumption of his alcohol habit – a contentious issue because Moore had a history of alcohol abuse. An argument escalated until, according to Appellant, Moore hit or slapped him on the forehead. With the claimed intent of scaring Moore, Appellant retrieved a shotgun which he believed to be unloaded. However, as Appellant flinched to dodge an unidentified object thrown at him by Moore, the gun discharged, killing Moore.

Immediately after the shooting, Appellant first called his wife, then called the 911 (emergency) operator. Appellant was subsequently interviewed by two detectives There were inconsistencies between the statements Appellant made to the 911 operator and the detectives, primarily whether the shooting was an act of self-defense, as stated to the 911 operator, or an accident that occurred when he flinched to avoid the unidentified object thrown at him by Moore. Additionally, there were many questions Appellant could not answer, including the nature of the object thrown by Moore, whether the object struck him, the distance between him and Moore when the gun discharged,

whether he had cocked the hammer on the gun, whether he held the gun at hip- or shoulder-height, and how Moore reacted to being shot.[1] Appellant, an avid hunter, was also unable to explain why the gun would have been loaded on this occasion despite his longtime habit of unloading his guns before storing them.

The crux of defense counsel's closing argument was that the prosecution had proven nothing beyond the information that Appellant had willingly provided through his two recorded statements; thus, his version that the shooting was an accident was more reliable than the prosecution's theory of intentional murder. He emphasized: "[The prosecutors] have not proved one other thing in this case that [Appellant] didn't tell them in the beginning. They have not proved one other thing." He argued further: "Everything they got in the whole case is what [Appellant] told them. . . . There's no evidence to show why you shouldn't believe him."

In response, the prosecutor began his closing argument by saying, "Let's look at all the evidence excluding the statements of [Appellant]." He then recounted where the body was found, the defendant's physical appearance, the location, condition and position of the victim's body, the blood trail leading from the sofa out the back door, chunks of body matter found on the sofa, measurements, location of the spent shotgun shell and wadding, the fact that the gauge of the spent shell was the same as that of the shotgun, that the shotgun was the only one of Appellant's weapons that had been removed from its sleeve, and that the toxicology results revealed no alcohol in Moore's blood. The prosecutor concluded this litany by telling the jury, "These are all things we know without anything doing on the defendant [sic]."

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[1] Physical evidence established that Moore was shot while sitting on the sofa and that he exited the house after being shot and collapsed in the backyard.

The prosecutor then pointed out that the ballistics expert had testified that it required seven pounds of pressure to pull the shotgun's trigger; that the weapon would not fire unless the hammer was cocked; and that the safety transfer and hammer were both in perfect working order. He further noted that no soot or stipling was found on the victim's shirt, indicating the shot was fired from more than four feet away, so, considering the length of the gun barrel, Appellant was probably at least seven feet away from the victim when the shot was fired. He then stated:

> But now, without any testimony, any statements from the defendant, we have now established . . . . [interrupted by Appellant's objection and request to approach the bench]

During the ensuing bench conference, defense counsel asserted that the prosecutor had commented on Appellant's failure to testify and moved for a mistrial. The prosecutor responded that he only intended to refute defense counsel's claim that the Commonwealth had no other evidence except that contained in Appellant's recorded statements, and that he believed he (the prosecutor) had only said "without any statements from the defendant." The trial judge informed the prosecutor that he had said both "without any testimony" and "without any statements," but that she did not know whether he was referring to testimony from other witnesses or testimony from the defendant – and ordered him to clarify the remark for the jury. The prosecutor then continued his argument by saying, "without any statement from his recorded statement or his 911 statement." Defense counsel did not object to this clarification or to any other comments made by the prosecutor during closing argument. Appellant claims the trial court's denial of his motion for a mistrial during the bench conference requires reversal for a new trial. We disagree.

First, it is questionable whether the issue is even preserved for appellate review. The trial court did not specifically sustain or overrule either defense counsel's objection to the testimony or his motion for a mistrial. In order to preserve for review the overruling of an objection or the denial of a motion, the party seeking relief must insist upon a ruling from the trial court. Bratcher v. Commonwealth, 151 S.W.3d 332, 350 (Ky. 2004); Sanborn v. Commonwealth, 892 S.W.2d 542, 556 (Ky. 1994); Bell v. Commonwealth, 473 S.W.2d 820, 821 (Ky. 1971). However, the fact that the trial judge directed the prosecutor to clarify his remarks at least implies that she sustained the objection. And the fact that the trial court did not declare a mistrial at least implies that she overruled the motion.

Whether to grant a mistrial is within the sound discretion of the trial court, and the ruling will not be disturbed absent an abuse of that discretion. Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). The failure to grant a mistrial is not reversible error if an admonition to the jury to disregard the evidence or remark would have cured the error. See Matthews v. Commonwealth, 163 S.W.3d 11, 17-18 (Ky. 2005); Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). "[A]n admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition." Matthews, 163 S.W.3d at 17 (internal citation omitted).

The Fifth Amendment privilege against compelled self-incrimination prohibits any direct reference by the prosecution to a criminal defendant's refusal to testify. Griffin v. California, 380 U.S. 609, 613, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965); Lent v.

Wells, 861 F.2d 972, 975 (6th Cir. 1988). Such has been the law of Kentucky long before Griffin was decided:

> In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.

KRS 421.225 (originally enacted as KS 1645, 1893 Ky. Acts, ch. 227, § 22, at 1167).

An improper direct reference, if not corrected at trial, normally constitutes reversible error. Griffin, 380 U.S. at 613-15, 85 S.Ct. at 1232-33; Rachel v. Bordenkircher, 590 F.2d 200, 202 (6th Cir. 1978) (granting writ of habeas corpus and requiring a new trial when the prosecutor remarked that he could not say what happened because the defendant "won't tell us"); Bradley v. Commonwealth, 261 S.W.2d 642 (Ky. 1953) ("There was one person in my opinion who could have told you, but if anybody told you I didn't hear it."). In Chapman v. California, 386 U.S. 18, 21-22, 87 S.Ct. 824, 826-27, 17 L.Ed.2d 705 (1967), the United States Supreme Court declined to adopt a per se rule that such comments always constitute reversible error (though holding that reversible error had occurred in that case).

While direct comments about a decision to remain silent or not to testify are clearly prohibited, indirect comments, such as arguably occurred here, require a more probing analysis. Lent v. Wells, 861 F.2d at 975. Such comments warrant reversal only when they are "manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." Bagby v. Sowders, 894 F.2d 792, 797-98 (6th Cir. 1990). See also Sholler v. Commonwealth, 969 S.W.2d 706, 711 (Ky. 1998); Tinsley v. Commonwealth, 495 S.W.2d 776, 782 (Ky. 1973). More

recently, the Sixth Circuit Court of Appeals has adopted a four-part test to determine whether an indirect comment requires reversal for a new trial:

> When a statement indirectly comments on the defendant's decision not to testify, this court uses four factors to evaluate such a statement: "1) Were the comments 'manifestly intended' to reflect on the accused's silence or of such a character that the jury would 'naturally and necessarily' take them as such; 2) were the remarks isolated or extensive; 3) was the evidence of guilt otherwise overwhelming; 4) what curative instructions were given and when."

Bowling v. Parker. 344 F.3d 487, 514 (6th Cir. 2003) (quoting Lent v. Wells, 861 F.2d at 975), cert. denied, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004). Further, "[a] court should not find manifest intent from such comments if some other explanation for the prosecutor's remarks is equally plausible." Gall v. Parker, 231 F.3d 265, 311 (6th Cir. 2000), superseded by subsequent statutory interpretation as recognized by Bowling v. Parker, 344 F.2d at 501 n.3. This occurs, for example, when the comment is "a fair response to a claim made by defendant or his counsel." Id. (quoting United States v. Robinson, 485 U.S. 25, 32, 108 S.Ct. 864, 869, 99 L.Ed.2d 23 (1988)).

In the case sub judice, the prosecutor clearly intended to rebut defense counsel's statement in closing argument that the Commonwealth had no evidence other than the defendant's statements by showing the physical and forensic evidence that tended to refute Appellant's theory of accident. The reference to "without any testimony" was clearly an unintentional slip that the prosecutor immediately corrected. Since even the judge expressed uncertainty as to whether the prosecutor was referring to the testimony of the witnesses who did testify or to the missing testimony of Appellant who did not testify, it is unlikely the jury would have automatically assumed he was referring to Appellant's failure to testify. Evidence of guilt was not overwhelming and no curative admonition was requested or given. However, the mention of "testimony" was an

isolated remark, and the trial court had given the jury a "no adverse inference" instruction prior to the arguments. Finally, at the direction of the court, the prosecutor clarified to the jury that he was referring to Appellant's two recorded statements. Considering the nature and extent of the remark in question, we conclude that any prejudicial effect would have been cured by an appropriate admonition to the jury. The trial court impliedly sustained Appellant's objection; he did not request a curative admonition; thus, the trial court did not err in denying his motion for a mistrial.

Accordingly, the judgment of conviction and sentence imposed by the Jefferson Circuit Court is affirmed.

All concur.

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