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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED: JUNE 21, 2007
RENDERED: MARCH 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000470-MR

DATE 6-21-07 Ella Grauith, D.C.

CORNELIUS JAMAL MONK — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 04-CR-00238 AND 05-CR-00020

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Upon a jury verdict, Appellant, Cornelius Monk, was convicted of First Degree Robbery[1] and of being a Second Degree Persistent Felony Offender.[2] The court sentenced Monk to twenty-five (25) years imprisonment. Appealing to this Court as a matter of right,[3] he argues that the prosecution denied his right to a fair trial by: (1) questioning his alibi witness about a prior misdemeanor in violation of KRE 609; (2) referring to a judge's prior ruling about the admissibility of evidence during cross-examination; (3) defining reasonable doubt; (4) improperly bolstering the victim's credibility; and (5) eliciting testimony regarding Monk's "guilty" body language. For the following reasons, we affirm Monk's conviction.

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[1] KRS 515.020.
[2] KRS 532.080.
[3] Ky. Const. § 110(2)(b)

This case began on January 14, 2004, when two armed men barged into the Hopkinsville apartment of Dustin Austin and Mary Francis Vowell. Austin had just arrived home when he heard a knock on the door. When Austin opened the door, two men entered the apartment. According to Austin, there was a larger man who was wearing a mask and a thinner man without a mask. Austin noticed that the thinner man had a "swollen eye," and he grabbed Austin's shirt and used the butt of his gun to strike him in the mouth three or four times. By this time Vowell, who was in the shower, heard the commotion and came out of the bathroom. The thinner man pointed the gun at Austin's head and threatened to kill them if they did not cooperate. The two men then ordered Austin and Vowell into the bathroom.

While they were in the bathroom, the two men ransacked the apartment and stole a laptop computer, a cellular telephone, Austin's watch, and even the apartment telephones. After hearing their dog crying, Austin and Vowell exited the bathroom, drove to Vowell's father's residence, and notified the Hopkinsville police department. After Austin and Vowell told Detective Scott Mays that one of the robbers had a "swollen eye," Mays assembled a photo lineup that included a picture of Monk. Both Austin and Vowell identified Monk as the "thin" robber. Mays then conducted a police interview with Monk. During the interview Monk never directly admitted that he committed the robbery. Thereafter, the grand jury indicted Monk for First Degree Robbery and later a second indictment was returned charging monk as a Second Degree Persistent Felony Offender. Monk was convicted on both charges.

Monk's first claim of error is that during the cross-examination of his alibi witness, his wife Alicia Monk, the Commonwealth asked, "You have a conviction for hindering

prosecution apprehension second degree, is that correct?" Monk immediately objected and moved for a mistrial. Before Alicia Monk answered the question, the trial judge sustained the objection and admonished the jury not to consider the question. Monk argues that he should have had a mistrial. Although the trial judge sustained the objection and admonished the jury not to consider the question, Monk contends that the simple act of asking the question was so prejudicial that it warranted a mistrial. The Commonwealth counters that the admonition cured any possible error.

This Court reviews the trial judge's denial of a mistrial under the abuse of discretion standard.[4] A mistrial is appropriate only where the record reveals a manifest necessity for the mistrial.[5] Where no error occurs – or where the error is properly cured – no mistrial is necessary. While KRE 609 does provide for impeachment of a witness with a prior criminal conviction, the rule only applies "if the crime was punishable by death or imprisonment for one (1) year or more."[6] Additionally, "[t]he identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction."[7] Since Alicia Monk's conviction for hindering prosecution in the second degree was a misdemeanor, KRE 609 bars the Commonwealth from using the conviction during cross-examination and from disclosing the specific offense involved.[8] Thus, the Commonwealth's question was improper in two ways: (1) by asking Alicia Monk about the existence of a prior

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[4] Bray v. Commonwealth, 68 S.W.3d 375, 383 (Ky. 2002).
[5] Id.
[6] KRE 609.
[7] Id.
[8] Slaven v. Commonwealth, 962 S.W.2d 845, 859 (Ky. 1997).

misdemeanor conviction; and (2) by disclosing that the prior conviction was for hindering prosecution in the second degree.

However, the trial judge sustained Monk's objection and admonished the jury not to consider the question. This Court has repeatedly held that "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error."[9] There are only two circumstances which rebut this presumption: "(1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was 'inflammatory' or 'highly prejudicial.'"[10]

The second exception is inapplicable because the Commonwealth did have a factual basis for asking Alicia Monk about her prior conviction since she was in fact previously convicted of hindering prosecution in the second degree. Concerning the first exception, Monk argues that Alicia Monk's alibi testimony was crucial to his defense. Because the Commonwealth's case consisted of only the victims' testimony, Monk alleges that the jury was forced to weigh the victims' credibility against Alicia Monk's credibility. Monk argues that the jury's knowledge of Alicia Monk's prior conviction destroyed her credibility in the eyes of the jury and therefore led to the guilty verdict.

However, under this standard the brief reference to Alicia Monk's prior misdemeanor conviction in the form of an unanswered question is insufficient to establish an overwhelming probability that the jury would be unable to follow the trial

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[9] Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).
[10] Id. (emphasis in original)

judge's admonition or that the reference established a strong likelihood that the evidence would be devastating to Monk. Because of Monk's immediate objection, Alicia Monk never answered the question. Based on the unanswered question and the judge's instruction to disregard the question, the jury could have as easily concluded that Alicia Monk was never convicted of the crime. In Johnson v. Commonwealth,[11] this Court found that a prosecutor's reference to a defendant's prior guilty plea was insufficient to rebut the presumption that the jury followed the judge's admonition because the inappropriate reference was brief and because the witness never answered the question.

This Court utilized similar reasoning in Sherroan v. Commonwealth,[12] when analyzing whether a reference to the defendant's probation status could be cured by an admonition. This Court held that "it would be tenuous to conclude that the jury was incapable of ignoring such brief and undetailed remarks regarding Appellant's probation, and even more tenuous to conclude that they were 'devastating' to his defense."[13] Similar to Johnson and Sherroan, the remarks involved in the present case were brief, and Alicia Monk's failure to answer the question could have led the jury to any number of conclusions.

While the present case is distinct from Johnson and Sherroan because the Commonwealth actually identified the underlying conviction, Monk is still unable to rebut the presumption that the admonition cured the error. The only situations we have found to be incurable by an admonition involve circumstances more prejudicial than the

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[11] 105 S.W.3d at 441.
[12] 142 S.W.3d 7, 17 (Ky. 2004).
[13] Id.

present case. In Terry v. Commonwealth,[14] this Court analyzed an accomplice's inadmissible testimony that the defendant killed the victim. We held that these statements were "highly prejudicial" and "so devastating as to be incurable by a mere admonition to disregard it."[15] The statement in the present case, however, is not as devastating or prejudicial because the brief reference to Alicia Monk's prior conviction did not directly implicate the defendant, Cornelius Monk, in the present case. This Court has also held that an admonition will be insufficient if the Commonwealth asks a repetitive series of improper questions concerning a prior conviction.[16] However, in the present case the Commonwealth only made one brief reference to Alicia Monk's prior conviction.

While the prosecutor clearly violated KRE 609, there was a prompt proper ruling and admonition from the trial court. Since Monk cannot show an overwhelming probability that the jury was unable to follow the court's admonition and that there was a strong likelihood that the effect of the inadmissible evidence was devastating to him, Monk is unable to rebut the presumption. Therefore, the trial judge's admonition cured the prosecutor's error. Because the admonition cured the error, the judge did not abuse his discretion in denying Monk's motion for a mistrial.

Monk's second argument is that the trial court improperly denied his motion for a mistrial after the prosecutor repeatedly referred to the judge's earlier ruling on the admissibility of the photo identification. During the testimony of Detective Mays, the prosecutor asked if the identification "was the same one we had a hearing on and the

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[14] 153 S.W.3d 794, 800-801 (Ky. 2005).
[15] Id.
[16] Swanger v. Commonwealth, 255 S.W.2d 38, 40 (Ky. 1953).

judge said...." After the defense objected, the prosecutor protested that the jury "could not find the identification unfair as a matter of law" and then asked Mays, "[i]s there any reason why this lineup would be inadmissible?" The defense objected and moved for a mistrial. The trial judge sustained the objection but denied Monk's motion for a mistrial. Again, we review a trial judge's denial of a mistrial for an abuse of discretion.[17]

This Court cannot conclude that these brief references to the trial judge's earlier rulings so prejudiced the defendant that there was a manifest necessity for the court to declare a mistrial. First, Detective Mays never answered the prosecutor's questions concerning the judge's earlier ruling because the judge sustained the defendant's objections. Second, it is hardly prejudicial when the complained of testimony merely insinuates that already admitted evidence (the photo identification) was in fact previously determined to be admissible. The jury's knowledge of the judge's ruling neither gives undue weight to the evidence nor informs them of an inappropriate piece of prejudicial evidence. Based on the facts of this case, we cannot say that the trial judge abused his discretion in denying Monk's motion for a mistrial simply because of three brief and unanswered questions when the resulting inferences were neither surprising nor harmful to Monk's defense.

Because Monk failed to lodge a contemporaneous objection for his final three arguments, we only review for palpable error.[18] Palpable error involves "prejudice more egregious than that occurring in reversible error and the error must have resulted in manifest injustice."[19] "To discover manifest injustice, a reviewing court must plumb the

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[17] Bray, 68 S.W.3d at 383.
[18] Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005).
[19] Id.

depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable."[20] Monk alleges that the prosecutor committed three errors that individually, and collectively, constituted palpable error.

First, Monk argues that palpable error occurred when the prosecutor discussed the meaning of reasonable doubt with the jury. During *voir dire*, the prosecutor told the jury that "we're not talking about beyond any doubt, we're not talking about beyond a shadow of a doubt, we're talking about finding proof beyond a reasonable doubt." The prosecutor further stated that finding proof beyond a reasonable doubt was similar to knowing a landmark was Mount Rushmore even if it was partially obscured by the clouds. The prosecutor then told the jury that "you don't have to have everything laid out in front of you to believe beyond a reasonable doubt" and that a defendant testifying "I did not do it" would not constitute reasonable doubt.

This Court has repeatedly held that counsel may not attempt to define reasonable doubt at any point during the trial.[21] However, we recently held in Johnson[22] that a prosecutor's statement that beyond a reasonable doubt was not the same thing as beyond a shadow of a doubt was not, in that case, reversible error.

However, crucial to our decision in Johnson was that the Commonwealth neither "engage[d] in a lengthy discussion of the standard" nor used a hypothetical, and also strongly emphasized the defendant's entitlement to a presumption of innocence.[23] In the present case, the Commonwealth continued the discussion by referencing the Mount Rushmore comparison and, most troubling, stating that a defendant testifying "I

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[20] Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 1006).
[21] Johnson v. Commonwealth, 184 S.W.3d 544, 549 (Ky. 2005).
[22] Id.
[23] Id.

did not do it" would not constitute reasonable doubt. While these statements clearly violate Callahan v. Commonwealth[24] and its progeny, and go well beyond Johnson, we cannot say that this error undermined the entirety of the proceedings to a degree that constituted a shocking or jurisprudentially intolerable defect.

Monk's fourth claim of error is that during the Commonwealth's case in chief, which consisted of only the victims' testimony, the Commonwealth improperly bolstered Vowell's credibility. During his direct examination, the Commonwealth stated that he had "the luxury of knowing a little bit about" Vowell because she was "part of the teen court team when [she] was in high school." Additionally, the Commonwealth said that "she makes an excellent hostess at Shoney's" and that he will "compliment [her] on that aspect as well." Again, Monk did not object to these statements. Monk argues that through these statements, the Commonwealth gave its personal opinion about Vowell's character. Monk is correct in that "[t]he personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment."[25] Nevertheless, the statements made do not constitute palpable error.

Monk's final argument is that Detective Mays committed error when he testified regarding the videotaped interrogation he conducted with Monk. As this claim is also unpreserved, we see no need to review it.

In conclusion, none of the alleged errors, either individually or collectively, deprived Monk of a fair trial.

Accordingly, we affirm.

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[24] 675 S.W.2d 391 (Ky. 1984).
[25] Moore v. Commonwealth, 634 S.W.2d 426, 438 (Ky. 1982).

Lambert, C.J.; Noble and Scott, JJ., concur. Cunningham, J., concurs in result only. McAnulty, J., dissents by separate opinion in which Minton and Schroder, JJ., join.

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Supreme Court of Kentucky

2005-SC-000470-MR

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE McANULTY

Respectfully, I dissent. I believe that the prosecutor's deliberate violations of KRE 609 and well-settled Kentucky case law condemning any attempts to define reasonable doubt -- along with the other errors discussed above -- deprived Monk of a fair trial.

After reviewing Alicia Monk's cross-examination, it is apparent that the prosecutor made a conscious decision to impeach her credibility -- no matter what -- by introducing evidence of a prior misdemeanor conviction in violation of KRE 609. After establishing Mrs. Monk's maiden name and her date of birth, the prosecutor stated, "You have a conviction for hindering prosecution . . ." At this point, defense counsel interjected and asked the trial court if the attorneys could approach the bench, to which the trial court responded, "Yes." Despite the request to approach and the trial court's permission to approach, the prosecutor continued blurting out the remainder of the charge, ". . . or apprehension in the second degree in Christian County, is that correct?"

In order to do so, the prosecutor had to speak over two more requests to approach by defense counsel and two more "Yes" responses from the trial court. Before the trial court allowed the prosecutor to resume his cross-examination with a different line of questioning, it stated simply to the jury, "Ladies and Gentlemen, disregard the last question."

On this issue, I do not dispute the Majority's reliance on our jurisprudence that holds that "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). I believe, however, that the presumption contemplates that the evidence was inadvertently presented to the jury in good faith. See Alexander v. Commonwealth, 862 S.W.2d 856, 859 (Ky. 1993), overruled on other grounds by Stringer v. Commonwealth, 956 S.W.2d 883, 891 (Ky. 1997) ("It is normally presumed that a jury will follow an instruction to disregard inadmissible evidence that is inadvertently presented to it, unless (1) there is an overwhelming probability that the jury will be unable to follow the court's admonition; and (2) a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant. . . . Absent bad faith, an admonition given by the trial judge can cure a defect in testimony.").

Here, I believe that the prosecutor's improper question was deliberate. And his persistence in asking the question over defense counsel's objection shows his bad faith. Thus, while it is apparent that the trial court did not countenance such tactics by the prosecution, I would hold nonetheless that the trial court abused its discretion in refusing to grant a mistrial.

Turning to the prosecutor's nearly two-minute attempt in *voir dire* to define reasonable doubt by stating what it is not and providing the convoluted cloud in front of

Mt. Rushmore example, this is still an obvious attempt to define reasonable doubt. It is prohibited. See Commonwealth v. Callahan, 675 S.W.2d 391, 393 (Ky. 1984). "[A]ll counsel shall refrain from any expression of the meaning or definition of the phrase 'reasonable doubt.'" Id. Despite the clarity of this instruction, this case illustrates that counsel continues to disregard the prohibition and test how far he or she can go before breaching it. I realize that defense counsel made no contemporaneous objection. However, I perceive this error as one of many that the prosecutor committed in this trial, the cumulative effect of which requires reversal.

Minton, and Schroder, JJ., join.

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ORDER

On the Court's own motion, this Court hereby modifies the opinion rendered on March 22, 2007 correcting page 10 of the Memorandum Opinion of the Court, as attached hereto, in lieu of page 10 of the opinion as originally rendered. Said modification does not affect the holding.

Entered: June 21, 2007.

CHIEF JUSTICE