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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000480-MR

RAYMOND WALKER — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
NO. 04-CR-003652

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Raymond Earl Walker was indicted in 2004 on several charges arising from a twenty-year old previously unsolved rape, burglary, and robbery case. Walker was tried on these charges in 2006 and convicted of one count of first-degree rape and one count of first-degree burglary. The trial court sentenced Walker to twenty years' imprisonment for each crime, to be served consecutively for a total of forty years' imprisonment. He appeals as a matter of right.[1]

Walker contends that the trial court erred by (1) denying his motion to dismiss the charges due to lengthy pre-indictment delay; (2) denying his directed verdict motion on the first-degree rape due to insufficient evidence of earnest resistance by the victim, as required under 1984 law; (3) failing to instruct the jury on the element of earnest

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[1] Ky. Const. § 110(2)(b).

resistance; (4) failing to instruct the jury in a manner consistent with the presumption of innocence and burden of proof; and (5) denying his motion for a mistrial after the jury heard Walker's status as a convicted sex offender and an inmate at the Green River Correctional Complex.

Finding no reversible error, we affirm.

I. BRINGING A COLD CASE TO TRIAL.

Advances in technology and a grant to fund testing of DNA samples from "cold cases" allowed DNA samples to be obtained in 2002 from items that had been collected as evidence twenty years before during an investigation following the robbery and rape of a female victim and the burglary of her apartment on September 20, 1984. Scientists comparing male DNA found in the victim's panties with the Kentucky State Police (KSP) Forensic Casework and Convicted Offender Indexes found that the DNA profile matched Walker's convicted sex offender sample profile.

Following the match, the investigating detective executed a search warrant to obtain a blood sample from Walker. The blood sample was sent to the KSP's central laboratory for DNA analysis. Three months before Walker was indicted, the DNA database supervisor reported that the DNA profile from Walker's blood sample matched the DNA profile from the victim's panties at 12 of the 13 loci. Six months after indictment, scientists performed more DNA analysis on the blood sample, panties, and items from the sexual assault kit; obtaining a partial DNA sample from the vaginal swab[2] that matched the blood sample on 9 of 13 loci and partial DNA sample and a partial

[2] Analysts had been unable to recover sufficient DNA from the vaginal swab to generate a DNA profile in earlier testing in 2002 or 2003.

DNA sample from the panties that matched the blood sample at 6 of 13 loci. Degradation of the DNA evidence had occurred over the twenty years since the rape, resulting in scientists being unable to obtain full DNA profiles from these items.

The indictment charged Walker with two counts of first-degree rape, one count of first-degree robbery, and one count of first-degree burglary.

At trial, the victim, C.A.M., testified recalling the incident in the early morning hours of September 20, 1984, and her efforts to help police identify the perpetrator. C.A.M. awoke on her couch at 3 a.m. to see a black male standing at the foot of the couch rifling through her briefcase. She saw a butcher knife in his hand. She screamed; and the man put his hand over her mouth, telling her to be quiet or he would kill her. He put a pillow over her face and told her not to look at him but asked where her purse was. He again threatened to kill her with the knife, and he hit her at one point after she tried to look at him.

After removing $200 from her purse, the man asked about her car. She told him she owned a car, which was parked out front; and she indicated that the car keys were on the coffee table. The man told her to undress, and she complied. He then held a pillow over her face, inserted his penis into her vagina and ejaculated. He took some beer from her refrigerator and asked her questions about her television, jewelry, and additional money before telling her to keep the pillow over her face and to get on the floor. He again inserted his penis into her vagina but did not ejaculate.

He directed her back to the couch where he tied her up with her robe belt and a telephone cord. He stuffed a paper towel in her mouth. He then made several trips in and out of her residence removing items such as jewelry and a television set. As he

was leaving, he called her by her middle name, which was the name she used; and he told her he would be back at 9 so they could go to the bank to get more money. He claimed to know that people with her job—she managed a local fast-food store—made good money. After he left, C.A.M. untied herself and ran to a neighbor's house to contact the police.

A physician examined C.A.M. and collected a sexual assault kit. C.A.M. gave a physical description to the police and assisted in making a composite sketch. She also contacted police whenever she had any "leads." She contacted police after a friend named Gerald Nelson told her that he had seen her stolen car. The car was recovered, and latent prints from the car were found to belong to Gerald Nelson. She also told them of receiving an anonymous call saying that a man named "Derrick Wilson" had raped her. But she was unable to identify Derrick Wilson in a photo pack.

Not long after the incident, C.A.M. told police she believed the perpetrator was a man named Victor Bright. She identified him in a photo pack but later said she was not positive that he was the perpetrator. Due to her doubts, no charges were filed against Bright. Later, she heard that Gerald Nelson had been bragging that he had raped her. Police interviewed Nelson in 1985 but decided not to file charges against him. The case lay dormant for many years until the grant money made DNA testing possible on cold cases, and the DNA testing identified Walker as the likely perpetrator.

The jury convicted Walker of the first-degree burglary charge and one count of first-degree rape but acquitted him of the other count of first-degree rape and the first-degree robbery charge. Following the jury's recommendation, the trial court sentenced

him to twenty years' imprisonment for each conviction, to run consecutively for a total of forty years' imprisonment.

II. ANALYSIS.

A. Trial Court Properly Denied Motion to Dismiss Based on Pre-Indictment Delay.

We find no error in the trial court's denial of Walker's motion to dismiss due to lengthy pre-indictment delay. Kentucky law does not have a statute of limitations on the prosecution of felonies.[3] And pre-indictment delay cannot constitute a violation of the constitutional right to a speedy trial since this right is only implicated when the defendant is under indictment.[4] We recognize that "unjustified and prejudicial preindictment delay may constitute a violation of due process and require dismissal"; however, "dismissal is required only where there is both substantial prejudice **and** an intentional delay to gain tactical advantage."[5]

We conclude that the trial court properly denied the motion to dismiss for the long pre-indictment delay in light of the absence of proof that the Commonwealth intentionally delayed for a tactical advantage the prosecution of the case against Walker. We note that the facts show that the police actively investigated the crime in the months following its commission, although its initial leads apparently led nowhere. The case remained unsolved for many years until grant money and advances in

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3 KRS 500.050 (1) ("Except as otherwise expressly provided, the prosecution of a felony is not subject to a period of limitation and may be commenced at any time.").

4 Kirk v. Commonwealth, 6 S.W.3d 823, 826 (Ky. 1999).

5 *Id.* (*citing, e.g.*, Reed v. Commonwealth, 738 S.W.2d 818, 820 (Ky. 1987) (emphasis added)).

technology allowed the Commonwealth to compare evidence in its "cold cases" to the DNA profiles of convicted sex offenders.

But even after his convicted offender sample was found to match the DNA profile compiled from the evidence collected in this case, Walker contends that "no action was taken on this information until over a year later," resulting in a further delay. Approximately one year after the match was made, a search warrant was executed to allow a blood sample from Walker. And Walker does not show that this additional one-year delay in executing the blood draw was intentional for the purpose of causing a tactical advantage.

It appears questionable whether Walker has established "substantial prejudice." Walker claims that the delay hindered his defense because he was

- unable to "develop a theory concerning an alternative perpetrator" because he was unable to locate or interview C.A.M.'s landlord at the time of the incident, who possibly had told her that someone had broken into and ransacked her apartment a few weeks later, leaving behind a butcher knife;

- unable to interview C.A.M.'s next door neighbor, who was the first person to observe and speak with C.A.M. after the incident, since this neighbor had died during the ensuing twenty years;

- unable to interview Victor Bright due to his death,[6] who could have been part of his defense concerning an alternative perpetrator; and

- hampered by the degradation of DNA evidence since "[e]arlier testing would have increased the odds of producing full DNA profiles and possibly provided exculpatory evidence to Raymond Walker."

But Walker does not specifically establish that being able to interview these now unavailable witnesses or that earlier availability of DNA testing would have materially

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[6] According to Walker, Bright was murdered; and his murder remains unsolved.

aided his defense.[7] Rather, he only speculates that perhaps he might have discovered some potentially exculpatory evidence if he had been indicted earlier.

The trial court acted properly in denying the motion to dismiss for pre-indictment delay in light of the lack of showing of either intentional delay or substantial prejudice.

B. Trial Court Acted Properly in Denying Walker's Directed Verdict Motion Based on Lack of Evidence of Victim's Resistance.

Walker argues that the trial court erred in denying his directed verdict motion because there was no evidence of the victim's "earnest resistance," which he argues was necessary for a conviction of first-degree rape under 1984 law. We disagree. Even under the law in 1984, the victim's resistance was not an element of the crime; rather, forcible compulsion, which was defined as force or threats which "overcome earnest resistance," was an element of the crime then, as it is now.

KRS 510.040(1)(a) provided then and now that: "A person is guilty of rape in the first degree when . . . [h]e engages in sexual intercourse with another person by forcible compulsion[.]" In 1984, KRS 510.010(2) defined "forcible compulsion" as:

> [P]hysical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.[8]

But even under this definition of forcible compulsion, the victim's resistance is not required if resistance would be useless or dangerous.

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[7] United States v. Lovasco, 431 U.S. 783, 785-86, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977) (noting that defendant failed to establish how witnesses who had died during pre-indictment delay would have aided the defense with their testimony). Ultimately, the Supreme Court decided that the indictment had been improperly dismissed due to pre-indictment delay. *Id.* at 797.

[8] 1974 Ky. Acts Chapter 406 § 81(2).

For example, in Howard v. Commonwealth,[9] this Court held that forcible compulsion—an element of the charge in that case, forcible sodomy—was sufficiently proven under the same definition of "forcible compulsion" in spite of Howard's contention that there was no showing of resistance by the victim:

> Here the prosecuting witness testified he was convinced that the appellant was armed with a pistol during the incident and that he had been threatened by the appellant that ". . . he was going to kill me if I didn't do what he told me to do." He further testified that in committing the offense, the appellant grabbed him by the throat and hit him in the back of the head. This testimony sufficiently proves the "forcible compulsion" element of the offense, and the motion for directed verdict of acquittal was therefore properly denied.[10]

In so holding, the Howard court quoted commentary indicating that "earnest resistance" requires "more than token initial resistance but less than a showing that the victim was physically incapable of additional struggle against his assailant" but that "[w]here additional struggle would obviously be useless and dangerous, the failure to struggle should not absolve the accused."[11]

Under the 1984 law, Walker was not entitled to a directed verdict of acquittal as a result of the victim's alleged lack of active resistance. Due to the assailant's being armed with a butcher knife and threatening to kill her, the victim's lack of active resistance would not absolve the accused because a struggle would obviously be useless and dangerous.[12]

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9 554 S.W.2d 375 (Ky. 1977).

10 *Id.* at 379.

11 *Id.*

12 *Id.* at 375.

C. Trial Court Did Not Err By Failing to Define Earnest Resistance in Jury Instructions.

Walker also complains that the trial court's jury instructions erred by not using the "earnest resistance" language contained in the 1984 version of KRS 510.010(2). Instead, the instructions stated that forcible compulsion "[m]eans physical force or threat of physical force, express or implied, which places a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped."[13] So the instruction defining "forcible compulsion" effectively followed the current version of the statute except that it omitted the statement that "[p]hysical resistance on the part of the victim shall not be necessary to meet this definition[.]"[14]

Under RCr 9.54(1), "[i]t shall be the duty of the court to instruct the jury in writing on the law of the case[.]" And in accordance with constitutional requirements barring ex posto facto laws, the law in place at the time of commission governs.[15] For the case at hand, a better instruction concerning "forcible compulsion" would have tracked the 1984 statutory language: force or threat of force which "overcomes earnest resistance."[16]

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[13] The instructions also defined "physical force" as "force used upon or directed toward the body of another person."

[14] KRS 510.010(2) was amended in 1988 to remove the requirement that the force or threat employed "overcomes earnest resistance." 1988 Ky. Acts Chapter 78 § 1(2). It was amended again in 1996 to explicitly state that "[p]hysical resistance on the part of the victim shall not be necessary to meet this definition." 1996 Ky. Acts Chapter 300 § 2(2).

[15] Commonwealth v. Morris, 142 S.W.3d 654, 662-63 (Ky. 2004) (declaring killing of unborn child within manslaughter definition prospectively but declining to apply newly broadened definition to that case because such was not the law at time of commission).

[16] *See* Price v. Commonwealth, 2003 WL 21993641 at *8 (Ky. 2003) (approving the trial court's instructions to the jury as to pre-1988 charges requiring a finding of "forcible compulsion" meaning "physical force that overcomes earnest resistance by placing a person

But Walker did not tender or request an instruction defining "forcible compulsion" using the 1984 statutory language. Instead, he tendered an instruction defining "physical force," which was not defined then—nor is it defined now—in KRS Chapter 510.[17] In declining to use Walker's tendered instruction defining "physical force," the trial court noted that "physical force" was not defined in sexual offense statutes or in the version of Palmore's Jury Instructions in effect in 1984.[18]

The trial court made a comment to the effect that "forcible compulsion" might have been different back in 1984, but Walker did not follow up on this comment to insist that the 1984 definition of "'forcible compulsion" should appear in the jury instructions. He did make an argument that the victim's resistance was required under 1984 law; but, as previously discussed, such resistance was not required if it would be useless or dangerous according to our case law interpreting the language defining the "forcible compulsion" statute as force or threats which overcome "earnest resistance."[19]

Although Walker might have had a better chance of prevailing in this appeal had he tendered a proper instruction defining "forcible compulsion,"[20] the instruction he

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in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.").

17 The trial court's definition of "physical force" comes from KRS 503.010(4), which pertains to justification defenses and which has not changed from 1984 to the present.

18 1 Palmore, John S. & Robert G. Lawson, *Kentucky Instructions to Juries (Criminal)* § 2.31 (1975) (Rape and Sexual Abuse—by Force) (which does not contain a definition of "physical force" but which defines "[f]orcible [c]ompulsion" as "physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury [to herself (or another person)] [in fear that she (or another person) will be immediately kidnapped].") *But see id.* at § 10.01 (defining "physical force" in self-defense instruction as "force used upon or directed toward the body of another person.").

19 Howard, 554 S.W.2d at 375.

20 Due to Walker's failure to preserve the issue of the correct statutory definition of forcible compulsion, we do not reach the issue of whether the trial court's failure to utilize the

tendered was not an accurate statement of applicable law and did not preserve the issue of correctly defining "forcible compulsion." The issue being insufficiently preserved for our review, we may only grant relief upon a "determination that manifest injustice has resulted from the error."[21] Given the proof that the perpetrator wielded a butcher knife, threatened the victim's life, covered her face with a pillow and hit her—proof which was sufficient to support the conviction even under 1984 law—we simply cannot conclude that any "manifest injustice" has resulted from any error in the trial court's failing to define "forcible compulsion" according to the applicable 1984 statutory definition requiring force or threats which overcome "earnest resistance." Thus, Walker is not entitled to relief on this ground.

D. The Trial Court's Instructions Did Not Remove the Presumption of Innocence nor Shift the Burden of Proof to Appellant.

In separate instructions concerning all four charged offenses,[22] the trial court instructed the jury to find the defendant guilty of each charged offense "if, and only if, you believe from the evidence beyond a reasonable doubt all of the following" elements of each charged crime. Walker objected to this instruction and requested that the trial court instead instruct the jury to find him "not guilty" of each offense "unless you believe

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1984 statutory definition of forcible compulsion constituted error in this case. Even if it were error, the issue would be subject to harmless error analysis. Thacker v. Commonwealth, 194 S.W.3d 287, 291 (Ky. 2006) (*citing* Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

[21] RCr 10.26. *See also* RCr 9.54(2) ("No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.").

[22] Walker was charged with two separate counts of first-degree rape, one count of first-degree burglary, and one count of first-degree robbery.

from the evidence alone and beyond a reasonable doubt all of the following" elements. He contends that the trial court's instructions "severely dilut[ed] the presumption of innocence and burden of proof."

While Walker's tendered instructions more closely resembled the model introductory instructions found in the current edition of Cooper's jury instructions handbook,[23] such model instructions are not binding upon the courts. And we have previously held that instructions to find a defendant "guilty if and only if" all elements of a crime are satisfied are not improper, especially where the jury is instructed on the presumption of innocence,[24] as the jury was in the instant case.

Walker is not entitled to relief on this ground.

E. The Trial Court Did Not Err in its Rulings Concerning the Testimony of Witnesses Warnecke and McKinney.

Walker contends that he was deprived of a fair trial due to the presentation of evidence that suggested and/or stated that he was a convicted sex offender and that he was serving a prison sentence at the time his blood sample was drawn for DNA comparison. We disagree.

Shortly before trial, the trial court granted Walker's motion in limine to prohibit mention that his DNA profile existed because he was a convicted sex offender. During trial, Walker cross-examined a Commonwealth witness, Stacy Warnecke, supervisor of the DNA database at the KSP Forensic laboratory, about the importance of following established protocols when collecting and analyzing DNA evidence. In particular,

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[23] 1 Cooper, William S., *Kentucky Instructions to Juries (Criminal)* §§ 2.01A-2.01D (5th ed. 2006).

[24] Patterson v. Commonwealth, 2007 WL 541923 at **7-8 (Ky. 2007); Warren v. Commonwealth, 2007 WL 541918 at *6 (Ky. 2007).

Walker's counsel inquired about a particular item of information that was missing from the paperwork concerning Walker's DNA sample. Warnecke then responded in a way that Walker asserts violated the trial court's order and deprived him of a fair trial:

> This particular sheet is, it's a DNA information sheet that is used for convicted offender testing. I am in charge of the DNA offender database, and we have kits that are used for collecting offenders' [DNA]. We have kits that are used for collecting suspects' [DNA]. And kits that are used for collecting victims' [DNA]. And sometimes the agency may just use one of those other kits because it has the appropriate blood tube in it, and that's fine. But, this particular paperwork is not the piece of paperwork that I needed for submission for case work. This would have been a piece of paperwork I would have needed for an offender because all offender samples come in with this particular piece of paperwork because it's associated with that particular kit.

Immediately following this statement, Walker's counsel approached the bench and moved for a mistrial. The trial court denied the mistrial motion but granted Walker's request and admonished the jury concerning Warnecke's testimony, stating to the jury:

> Ladies and Gentlemen of the jury, any reference that this witness made to an offender packet, that offender is not to be attributed to Mr. Walker in any manner and should be disregarded, too, by you. Thank you.

Walker contends that the trial court erred in denying his motion for a mistrial. We disagree. "A mistrial is an extreme remedy to be utilized **only** when the record reveals a 'manifest necessity' for such action."[25] And the trial court's ruling on a mistrial motion should not be disturbed absent an abuse of its discretion.[26] Given Warnecke's answer, which did not directly state that Walker was an offender, we conclude that the trial court did not abuse its discretion in denying the mistrial.

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[25] Turner v. Commonwealth, 153 S.W.3d 823, 829 (Ky. 2005) (*citing* Kirkland v. Commonwealth, 53 S.W.3d 71, 76 (Ky. 2001) (emphasis added)).

[26] Moody v. Commonwealth, 170 S.W.3d 393, 397 (Ky. 2005).

Furthermore, the jury is presumed to have followed the trial court's curative admonition.[27] "There are only two circumstances in which the presumptive efficacy of an admonition falters: (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.'"[28] The second exception was not applicable here since defense counsel's question had a factual basis and was not inflammatory. And the witness's answer had a factual basis that was not inflammatory or highly prejudicial given its somewhat ambiguous nature and the fact that the witness did not actually identify Walker as a convicted sex offender. In light of this ambiguity and the lack of direct prejudicial effect, the first exception is not met either because there is no "overwhelming probability that the jury will be unable to follow the court's admonition" or any "strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant[.]"

So we find no error in the trial court's denial of the mistrial motion following the statement by Warnecke, especially in light of the curative admonition.

Immediately after the trial court's resolution of the issue concerning Warnecke's testimony, the entire deposition testimony of Sandra McKinney, the nurse at the Green River Correctional Facility (GRCC) who had collected Walker's blood sample for DNA analysis, was presented to the jury via videotape. McKinney was out of state during the trial and unable to testify live. Walker argues that the trial court erred by allowing the jury to hear McKinney's testimony on re-direct in which she stated that she was familiar

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[27] Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002).

[28] Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (citations omitted).

with Walker, who was an inmate at GRCC, the prison where she worked. But, after carefully examining the record, we conclude that the trial court did not err in doing so.

At the deposition, McKinney testified on direct by the Commonwealth that she was employed at a "medical facility." "Medical facility" was the agreed-upon sanitized term that McKinney was instructed by agreement of counsel to use when referring to GRCC. She also testified on direct to taking the blood sample under court order, and to having positively identified Walker before drawing his blood.

On cross-examination, Walker's counsel pressed McKinney about the importance of following established protocol and asked why Walker's thumbprints did not appear on the DNA information sheet since the form specifically required them. McKinney testified that Walker's thumbprints were taken that day because she always took thumbprints after taking a sample, but they must not have been placed on that particular form.

In an effort to rehabilitate the witness, the Commonwealth then asked McKinney on re-direct how long she had been a nurse at the "Green River facility" and whether the Green River facility was a "prison/correctional facility," prompting Walker's counsel's objections to both questions. McKinney answered the second question in the affirmative. The Commonwealth asked if one purpose of taking thumbprints was to verify the identity of the person providing the sample, and she responded affirmatively. Then the Commonwealth asked if she was satisfied that she had drawn Walker's blood that day based on his prison file and her familiarity with him. Again, she responded in the affirmative.

Before any of McKinney's videotape was played for the jury to hear, Walker asked the trial court to exclude the Commonwealth's re-direct containing McKinney's reference to the Green River facility and to Walker's status as an inmate there. But the trial court stated that it would only exclude the re-direct of McKinney if Walker agreed to exclude the cross-examination of McKinney that raised the question concerning the accuracy of the form. The basis for this ruling, according to the trial court, was to allow the Commonwealth to rehabilitate its witness after Walker effectively raised the specter of possible misidentification of the person from whom the blood sample was taken.

Walker declined the trial court's offer and opted to allow the presentation of this re-direct evidence to the jury so that the jury could also hear the cross-examination. But he again objected to the admission of deposition testimony referencing the correctional facility. The trial court overruled the objection and played the entire deposition videotape to the jury. Although the trial court offered Walker a jury admonition on this point, Walker later withdrew the request for an admonition, apparently in fear that it would draw more attention to his prior imprisonment. He moved for a mistrial, which the trial court denied.

Walker contends that McKinney's identification of him as an inmate was not necessary to establish her familiarity with him and made it impossible for the jury to try him "solely on the question of his guilt of the offense charged in the indictment."[29] The potential prejudicial effect of admitting McKinney's statement concerning Walker's inmate status[30] could have been ameliorated by the curative admonition that the trial

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[29] Lantrip v. Commonwealth, 713 S.W.2d 816, 817 (Ky. 1986).

[30] *See* Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999) (stating that where a witness referred to the defendant being incarcerated on a prior charge, an admonition cured the

court offered; thus, there was no manifest necessity for a mistrial, and the trial court did not abuse its discretion in denying his motion for a mistrial.[31] Nor do we find any abuse of discretion in conditioning admission of the cross-examination on admission of the re-direct examination.[32] Once Walker "opened the door" to the circumstances under which his sample was obtained by challenging the witness concerning the absence of thumbprints, effectively challenging the identification, the prosecution was entitled to "rehabilitate" her by referring to the circumstances of the identification. In our view, the trial court fairly balanced the parties' interests by allowing Walker the option either to present both his cross-examination with the Commonwealth's re-direct examination or to present neither. And for added measure, the trial court offered Walker an admonition.

Having found no error on the part of the trial court regarding the admission of these two statements of Warnecke and McKinney, we further reject Walker's argument that the combined effect of these statements deprived him of a fair trial or merited relief under the standard set out in Johnson v. Commonwealth.[33]

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error and trial court properly denied motion for mistrial). Foreign authority also recognizes that admission of testimony about a defendant's prior incarceration may have an unduly prejudicial effect, although this can be corrected by an instruction/admonition to disregard and is not so prejudicial as to require a mistrial. *See* Ruger v. State, 941 So.2d 1182 (Fla. Dist. Ct. App. 2006). We have recognized that in some situations, evidence of prior incarceration may be properly admitted if relevant for some purpose other than just bad character/habits/ criminal disposition. Major v. Commonwealth, 177 S.W.3d 700, 708 (Ky. 2005) (holding that evidence that defendant was incarcerated when he confessed murder was properly admissible since it provided a context and setting for the confession).

31 Combs v. Commonwealth, 198 S.W.3d 574, 582 (Ky. 2006).

32 *See generally* KRE 611(a)(1) & (b) (regarding trial court's duty to exercise reasonable control over mode of examining witnesses in the interest of "the ascertainment of the truth" and power to limit cross-examination).

33 105 S.W.3d at 441.

III. CONCLUSION.

For the foregoing reasons, the judgment is AFFIRMED.

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, Schroder, and Scott, JJ., concur.

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