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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 12-13-06 ELIA Grant, D.C.

2005-SC-000680-MR

WILLIAM CARR — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
NO. 04-CR-001178

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, William Carr, was convicted of two counts of sodomy in the first degree and one count of attempted sodomy in the first degree. He was sentenced to twenty years for each count of sodomy, and ten years for the attempt, to run concurrently for a total sentence of twenty years. He appeals from his conviction as a matter of right.[1]

On September 29, 2003, Appellant was arrested and charged with three counts of oral sodomy in the first degree based on allegations made by his girlfriend's daughters. Because Appellant was seventeen years old when these charges were brought, a petition was filed in the Juvenile Session of Jefferson District Court. On March 11, 2004, a hearing was conducted pursuant to KRS 640.010, and the juvenile

[1] Ky. Const. § 110(2)(b).

court ordered that Appellant be transferred to the circuit court as a youthful offender and tried as an adult.

On April 15, 2004, a Jefferson County Grand Jury returned an indictment charging Appellant with several offenses, including three counts of sodomy in the first degree.[2] Prior to trial, Appellant filed a motion *in limine* to prevent introduction of certain evidence including "[t]he portion of Gloria Dobbins' statement where she states that . . . [Appellant] had stuck a stick into the private area of another girl at the 4-H Club." The Commonwealth did not object and the trial court sustained the motion. A jury was impaneled and sworn on December 14, 2004, but a mistrial was declared after a police officer testified about the aforementioned excluded third-party incident. The prosecutor asked the investigating officer, "[h]ow did you come across this case?" The officer stated that he received a call from Child Protective Services that a Ms. Dobbins from the 4-H Club had called to report that three girls reported their babysitter masturbated in front of them and that the same man had apparently poked another girl between the legs with a stick on the day of the report. Appellant objected and moved for a mistrial because the statement about the stick involved sexual conduct with someone other than the three victims listed in the first three counts of the indictment and based on the court's pretrial order. Regarding the prosecutor's instructions to the officer, the prosecutor explained that he had told the officer, "[t]he only thing we're going to talk

[2] Counts four through nine of the indictment also charged Appellant with two counts of rape in the first degree, two counts of incest, and two counts of sexual abuse in the first degree. The alleged victims of those charges were his sisters. The trial court granted Appellant's motion to sever those counts for a separate trial, and the Commonwealth elected to try sodomy counts one, two, and three of the indictment first. This appeal only concerns the trial and retrial of counts one, two, and three.

about today is what went on in the house." The trial court reviewed the tape to confirm the officer's testimony and eventually declared a mistrial.

On December 16, 2004, Appellant filed a motion to dismiss the indictment on grounds that the Commonwealth's actions caused the mistrial. Specifically, Appellant alleged that the Commonwealth failed to advise the lead officer of certain pretrial motions prohibiting testimony. The trial court, in denying this motion, found that there was no bad faith or overreaching on the part of the prosecutor as intentional misconduct on the part of the lead officer. Therefore, the court conducted a retrial of counts one, two, and three of the indictment on May 2 through May 5, 2005.

At the retrial the Commonwealth presented testimony from four daughters of Appellant's former girlfriend, Theresa.[3] J.W., who was ten years old at the time of trial and seven years old at the time of the abuse, testified that she lived with her four sisters[4] and her mother at 1700 Hale Avenue in Louisville when Appellant moved in during the summer of 2002. Appellant would baby-sit her and her sisters while their mother was at work. J.W. testified that Appellant would play games with them, including a game called "hide and go lick" where the girls would hide, and Appellant would get to lick them anywhere he wanted if he found them. J.W. testified to one specific instance where Appellant licked her "private parts" which she further identified by marking the vaginal area in a diagram. Da.W. was present when this happened and she testified she saw Appellant do this to J.W. Appellant threatened to beat J.W. if she told

[3] The mother's first name and the initials of the children will be used to protect the anonymity of the parties involved.
[4] One sister, A.W., moved out of state to live with her father.

anybody. Gloria Dobbins of United Clubs, Inc. was the first person to whom J.W. confided the details of what happened.

Da.W. was one year younger than J.W. Da.W. testified that Appellant licked her private parts and further identified what she meant by marking the vaginal area on a diagram. J.W. testified she saw Appellant do this.

De.W. also verified that Appellant liked to play the "hide and go lick it" game. De.W. stated that Appellant would walk around naked in the house while the mother was away. De.W. saw Appellant play with his "private parts." One time, Appellant came into De.W.'s bedroom while she was asleep and tried to lick her private parts. Appellant's tongue did not actually touch De.W.'s private parts, however De.W. further testified that she saw Appellant lick J.W. and Da.W. when she walked into the room where Appellant was doing this.

Another sister, M.W., testified that she went into the bedroom J.W. and Da.W. shared and saw Appellant licking on the two girls. Although Appellant never touched her sexually, she testified that Appellant talked about "busting a cherry" and that he was going to do it with them. She did not really know what this meant. M.W. also saw Appellant naked in the house. Appellant would routinely show his penis to the girls whenever the mother was at work and would fondle himself. One time, Appellant choked J.W. and would not stop even though J.W. cried and coughed. M.W. tried to help by pulling his fingers off J.W.'s throat. M.W. once told her mother that Appellant was mistreating them, but did not tell her about the "nasty stuff" because she was scared. She did not tell everything until after she confided in Ms. Dobbins.

The Commonwealth called Gloria Dobbins as a witness since she was the first person in whom the children confided. Ms. Dobbins founded and ran United Clubs, Inc., which combined a Bible club and a 4-H Club. Ms. Dobbins and others sought to enhance the parent-child relationship, teach good morals, and teach positive social behavior. De.W., J.W., and Da.W. were members in the club. In questioning Ms. Dobbins, the prosecutor asked if the three victims told her about being abused by Appellant.

> Q. Did the girls tell you something about, that happened at the hands of Mr. Carr? Did they at some time tell you that Mr. Carr had done something to them?
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> A. Right We had a girl that we – the children were practicing. The Step Teens were practicing in the basement. Mr. Carr was on the piano where he usually practiced the piano, but he got off the piano and rushed down into the basement where the girls were. After a while, one of the girls came running upstairs and said "Mamaw" – they all called me Mamaw. And she said, "Mamaw, get William." And I said, "What's he doing? What did he do?" And he ran out the door, he rushed out the door and I said "What did he do?" And she said he had taken a mop handle, stuck it in her private –.

At this point, Appellant interrupted and asked to approach the bench. Appellant stated there was an order (on the motion *in limine*) from the day before which prohibited this testimony. Appellant did not ask for specific relief, but the trial court treated the matter as if it were a motion for a mistrial. The trial court denied the motion for mistrial and made specific findings that (1) the Commonwealth could not introduce evidence of a mop handle being inserted into the girl's private areas, (2) that the Commonwealth did not intentionally violate any order because it was not clear what was being precluded by the pre-trial order, (3) there was testimony about a mop handle but there was no

testimony it was being used in a sexual context, and (4) the reference to the mop handle was not so prejudicial as to require a mistrial.

At the end of the trial, Appellant again moved for a mistrial based on Ms. Dobbins' statement. The trial court overruled the motion and again stated that it had not made its pre-trial ruling prohibiting this testimony explicit. The trial court noted Ms. Dobbins was stopped during her testimony and the court found her statement "did not create an issue of prejudicial information coming before the ladies and gentlemen of the jury. . . ."

In this appeal, Appellant asserts three instances of error. Appellant first argues that the trial court erred by failing to dismiss counts one, two, and three of the indictment after a mistrial was declared, and that jeopardy had attached. We note that this issue was properly preserved for review by Appellant's motion to dismiss the indictment after the trial court granted a mistrial.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." Section 13 of the Kentucky Constitution likewise provides that "[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb. . . ." Both of these provisions "are identical in the import of their prohibition against double jeopardy."[5] Furthermore, "[j]eopardy attaches only when the jury is impaneled and sworn."[6] "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest

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[5] Jordan v. Commonwealth, 703 S.W.2d 870, 872 (Ky. 1985).
[6] Lear v. Commonwealth, 884 S.W.2d 657, 661 (Ky. 1994) (citing Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.E.2d 24 (1978)).

necessity' for a mistrial or 2) the defendant either requests of consents to a mistrial."[7] As a general rule, a mistrial granted on the Defendant's motion removes any double jeopardy bar to retrial.[8] However, the United States Supreme Court has held that a defendant in a criminal trial who successfully moves for a mistrial may still invoke the bar of double jeopardy against a second trial where "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."[9] This Court has held that the defendant must show "that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court."[10] It is not enough that the prosecutor erred or even acted intentionally for there to be bad faith. The prosecutor must act with intent to provoke the defendant into moving for a mistrial in order to have a better chance at convicting the defendant in a subsequent trial.[11]

As previously noted, the prosecutor instructed the lead police officer to talk only about the incidents in the girls' home. However, the prosecutor did not specifically inform the officer of the trial court's order prohibiting certain testimony. When the prosecutor questioned the officer about how he had come across this case, the officer responded "that the three young ladies had reported to Miss Dobbs" at the 4-H Club "that their babysitter had been masturbating in front of them" and that "he had touched

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[7] See KRS 505.030(4); Leibson v. Taylor, 721 S.W.2d 690, 693 (Ky. 1986) (overruled on other grounds by Shaffer v. Morgan, 815 S.W.2d 402 (Ky. 1991)); United States v. Dinitz, 424 U.S. 600, 606-07, 96 S.Ct. 1075, 1079, 47 L.E.2d 267 (1976).
[8] Stomps v. Commonwealth, 648 S.W.2d 868 (Ky. 1983); Silverburg v. Commonwealth, 587 S.W.2d 241 (Ky. 1979).
[9] Oregon v. Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).
[10] Tinsley v. Jackson, 771 S.W.2d 331, 332 (Ky. 1989).
[11] Terry v. Commonwealth, 153 S.W.3d 794, 803-04 (Ky. 2005) (citing United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)).

some kids in the basement [of the 4-H Club] with a stick or something between their legs." The prosecutor contended that he had only expected the officer to say he had received a call from CPS. Noting that allegations of sexual abuse were involved and that a trained officer had given the prejudicial testimony, the trial court found that an admonition would not be sufficient to cure the prejudice, thus granting a mistrial. In denying Appellant's motion to dismiss the indictment with prejudice, the trial court did not find that the prosecutor's actions were in bad faith or overreaching on the part of the prosecutor as intentional misconduct on the part of the lead officer.

We discover no abuse of discretion or clear error in the trial court's findings.[12] Appellant has offered no reason or evidence why the prosecutor would have wanted to entice Appellant into a mistrial. An unethical prosecutor might try to provoke a defendant into a mistrial where evidence is missing or witnesses may not be found. However, in the case at bar the prosecutor asked a seemingly innocent question, and received an answer that was hardly responsive. Moreover, the Commonwealth argued against the mistrial, and did not acquiesce in the motion for a mistrial by Appellant. Perhaps the Commonwealth should have more thoroughly explained the motion *in limine* to the officer, but we agree with the trial court's assessment that by failing to do so the prosecutor did not act in bad faith. We will not disturb such trial court findings on appeal if they are supported by substantial evidence and the trial court is not clearly erroneous in its findings.[13]

Appellant next argues that the trial court erred by failing to grant a mistrial during the retrial when the Commonwealth introduced inadmissible evidence of a subsequent,

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[12] Commonwealth v. Deloney, 20 S.W.3d 471 (Ky. 2000).
[13] Id. at 474.

uncharged sexual act involving a separate alleged victim. This issue was properly preserved for review by Appellant's motion *in limine* and motion for mistrial.

The issue of what evidence would be limited was taken up anew by the trial court before Appellant's second trial. Appellant sought a laundry list of items to be excluded by his written motion *in limine*. The evidence sought to be limited included:

> 4. The portion of Gloria Dobbins' statement wherein she states that the girls had told her that William had masturbated in front of the girls and had also stuck a stick into the private area of another girl at the 4-H Club.

The trial court ruled that "[f]or the reasons stated on the record, except for the statement of Diana Carr (paragraph 3) & the statement of Gloria Dobbins (paragraph 4) unless for impeachment, the balance of the motion is denied."

The question that precipitated Appellant's motion for mistrial did not specifically elicit the testimony of which Appellant now complains. The prosecutor asked Ms. Dobbins, "[d]id the girls tell you something about, that happened at the hands of Mr. Carr? Did they at some time tell you that Mr. Carr had done something to them?" Ms. Dobbins then began a response which was, in part, non-responsive to the question because it referred to something Appellant did to another person. Her answer ended, "[a]nd he ran out the door, he rushed out the door and I said what did he do? And she said he had taken a mop handle, stuck it in her private –." Defense counsel immediately objected, arguing that the Commonwealth had violated the court's pretrial order prohibiting this testimony. The prosecution claimed that defense counsel was confused and that the trial court had denied the motion in limine in its entirety. After reviewing defense counsel's motion and its order, the trial court agreed that it meant to exclude this uncharged act involving a third person. However, the court found that the

Commonwealth had not intentionally violated any order because the court had not made it clear that this testimony would be precluded. Treating defense counsel's objection as a motion for mistrial, the court found that a mistrial was not warranted under these circumstances. The court stated that the jury had no idea that the mop handle involved a sexual assault or sexual misconduct and found that merely referencing a mop handle was not so prejudicial as to require a mistrial.

The next day, Appellant renewed his motion for a mistrial based on Gloria Dobbins' testimony. Defense counsel argued that this testimony was irrelevant to the charges being tried, was unduly prejudicial, and could not be erased from the jurors' minds. The trial court agreed that the episode involving touching a third party with a stick or mop handle had little or no probative value, and that the prejudice from introducing that evidence would outweigh any probative value. However, the trial court felt that its ruling had not been explicit and further believed that Ms. Dobbins had been stopped before she could actually testify about the prejudicial evidence. Therefore, the court once again denied the motion for a mistrial.

"Whether to grant a mistrial is within the sound discretion of the trial court, and 'such a ruling will not be disturbed absent . . . an abuse of discretion.'"[14] "A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity."[15] "[F]or a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be

[14] Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005) (quoting Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004)).
[15] Id. (citing Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985)).

denied a fair and impartial trial and the prejudicial effect could be removed in no other way."[16]

There was no manifest necessity requiring a mistrial due to the mop handle testimony. The trial court specifically found there was no intentional misconduct by the prosecutor and that its ruling on the pre-trial motion was unclear. Ms. Dobbins was cut off by Appellant's objection before explaining that Appellant stuck the mop handle in the girl's private "parts." Appellant sought no other form of relief.

Regardless of whether the jury may have inferred that Appellant used the mop handle in a sexual manner, there was no requirement of a mistrial. The evidence against Appellant was overwhelming, including two children who testified that Appellant licked their private parts and a third who testified Appellant attempted to lick her private parts. A fourth child witnessed two of the events for which Appellant was charged. In addition, the sisters testified to a number of other inappropriate acts where Appellant was apparently grooming them for sexual contact. Appellant walked around the house naked, he played with his penis in front of the girls, he told the girls he was going to "bust their cherries," and he used physical force and intimidation to scare the girls into keeping quiet. Measured against this evidence the mop handle testimony was not of such force and not so prejudicial as to create a manifest necessity for a mistrial, and we so hold.

Appellant's final argument is that the trial court committed reversible error by refusing to strike Juror No. 104625, Juror No. 116723, and Juror No. 116601 for cause.

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[16] Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002) (citing Gould v. Charlton Co., 929 S.W.2d 734, 738 (Ky. 1996)).

We note that this issue is preserved by Appellant's motion to excuse these jurors for cause.

The right to an impartial jury is a fundamental constitutional right, a violation of which may never be harmless.[17] However, the law recognizes that a trial court is endowed with broad discretion in determining whether to excuse a prospective juror for cause.[18] A juror should only be dismissed for cause if the juror cannot conform his or her views to the requirements of the law, and render a fair and impartial verdict.[19] "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause."[20] "A determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination."[21]

To determine whether Appellant's basis for claiming that the three prospective jurors should have been excused, we will examine each juror in turn. We note that none of the following jurors actually served on the jury, as Appellant used his preemptory strikes to remove them.

Juror No. 104625

During voir dire, the trial court asked the following questions:

> Q. How many of you have been called as witnesses before? You saw something happen or [in] your line of work, you're called to testify as an

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[17] Paenitz v. Commonwealth, 820 S.W.2d 480, 481-82 (Ky. 1991).
[18] See McQueen v. Commonwealth, 669 S.W.2d 519 (Ky. 1984); Pennington v. Commonwealth, 455 S.W.2d 530 (Ky. 1970).
[19] Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994).
[20] Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958) (citing Sizemore v. Commonwealth, 276 S.W. 524 (Ky. 1925)).
[21] Commonwealth v. Lewis, 903 S.W.2d 524, 527 (Ky. 1995).

> expert, but you've had some exposure as a witness before? Okay, two. Anything about that experience of having appeared as a witness that you think would have an effect on you listening to the evidence of this case?

Juror No. 104625 responded as follows: "Probably. As a retired social worker, I testified in family court and (inaudible) advocate for victims (inaudible)." At the end of voir dire, the trial court disagreed with Appellant's characterization of this juror's answers and generally summed up the answers of the jurors as follows:

> Numerous jurors expressed some strong feelings about what they would do if they believe someone committed a crime against a child. None of them expressed the feelings though, that that would cause them to prejudge this case simply because the allegations were made and I think the same thing applies to juror in seat number one (Juror No. 104625). So, I'm going to deny the motion for cause as to that juror.

This juror's situation is quite similar to a juror in Alexander v. Commonwealth.[22] In that case, a prospective juror advised the court that she was not certain she could sit impartially in a trial. The juror was an investigative social worker with Child Protective Services, and she stated unequivocally that her position would affect her ability to be fair and impartial in the case. It has long been held that "[i]t is the probability of bias or prejudice that is determinative in ruling on a challenge for cause."[23] However, in the case at bar the prospective juror gave no such unequivocal answer. The juror stated only that her experience would "probably" have an effect on her ability to listen to the evidence of the case. Unlike the juror in Alexander, this juror did not express that she

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[22] 862 S.W.2d 856 (Ky. 1993) (overruled on other grounds by Stringer v. Commonwealth, 956 S.W.2d 883 (1997)).
[23] Pennington, 316 S.W.2d at 224.

had feelings that would cause her to prejudge the case. We hold that the trial court properly exercised its discretion with respect to this juror.

Juror No. 116723

Juror No. 116723 stated that he had worked for five years in a juvenile residential setting with offenders and victims of sexual abuse, and that based on his experience there, he stated he was biased in "this type of case." He further stated that he was very opinionated about how sexual offenders should be punished and that his opinions would not be acceptable in today's society. Nevertheless, when asked by Appellant, this juror stated that he would be able to sit and weigh the evidence fairly. The trial court noted this answer when determining the juror would not be dismissed for cause.

If we dismissed all jurors for cause who have pre-conceived ideas about child sex crimes, the result would likely be an inability to seat a jury. Indeed, most of the population undoubtedly harbors some sort of "bias" against sexual offenders and against sexual based crimes. In Young v. Commonwealth[24] this Court held that there was insufficient reason to dismiss a prospective juror for cause in a murder case involving drug trafficking where the prospective juror had a "zero tolerance" against drug offenses and had testified for the prosecution in drug cases. Additionally, in Turner v. Commonwealth[25] we held that jurors' pre-conceived beliefs regarding homosexuality did not render them unfit to sit on the panel, so long as they were able to set aside those beliefs and considered the case impartially. RCr 9.36(1) states in part: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." However, in this

[24] 50 S.W.3d 148 (Ky. 2001).
[25] 153 S.W.3d 823 (Ky. 2005).

case the prospective juror gave adequate assurances to the trial court that he could render a fair and impartial verdict, despite his preconceived notions about this type of crime. This comports with RCr 9.36(1) and gave the trial court a reasonable basis for declining to remove the juror for cause.

Juror No. 116601

Appellant next argues that Juror No. 116601 should have been dismissed for cause because she had been the victim of rape and had taken a class on sexual offenders. The juror apparently even knew statistics about sexual offenders. The trial court considered this and noted that he had watched this prospective juror during voir dire and concluded she did not express any grounds to dismiss her for cause.

Being a victim of a similar crime does not create grounds to dismiss a juror for cause.[26] This is true even in a prosecution for rape and sodomy where the prospective juror had been raped by her stepfather.[27] Thus the fact that the juror was a rape victim did not disqualify her. Likewise, the fact that a prospective juror has some specialized knowledge or experience in an area does not disqualify that person from sitting on a jury. This Court has determined that a prospective juror did not have to be dismissed for cause when the juror had worked with the state's marijuana eradication taskforce and had been shot by a drug dealer in a murder case where there would be evidence the defendant was a drug trafficker.[28] Even law enforcement officers, with specialized

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[26] Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997) (citing Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990)).
[27] Whalen v. Commonwealth, 891 S.W.2d 86, 88-89 (Ky.App. 1995) (overruled on other grounds by Moore v. Commonwealth, 990 S.W.2d 618 (Ky. 1999)).
[28] Young v. Commonwealth, 50 S.W.3d 148, 163-64 (Ky. 2001).

knowledge about crime, are not disqualified as jurors for that reason.[29] The trial court did not abuse its discretion in refusing to dismiss the juror for cause.

For the foregoing reasons, Appellant's convictions are affirmed.

Lambert, C.J., and Graves, McAnulty, Minton, Scott, and Wintersheimer, JJ., concur. Roach, J., concurs in result only.

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[29] See Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990).