# 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# NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED



# Supreme Court of Kentucky

2006-SC-000745-MR

MICHELLE NAPIER — APPELLANT

V.

ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE RON JOHNSON, SPECIAL JUDGE
NO. 02-CR-000035

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Michelle Napier, appeals her September 1, 2006, Judgment and Sentence in the Whitley Circuit Court, as a matter of right pursuant to Ky. Const. § 110(2)(b), of the charge of complicity to commit the murder of Roger Arthur "Cotton" Adams on October 7, 1984, wherein she was sentenced to a term of twenty years. She now asserts that the Whitley Circuit Court erred by (1) overruling her motion for a directed verdict, and (2) in not allowing, or taking appropriate corrective measures regarding two comments by one of the Commonwealth's witnesses, while on cross-examination, that the witness had taken a lie detector (polygraph) test. For the reasons set out herein, we affirm the conviction.

## I. Facts

On March 11, 2002, the Whitley County Grand Jury issued an indictment charging James Wesley Napier (Napier) with murder and Appellant, Michelle

Napier, with Complicity to Commit Murder, for the October 7, 1984, shooting death of Roger "Cotton" Adams (Adams). At the time of the shooting, Appellant was dating Napier. They were married approximately six months later. At Appellant's request, she and Napier were tried separately, with Appellant having been tried first.

Appellant was twenty-three (23) in October of 1984. Her sister, Sherri Long (Sherri), was nineteen (19). At the time, Sherri was dating Adams and living in a motel room with Adams, Martin Monholland (Monholland),[1] and Marvin Luttrell (Luttrell).

According to Monholland, on October 4, 1984, he and Adams were just outside the open door to the motel room working on a car when they heard a gunshot from the motel room. Monholland immediately ran inside and found Sherri, who he believed, had shot herself in the right temple. Luttrell was in the bathroom. Monholland then called the police. Marilyn, Sherri and Appellant's mother, later testified, however, that Sherri was left handed. However, no charges were filed in Sherri's death as it was treated as a suicide.

Shortly after Sherri's funeral, *Adams disappeared.* His body was found several weeks later by a fisherman in Cabin Creek. He had been shot once in the forehead and his body was wrapped in chains. Years later, on February 19, 2002, Appellant was interviewed by Joie Peters of the Kentucky State Police. The tape of that interview was played in full for the jury during the trial.

In the interview, Appellant acknowledged that she believed someone murdered Sherri, noting that Sherri was left-handed, yet she was shot in the right

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[1] Appellees' brief refers to Monholland as "Arthur Nicholas Monholland," while Appellant refers to him as "Martin Monholland."

temple, with no powder burns on her hands and no fingerprints on the gun. She thought that one of the three persons present had killed her. She noted that Adams did not come to the funeral, but admitted that after she and Napier left the cemetery following Sherri's burial, they saw Adams, stopped and asked him if he wanted to see Sherri's grave, which he did, so they drove him back to the cemetery.

When they got to the cemetery, she walked to Sherri's grave. Adams, however, did not follow her. Then, as she knelt by the grave, she heard a "pop," looked back and saw Napier standing by his white Lincoln Town car with the door open. He told her to "come on." When she got to the car, Napier said to her, "are you okay with it?" She looked in the back seat and saw Adams dead. She thought Napier had a .38 caliber pistol.

When the officer asked her again what Napier had said, she repeated that he had asked her if she was "okay with it" because "if you're not, I'll have to do you too." She indicated that she said, "[she] was okay with it, because [she] was afraid." According to her statement, Napier then dropped her off at a woman's house, whose name she could not recall, and she ultimately ended up at her mother's house. She also stated that Napier later got Ed Sizemore (Sizemore) to clean the car up. Sizemore testified at trial as to his attempts to clean the car and the assistance he gave Napier in disposing of Adams' body.

Appellant noted that she was not married to Napier at the time, of the alleged murder, but married him later when she was pregnant and he was in jail. She said they were still married, but she wanted a divorce, so she could have a real marriage, but acknowledged she would then have to testify against him.

She also stated that a few months before the interview, Napier had come to see her and took her to Williamsburg to his sister's house, where his sister tried to get her to say that she had committed the murder, reasoning that since Napier had money, he could take care of her daughter (who was living with him) better than she could; however she refused. She also reiterated that she was afraid of Napier and that when he found out that she had given a statement, "[she] would be dead, or her mother would be, or somebody." Napier did not testify at Appellant's trial.

Officer Powers testified that Appellant did appear to be afraid of Napier during the interview. He also testified that Napier drove up during the interview, but fled before he could arrest him. He was arrested later in 2005, approximately a year before the trial, in August 2006.

Sizemore testified that he drove a truck for Napier and, at various times, had been related to him through several marriages. He testified that in October 1984, Napier brought his white Lincoln Town car to him and asked him if he would clean it up and he agreed. He believed it was late at night. At the time, he noticed that Napier had what appeared to be spots of blood on his pants, which Napier said was rust.

Although he at first testified that "Marilyn" (Appellant and Sherri's mother) was with Napier that night and that it was his "understanding that she had dropped him off, then came back later and picked him up," the Commonwealth pointed out "Marilyn" was Appellant's mother, then reiterated the question, asking if Appellant was with Napier that night when he came to see him. Sizemore then answered, "yes."

Sizemore testified that he left town for a little while, but when he got around to cleaning the car a couple of days later, it was in Napier's mother's driveway. There was a mess in the floor and under the mat. When asked what it looked like, he testified "flesh" and added, "[w]hat was left of a man's head, I guess." He testified he tried to clean it up, but could never get rid of the foul smell and worked on it for two days, but never opened the trunk.

At one point, he overheard Appellant state to Napier's sister, Carol, that there was a body in the trunk, that it was Adams' body and that she had killed him. According to Sizemore, she said she had reached across the back seat and shot him. Napier, however, told Sizemore that *he had killed* Adams and put him in the trunk.

Sizemore said that Napier later suggested that they get rid of the body and Sizemore suggested the place to dispose of it. He then described how he and Napier had gotten rid of the body, wrapping it with a logging chain and dumping it in the water at a fishing hole in Cabin Creek, where he used to fish.

Monholland, who testified about Sherri's death, also testified that he went to the funeral home the night before her funeral and while there, Napier wanted him to go outside and talk, but he did not go. He became concerned and had his sister bring the car around and they left. He also noted that when he entered the funeral home, he heard Appellant screaming. He assumed it was because he was there. While there, Appellant, however, did not approach him, only Napier.

Monholland did testify, however, that Napier and Appellant followed him and his sister in the white Lincoln Town car when they left. After a while, however, he pulled his car over onto the shoulder and got out holding his gun.

Napier drove on by. He acknowledged that he did not attend the funeral for Sherri, since he "knew not to."

The last time he saw Adams was the night before they were supposed to go to court on a public intoxication (PI) charge, which apparently was the Monday following Sherri's Sunday funeral. He went to Adams' motel that morning to get him to go to court, but no one answered the door. Once he got the motel operator to let him in, he looked in the room. Adams was not there and his bed had not been slept in.

Larry Adams, Adams' brother, testified that he also visited the funeral home before Sherri's funeral. When he was leaving, headed for his car, he overheard Appellant tell Napier, "[that's] not [Adams] that's his brother." To him, it was an eerie experience as they were "staring holes through him."

The next day Larry received a phone call from Appellant and Sherri's mother. About halfway through the conversation, based upon what she said, he immediately felt Adams was dead. Larry then tried to locate his brother and the next day called the police. He testified later on rebuttal, that Marilyn, in this tearful telephone conversation had told him "I'm so sorry they have hurt your brother . . . [he] didn't deserve that."

The Commonwealth also called Dr. George Nicholls, a forensic pathologist, who had performed the autopsy on Adams. Dr. Nicholls testified that Adams was killed by a .38 caliber bullet which struck him in the head. He found an additional bullet in Adams' diaphragm, but noted that it had been from a previous shooting, possibly a long time prior to the date of his death. He did not find any corresponding gunpowder residue around the bullet wound to the head,

nor was there any suet present around the skin. Therefore, he believed the muzzle to target distance of the gunshot exceeded the length necessary to produce gunpowder residue and suet. He did not state his belief as to the actual distance.

Several other witnesses testified for the Commonwealth to other aspects of the case. However, their testimony is not relevant to the errors alleged herein. Both sides stipulated that the cemetery where the shooting allegedly occurred was in Whitley County.

## II. Analysis

### A. The trial court was correct in overruling Appellant's Motion for a Directed Verdict

Appellant first argues that the trial court erred in overruling her motion for a directed verdict on the charge of complicity to commit murder. However, on a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991), and if the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Id. Manifestly, "[i]f the totality of the evidence is such that the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient, albeit circumstantial." Hodges v. Commonwealth, 473 S.W.2d 811, 813-14 (Ky.1971).

Under KRS 503.020(1), a person is guilty of an offense committed by another person when, "with the intention of promoting or facilitating the

commission of the offense, he [or she]: . . . [a]ids, counsels, or attempts to aid such person in planning or committing the offense . . . ." Pursuant thereto, the jury was instructed that it could find Appellant guilty of complicity to commit murder, if it believed beyond a reasonable doubt, all of the following:

> A. That in this county, on or about the 7th day of October, 1984 . . . she aided and assisted James Wesley Napier in shooting Roger Arthur Cotton Adams with a gun;
>
> B. That in so doing she intended to cause the death of Roger Arthur Cotton Adams;
>
> C. That under the circumstances as she believed them to be, the defendant's actions constituted a substantial step in a course of conduct planned to result in the death of Roger Arthur Cotton Adams . . . .

Admittedly, one's mere presence at the scene of a crime is insufficient to prove one's guilt. See Moore v. Commonwealth, 282 S.W.2d 613, 615 (Ky. 1955). However, the evidence here established much more than a presence.

Appellant's own statement established that she thought one of the three men present in the motel room had killed her sister. Adams was her sister's boyfriend and one of the three. When one of the three, Monholland, attempted to go to the funeral home the night before the actual funeral, he was approached by Napier who wanted to talk with him. Fearing that Napier was going to harm him, he asked his sister to get the car and they left, yet were followed from the funeral home by Napier and Appellant in Napier's white Lincoln Town car. When Monholland stopped the car and got out with his gun, Napier and Appellant drove on by.

Larry Adams, the deceased's brother, gave similar testimony to the effect that when he went to the funeral home he saw Napier and Appellant and testified

to hearing Appellant say to Napier when he was leaving "that's not [Adams], that's his brother." Even so, Appellant and Napier followed him to his car, staring "holes through him." To him, it was an eerie experience.

Appellant testified that although Adams did not show up at the funeral, she and Napier saw him as they left the cemetery, stopped and asked him if he wanted to see Sherri's grave. They then drove Adams back to the cemetery where, according to the Appellant, Napier shot him in the car while she was at Sherri's grave. Napier then told her to "come on" (back to the car) and then asked her "are you okay with it?" According to Appellant, she said she was, but only because she was afraid Napier would kill her too.

Appellant then testified that Napier dropped her off at "some woman's house," whose name she could not recall, and that she later ended up back at her mother's. Sizemore, however, testified that Napier came to his house to ask him if he would clean up Napier's white Lincoln Town car for him, which he later testified he did and Appellant was with him. He also testified that he overheard Appellant telling Napier's sister, Carol, that there was a body in the trunk of the car, that it was Adams' body and that she had killed him – specifically, that she had reached across the back seat and shot him. Sizemore later assisted Napier in disposing of the body in Cabin Creek.

Several months after Adams' death, Appellant married Napier. Admittedly, she told Officer Powers that she was afraid of Napier, that she wanted a divorce so she could have a real marriage, but notably, these statements were made almost *eighteen years* after Adams' death.

Viewed in a light most favorable to the Commonwealth, we find no error in the trial court's denial of Appellant's motion for a directed verdict on this evidence. In her brief, Appellant challenges the credibility of the prosecution's witnesses, arguing, for example, that she was only a passenger in Napier's car. However, her argument as to how she believes the jury ought to have viewed the evidence does not change its totality. That evidence, when viewed in a light most favorable to the Commonwealth, supports a finding that Appellant and Napier took the victim to the location where he was killed, that Appellant and Napier removed the victim's body from the scene of the crime and Appellant herself – who was known to carry a gun, even claimed responsibility for the victim's death, albeit Napier did too.

"[I]ntent may be inferred from the actions of a defendant or from the circumstances surrounding those actions." Marshall v. Commonwealth, 60 S.W.3d 513, 518 (Ky. 2001). Moreover, a complicity conviction can be based exclusively upon circumstantial evidence. Slone v. Commonwealth, 677 S.W.2d 894, 896 (Ky. App. 1984). In this instance, under the evidence as a whole, it was not clearly unreasonable for a jury to find Appellant guilty of the charged complicity offense. See Benham, 816 S.W.2d at 187. Thus, we find no error.

**B. Appellant's Due Process rights were not violated in this instance by a witness' comments during cross-examination by Appellant's counsel, that he "took a lie detector (polygraph) test"**

Appellant asserts that the comments by Monholland, while under cross-examination by Appellant's counsel, that he had taken a lie detector (polygraph)

test violated Appellant's due process rights. On two separate occasions, Monholland voluntarily offered that he had taken a lie detector (polygraph) test. In the first instance, the colloquy occurred as follows:

> Defense Counsel: Do you remember talking to Colan Harrell about this case in October of 1987?
>
> Monholland: That might have been when I took a lie detector, I don't know
>
> Defense Counsel: May we approach Your Honor?
>
> Judge: You may.

During the bench conference, Appellant's counsel suggested to the court that Monholland had, in fact, not passed the test, or at least had never completed it, and requested permission to cross-examine him on this point. The court, observing the testimony to be "troublesome ground," denied the request stating "we're not getting into the results of the lie detector test." After further discussion, the court stated that it did not want either side to mention it.

When cross-examination resumed, however, the reference occurred again, as follows:

> Defense Counsel: So you [have] been interviewed by Colan Harrell, do you recall, more than once, is that fair to say?
>
> Monholland: Yes, I [have] been interviewed several times. I even took a lie detector test over there.
>
> Judge: Alright.
>
> Defense Counsel: We heard you the first time.
>
> Judge: Let's, I don't want anyone to use the word lie detector test again. Do not refer to it.
>
> Monholland: Polygraph?

Judge: Polygraphs are not admissible in court. So that, that's the end of it. If there's further admonitions requested I'll give them. Any further admonitions requested?

Prosecutor: Your Honor, I think you made it real clear.

Defense Counsel: I think you did, Judge.

Judge: Alright.

Other than the comments by Appellant's two counsel at the bench conference to the effect that Monholland had in fact failed the lie detector test, or in the alternative, had failed to complete it, no avowal was requested or made as to what his testimony would have been in regards to passing, failing, or failing to compete, the lie detector test. Nor were any further admonitions requested of the court, even though the court indicated it would give further admonitions if requested. Neither was a mistrial requested.

Appellant asserts her "due process" arguments were "partially preserved for review," by the requested bench conference following the first reference by Monholland. Appellee disagrees.

**a. The trial court did not err in denying Appellant the right to cross-examine Monholland on his comment about his lie detector test**

Appellant's request at the bench conference to be allowed to cross-examine Monholland in regards to his comment about his lie detector test and the court's subsequent denial thereof would, under normal circumstances, be sufficient to preserve this issue in regards to the court's denial. However, under the rules of evidence applicable at the time, where the ruling was one excluding evidence, the requesting party had to make an offer of proof by avowal. KRE 103(a)(2) (1996). "Counsel's version of the evidence [was] not enough. A

reviewing court must have the words of the witness." Noel v. Commonwealth, 76 S.W.3d 923, 931 (Ky. 2002) (citing Partin v. Commonwealth, 918 S.W.2d 219, 223 (Ky. 1996) (overruled on other grounds by Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008)).). In this instance, Appellant's counsel disagreed between themselves as to what they believed Monholland's answers would have been; with one believing he had failed the test and the other indicating he just did not complete it.

We note, however, that effective May 1, 2007, this court amended KRE 103(a)(2) to allow preservation, if "the substance of the evidence was made known to the court by offer" from counsel. Yet, in this instance, were we to apply the rule as amended, with Appellant's counsel disagreeing among themselves as to what the evidence would be, we still could not say that a valid "offer of proof" was made.

The question of preservation aside, however, this court long ago held that evidence of lie detectors, or polygraph examinations, are inadmissible in Kentucky. Conley v. Commonwealth, 382 S.W.2d 865, 867 (Ky.1964). "This court has held repeatedly and consistently that it does not . . .consider such evidence scientific or reliable." Ice v. Commonwealth, 667 S.W.2d 671, 675 (Ky. 1984). "We have not only excluded the evidence of polygraph examiners, but excluded mention of the taking of a polygraph, *the purpose of which is to bolster the claim of credibility or lack of credibility of a particular witness or defendant.*" Id. (citing Perry v. Commonwealth, 652 S.W.2d 655 (Ky. 1983)) (emphasis added).

In Conley, we reversed when evidence of the lie detector (polygraph) results were introduced pursuant to the defendant's written consent. In Ice, we reversed when evidence was introduced as to the lie detector results of witnesses against the defendant specifically bolstering their testimony given at the trial. In Perry, we admonished the trial court, on retrial, not to permit a party in a paternity action to testify he "took a polygraph test," as, "[i]n reply to his own counsel's question [he] said that there was no doubt in his mind that he was the father of the child because '. . . I even went on my own and took a lie detector test.'" Perry, 656, S.W.2d at 661-62.

In Morgan v. Commonwealth, 809 S.W.2d 704 (Ky. 1991), a polygraph examiner described the room in which Appellant had given an incriminating statement, noting a desk, two chairs, a two-way mirror and a polygraph instrument. We held that the reference to the polygraph was intentional and created a clear inference that *Appellant* had taken and failed a polygraph examination. Id. at 706. (emphasis added). Add in McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky. 1984), we explained that "[t]he mere mention of the words 'polygraph' or 'polygraph examiner' is not fatal, per se. There must arise a clear inference that there was a result and that the result was favorable, or some other manner in which the inference *could be deemed prejudicial*." Id. (emphasis added).

The colloquy in McQueen was:

> [Q] At that time you were in fact waiting to interrogate the Defendant Burnell and then decided not to; isn't that true?
>
> A At what point, sir?
>
> [Q] At the time that you interrogated Miss Rose-

A In Frankfort?

[Q] Yes, sir.

A No, sir, that was not my decision up there. The polygraph examiner said he could not-

THE COURT:

Mr. Estes, just confine it to yes or no.

A No, sir.

Id.

In Tamme v. Commonwealth, 973 S.W.2d 13, 33 (Ky. 1998), the witness uttered "this for a polygraph[?]" intending to indicate that the interview did not occur at the place referenced in the question, but at the state police polygraph laboratory. Relying upon McQueen, and the belief that the utterance within the context within which it occurred, could not be deemed prejudicial, we again noted "[t]he mere inadvertent utterance of the word 'polygraph' is not grounds for reversal." Id. It must be deemed "prejudicial." Id.

Again, in Garland v. Commonwealth, 127 S.W.3d 529, 545 (Ky. 2003) (reversed on other grounds by Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005)), we held that the mention of the fact that the Appellant had taken a polygraph test was not grounds for reversal, stating:

> This information was revealed during the testimony of defense witness Starling Douglas, Appellant's brother-in-law, who stated that Appellant had come to visit him three or four days after the murders "right after he had come from London from having polygraph tests done." Ms. Isgrigg, Appellant's ex-wife, also testified that Appellant came to her sister's house on the Monday after the murders "[w]hen he had to go for a polygraph test." Although polygraph evidence is inadmissible, in this case the inadvertent references came from defense witnesses upon examination by defense counsel. After the second mention of

> "polygraph," the Commonwealth objected, and the trial court admonished the witness not to say "polygraph." As the mere utterance of the word *without a prejudicial inference as to the result* is not grounds for reversal, Appellant's claim must fail.

(Internal citations omitted) (emphasis added). Thus, we clearly require that the reference must, within the context given, be prejudicial.

In this instance, the comments were made by the witness during cross-examination by Appellant's counsel; they were references to the fact that the witness had taken a lie detector (polygraph) test in 1987, yet no mention was made of the result.

Importantly, the context created by the questions asked and evidence introduced in this case, indicate that the lie detector (polygraph) test was taken of the witness in regards to events surrounding the death of Appellant's sister, Sherri, rather than the death of Adams, for which Appellant was on trial. This conclusion is compelled (even if erroneous) by the fact that the evidence in this case limited the people involved in the murder of Monholland's friend, Adams to two people, i.e., the Appellant by her own admission and the evidence of others, as to Napier, who Appellant fingered as the actual shooter.[2] This analysis is further buttressed by evidence establishing that Monholland was one of only three persons present with Sherri at the motel when she died. The jury, of course, was aware of this through the taped statement of Appellant that she believed that one of them killed Sherri, as well as the fact that Sherri died as a result of a gun shot wound to the right temple, though she was left-handed. Moreover, the jury was aware that her death was ultimately treated as a suicide.

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[2] Admittedly, we have not been provided with a transcript or the tape of this polygraph interview, yet it is the context and meaning to the jury which must be measured for prejudice.

Thus, were we to consider the issue preserved as to the court's denial of cross-examination as to these statements, notwithstanding the absence of an avowal, we would still not be disposed to find error, as any further "mudding of the waters" regarding his having taken a lie detector (polygraph) test in 1987, would only confuse and exacerbate immaterial issues. KRE 403.

In any event, we find no "manifest injustice," on these facts, and thus no "palpable error."

**b. There was no palpable error in the trial court not granting a mistrial or giving further admonitions *sua sponte***

As these issues were not raised before the trial court, RCr 9.22, they may only be reviewed under the "palpable error" rule, RCr 10.26. "Under RCr 10.26, 'an error is reversible only if a manifest injustice has resulted from the error.'" Yell v. Commonwealth, 242 S.W.3d 331, 340 (Ky. 2007) (citations omitted). "'To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.'" Id. (citations omitted). "For an error to be palpable, it must be 'easily perceptible, plain, obvious and readily noticeable.' A palpable error 'must involve prejudice more egregious than that occurring in reversible error[.]'" Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted). Thus, the alleged error must be "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." Id. (citing Soto v. Commonwealth, 139 S.W.3d 827, 873 (Ky. 2004).).

Appellant simply asserts here, that absent her right to cross-examine the witness as to the statements, the court should have *sua sponte* declared a

mistrial and/or given additional admonitions. In fact, the court after the second occurrence, admonished the witness, as well as counsel. "Let's, I don't want anyone to use the word lie detector test again. Do not refer to it." Thereafter, the court admonished the jury, "[p]olygraphs are not admissible in court. So that, that's the end of it. If there's further admonitions requested I'll give them. Any further admonitions requested?" No such request was made by counsel, nor was a mistrial requested. Moreover, nothing contained in RCr 10.26 precludes the wavier of "palpable error" or the waiver of a constitutional right. West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989).

Here, it is fair to conclude that the court even went so far as to prod Appellant as to what further admonitions she would desire. Thus, the fact that Appellant's counsel did not request any further admonitions, and did not request a mistrial, strongly suggests that counsel "believed the admonitions were sufficient, or despite the improper [comment], desired to have the jury as impaneled render a verdict in [her] case." Id. at 603. Thus, it "strongly suggests that defense counsel's failure to move for a mistrial was a tactical decision." Id. Thus, under the standards set out above, we are unable to conclude that the court's conduct under these circumstances is anywhere near the level required for "our intervention pursuant to RCr 10.26." Id.

## III. Conclusion

For the reasons aforesaid, Appellant's conviction is affirmed.

Minton, C.J., Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J., not sitting.

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