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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000498-MR

KENNETH MATTINGLY — APPELLANT

V.

ON APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, JUDGE
NO. 05-CR-00373

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Kenneth Mattingly appeals as a matter of right from the June 21, 2007, Judgment of the Nelson Circuit Court convicting him of first-degree unlawful imprisonment, first-degree wanton endangerment, operating a motor vehicle without a license, and being a first-degree persistent felony offender, and sentencing him to twenty years' imprisonment. Appellant raises as the sole issue on appeal, that the trial court erred by not granting a mistrial after Appellant had an outburst in the courtroom. We affirm.

The pertinent facts of this case are essentially undisputed. In the summer of 2005, Appellant and his wife, L.M., the victim, were separated. L.M. had filed for divorce and was living with friends. On July 16, 2005, Appellant borrowed a truck from his friend, Michael Reiter, telling Reiter he needed it to

visit his sister. Reiter typically kept a loaded .40 caliber pistol in the truck, and it was in the truck when Appellant borrowed it. On July 18, 2005, Appellant drove to a residence where L.M. was staying with a friend. L.M. was outside mowing the lawn when Appellant pulled up. Appellant got out of the truck and pointed the pistol briefly at L.M., and then at himself, and threatened to kill himself if L.M. would not go with him. L.M. told him she did not want to go, but Appellant grabbed her arm and forced her into the truck. Appellant slid the gun down between the seats. Appellant drove into a cornfield, where he and L.M. sat and talked for a while. Appellant wanted L.M. to have sex with him. L.M. told him no, and that she could not because she just had surgery, but Appellant had sex with her anyway. L.M. did not try to stop him because she was scared.

Appellant subsequently drove them to his brother-in-law's house, where they stayed for about thirty minutes. L.M. did not ask for help while they were there because she was scared, Appellant having threatened that if she said anything "it would be bad." From the brother-in-law's house, Appellant drove them to another cornfield, where they sat and talked again. As they talked, Appellant "simmered down." L.M. asked Appellant if she could call her mother to tell her she was okay. Appellant drove to a convenience store, where L.M. called her mother from a phone booth and told her she was alright and not to worry. L.M. did not tell her mother where she was, because Appellant had told her not to, and was standing beside her while she made the call. Appellant

wanted L.M. to go in and buy him cigarettes, which she did. She bought the wrong kind, so Appellant had her go back in and exchange them. L.M. did not ask for help in the store, because she "knew it would be bad", and didn't want to drag anyone else into it. Appellant and L.M. left and drove around some more. L.M. was finally able to talk Appellant into taking her home.

Meanwhile, the police had been looking for Appellant and L.M. A witness to L.M.'s abduction had earlier called the police to report L.M. had been taken against her will. L.M.'s mother had also called the police after L.M.'s phone call, and the police traced the call to the convenience store. As Appellant was driving L.M. home, police officers spotted the truck. A police car got behind the truck, and then pulled in front of it to stop Appellant. Appellant swerved around the police car. Other police vehicles had converged on the scene as well, and Appellant came to a stop without further incident. As Appellant was exiting the truck, he reached back in. L.M. thought he might be reaching for the gun, so she grabbed it and tried to throw it out the window. A police officer who, unbeknownst to L.M., was already by the window, then grabbed the gun and took it. Appellant was arrested.

On September 21, 2005, a Nelson County Grand Jury issued a 13 count indictment against Appellant as a result of his actions. Appellant was charged as follows: Count 1 - Kidnapping; Count 2 - Possession of a Firearm by a Convicted Felon; Count 3 - Wanton Endangerment First Degree (for pulling the gun on L.M.); Count 4 - Wanton Endangerment First Degree (for swerving

around the police car); Count 5 - Fleeing and Evading Police First Degree; Count 6 - Unauthorized Use of Motor Vehicle; Count 7 - Operating a Motor Vehicle While License Suspended for DUI; Count 8 - Resisting Arrest; Count 9 - Operating a Motor Vehicle Under the Influence of Alcohol (second offense); Count 10 - Escape Third Degree; Count 11 - Failure to Wear Seat Belt; Count 12 - No Operator's License; Count 13 - Possession of Open Container in Vehicle.[1] An additional indictment was returned charging Appellant with being a First Degree Persistent Felony Offender (PFO I).

A jury trial was held on May 22-23, 2007. Prior to trial, on the Commonwealth's motion, without objection, Count 1 was amended to first-degree unlawful imprisonment, and Counts 7, 9, 10, 11, and 13 were dismissed. The trial proceeded, with the aforementioned facts introduced into evidence. As it prepared to read the verdict, the trial court warned it did not want any outbursts from anybody in the courtroom. The trial court then read the verdict. Appellant was found guilty of first-degree unlawful imprisonment (Count 1), one of the counts of first-degree wanton endangerment (Count 3, pertaining to L.M.), and operating a motor vehicle without a license (Count 12), and not guilty as to the remaining counts.[2] The court planned to conduct the sentencing phase after lunch. As the court excused the jurors for lunch, the following verbal altercation occurred between Appellant and the trial court:

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[1] While the facts raise a question as to why Appellant was not charged for the sexual assault, the trial testimony indicated that the victim did not disclose this to police, and only told the prosecutor just prior to trial.

[2] Counts 4, 5, and 6. Appellant received a directed verdict as to Count 8 (resisting arrest).

COURT: What I'm going to do is give everybody a lunch break here –

APPELLANT: I'd like to say something.

COURT: Mr. Mattingly –

APPELLANT: I'd like to go back to the penitentiary. I'm done with y'all.

[Appellant stands up, and is surrounded by bailiffs.]

COURT: Mr. Mattingly, I've told you I didn't want any outbursts. You sit down.

APPELLANT: I'm done.

COURT: No, I told you –

APPELLANT (loudly): You can send me back, or there's gonna be an outburst.

COURT: Mr. Mattingly, you sit down. I've told you before. I'm warning you. If you want me to give you –

APPELLANT (yelling): You warn me all you want –

COURT: If you want to be held in contempt, I'll give you your wish.

APPELLANT (yelling): I want one.

COURT: Okay.

APPELLANT (yelling): Give me another one. Give me all you want. But, I'm not gonna sit here – your little circus here – we're not gonna do this no more. You done? You got your guilty plea. Now, send me back and when you get ready to sentence me, fine, let's do it.

COURT: Well, we're going to have an afternoon session –

APPELLANT: (Unintelligible)

COURT: You'll be back this afternoon, you're in contempt, take him on out please. We'll come back after lunch for the sentencing phase. Be back at 1:05. 1:05. We'll take an hour.

APPELLANT: (Unintelligible)

[Appellant removed from courtroom by bailiffs.]

COURT: Thank you all.

[Extremely loud banging heard in the courtroom.][3]

COURT: He's in a secure area. Everybody's okay.

[Extremely loud banging heard in the courtroom.]

UNIDENTIFIED VOICE: (Unintelligible) shackle him.

JUROR: Go on to lunch?

COURT: Yes, go on to lunch. See you at 1:05.

After the lunch break, with the jury not present, Appellant was brought back into the courtroom. Appellant told the trial court that he did not want to be there for the rest of the trial, that he was tired of it, that the court got what it wanted. The trial court tried to reason with Appellant that it would be in his best interest to stay in the courtroom for the rest of the trial. Appellant insisted he just wanted to leave and go back to jail, that he didn't want to deal with the trial anymore, and that he didn't care about being at the sentencing phase because he was already doing so much time that whatever time the jury gave him today did not matter. The trial court continued to encourage Appellant to stay if he could do so without making an outburst, and Appellant eventually agreed.

Defense counsel moved for a mistrial "in regards to the jury hearing the

[3] The record indicates this noise was Appellant kicking and pounding on the door of the holding cell. His actions also caused the window of the holding cell to crack.

outburst as well as [the Court's] ruling on contempt."[4] The trial court denied the motion, reasoning that it was not fair to allow Appellant a new trial because of his own outburst. Defense counsel then referenced a previous discussion about sending Appellant to KCPC,[5] but that he was not requesting that at this time. The court observed that it had previously found Appellant competent, and believed he was still competent.[6]

The remainder of the trial proceeded without incident.[7] The court held the penalty phase for the misdemeanor conviction,[8] followed by a second guilt phase where Appellant was additionally found guilty of Possession of a Firearm by a Convicted Felon (Count 2), and finally, a second penalty phase for the felony convictions and PFO I charge. The jury found Appellant guilty of being a PFO I. The jury recommended a sentence of five years for the unlawful imprisonment, five years for the wanton endangerment, and ten years for the possession of a firearm by convicted felon, to run consecutively, enhanced to twenty years each by the PFO I. On June 21, 2007, the trial court sentenced

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[4] Appellant does not challenge the contempt order on appeal.

[5] Kentucky Correctional Psychiatric Center.

[6] Appellant had been evaluated at KCPC twice prior to trial. Competency hearings were held on March 31, 2006, and March 2, 2007, after both of which Appellant was found competent to stand trial. Appellant does not challenge the trial court's finding of competency.

[7] Appellant did not cause any further disturbance. However, during the break after the close of proof of the PFO phase, defense counsel informed the trial court that Appellant wanted to go back to his cell, and the trial court allowed him to do so. When the jury returned, before the instructions were read, the trial court admonished the jury not to draw any inferences from, or be prejudiced by, Appellant's absence.

[8] The jury recommended a sentence of 45 days for the operating a motor vehicle without a license conviction.

Appellant to a total of twenty years' imprisonment. He appeals to this court as a matter of right.

The sole issue raised by Appellant on appeal, is that the trial court erred in not granting a mistrial as a result of Appellant's outburst. Appellant contends that his outburst put the jurors in fear for their safety, transforming them from impartial observers, into crime victims themselves, citing the menacing statute, KRS 508.050, which provides, "[a] person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury." Appellant contends that, as victims of Appellant's criminal behavior the jury could no longer deliberate impartially, as evidenced by the fact that they recommended the maximum possible sentence. Appellant contends that he is therefore entitled to complete the second guilt phase, and the penalty phases, with a new jury. We disagree.

> It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion. Moreover, a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a manifest necessity for such an action. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004) (internal citations and quotations omitted). First, having reviewed the videotape of the outburst, we disagree with Appellant that his outburst turned the jury into victims of

menacing. Although Appellant was loud, and even yelling at times, his comments were not threatening, and further, were clearly directed at the trial court, not the jury. He did not make any threats toward the jury, the court, or anyone else in the courtroom. From what can be seen on the videotape,[9] Appellant made no threatening movements or gestures either, nor is it alleged that he did so. Rather, the gist of Appellant's outburst was that he was fed up with the trial, that it was over as far as he was concerned, and he just wanted to leave and go back to prison. Accordingly, we conclude Appellant's argument that he perpetrated the crime of menacing upon the jurors to be entirely without merit.

Appellant concedes, and it goes without the necessity of citation, that a defendant should not benefit from his own misconduct in the courtroom. Appellant asks us to consider this case as a unique circumstance, however, due to Appellant's history of mental health problems. We recognize that where a defendant's misconduct at trial raises a substantial question of competency, a mistrial may be warranted. See Quarels v. Commonwealth, 142 S.W.3d 73, 77 (Ky. 2004). However, that is not the case here, and Appellant does not challenge the trial court's finding of competency on appeal.

We are not aware of any case permitting a mistrial as a result of an outburst by a competent defendant.[10] And, we see nothing in this loud, but non-threatening, outburst as would warrant this extreme remedy here.

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[9] Which alternates between Appellant and the trial court.

[10] Although we note that RCr 8.28(2) does permit a defendant to be removed from the courtroom for this reason.

Woodard, 147 S.W.3d at 68. In cases where an outburst has come from a victim or family member, we have recognized that "an admonition to the jury to disregard the display is more than sufficient to cure any possible prejudice that might occur from the situation." Coulthard v. Commonwealth, 230 S.W.3d 572, 577 (Ky. 2007) (citing Blackburn v. Commonwealth, 247 S.W.2d 528, 530 (Ky. 1952), and Belt v. Commonwealth, 2 S.W.3d 790, 793 (Ky.App. 1999)). Appellant takes issue with the fact that the trial court did not give an admonition in this case. However, none was requested. Failure to request an admonition waives any claim that the Appellant was prejudiced by the lack thereof. Coulthard, 230 S.W.3d at 578 (citing Lanham v. Commonwealth, 171 S.W.3d 14, 28-29 (Ky. 2005)).

For the aforementioned reasons, we conclude the trial court did not abuse its discretion in denying Appellant's motion for a mistrial. Bray v. Commonwealth, 68 S.W.3d 375, 383 (Ky. 2002). Accordingly, the judgment of the Nelson Circuit Court is affirmed.

All sitting. All concur.

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