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RENDERED: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000575-MR

RANDALL CREEK — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 08-CR-00991

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Warren Circuit Court jury found Appellant, Randall Creek, guilty of murder, for which he received a sentence of life imprisonment. He now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred by denying his tendered instructions, by allowing an unqualified juror to deliberate in his case, and by denying his motion for change of venue.

I. BACKGROUND

On November 19, 2009, a Warren County grand jury indicted Appellant and charged him with one count each of murder, first-degree wanton endangerment, and tampering with physical evidence. At the time of the incident in question, Appellant was a deputy sheriff in Simpson County and a veteran of the first Gulf War. The charges arose from Appellant shooting Debbie Rediess to death with his service weapon on October 5, 2008, and pointing the same gun at her boyfriend, Gregory Wilson. Appellant was later

apprehended in Iowa and waived extradition to Kentucky. Upon his return, he entered a plea of not guilty.

At trial, the jury found Appellant guilty of murder and first-degree wanton endangerment, but not guilty of tampering with physical evidence. During the penalty phase, the jury recommended Appellant be sentenced to life in prison for the murder conviction and five years in prison for the wanton endangerment conviction. The trial court entered the sentences recommended by the jury, with the five year sentence for wanton endangerment to be served concurrently with the sentence of life imprisonment. This appeal followed.

II. ANALYSIS

A. Instructions

Appellant first argues that the trial court denied his right to present a defense when it refused to grant his requested instruction on involuntary intoxication.[1] According to Appellant, the court's refusal constituted an abuse of discretion because he set forth sufficient evidence to support his contention that his involuntary intoxication negated an element of the offense, i.e. intent to commit murder.[2] We disagree.

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[1] Appellant specifically contends that he was entitled to instructions on involuntary intoxication, second-degree manslaughter, and reckless homicide. While Appellant argues that any instruction on intoxication would compel a contemporaneous instruction on second-degree manslaughter, *Slaven v. Commonwealth*, 962 S.W.2d 845, 857 (1997) (holding that the "failure to instruct on second-degree manslaughter as a lesser included offense of murder was prejudicial error" when the trial judge granted the appellant's request for an instruction on the defense of intoxication), Appellant fails to articulate why he deserves an instruction on reckless homicide.

[2] In their respective briefs, the Commonwealth and Appellant engage in a convoluted debate as to whether an instruction of involuntary intoxication can

The defense of involuntary intoxication is set forth in KRS 501.080(1) and provides that "[i]ntoxication is a defense to a criminal charge only if such condition . . . [n]egatives the existence of an element of the offense."[3] Although intoxication may be a defense to a charge, we have consistently recognized that a defendant must set forth sufficient evidence to justify such an instruction:

> [E]vidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing. *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112, 117–18 (1990); *Meadows v. Commonwealth*, Ky., 550 S.W.2d 511 (1977); *Jewell v. Commonwealth*, Ky., 549 S.W.2d 807 (1977), *overruled on other grounds, Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981).

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warrant an instruction on manslaughter. According to the Commonwealth, if Appellant was entitled to an instruction on involuntary intoxication, that defense was absolute and thus does not trigger the inclusion of a second-degree manslaughter instruction as would be the case when an instruction on voluntary intoxication is given. Appellant responds that, while involuntary intoxication serves as an "all or nothing" defense to general intent crimes, it can be a defense warranting instructions on lesser included offenses when the intoxication negates the specific intent element of the higher charge. Rather than delve into this argument, we can resolve this case by simply determining whether Appellant set forth sufficient evidence to support such an intoxication instruction.

[3] Nowhere in his brief does Appellant argue that his involuntary intoxication equated to insanity under KRS 501.080(2), which reads:

> Intoxication is a defense to a criminal charge only if such condition either:
>
> (1) Negatives the existence of an element of the offense; or
>
> (2) *Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.*

(Emphasis added).

Springer v. Commonwealth, 998 S.W.2d 439, 451 (Ky. 1999).[4] "We review a trial court's decision not to give an instruction under the abuse of discretion standard." *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (*citing Crain v. Commonwealth*, 257 S.W.3d 924 (Ky. 2008)).

In *Harris*, we found the trial court did not abuse its discretion in denying an instruction on voluntary intoxication. 313 S.W.3d at 51. In that case, the appellant presented evidence that he was an active alcoholic and had been observed in a drunken state by three witnesses on the day of the murder. *Id.* at 50. Two of those witnesses testified that "they saw Harris walking along the railroad tracks as he often did when drunk, talking to himself, waving his arms, and apparently oblivious to his surroundings." *Id.* at 50-51. The third witness, the appellant's son-in-law, testified that he had seen the appellant "drinking beer and intoxicated to the extent that his speech was slurred." *Id.* at 51. However, we agreed with the trial court because "the evidence showed only that, although he had drunk heavily that afternoon, at least an hour-and-a-half before the offense he understood his son-in-law's request to borrow money, he was in sufficient control of himself and was aware enough of his circumstances to join Dwayne Harris and Epperson's excursion with Browning, and after returning to Harlan he not only remembered the killing but boasted of it." *Id.*

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[4] Admittedly, our cases addressing the sufficiency of the evidence to support an intoxication instruction all deal with voluntary intoxication under KRS 501.080(1). However, considering that the claim is the same, i.e. that his intoxication negated the mental state of the offense, we believe the same standard applies whether the intoxication alleged was voluntarily or involuntarily brought about. *See note* 3.

In this case, Appellant had been prescribed Lortab and Flexeril for back pain on September 29, 2008, and also received a Kenalog injection and a Medrol dose pack for a skin rash. According to his expert, pharmacist Rodney Richmond, the steroids taken by Appellant prior to the shooting had the potential side effects of euphoria, anger, hostility, aggression, and changes in concentration and judgment. He did not, however, testify that Appellant suffered any of these side effects, be they mild or major.

Prior to going to Rediess' home on October 5, 2008, Appellant had worked a full shift without incident until relieved by Deputy Jim Bouer at 7:00 a.m. Appellant then drove from Simpson County to Rediess' home in Smiths Grove and shot her four times. Appellant subsequently ordered Wilson, who had emerged after hearing the shots, back into the house by pointing his gun at him.

After the shooting, Appellant drove to the home of his ex-wife, Angela Lay, in Allen County and told her that he had just shot Rediess. According to Lay, Appellant acted "normal" and "unusually calm" in explaining that he had shot Rediess because she had lied to him.

Besides visiting his ex-wife, Appellant also left a series of voice mails to current and former co-workers. For instance, Appellant called Deputy Bouer and said that he shot his ex-girlfriend after he got off work because she had been lying and cheating. Appellant also called Tim Phillips, with whom he had worked at the Simpson County Detention Center, and said that he "shot the

bitch in the back of the head," that he "put two or three in her chest," and, if she survived, that she would be "brain fucking dead."

Later, while in custody in Black Hawk County, Iowa, Appellant told another inmate how he went to Rediess' home, saw her boyfriend's car in the driveway, and "was going to make it lights out for both of them." Appellant also consented to an interview with Black Hawk County Sheriff Detective Jason Terrones, wherein he detailed the events and stated that he would have kept shooting her but she was laying on the concrete and he was afraid a bullet would ricochet.

Several other witnesses testified in support of Appellant's intoxication defense, noting that his behavior leading up to and including the shooting was completely out of character. Appellant himself testified that he did not recall pulling the gun and that, when Rediess turned her back to him, he no longer saw a woman but instead, an Iraqi soldier. According to Appellant, all he could recall of the shooting was an Iraqi soldier dropping to the ground.[5] Appellant, however, admitted that he remembered going to work prior to the shooting and stated that he had no problems while there. He also recalled driving to Rediess' house, seeing Wilson's car in the driveway, knocking on the door, Rediess answering the door and coming outside to talk to him, and Rediess turning her back on him.

[5] As he was being transported back to Kentucky, Appellant also indicated that he had blacked out during the shooting.

Here, unlike in *Harris*, Appellant did not establish that he was intoxicated, as his expert could not say that he suffered any of the possible side effects of the steroids taken prior to the shooting. Furthermore, if we assumed Appellant was intoxicated, he testified that he recalled the events immediately preceding the shooting. Moreover, his trip—visiting Simpson, Warren, and Allen Counties in Kentucky, as well as Black Hawk County, Iowa—demonstrated that he was capable of driving. *See Stanford v. Commonwealth*, 793 S.W.2d 112 (Ky. 1990) (smoking cocaine and drinking beer half-an-hour to an hour-and-a-half before the offense did not justify intoxication instruction where evidence showed that defendant was still capable of driving). Finally, his visit with his ex-wife, the two voicemails, and his statements made to another inmate and Detective Jason Terrones show that Appellant "not only remembered the killing but boasted of it." *Harris*, 313 S.W.3d at 51.

Because Appellant failed to set forth evidence sufficient to support a doubt that he knew what he was doing when the offense was committed, the trial court did not abuse its discretion in denying an instruction on involuntary intoxication.

B. Unqualified Juror

RCr 9.36 requires a judge to excuse a juror if there is a reasonable basis to believe the juror cannot be fair and impartial. Moreover, we have held that a juror should be excused for cause if he would be unable in any case, no matter how extenuating the circumstances may be, to consider the imposition of the

minimum penalty prescribed by law. *Grooms v. Commonwealth*, 756 S.W.2d 131, 137 (1988).

Within these mandates, a trial court has considerable discretion in determining whether a juror should be stricken for cause. *Murphy v. Commonwealth*, 50 S.W.3d 173, 182 (Ky. 2001) (*citing Campbell v. Commonwealth*, 788 S.W.2d 260 (Ky. 1990)). Because a determination as to whether to excuse a juror for cause generally lies within the sound discretion of the trial court, we review only for a clear abuse of discretion. *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). However, if a litigant fails to properly preserve such an argument,[6] we will not address it unless he or she requests palpable error review. *See Anderson v. Commonwealth*, No. 2002-SC-0227-MR, 2003 WL 22975322 (Ky. December 18, 2003) (declining to address whether a juror was unqualified in absence of a motion to strike); *Murphy*, 50 S.W.3d 173 (exercising palpable error review because motion to strike was withdrawn).

Appellant contends that the trial court erred by failing to strike a juror that he alleges was unqualified. Conceding this issue was unpreserved, Appellant requests palpable error review pursuant to RCr 10.26, to wit:

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[6] To properly preserve error attributable to a trial court's failure to strike a juror, an appellant must move to excuse that juror and exhaust all of his peremptory challenges. Moreover, "in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." *Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009). Here, Appellant made no motion to strike the juror in question for cause and failed to exercise a peremptory strike against her.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

To be deemed "palpable," an error must be clear and plain under current law, *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006), and such an error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005) (internal quotations omitted). Most importantly, a palpable error does not justify relief unless it has resulted in a manifest injustice, i.e. it so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Appellant argues that he suffered a manifest injustice when an unqualified juror was permitted to deliberate in his case. According to Appellant, this juror should have been removed because voir dire revealed she might not be able to consider the imposition of the minimum penalty prescribed by law. Moreover, before opening statements, she exhibited somewhat erratic behavior. The Commonwealth responds that Appellant is not entitled to relief because the alleged error does not rise to the level of manifest injustice. We agree with the Commonwealth.

In this case, the juror in question approached the bench to acknowledge that she had heard media coverage of the case. Although she indicated that she had no preconceived notion regarding the matter, she stated "if he's guilty,

I believe in the death penalty."[7] The trial court informed the juror that this was not a death penalty case and did not question her further regarding her unprompted statement. However, all jurors were subsequently questioned by defense counsel regarding their ability to consider mitigating evidence and the full range of penalties available in the event they found Appellant guilty. The juror in question gave no indication that she could not consider the full range of penalties.

Before opening statements, the bailiff reported that he had been approached by a few jurors who told him the juror in question was extremely upset and saying that she did not believe she could deal with the trial. The defense counsel, the prosecutor, and the trial court thus agreed to revisit the issue after opening statements.

However, after opening, the trial court attributed the juror's behavior to a bad case of "initial nerves" after observing her during both attorneys' opening statements. According to the court, she got up and left "strongly" and did not appear to be emotional or upset. As a result, the judge declined to question her further unless either the prosecutor or the defense counsel wished him to do so. Neither made such a request.

The matter was revisited again at the close of the first day of trial, with the trial court noting that defense counsel, having "selected her," must have

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[7] Based upon the juror's statement, Appellant puts forward a litany of cases in which a potential juror expressed a preference for the death penalty. *See, e.g., Morgan v. Illinois*, 504 U.S. 719 (1992). However, as Appellant himself notes, this case is distinguishable because he was not charged with capital murder.

"seen something in her."[8] The trial court then said that it watched her during opening statements and observed that she was listening, taking some notes, and that "she did not display a physical discomfort." Once testimony began, including the introduction of photographs, the trial court added that the juror made eye contact with the witnesses, watched the screen, and took notes. According to the judge, "nothing appeared—to bring about, to indicate any level of discomfort . . . ."[9]

For these reasons, we do not believe Appellant suffered a manifest injustice. Although we decline in this case to describe his counsel's conduct as inviting error,[10] we fail to see how inclusion of the juror in question could be considered "shocking or jurisprudentially intolerable" in light of the court's scrutiny, not to mention the repeated acquiescence to her presence on the jury.[11] Simply put, we cannot, based on the record before us, conclude that she would not be able to consider the imposition of the minimum penalty prescribed by law, especially since she gave no such indication when all the jurors were questioned by defense counsel.[12] Moreover, we see no reason to

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[8] Presumably, the trial court is referring to defense counsel's failure to use a peremptory challenge.

[9] The prosecutor and the defense counsel also noted that the juror made eye contact with them during their statements. Moreover, each denied observing anything about the juror's demeanor that caused them any concern.

[10] Contrary to the trial court's characterization, a defense attorney does not "select" a juror by failing to exercise a peremptory challenge against them. *See supra* note 7.

[11] To hold otherwise under these circumstances would be tantamount to creating an automatic reversible error for strategic decisions by terming them "palpable."

[12] In any event, we note that neither of the sentences was the minimum.

dispute the trial court's evaluation of her behavior at trial, as it was best situated to make such a determination.

Because the inclusion of this juror was not "shocking or jurisprudentially intolerable," we hold that Appellant did not suffer a manifest injustice.

C. Venue

Appellant finally argues that the trial court erred by denying his motion for a change of venue. In evaluating change of venue questions, "wide discretion is, and should be, vested in the trial court" because "the judge is present in the county and presumed to know the situation." *Stopher v. Commonwealth*, 57 S.W.3d 787, 795 (Ky. 2001). As such, we only review for an abuse of discretion. *See Jacobs v. Commonwealth*, 870 S.W.2d 412, 416 (Ky. 1994).

Here, Appellant contends the trial court abused its discretion because of the extensive and detailed publicity, which he asserts compromised his right to a fair, impartial and indifferent jury free from outside influences. We simply disagree.

Pursuant to the Due Process Clause of the 14th Amendment of the United States Constitution,[13] as well as KRS 452.210,[14] a change of venue

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[13] "Widespread bias in the community can make a change of venue constitutionally required." *McCleskey v. Kemp*, 481 U.S. 279, 310 n.30 (1987) (*citing Irvin v. Dowd*, 366 U.S. 717 1961)).

[14] KRS 452.210 reads:

> When a criminal or penal action is pending in any Circuit Court, the judge thereof shall, upon the application of the defendant or of the state, order the trial to be held in some adjacent county to which there is no valid objection, if it appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending. If the judge is

should be granted if it appears that the defendant cannot have a fair trial in the county wherein the prosecution is pending. *Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978). To obtain a change of venue, "[p]rejudice must be shown unless it may be clearly implied in a given case from the totality of the circumstances." *Id.* In so doing, the moving party must show that (1) there has been prejudicial news coverage, (2) the coverage occurred prior to trial, and (3) the effect of such news coverage is reasonably likely to prevent a fair trial. *Brewster*, 568 S.W.2d at 235. (*citing Sheppard v. Maxwell*, 384 U.S. 333 (1966)). "[T]he mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." *Brewster*, 568 S.W.2d at 235.

In this case, Michael Jamison, David Gordon, and Dr. Jerry Daday, an assistant professor in the Western Kentucky University Department of Sociology, testified in support of Appellant's motion for change of venue from Warren County.[15] Jamison, an attorney and acquaintance of Appellant, testified that he had seen coverage of the matter on television, in the newspaper, and on the internet, and that the coverage used the words "kill" and "murder." He also testified that Appellant's career path included law

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satisfied that a fair trial cannot be had in an adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had.

[15] Appellant not only requested a change of venue, but also that this change did not include those counties surrounding Warren County.

enforcement jobs and that he had run for Warren County Jailer against Jackie Strode, a well-liked candidate, in 2002. According to Jamison, Appellant was outspoken on his opinions, very active in Republican Party politics, and was a frequent letter writer to the local newspaper. Moreover, Jamison stated that most members of the community concluded the case was "open and shut" for murder and that he did not believe Appellant could get an impartial jury in Warren County. However, Jamison admitted that the only media reports he could recall were to the effect that Appellant was a suspect, that the Kentucky State Police were searching for him, and that one outlet released a letter or e-mail from him, although Jamison could not remember the details of the letter or e-mail. Finally, Jamison acknowledged that all of the people he spoke to about the matter knew Appellant.

Gordon, Appellant's ex-father-in-law and friend, testified that he was aware of the media coverage and had discussed the matter with members of the community. According to Gordon, the people he had spoken with believed Appellant to be guilty without exception. He also noted that Appellant wrote letters to the newspaper and that people in the community found him to be outspoken in his opinions. Like Jamison, Gordon believed it would be difficult to find a jury in Warren County that had not already formed an opinion in the case. However, he conceded that almost all of the people to whom he spoke regarding the matter knew of Gordon's relationship to Appellant or were friends of Appellant.

Appellant also provided the results of telephone survey conducted by Dr. Daday derived from a sample of 367 persons using the AT&T White Pages for Warren County. Dr. Daday testified that of the 367 persons selected, 127 agreed to participate, yielding a 9% margin of error. According to Dr. Daday, 54% of those surveyed confirmed that they had heard of Appellant, 61% knew Appellant had been charged with murder,[16] and 32% believed him to be guilty.[17]

After considering the testimony and survey, the trial court denied the motion and proceeded to voir dire, which it felt would be a better measure of whether a fair and impartial jury could be seated in Warren County. Forty-six potential jurors were called during the first round of voir dire, with 21 acknowledging having some knowledge of the case and 13 excused due to their preconceived notions as to Appellant's guilt.[18] In total, 59 prospective jurors

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[16] We note that more people said they knew Appellant had been charged with murder than said they had heard of Appellant. Dr. Daday attributed this statistical oddity to additional information about the charge triggering a memory of Appellant in some persons that his name alone had not elicited.

[17] Dr. Daday's report noted that the White Pages, though, were less than ideal because it omitted people with unlisted numbers or no landline from the sample. According to Dr. Daday, younger residents, who frequently use a cell phone in lieu of a landline, were potentially under-represented.

[18] Of the 32 persons called for the initial venire, 14 acknowledged having some knowledge of the case and nine were excused per their admission to previously forming an opinion as to Appellant's guilt. Of those initially excused, only five attributed their opinion solely to information gleaned from news coverage.

After the initial excusals, the clerk called nine people as replacements. Of those nine, five had previously heard of the matter and four were excused, one due to a hardship in finding childcare and three per their admission to previously forming an opinion as to Appellant's guilt. Of the three persons excused for having previously formed an opinion, one stated that she lived about a mile from the residence where the crime was committed, had a neighbor who was a volunteer firefighter that had responded to the scene of the shooting, and had a daughter that had gone to school

were called, 29 had prior knowledge of the case, and 17 were excused due to their preconceived notions.[19] Of the 14 jurors eventually selected to serve, only three stated during voir dire that they had any prior knowledge of the case and all three stated that they had formed no opinion as to the outcome of the matter. Notably, Appellant did not challenge for cause any of the remaining 14 jurors.

Based upon our review of the record, we do not believe that the trial court abused its discretion. Jamison, who provided the only testimony regarding the nature of the coverage, could only establish that the coverage

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with the victim while the other stated that he worked with a person that was a close friend of the victim.

The clerk then called four more people as replacements, with one acknowledging having some knowledge of the case and, more importantly, that he had a preconceived notion about the case because he had coached Appellant in baseball and had kept up with the case in the media. The clerk finally called another person to replace the one excused. Although that person stated that she had prior knowledge of the matter, she had not formed an opinion and thus remained on the panel.

[19] Upon completing the first round of voir dire, the trial court then questioned the 32 remaining jurors about the schedule of the trial and potential conflicts or prior excusals. Five people were then excused because of economic hardships and/or medical reasons that precluded them from serving on a lengthy trial.

After excusal these five persons, the clerk called jurors one at a time as replacements. Three people were excused because they had a preconceived notion regarding whether Appellant was guilty while two were excused due to medical appoints scheduled during the trial. Of the five seated, two had previously heard of the case (but had formed no opinion thereon) while the remaining three stated that they had not heard anything about the case.

During the prosecutor's voir dire, one juror was excused because he was friends with the Assistant Commonwealth's Attorney and was replaced by a juror who acknowledged having a little bit of prior knowledge of the case, but had not formed an opinion as to Appellant's guilt. A second juror then stated that he knew the victim's son and would have a hard time sitting on the jury. This juror was excused and replaced by a juror that stated he had no prior knowledge of the case. Finally, a third juror stated that the crimes occurred down the road from where he lived and that he had formed an opinion as to Appellant's guilt. This juror was excused and also replaced by a juror that stated he had no prior knowledge of the case. No jurors were excused for cause during Appellant's voir dire.

used the words "kill" and "murder." While these words constitute terms of art in the legal world, they are undoubtedly used interchangeably amongst laypersons and, accordingly, it would be absurd to describe their usage in news coverage as prejudicial. Without more, we can only assume that the coverage in this case reported nothing more than the uncontroverted facts that Appellant was a suspect in a murder and thus the state police were searching for him.

Even if we accepted as true that Jamison set forth evidence of prejudicial news coverage, we simply cannot say that the trial court erred in concluding that the effect of such coverage was not reasonably likely to prevent a fair trial. Both Jamison and Gordon acknowledged that almost all of the persons they spoke to either knew or knew of Appellant prior to the shooting. More importantly, a review of the jury voir dire testimony undermines such a determination. At the outset, we note that the court had little difficulty in selecting a jury, as only 59 venire members were required to seat a 14 member jury. *See Foster*, 827 S.W.2d 670, 675 (Ky. 1991) (stating that the fact that "only fifty-eight veniremen were required to complete a fourteen-member jury . . . is evidence of a community which was not prejudiced.") (citation omitted). Of those 59, less than half had any prior knowledge of the matter and just 17 were excused due to their preconceived notions. *See Bowling v. Commonwealth*, 942 S.W.2d 293, 298 (Ky. 1997) (Affirming the trial court's denial of a change of venue motion even though "84.6 percent of jurors examined during individual voir dire admitted exposure to publicity and some

knowledge about the case."); *Wood v. Commonwealth*, 178 S.W.3d 500, 513 (Ky. 2005) (Affirming the trial court's denial of a change of venue motion even though "approximately 95 percent of the members of the jury pool had been exposed to pretrial publicity."); *Stopher*, 57 S.W.3d at 796 (Affirming the trial court's denial of a change of venue motion even though 40% of the jurors questioned "were excused based on opinions of guilt, excess knowledge of the facts, or refusal to consider the death penalty."). In fact, only three of the 14 jurors eventually selected to serve had any prior knowledge of the case (and none had formed a prior opinion as to Appellant's guilt). Finally, Appellant did not challenge for cause any of the 14 persons that ultimately sat on the jury in this case, which is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt. *See Foster*, 827 S.W.2d 670; *Beck v. Washington*, 369 U.S. 541 (1962).

Because Appellant failed to conclusively establish prejudicial news coverage and a resultant reasonable likelihood of an unfair trial, we hold that the trial court did not abuse its discretion in denying his motion for change of venue. We pause, though, to address Appellant's misplaced reliance on this Court's decision in *Jacobs*, 870 S.W.2d 412.[20]

In *Jacobs*, this Court reiterated that prejudice "may be clearly implied in a given case from the totality of the circumstances." 870 S.W.2d at 416 (*citing*

[20] We also reject Appellant's reliance upon *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.22 (1976), in which the United States Supreme Court stated that "the smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed." In that case, the events took place in a community of 850 people, *Id.* at 567, whereas the population of Warren County in 2010 was 113,792.

Estes v. Texas, 381 U.S. 532 (1965)). Here, Appellant notes the circumstances surrounding the case—that he previously ran for jailer, that he was considered outspoken on his opinions, that he was a frequent letter writer to the local newspaper, and that 32% of Warren County residents surveyed believed him to be guilty.[21] However, we believe *Jacobs* to be clearly distinguishable from this case.

In *Jacobs*, 870 S.W.2d at 415, the pre-trial publicity reached a fever pitch, going so far as to encourage community members to fundraise for the appellant's prosecution:

> This murder was described by county officials as one of the most brutal in Knott County history. The initial and subsequent news reports described Jacobs' conviction of a similar slaying in 1974, and his release after such conviction when the earlier crime was overturned on appeal. Developments in this awaited trial permeated the media to such an extent that curbstone opinions, not only as to appellant's guilt, but even as to what punishment he should receive, were solicited and recorded. The force of adverse publicity gave impetus to the excitement and fostered prejudice among the people of the community. In fact, one of the public fund raising events to aid in Jacobs' prosecution raised $2,922.

Furthermore, a public opinion survey/poll indicated that most persons had not only heard about the case, but also formed an opinion as to the appellant's guilt:

> The public opinion survey/poll which was filed with the record indicated that in 100 calls, 98 persons had read or heard about the crime. Eighty-nine thus polled were aware of appellant's name; 73 knew that he had been in prison previously, and 60 were aware of that charge. Ninety-three persons had heard both radio and television stories, some up to at least 100 such reports. Eighty-five considered Jacobs guilty, while 15 did not respond or stated they

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[21] *See supra* note 16.

> did not know. Sixty-five thought Jacobs would receive a fair trial in Knott County.

Id. And "prospective jurors gave repeated voice to the community's sentiment that was widespread against him" during the course of voir dire:

> All potential jurors, save one, had knowledge of the case. Of the 153 or more jurors that were voir dired individually, 112 were excused because they had preconceived opinions about appellant's guilt, could not presume him innocent, or admitted to knowledge of his prior manslaughter conviction. Of 38 jurors who were accepted by the court, 19 had an initial opinion that Jacobs was guilty. Of those 19 jurors, four sat on the panel that decided the case.

Id. Based upon the media build-up, polls, and voir dire examination, this Court held that the appellant was denied his constitutional right to a fair trial. *Id.* at 417.

Unlike *Jacobs*, here only 59 venire members were required to seat a jury, less than half had any prior knowledge of the matter, and just 17 were excused due to their preconceived notions. Most importantly, none of the jurors who sat on the panel that decided the case had an initial opinion that Appellant was guilty. Moreover, nothing in the record indicates that an inflammatory atmosphere existed in Warren County or the Warren County Justice Center. *Murphy v. Florida*, 421 U.S. 794, 802 (1975) (stating that the "indicia of impartiality might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory."). Finally, at most 61% of those persons surveyed by Dr. Daday had knowledge of the case and only 32% considered Appellant guilty, which, again, simply cannot be equated to *Jacobs*. We, therefore, find no error.

III. CONCLUSION

For the foregoing reasons, Appellant's murder conviction and corresponding sentence of life in prison are affirmed.

All sitting. All concur.

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