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<u>NOT TO BE PUBLISHED OPINION</u>

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000727-MR

JONATHAN LEVI JOHNSON | APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
NO. 09-CR-000191

COMMONWEALTH OF KENTUCKY | APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jonathan Levi Johnson, was convicted in Jefferson Circuit Court of first-degree robbery, first-degree assault, second-degree assault, and as a first-degree persistent felony offender, and sentenced to twenty-four years' imprisonment. He claims the trial court erred in two evidentiary decisions at trial. Finding no error, this Court affirms.

I. Background

On September 18, 2008, Appellant forced his way into Gerald Kleinhenz' home. He encountered Kleinhenz' friend, Bridget Elder, just inside the door. Elder recognized Appellant from times when she had observed him smoking cocaine. Appellant attempted to shoot her point-blank in the head, but his shotgun misfired. After this shooting failure, he stabbed her multiple times in the chest. Appellant then turned to Kleinhenz, knocked him to the floor, and

attempted to shoot him as well, but once again, the gun misfired. Undeterred by his malfunctioning shotgun, Appellant demanded money from Kleinhenz, who tossed him $40 in cash. Appellant grabbed the money and left.

After Appellant fled, Elder called 911 to report the incident. On the call, Elder described how she had been stabbed multiple times in the chest. She further exclaimed that she was dying from the wounds and wanted to talk to her mother and children. A recording of this call was played for the jury at trial.

Following the trial in Jefferson Circuit Court, the jury found Appellant guilty of first-degree robbery, first-degree assault, and second-degree assault, as a persistent felony offender. The three convictions were set to run concurrently for a total sentence of 28 years, but then reduced at final sentencing to 24 years. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant challenges two items of evidence presented to the jury: Elder's statement that she had previously seen Appellant use illegal drugs; and the recording of the 911 call after the attack.

A. Prior Drug Use

Prior to trial, Appellant successfully moved to exclude any reference by Elder to Appellant's drug use. Indeed, to prevent any inadvertent elicitation of this information, the court instructed the Commonwealth to refrain from asking Elder how she knew Appellant. Nonetheless, the Commonwealth began

its direct examination by questioning Elder, "[H]ow do you know him?" Unsurprisingly, Elder responded, "I met him when . . . he was there with his girlfriend smoking crack." Upon mention of such drug use, Appellant objected and requested a mistrial. The court refused to grant a mistrial, but admonished the jury to "disregard her last comments."

The inadmissibility of Elder's testimony that she had previously seen Appellant use illegal drugs is routine under KRE 404(b). However, the appearance of inadmissible evidence does not always require a mistrial. On the contrary, one should only be granted when there is "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985). For this necessity to exist, "the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002). The trial court has broad discretion to ascertain this necessity. *Gosser v. Commonwealth*, 31 S.W.3d 897, 907 (Ky. 2000).

In this case, the trial court appropriately found such necessity lacking. Appellant's interests were satisfactorily served by admonishing the jury to ignore Elder's comment about drug use. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

"There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the

jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis and was inflammatory or highly prejudicial." *Id.* (citations omitted). Neither circumstance is present here.

There was no cause to believe the jury would be unable to follow the court's admonition. Elder's testimony about Appellant smoking cocaine lasted less than a second before being immediately cut off by objection. There was nothing dramatic or emotional about its recitation. Furthermore, it was completely isolated from the bulk of Elder's testimony and could easily be separated from her testimony about the actual crime at issue, which was much more impactful itself. The judge's admonition to ignore the brief statement was clear and direct and easily followed by the jury. *Johnson*, 105 S.W.3d at 441.

Nor was the testimony elicited from a question lacking a "factual basis." Although the court had instructed the Commonwealth not to ask such a question, and enjoyed the discretion to do so, how Elder knew Appellant was in fact relevant to establish her ability to identify him. Elder's response to the question, aside from its prejudicial effect, demonstrated how she had seen him numerous times and that he spent time in the neighborhood. Although, per the trial court's ruling, the question should not have been asked, one cannot say it lacked a factual basis.

As such, admonition was the appropriate remedy; not a mistrial.

B. The 911 Call

Over Appellant's objection, the recorded 911 call was played both during the Commonwealth's opening statement and through its direct examination of Elder. Appellant concedes that part of the 911 call—particularly, Elder's statement that she was stabbed by Appellant—was relevant and admissible. He contests that other portions—Elder's exclamations that she was dying and needed to talk to her mother and children—were irrelevant, unduly prejudicial, and inadmissible hearsay.

As to their relevance, both statements served to prove Elder's "serious physical injury," an element of first-degree assault. KRS 508.010(1)(a). "Serious physical injury" is defined as "physical injury which creates a substantial risk of death." KRS 500.080(15). Thus, to prove first-degree assault, the Commonwealth had the burden to prove that Elder faced a substantial risk of death.

Both Elder's statements complained of by Appellant aid in this proof. The first statement, that she was dying, is direct evidence, in the form of lay opinion testimony, of her physical condition. Her stated belief that she was dying was evidence from which a reasonable jury could believe that there was a substantial risk she would die.[1] While a victim's opinion that she is dying certainly is not perfect proof of a substantial risk thereof, it has some relevance to the severity of the injuries she sustained. *See* KRE 401. A reasonable jury

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[1] In addition to relevancy, lay opinion testimony must satisfy the criteria provided in KRE 701. However, because Appellant has not raised that evidentiary concern and no glaring violation has occurred, we do not consider it on appeal.

could believe that her statement that she was dying served to describe an awareness of injuries beyond the trivial.

Likewise, Elder's statement that she needed to talk to her children is simply circumstantial proof of the same point. One can infer from that statement that she was aware of injuries of a serious nature that posed a risk of death and thus she realized the possibility that this might be her last chance to speak to them. While to that extent the statement served a redundant purpose, that redundancy certainly does not negate its relevance. *See id.* While this is not perfect, or definitive proof, it does tend to provide a description of sorts of her injuries: so bad she thought she was dying.

Nor does the undue prejudice from these statements substantially outweigh their probative value. KRE 403. As noted above, such statements, lacking the precision of a medical diagnosis and prognosis, are not perfect evidence, which demonstrates that they have somewhat limited probativeness of the ultimate fact to be proved. But the Rules of Evidence have an inclusionary thrust,[2] and thus KRE 403 requires that any undue prejudice "substantially outweigh[]" probativeness before evidence will be excluded. While Elder's fear that she was dying and would not see her children again surely carried some inflammatory potential, such prejudice is minimal in light of the fact that Elder did not die after all and can in fact see her children again. This minimal prejudice did not outweigh the limited probativeness of the

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[2] Professor Lawson has stated this notion even more explicitly: "There is an inclusionary thrust in the law of evidence that is powerful and unmistakable, one that tilts the outcome toward admission rather than exclusion . . . ." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.05[3], at 70-80 (4th ed. 2003).

statements themselves, which added context to the statement to which Appellant does not object. More importantly, the trial judge is vested with substantial discretion under KRE 403, *see Burton v. Commonwealth*, 300 S.W.3d 126, 137 (Ky. 2010), and the decision to play the 911 call as a whole was a proper exercise of that discretion.

Nor is either statement barred by the law of hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). To the extent the two statements Appellant complains of were hearsay, the "truth" they were offered to prove was Elder's serious physical injury, not that she was dying and would not see her children again. Both statements imply Elder's impression that she was seriously injured, which is at least circumstantial proof of the actual extent of her injuries. Thus, they fit squarely as present sense impressions under KRE 803(1). This exception allows for statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Elder's statement that she thought she would die was made *while* she was perceiving bodily injury and implicitly described that injury as serious. Likewise, the statement that she wanted to speak with her children was an indirect statement implying her present impression of the degree of her injuries. As both statements provided Elder's present sense impression about her physical condition, they were admissible under the KRE 803(1) exception to hearsay.

III. Conclusion

For the aforementioned reasons, the judgment of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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