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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 19, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4/9/09 Kelly Klaber D.C.

2007-SC-00711-MR

DERWIN IVAN NICKELBERRY — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, JUDGE
NO. 04-CR-00184-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Derwin Ivan Nickleberry, appeals to this court his convictions of robbery in the first-degree and kidnapping, as a matter of right, pursuant to Ky. Const. § 110(2)(b). He was sentenced by a Daviess County jury to forty (40) years imprisonment.

Appellant claims two errors arose during his trial affecting his constitutional right to due process: first, remarks made during the Commonwealth's closing argument amounted to prosecutorial misconduct, denying him a fair trial; second, the trial court erroneously refused to hold a hearing after Appellant raised concerns about his trial counsel's performance after the close of evidence.

Finding no merit to Appellant's arguments, we affirm the ruling of the Daviess Circuit Court and uphold Appellant's conviction.

I. BACKGROUND

On the evening of August 15, 2003, employees working at a Blockbuster Video store in Owensboro, Kentucky were robbed by two African-American men at gunpoint. The two individuals left the scene with some $4,000 in cash and a number of video games.

On the evening of September 7, 2003, employees working at a Hollywood Video store in Owensboro were robbed at gun and knife point by two African-American men. Again, the two individuals left the scene with $1,500 in cash and some video games.

The victims of these two crimes had identical recollections of the men who robbed them. However, none of them were able to give an accurate description of their assailants. Eventually, Raymond Johnston, an employee of the Hollywood Video store, was able to identify Appellant from a photo lineup some months later. Johnston also identified Appellant in open court as one of the perpetrators.

Tommy Jerome Hardin was initially the only person charged with the crimes. Hardin eventually told authorities that Appellant was involved in both robberies, purportedly because he wanted "everyone responsible to own up." Hardin and Appellant had lived in the same apartment complex in Radcliff, Kentucky for approximately six or seven months during the period of the robberies. Hardin maintained that he

and Appellant were friends, but Appellant vehemently denied the friendship.

At trial, Appellant's defense was one of complete denial and that Hardin had wrongly implicated him in the robberies. Appellant testified in his own defense. Later, Appellant's counsel called Antiwon Tillman to testify that Appellant and Hardin were not friends. Tillman testified that Hardin and Appellant once got into a fight because Hardin broke into Appellant's car and stole his CD player.

Ultimately, the jury acquitted Appellant on all charges pertaining to the Blockbuster store robbery. However, they found him guilty of robbery in the first degree and kidnapping in connection with the Hollywood Video store robbery. The jury recommended the maximum sentences of twenty (20) years for each charge, to run consecutively. The trial judge followed the jury's recommendations and on February 15, 2007, sentenced Appellant to forty (40) years imprisonment.

II. ANALYSIS

A. THE PROSECUTOR'S CONDUCT DURING HIS CLOSING ARGUMENT DID NOT DENY APPELLANT A FAIR TRIAL.

Appellant first argues that alleged misconduct of the prosecutor during his closing argument deprived Appellant of his fundamental right to a fair trial. Appellant has two specific complaints regarding the prosecution's closing argument: (1) the prosecutor misled the jury into believing that Appellant had confessed; and (2) the prosecution told the

jury Appellant was incarcerated for a parole violation, when it was really a probation violation.

"In any consideration of alleged prosecutorial misconduct . . . we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (Ky. 1974)). "We reverse for prosecutorial misconduct in a closing argument only if the misconduct is 'flagrant' *or if each of the following [is] satisfied:* (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002) (emphasis added).

First, we will consider the "confession claim." During his closing argument, the prosecutor made the following statement:

> I asked you all [in voir dire], any of you think that the Commonwealth, for a crime to be committed, has to provide you with a confession or an eyewitness? And you said no, we're not going to hold the Commonwealth to that burden . . . but in this case ladies and gentlemen, that's exactly what we provided to you. We provided a confession and an eyewitness . . . we've given you a confession and an eyewitness. Raymond Johnston is your eyewitness. All of those other witnesses are your eyewitnesses . . . the other witness is Mr. Hardin.

Appellant argues that the above statement misstated evidence from the trial and prejudiced the jury against him. It is important to note that Appellant did not object during trial, leaving this issue unpreserved for

review. Appellant has requested and we will review this argument for palpable error under RCr 10.26.

It is true that Appellant did not confess to the crimes charged at any point during or before the trial. However, the prosecutor was not referring to Appellant in this argument. The Commonwealth was referring to Mr. Hardin, who did confess to the police and implicated Appellant. While the prosecutor's choice of words might have been less precise than desired, we must view them in light of the standard set forth in Slaughter; namely, was the use of the word "confession" such an egregious abuse of the substantial latitude which prosecutors are afforded during closing arguments as to deny Appellant a fair trial? We believe not.

"[W]e must always consider these closing arguments 'as a whole' and keep in mind the wide latitude we allow parties during closing arguments." Young v. Commonwealth, 25 S.W.3d 66, 74-75 (Ky. 2000) (citing Wallen v. Commonwealth, 657 S.W.2d 232, 234 (Ky. 1983) and Bowling v. Commonwealth, 873 S.W.2d 175, 178 (Ky. 1993)). Here, Appellant argues that, because the prosecution used the word "confession" in its closing statement, the jury was led to believe that he confessed. However, the prosecutor *was not* arguing a confession was obtained from Appellant, rather from Hardin, his partner in the crimes. The prosecutor even used the word "confession" again later in his closing argument when referring to Mr. Hardin. Furthermore, none of the Barnes elements are satisfied. Nor, can we say that the prosecutor's

actions even amount to misconduct. To find egregiousness here, we would have to hold that the mere use of the word "confession" is misconduct. We are indisposed to make such a ruling.

Appellant likewise argues that, he was prejudiced because the prosecutor's closing argument referenced a prior incident as a parole violation instead of a probation violation. We disagree.

"[I]t has long been the law in Kentucky that an admonition to the jury . . . cures the error unless it appears the argument was so prejudicial, under the circumstances of the case, that an admonition could not cure it." Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky. 2001) (citing Knuckles v. Commonwealth, 261 S.W.2d 667 (Ky. 1953) and Thomas v. Commonwealth, 245 S.W. 164 (Ky. 1922)).

At trial, during closing arguments, the Commonwealth mistakenly argued that Appellant had testified the only time he was in Owensboro was while he was incarcerated for a parole violation, to which Appellant objected. Here, upon objection to the statement, the judge clarified the misstatement and admonished the jury. In the trial judge's admonition, he directed the jury to rely on the evidence they had heard prior, not the prosecution's closing argument about whether Appellant violated parole or probation, because closing arguments are not evidence. Following the admonition, Appellant's counsel made no further objections or motions. "We have held that failure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted. 'It is well within the realm of valid assumption that counsel was

satisfied with the court's admonition to the jury.'" West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989) (quoting Hunter v. Commonwealth, 479 S.W.2d 4, 6 (Ky. 1972)).

Thus, upon review of the closing argument as a whole and giving deference to the wide latitude which we afford the parties during such arguments, the prosecution's arguments do not reach the threshold of egregiousness. Moreover, the court's admonishment to the jury sufficed to cure any misstated reference in regards to probation and parole. Accordingly, any error was cured and Appellant was afforded a fair trial.

B. THE TRIAL COURT'S FAILURE TO CONDUCT A HEARING AFTER APPELLANT RAISED CONCERNS ABOUT HIS TRIAL COUNSEL'S PERFORMANCE DID NOT DEPRIVE HIM OF DUE PROCESS.

Appellant next argues that the trial court erred by failing to hold a *sua sponte* evidentiary hearing when, after the jury retired to deliberate, but before the verdict was announced, Appellant voiced dissatisfaction with the performance of his appointed counsel. We disagree.

RCr 11.42 provides that any person convicted of a crime may move the court to vacate, set aside, or correct the sentence. An RCr 11.42 action is the proper avenue for persons convicted of a crime *to state all* grounds for holding the sentence invalid, which includes ineffective assistance of counsel. However, *there is no Kentucky law that requires a trial court to hold a post-close-of-evidence, pre-conviction hearing on ineffective assistance of counsel,* or, for that matter, that requires an

appellate court to review claims of ineffective assistance of counsel on direct appeal.

> As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered . . . This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872-873 (Ky. 1998) (internal citations omitted).

In the present instance we are without a trial record upon which to review this issue; no evidentiary hearing was held and the trial court did not rule on the issue. Nor was the court obligated to hold such a hearing. If Appellant had moved for a new trial, then, a hearing would have been required. However, those are not the facts of this case. Appellant merely told the trial judge that he had some concerns about his trial counsel's work after the jury was sent into deliberations. It would be improper to require a court to hold an evidentiary hearing on ineffective assistance of counsel claims at that time.

Thus, because no Kentucky law requires a *sua sponte* evidentiary hearing to address post-close-of-evidence, pre-conviction complaints on an attorney's performance, Appellant's argument is without merit. RCr 11.42 is the proper avenue of relief for these claims.

III. CONCLUSION

Accordingly, for the reasons set forth herein, we hereby affirm Appellant's convictions.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Kenneth Wayne Riggs
Assistant Attorney General
Office of the Attorney General
Office of the Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601