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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2010-SC-000094-MR

LEWIS A. BALLARD — APPELLANT

V.

ON APPEAL FROM BOURBON AND WOODFORD CIRCUIT COURTS
HONORABLE ROBERT G. JOHNSON, JUDGE
NO. 07-CR-00033 AND 09-CR-00102

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Lewis Ballard appeals as a matter of right, Ky. Const. § 110, from a judgment entered by the Bourbon Circuit Court convicting him of murder and first-degree sodomy and sentencing him to a total punishment of life imprisonment without the possibility of parole.

Ballard now claims that the trial court erred: (1) by failing to strike two jurors for cause; (2) by allowing the prosecutor on cross-examination of Ballard to admit into evidence, and question Ballard about, irrelevant but prejudicial items depicted in a photograph; (3) by allowing an untimely amendment of the indictment following voir dire; (4) by admitting incompetent evidence through the Commonwealth's expert witness, Dr. Emily Craig; (5) by denying Ballard's right to present a complete defense when it excluded prior inconsistent statements of a witness for the Commonwealth, and excluded evidence relating to a blue fiber of unknown origin found in an evidence envelope; (6) by denying

his request for a missing evidence instruction in connection with the disappearance of a hair found at the crime scene; (7) by admitting expert testimony concerning the expert's analysis of a rape kit swab; and (8) by denying his motion for a directed verdict on the murder and first-degree sodomy charges.

For the reasons explained below, we affirm the judgment of the Bourbon Circuit Court.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In August 2007, Bobby Mullins lived on Main Street in Paris, Kentucky, and for about three years, had rented a spare room in his house to Ballard. Bobby often kept his six-year old grandson, Wesley, on weekends. Ballard got along well with Wesley. They were friends, and Ballard would buy him toys and play with him.

On Friday August 3, 2007, Bobby picked up Wesley around lunchtime and took him to his residence. Throughout the remainder of the afternoon and evening Wesley, Bobby, and Ballard engaged in typical activities. Ballard played with Wesley for much of this time. Later that evening Wesley, Bobby, and Ballard played darts. Bobby went to bed first, while Wesley and Ballard continued to play darts. Eventually they went to bed and, as he normally did, Wesley slept in Ballard's room with him. At about 3:00 a.m. on August 4th, Bobby got up to check on Wesley. He knocked on Ballard's door and Ballard told Bobby that Wesley was with him.

Bobby awoke at about 7:30 a.m. on August 4th and proceeded to do various errands until the late afternoon. He did not disturb Ballard and Wesley, assuming that they were sleeping-in after being up late the night before. Finally, in the late afternoon Bobby knocked on Ballard's door and asked about Wesley. Ballard responded that Wesley had not been in the room with him all afternoon but he was not alarmed by Wesley's absence because he thought Wesley was scheduled to visit his father in prison that day.

After realizing that Wesley was missing, Bobby and Ballard separately searched for him. While Ballard investigated at several nearby businesses, Bobby found Wesley's dead body in the garage. A large area of blood spatter surrounded the body. A blood spatter found on the boots that Ballard wore was identified by DNA analysis as Wesley's. The ultimate cause of Wesley's death was hemorrhaging in the brain due to traumatic blows inflicted upon his head.

While there were no outward signs that Wesley had been sexually abused, an anal swab disclosed the presence of semen and three sperm cells. No DNA testing was performed on this swab. However, a swab of Wesley's penis disclosed the presence of a mixture of his DNA and someone else's. According to the Commonwealth's DNA expert, only an estimated 1 in 81,000 men could have been a contributor to the DNA mixture, while Ballard's DNA expert placed the figure at 1 in 28 men. Both experts agreed, however, that Ballard could not be excluded by the DNA testing.

Ballard was indicted for Wesley's murder and first-degree sodomy. At trial, in Woodford County following a change of venue, Ballard denied that he committed the crimes and suggested that Bobby was the perpetrator. The jury returned a verdict convicting Ballard of murder and first-degree sodomy. It recommended a sentence of life without the possibility of parole for the murder conviction, and a sentence of life for the first-degree sodomy conviction. The trial court entered a final judgment in accordance with the jury's verdict and sentencing recommendation.

## II. THE TRIAL COURT PROPERLY DENIED BALLARD'S MOTIONS TO STRIKE JURORS 131 AND 160

Ballard first argues that the trial court erred by failing to grant his motions to strike Jurors 131 and 160 for cause. While he ultimately used a peremptory strike on both jurors, Ballard argues that the trial court abused its discretion by failing to strike the jurors for cause and thus his conviction should be reversed. *See Shane v. Commonwealth*, 243 S.W.3d 336, 340 (Ky. 2007).[1]

### *1. Standard of Review*

RCr 9.36(1) provides that the trial judge shall excuse a juror for cause when there is reasonable ground to believe that the prospective juror cannot

[1] In *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009), we further explained that in order to bring a claim under *Shane*, the party "must identify on his strike sheet any additional jurors he would have struck." *Id.* at 854. However, because *Gabbard* was not rendered until October 29, 2009, one day after the conclusion of trial, the *Gabbard* rule is not applicable in this case.

render a fair and impartial verdict. *Smith v. Commonwealth*, 734 S.W.2d 437, 444 (Ky. 1987).

The established "test for determining whether a juror should be stricken for cause is 'whether ... the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.'" *Thompson v. Commonwealth*, 147 S.W.3d 22, 51 (Ky. 2004). "[T]he party alleging bias bears the burden of proving that bias and the resulting prejudice." *Cook v. Commonwealth*, 129 S.W.3d 351, 357 (Ky. 2004). Where there is such a showing, "[t]he court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Shane*, 243 S.W.3d at 338; *Walker v. Commonwealth*, 288 S.W.3d 729, 736–37 (Ky. 2009); *Hunt v. Commonwealth*, 304 S.W.3d 15, 42-43 (Ky. 2009).

Further, we have "long recognized that 'a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.'" *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). That determination, however, "is based on the totality of the circumstances ... [and] not on a response to any one question." *Id.*

***2. Juror 131***

During the individual voir dire, Juror 131 acknowledged that he was familiar with the case having followed it in news reports, and that he had spoken with his wife about how "horrible" the case was. He also stated that

while Bourbon County had not "martyred" Wesley, it did memorialize him by naming a youth center after him. He further indicated that he would not be "too happy" about serving on the jury because he had grandchildren about Wesley's age and did not like "that type of thing."

Most significantly, during examination by defense counsel, Juror 131 stated, "You know, the one other thing about, and I don't even know whether this is correct or not but it sticks in my mind, that Mr. Ballard was a convicted pedophile. That sticks in my mind, but I don't know if that's true or not. I can't remember."[2] He further added that he may have read about it "a long time ago."

Ballard moved to strike the juror for cause based upon his recollection of having heard that Ballard was a convicted pedophile, but the judge deferred his decision pending further discussion with the juror. During the ensuing discussion, Juror 131 indicated that, if selected for service, he would not consider the information about the defendant's background he had heard in news reports; that his recollection of the pedophile report was "vague"; that the information would not be in the "back of [his] mind" as he considered the case; that the information would be "insignificant" compared to the evidence presented at trial; and that he would be able to follow the court's instruction in this case to only consider evidence presented and admitted in the courtroom.

[2] The record discloses that Ballard was sentenced to eight years in prison in 1989 for the second-degree rape of a twelve-year-old girl. This fact was reported in some news reports.

Following this discussion the trial court refused to strike Juror 131 for cause, and Appellant ultimately used a peremptory strike against him.

Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. *Maxie v. Commonwealth*, 82 S.W.3d 860, 862 (Ky. 2002). Therefore, Juror 131's admitted familiarity with the case through news reports, including his knowledge of Ballard's prior sexual crime is not an automatic basis for disqualification for cause. Further, his statement that he would not be "happy" about the subject matter of the case because he had grandchildren about Wesley's age and that he did not "like this type of case" do not disqualify Juror 131, as these would be ordinary sentiments among the general public in a tragic case like this. In addition, when questioned directly about his vague recollection that Ballard was a convicted pedophile, the juror unequivocally indicated that he would set that aside and consider only the evidence presented at trial. Moreover, the juror testified that he "[didn't] have an opinion because I haven't heard any facts, just what I read in the paper [and] those aren't facts"; that he could consider the full range of penalties; and that he could consider both mitigating and aggravating evidence before imposing a penalty. In consideration of these commitments to impartiality, and under the totality of the circumstances, we are persuaded that the trial court did not abuse its discretion in denying the motion to strike Juror 131.

***3. Juror 160***

Juror 160 was a retired Lexington Police Officer who worked as a U.S. Marshal at the Federal Courthouse in Fayette County at the time of Ballard's

arrest. She had heard about the case and stated that it was her understanding that the case involved a six-year-old boy "that was sodomized by Mr. Ballard and then beat to death in a garage in Bourbon County." Ballard's chief complaint is that this juror, through her job, had "inside" information concerning the case because fellow U.S. Marshals were involved in his arrest. As relevant here, Juror 160 disclosed to the court that, "[m]y understanding is just that they had to tase [Ballard], that he was tased during the course of his arrest." She stated that fellow U.S. Marshals told her this and she had no reason to doubt their story. Following additional discussions, Ballard moved to strike Juror 160 for cause, and the trial court denied the request.

Juror 160's status as a retired Lexington Police Officer and a U.S. Marshal does not require her removal for cause. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997) (being a law enforcement officer is insufficient to excuse for cause from jury service). Neither did the fact that she had "inside" knowledge that Ballard had been tased compel dismissal of the juror. That a defendant had been tased while he was being arrested implies, at most, some difficulty occurred in effecting his arrest and that he may have resisted. Compared to the severity of the crimes Ballard was charged with, a juror's impression that he may have been uncooperative upon arrest is not sufficient to disqualify her from the venire.

Further, Juror 160 indicated that she had not formed an opinion about the case, and that she could be fair and impartial if she was selected for service. While there is no such thing as a rehabilitative magic question (or

answer), we are persuaded that the trial court did not abuse its discretion by denying Ballard's motion to exclude Juror 160.

## III. REVERSIBLE ERROR DID NOT OCCUR AS A RESULT OF THE COMMONWEALTH'S VIOLATION OF THE TRIAL COURT'S ORDER NOT TO REFER TO ITEMS DEPICTED IN A PHOTOGRAPH BY NAME

During its cross-examination of Ballard, the Commonwealth sought to introduce a photograph of a dart game scorecard lying on a table. Ballard objected to admission of the photograph because, in addition to the scorecard, the photo also depicted two types of lubricating jelly and a pair of handcuffs. At the bench, Ballard argued that if the photograph was introduced, the handcuffs and lubricant should be cropped out. After further discussion it was agreed that the Commonwealth could ask Ballard if he recognized the items in the photograph without showing the picture to the jury, and the trial court directed the prosecutor not to mention the handcuffs and lubricating jelly by name.

When the prosecutor asked Ballard if he recognized the items, Ballard responded that he had bought the handcuffs as a toy for Wesley,[3] and that the other items (the lubricant which he did not specifically identify) belonged to Bobby. After this response, in violation of the trial court's ruling, the prosecutor asked Ballard "if he recognized the lubricant." Ballard objected, and at the subsequent bench conference, the prosecutor defended his question by claiming that Ballard had first mentioned the lubricant. In fact, Ballard had

[3] On appeal, Ballard raises no claim of error concerning the handcuffs.

not mentioned this item by name. Ballard did not request a mistrial at this time or request any other relief. The trial court suggested that the prosecutor ask the question again without specifically mentioning the lubricant and this was done without objection from Ballard.

Afterward, back at the bench, Ballard again objected to the introduction of the photograph without appropriate cropping, and the prosecutor simply dropped his request to introduce the photograph as evidence. The trial court then offered to admonish the jury to disregard the improper reference to the lubricant, but the defense declined the offer.

Consequently, Ballard did not request a mistrial and declined an admonition directing the jury to disregard the reference. The trial court did not err by failing to *sua sponte* give an admonition or declare a mistrial. *Hayes v. Commonwealth*, 58 S.W.3d 879, 883 (Ky. 2001) ("In the case before us, the trial judge asked defense counsel what relief she wanted. She received the relief requested and never asked for an admonition. The trial court did not err by allowing the trial to proceed."). Moreover, in *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), we held that a defendant cannot seek additional relief on appeal when a trial court's attempts to cure an error are accepted by a defendant without any request for additional curative measures. *Id.* If the error was so egregious that it cannot be cured by an admonition, it is incumbent upon the defendant to inform the trial court of his request for a mistrial.

Ballard had requested only that the lubricating jelly and handcuffs be cropped from the picture, and the picture was ultimately not introduced into evidence. He sought no other relief. As it appears that he agreed with the trial court's approach and did not request any further curative measures, he received all the relief that he requested. There is no error to review. *Rankin v. Commonwealth*, 265 S.W.3d 227, 236 (Ky. App. 2007).

To the extent that this issue may be construed as a claim of unpreserved prosecutorial error, "[w]here there was no objection, we will reverse only where the [prosecutorial] misconduct was flagrant and was such as to render the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). Here, the prosecutor's single and fleeting reference to the lubricating jelly, which was otherwise never connected to Ballard or the crime, did not render his trial fundamentally unfair. *Hunt v. Commonwealth*, 304 S.W.3d 15, 37 (Ky. 2009) (single fleeting reference to defendant's invoking his right to remain silent did not result in palpable error).

## IV. THE INDICTMENT WAS PROPERLY AMENDED

Ballard next argues that the trial court erred by permitting the Commonwealth to amend the indictment after the completion of voir dire but before the commencement of the guilt phase. In the original indictment, Ballard was charged with killing Wesley "by repeatedly striking him in the head with a blunt object thereby causing his death." Upon completion of voir dire, the Commonwealth moved to amend the murder charge to accuse Ballard of

killing Wesley "by repeatedly striking him in the head with a blunt object thereby causing his death *and/or repeatedly striking his head against a fixed object.*" (emphasis added). This amendment was consistent with the report of the Commonwealth's expert forensic anthropologist, Dr. Emily Craig, which had been provided to Ballard via discovery. After considering the parties' arguments, the trial court granted the motion to amend. In support of its ruling the trial court noted that the amendment stemmed from information the parties had all along; that the amendment did not change anything about the case; and that the amendment would require no new testing or experts. The trial court further denied Ballard's request for a continuance.

Nevertheless, Ballard contends that the amendment amounted to a material change in the murder accusation; that the change did require additional testing; and that the lack of trial preparation caused by the untimely amendment violated his right to present a defense and to confront the witnesses against him through effective cross-examination.

RCr 6.16 states:

> The court may permit an indictment, information, complaint, or citation to be amended at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

The amendment of the indictment satisfies the essential requirements of RCr 6.16 because it was made before the trial began and did not charge Ballard with a new or different offense. *Owens v. Commonwealth*, 329 S.W.3d 307, 315 (Ky. 2011) (upholding amendment the morning of the first day of trial

changing the mental state for first-degree assault charge from "intentionally" to "wantonly"). Ballard had ample notice of the nature of the murder charge to prepare and present an effective defense based on the information provided in Craig's report. Furthermore, precisely how the blows were inflicted upon Wesley was immaterial because Ballard's entire defense was centered on his argument that he was not involved in the crimes.

The appropriate relief for a late amendment to an indictment that prejudices the defendant is a continuance. For the reasons explained above, though requested by Ballard, we agree with the trial court that the amendment was not prejudicial to the accused and that a continuance was not required. *Wolbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky. 1997) (indictment may be amended at any time to conform to proof providing that substantial rights of defendant are not prejudiced and no additional evidence is required to amend offense).

## V. DR. EMILY CRAIG'S TESTIMONY

Dr. Emily Craig was the Commonwealth's principal expert forensic witness. Prior to trial she prepared a report describing the injuries to Wesley's head and stated that the injuries could have been caused either by striking his head with a weapon, or striking his head against one or more hard objects. Ballard argues that three reversible errors occurred during Dr. Craig's testimony.

First, while explaining to the jury how Wesley may have been killed, Dr. Craig referred to photographs of items she found in the garage that were consistent with the kinds of things that could have been used to inflict the head injuries, including a metal grate, a piece of wood, and a skillet. Ballard objected to the use of these photographs as irrelevant and misleading because Dr. Craig could not identify the specific murder weapon. He contends that the photographs encouraged the jury to speculate about which of the items might have been used to cause Wesley's death.

Second, Ballard objected to Dr. Craig's demonstration to the jury, during which she hit a lump of modeling clay with various items to illustrate the analogous consequences that such items might inflict upon the human head. Ballard argues that the demonstration was "utterly irrelevant, except for the overwhelmingly undue prejudice that [Ballard] suffered from it."

Ballard challenges both the garage item photographs and the modeling clay demonstration only on the grounds of relevancy and prejudice. However, this was a murder trial, and so evidence relating to how Wesley received the traumatic injuries to his head, the types of items which could have been used to inflict the blows, and the effect of blows to the human skull were all relevant to establishing that a murder had occurred. On the other hand, Ballard's defense did not try to refute that Wesley was murdered. His defense was that he was not involved in the murder. As such, his defense stood to suffer little prejudice by the testimony. Whether the blows were inflicted with a skillet or a

grate, or by striking the child's head on the floor was not consequential to his defense and, therefore, had no prejudicial effect upon his defense.

Because the probative value of the evidence was not substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading to the jury, the trial court did not abuse its discretion by admitting the photographs illustrating potential weapons and the modeling clay evidence. KRE 403.

Finally, Ballard argued that the Commonwealth violated our pretrial discovery rules by not disclosing its anticipated use of the photographs and modeling clay demonstration. RCr 7.24. We agree that a case could be made that Dr. Craig's analysis of possible murder weapons and her modeling clay demonstration should have been disclosed prior to trial. However, we need not examine that issue in detail because, even assuming that disclosure violations did occur, we are convinced that any error was harmless. As noted, Ballard's defense was that he was not present when the murder was committed, and Dr. Craig's pictures of items that may have been used to commit it were not specifically linked to Ballard in any way, and were not consequential to his defense. As such, pretrial knowledge of the pictures or clay demonstration would not have assisted with his overall trial strategy. *Gibson v. Commonwealth*, 248 Ky. 601, 59 S.W.2d 573, 575 (1933) (in murder prosecution, admitting deceased's declaration that defendant had inflicted the fatal injuries held not prejudicial, where only question was whether defendants shot in self-defense.). Accordingly, any error did not substantially sway the

verdict, and is therefore regarded as harmless. *See Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009).

## VI. THE TRIAL COURT PROPERLY EXCLUDED BOBBY MULLINS'S PRIOR INCONSISTENT STATEMENTS AND EVIDENCE RELATING TO THE BLUE FIBER

Ballard next argues that the trial court erred by sustaining the Commonwealth's objection to his impeachment of Bobby Mullins with three prior inconsistent statements and by excluding evidence concerning a blue fiber because of chain of custody concerns.

### *1. Bobby's Prior Inconsistent Statements*

Randy Crawford, a paramedic who arrived to render emergency assistance to Wesley, testified to three statements that Bobby made to him on that occasion: (1) that he had seen Wesley asleep at 3:00 a.m. that morning; (2) that he had not checked on Wesley until 6:00 p.m. on the afternoon he was found; and (3) that he had not touched Wesley after finding him in the garage. Ballard sought to introduce these statements as inconsistent with Bobby's trial testimony.

The Commonwealth objected to the introduction of Crawford's statements. The trial court agreed, excluding the evidence on the basis that Ballard did not comply with the foundational requirements for the admission of prior inconsistent statements as required by KRE 613. In his opening brief, Ballard cites to no authority for his claim of error, stating only that, "[t]hese statements Bobby made to Mr. Crawford would have been material and

persuasive to his defense. Reversible error in violation of his constitutional rights occurred when they were excluded."

KRE 801A(a)(1) allows admission of a witness's prior inconsistent statement provided the witness testifies at trial and is examined about the statement, subject to the foundational requirements contained in KRE 613. KRE 613(a) requires, before the prior inconsistent statement of a witness can be offered, that the witness "must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them." *Tunstull v. Commonwealth*, 337 S.W.3d 576, 590 (Ky. 2011).

Ballard makes no assertion that he made the necessary inquiries mandated by KRE 613. In his reply brief Ballard suggests complying with the KRE 613 requirements would have been futile because Bobby was on morphine for cancer during the trial and wouldn't have been able to recall what he told Crawford. He argues "[d]ue to Bobby's inability to remember, the [Commonwealth's] reliance on lack of a foundation to exclude the evidence is misplaced." However, this argument misperceives the scope of KRE 801A(a)(1). "A statement is inconsistent for purposes of KRE 801A(a)(1) whether the witness presently contradicts or denies the prior statement, *or whether he claims to be unable to remember it.*" *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997) (emphasis added). Therefore, Ballard could have confronted Bobby with his prior statements to Crawford pursuant to KRE 613, and if Bobby was unable to remember making the statements the foundational

requirements of KRE 801A(a)(1) would have been satisfied. Thus, since Ballard failed to comply with KRE 613, the trial court properly sustained the Commonwealth's objection to the admission of Bobby's prior statements.

***2. Blue Fiber Evidence***

Laura Mosenthin was an expert who analyzed strands of hair collected at the crime scene. One of the hair samples was believed to have been placed by police detectives in an evidence envelope, which was marked accordingly. However, when Mosenthin opened that envelope, she found only a strand of blue fiber. How the fiber came to be inside the envelope, and what happened to the hair is unknown. Nevertheless, Mosenthin tested the blue fiber and determined that it did not match fibers from the blue shirt Ballard wore the day of the murder.

Ballard called Mosenthin to testify, but the Commonwealth objected to the admission of her analysis of the blue fiber. The trial court sustained the objection on the basis that a valid chain of custody of the fiber could not be established since no one knew how the fiber was obtained or how it got into an evidence envelope. Ballard argues that reversible error occurred because the fact that the fiber did not come from his shirt was relevant and exculpatory evidence, and that its exclusion violated his right to present a defense.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE 901(a). "While the integrity of weapons or similar items of physical evidence, which are clearly

identifiable and distinguishable, does not require proof of a chain of custody," a chain of custody is required for items "which are not clearly identifiable or distinguishable[.]" *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998) (citations omitted); Robert Lawson, *The Kentucky Evidence Law Handbook*, § 11.00, 592-593 (3rd ed. Michie 1993). Clearly, the fiber is evidence which would not be clearly identifiable or distinguishable and thus a chain of custody was required before it was admissible.

While a perfect chain of custody is not required before evidence can be admitted, *Rabovsky*, 973 S.W.2d at 8, here, there was a complete failure in establishing the chain of custody of the fiber. No one knows where the blue fiber came from, where it was found, who found it, whose custody it passed through, or how it came to be in the evidence envelope which was supposed to contain a hair found at the crime scene. With there being a complete failure in establishing a chain of custody for the blue fiber, the trial court did not abuse its discretion in preventing Mosenthin from testifying concerning her analysis of the item. *Thomas v. Commonwealth*, 153 S.W.3d 772, 781 (Ky. 2004) (the trial court is granted wide discretion in this area because required foundation depends upon the nature of the evidence.)

## VII. THE TRIAL COURT PROPERLY DENIED BALLARD'S REQUEST FOR A MISSING EVIDENCE INSTRUCTION

In an argument related to the previous one, Ballard contends that the trial court erred by denying his request for a missing evidence instruction in relation to the hair missing from the evidence envelope. Detective Lizer stated

that he collected a hair next to Wesley's body in the garage. He packaged the hair in a bag and sent it to Mosenthin for analysis. When she opened the bag, rather than the hair, it contained a blue fiber. Citing to *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005), *Shegog v. Commonwealth*, 142 S.W.3d 101 (Ky. 2004), and *Estep v. Commonwealth*, 64 S.W.3d 805 (Ky. 2002), Ballard contends that he was entitled to a missing evidence instruction because of the misplacement of the hair.

"[T]he purpose of a "missing evidence" instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence." *Estep*, 64 S.W.3d at 810 (emphasis in original). In *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997), we adopted the view expressed in *Arizona v. Youngblood*, 488 U.S. 51 (1988) that, absent a showing of bad faith, the Due Process Clause is not implicated by "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 572. In such cases a missing evidence instruction is not required.

The lost hair at issue in this case cannot fairly be said to be even potentially exculpatory. Even if the hair did not match Ballard, it would not be exculpatory evidence because it is unknown when or under what circumstances the hair arrived in the garage. Therefore, assuming that the hair did not match, that would not prove that Ballard did not commit the crimes. Nor does Ballard allege any bad faith in connection with the loss of the

hair, and, given the nature of the evidence, there is no basis by which bad faith may be inferred. The police would have had no conceivable motive to destroy the hair and replace it with a blue fiber. As such, the trial court properly denied Ballard's request for a missing evidence instruction. *Estep*, 64 S.W.3d at 810. (absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from the Commonwealth's failure to collect or preserve evidence.)

## VIII. THE TRIAL COURT PROPERLY ADMITTED THE RAPE SWAB EVIDENCE

Ballard next contends that the trial court erred by permitting the Commonwealth's DNA expert to testify that she observed three sperm cells in her viewing of a slide made from a rape kit anal swab of the victim. He argues that the evidence should have been excluded because "it lacked any evidentiary value"; and because "she took no steps to record, verify, or memorialize her findings. She did not take any pictures of her findings. She did not diagram the location of the cells in her notes. She offered no other documentation of her findings. She failed to note how long she looked at the slide." Ballard also claims that his DNA expert, despite a more diligent effort, could not observe the cells.

Since Ballard was accused of sodomy, the presence of sperm cells in the rape kit swab was obviously relevant, KRE 401, and the probative value of the evidence was not outweighed by the danger of undue prejudice. Accordingly,

the trial court did not err by admitting the evidence under the KRE 403 balancing test procedure.

Ballard's remaining points go toward the credibility of the expert witness's observations and failure to document her observations. However, any perceived weaknesses in the witness's methods go only to its weight, and not its admissibility. *Arndell v. Peay*, 411 S.W.2d 473, 475 (Ky. 1967) ("[L]ack of specialized training by a doctor goes only to weight and not to competency."). Moreover, the testimony of a DNA expert concerning her observations of a microscope slide is not excludable as "junk science." *Commonwealth v. Martin*, 290 S.W.3d 59, 67 (Ky. App. 2008) (a trial court's gatekeeping role regarding admissibility of scientific expert testimony under *Daubert* is designed to banish "junk science" evidence from the courtroom; the court is restricted to keeping out unreliable expert testimony, not to assessing the weight of the testimony as this latter role is assigned to the jury). Because "[c]redibility and weight of the evidence are matters within the exclusive province of the jury," *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999), the trial court did not err by refusing to exclude the testimony based upon Ballard's perceived deficiencies in its reliability.

## IX. BALLARD WAS NOT ENTITLED TO A DIRECTED VERDICT

Ballard's final argument is that he was entitled to a directed verdict on both the murder and sodomy charges. In support of his argument he contends that there was no evidence of deviate sexual intercourse to support the first-

degree sodomy charge, that the Commonwealth failed to prove that he was wearing the blood spattered boots when Wesley was killed, and otherwise presented no evidence connecting him to Wesley's murder.

We review the trial court's ruling on a motion for a directed verdict using the standard outlined in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Further, "an appellate court cannot . . . substitute its judgment as to credibility of a witness for that of the trial court and jury." *Brewer v. Commonwealth*, 206 S.W.3d 313, 319 (Ky. 2006). It is only where the testimony on behalf of the Commonwealth fails to incriminate the accused, or is wholly insufficient to show guilt, that a directed verdict of acquittal should be given. *Bradley v. Commonwealth*, 465 S.W.2d 266, 267 (Ky. 1971). A review of the record convinces us that the Commonwealth produced sufficient proof of Ballard's guilt on all elements of the charges.

More specifically, the sodomy conviction is supported by evidence that: (1) Ballard's DNA could not be excluded from a DNA mixture swabbed from

Wesley's penis, and that only 1 in 81,000 persons could have contributed to the mixture; and (2) sperm cells were found on the rape kit anal swab, and by a reasonable inference belonged to the killer. The murder conviction was supported by the blood spatter evidence on Ballard's boots and the reasonable inference that he wore them at the time of the crimes, the fact that Ballard was the last known person with Wesley, and Bobby's testimony that he did not see Wesley after he went to bed the previous evening.

In consideration of this evidence pointing toward Ballard's guilt, the trial court did not err in refusing to direct a verdict of acquittal.

## X. CONCLUSION

For the foregoing reasons, the judgment of the Bourbon Circuit Court is affirmed.

Minton, C.J., Abramson, Schroder and Venters, JJ., concur. Cunningham, J., concurs by separate opinion. Noble, J., dissents in part by separate opinion, in which Scott, J., joins.

CUNNINGHAM, J., CONCURRING: I concur, but write separately to state that our call on the questionable jurors was a close one. It baffles me as to why trial judges continue to push the envelope on these suspect jurors. We, at the appellate level, should not have to continue to deal with these troublesome rulings. Trial judges must stop living on the edge. When doubts arise, judges should err on the side of caution and excuse the questionable juror. Better to

incur more expense in expanding the number of jurors called into the jury pool than to sustain the expense of retrials.

NOBLE, J., DISSENTING IN PART: The crime committed against the child victim in this case is heinous and must cause revulsion, anger, and grief for the human race in the heart of any citizen. But justice demands that before punishment is visited on the perpetrator of this crime, we must be certain, beyond a reasonable doubt, that he is the perpetrator. To that end, rules of evidence and procedure have developed to ensure a fair and impartial trial. These rules and procedures may not always accomplish that goal, but when they are not followed, it is certain that the goal of justice has not been met.

Nothing can be more fundamental to obtaining justice in a trial by jury than to select only jurors who can be fair and impartial *beyond reasonable question.* One of the tools used to achieve this end is the peremptory challenge. As this Court discussed in *Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993), and *Shane v. Commonwealth,* 243 S.W.3d 336 (Ky. 2007), those challenges are a substantial right, the violation of which casts a shadow over the entire trial of a matter. If a reasonable person cannot look at a juror who is allowed to serve on a jury and believe that the prospective juror can be fair and impartial, then the prospective juror must not sit on the jury. When a court fails to excuse a juror who should not be allowed to serve, the only option available to defense counsel is to use a peremptory challenge in the hope that the jury can be made fair. But that forcing of defense counsel's hand impairs a substantial right. *See Shane,* 243 S.W.3d at 341.

Despite this Court having frequent opportunity to write on this principle, trial courts *persist* in allowing marginal jurors to remain on the jury panel, which inevitably forces defense attorneys to expend peremptory challenges in an attempt to seat a fair and impartial jury. There is no viable reason for this. A frequently offered reason is that there are not enough jurors in a given venue. This is patently not the case. With the possible exception of a few counties with very small populations, the population of citizens eligible to be jurors should be more than sufficient to allow an unquestionably fair and impartial jury to be selected, even in the most difficult of cases, such as those involving the death penalty. Thus there is no shortage of potential jurors.

Rather, any problem really lies with the process used to select the venire in a given county. Where that process is flawed, whatever the reason, it must be corrected to ensure an adequate venire.

Additionally, we must guard against allowing otherwise fair jurors to avoid their duty. Admittedly, many people would rather not serve on a jury because of the burdens such service imposes. Nonetheless, it is their duty as citizens to serve as needed, and our system of trial by jury is dependent upon such service. Few people ever expect to land in court; but if they do, they want full protection of their right to a fair and impartial trial. Jury service is a way of "paying it forward" against a potential need for themselves, family, or friends. It is one of the best and most crucial parts of participatory democracy. Judges must work to keep *qualified* jurors in the venire, no matter how unpopular service is.

That, however, is no excuse to allow biased or otherwise unqualified jurors through the jury selection process. There must not be reasonable questions about the bias of the jurors selected to serve.

I believe Juror 160 created such reasonable questions by her answers on voir dire in which she admitted to talking to the investigating officers about this case. While I agree with the majority that merely being or having been a police officer does not *automatically* disqualify a potential juror, to the extent that job allows the person to have inside investigatory information about *the case at issue,* then the officer's impartiality can be reasonably questioned.

It is difficult to imagine how a juror, especially one who is a fellow officer, could disregard what she had heard from an inside investigator about the case. And while Juror 160 might honestly have believed she would decide the case on its merits as presented in court, it is impossible to know how her view of the evidence presented was tainted by what she had learned of the case from other officers, whom she no doubt respected. What is clear is that there is a reasonable question as to whether she could truly be impartial. This is further affirmed by her statement that her understanding of the case was that the child "was sodomized *by Mr. Ballard* and then beat to death in a garage in Bourbon County." By this statement, it was obvious that the Appellant was already guilty in her mind, and that at best, the burden would be on the defendant at trial to change her mind. The defendant has no such burden under the law.

Juror 131, though a closer call, should also have been struck for cause, because in his mind, Appellant was a pedophile, and even if he *wanted* to forget having heard this, it is clearly questionable whether he *could.*

There is no sensible, viable, functional, or legal reason these jurors were left in the jury pool, requiring a peremptory strike to remove them. Under *Shane*, the Appellant is entitled to a reversal and a new trial because of the failure to excuse the jurors for cause.

Reversal is further supported by some evidentiary problems.

First, I disagree with the majority that evidence must be prejudicial to one's defense before it can be prejudicial at all. Dr. Emily Craig, the Commonwealth's expert witness, testified about items found in the garage that could have caused the kind of blunt head trauma that killed the child, and was allowed to refer to photos of these items. However, none of the items shown could be identified as the murder weapon, which should have been possible given the brutal beating the child suffered. Thus their introduction was improper due to the speculative nature of the testimony, which was far more prejudicial than probative. Also, she was allowed to demonstrate by striking a lump of modeling clay with several objects to demonstrate how the blows caused damage to the child. It should be obvious that there are strong dissimilarities between a clay object and one made of skin and blood. The evidence was not offered to demonstrate the shape a specific weapon would make if it struck an object, as no murder weapon was identified, and there was no way to predict potentially varying degrees of force. But this could possibly

be dealt with on cross-examination. However, doing the actual demonstration in court before the jury included a visual and visceral aspect that made the demonstration unduly prejudicial, when it had little, if any, probative value.

The majority finds these two evidentiary issues not to create error on the grounds of relevance and prejudice because Appellant's defense was that he was not involved in the murder, and thus this evidence did no damage to his defense theory. However, the Commonwealth does not get a free pass. It still must make its case against the Appellant, and it may not do so with irrelevant and speculative evidence. If the jury did not believe Appellant's theory, then evidence such as this is clearly prejudicial as to the degree of the crime committed and later in sentencing. A competent defense attorney must guard against such a possibility, as did the attorney here.

For the reasons stated above, I would very reluctantly reverse, because I do believe that our process of justice must be the same for all.

Scott, J., joins.

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