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NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
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ACTION.

Supreme Court of Kentucky

2011-SC-000172-MR

FRANKIE COVINGTON

APPELLANT

V. ON APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
NO. 06-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Frankie Covington, was convicted by a Bourbon Circuit Court jury of kidnapping and of being a first-degree persistent felony offender (PFO). For these crimes, Appellant received an enhanced sentence of life imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.¹

Appellant asserts four arguments on appeal: 1) that KRE 404(b) was violated by the introduction of evidence that he had been in prison prior to the alleged crime; 2) that the trial judge erred by not recusing himself from the matter; 3) that his Sixth Amendment right to confrontation was violated when

¹ Appellant had previously pled guilty but when the trial court declined to impose the sentence recommended by the Commonwealth, he sought to withdraw his plea. On appeal following the trial court's refusing to set aside the guilty plea, we reversed and remanded with directions to set aside the plea. See *Covington v. Commonwealth*, 295 S.W.3d 814 (Ky. 2009) (*Covington I*). This proceeding followed that remand.

the Commonwealth introduced drug test results from the victim through the testimony of two police officers and not through the testimony of the lab technician who performed the analysis; and 4) that the trial court violated RCr 9.74 when it permitted consideration of jury questions outside of his presence. For the reasons set forth below, we affirm Appellant's convictions and sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

Georgetown attorney Sharon Muse testified that on April 7, 2006, Appellant approached her as she left her office and asked if she would represent him in a legal matter. Muse did not immediately recognize Appellant and she told him to make an appointment with her secretary. Appellant however persisted in talking with Muse and ultimately asked her for a ride to his grandmother's house. Due to a sudden rain storm, Muse agreed. As she drove, Muse remembered that Appellant was a former client who she had represented at a criminal arraignment in district court and in a preliminary hearing. Appellant had also asked Muse to represent him and his wife in a slip and fall case, which Muse declined because she did not handle tort cases.

Muse became increasingly concerned about her safety the farther she drove with Appellant. Sensing that she might be in danger, Muse reached into her purse and called her boyfriend's number on her cell phone so he would hear what was happening in the car. Appellant became agitated and angry with Muse and at one point held a knife to her throat and stated that he was going to rape her because she was the reason he spent time in prison.

Appellant told Muse to pull off the road at a farm in Bourbon County. It was there that Muse escaped and was aided by several passing motorists who called the police. The Kentucky State Police arrested Appellant in a nearby field. Appellant at that time told the police that he was in Muse's car to use cocaine with her. As a result of Appellant's statement, Muse voluntarily took a drug test which she passed.

Appellant was indicted for kidnapping, sexual abuse, resisting arrest, and for being a first-degree PFO. Initially, he pled guilty to the charges but was permitted to withdraw his plea pursuant to RCr 8.10 when the trial judge chose to impose a sentence greater than the twenty years the Commonwealth had agreed to recommend. *See Covington I*, 295 S.W.3d 814.

Appellant was tried before a jury in February 2011 and was found guilty of kidnapping and of being a first-degree PFO. He was acquitted on the sexual abuse and resisting arrest charges. Appellant was sentenced to an enhanced sentence of life imprisonment. This appeal followed.

II. THE ADMISSION OF EVIDENCE OF APPELLANT'S PRIOR INCARCERATION DID NOT VIOLATE KRE 404(B)

Appellant's first argument is that KRE 404(b) was violated when, during the guilt phase of his trial, evidence was introduced that he had previously served a term of imprisonment. Only a few days before Muse's kidnapping, Appellant was released from prison after serving three years on a felony conviction. While Muse was not Appellant's attorney when he pled guilty to the previous charge or was sentenced to prison as a result thereof, she did

represent him during an earlier stage of that felony proceeding. The Commonwealth filed notice under KRE 404(c) that it intended to introduce evidence of this prior imprisonment because its theory of the case was that Appellant acted against Muse because he blamed her for his imprisonment. The trial court allowed the evidence to be introduced under the motive exception to KRE 404(b), but limited it only to the crimes for which Muse had represented Appellant. Subsequently, Muse's boyfriend testified that after Muse dialed him on her cell phone he overheard Muse and Appellant discussing Appellant's time spent in prison. Muse also testified that she had briefly represented Appellant during his prior felony proceeding.

Appellant now argues that the trial court erred by allowing the admission of evidence of his prior imprisonment because the prejudicial effect of that information outweighed its probative value. *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). He contends that it was unnecessary for his prior incarceration to be admitted because the Commonwealth had sufficient evidence to prove the elements of kidnapping without it. KRS 509.010(1). We disagree, and find that the admission of evidence regarding his prior incarceration was proper.

The admissibility of evidence of other crimes under KRE 404(b), is reviewed under a three-part inquiry which includes examining the evidence's relevance, probativeness, and prejudice to the defendant associated with the other crime. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). As part of this review the prejudice the defendant may incur as a result of the evidence

is balanced against its probative nature. *Wilson v. Commonwealth*, 199 S.W.3d 175 (Ky. 2006). The trial court's evidentiary ruling is reviewed for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

In this case, the evidence that Muse previously represented Appellant on a felony charge and that he served prison time supports the Commonwealth's theory that Appellant intended to kidnap Muse. The evidence is also relevant to establish a motive as to why Appellant might have intended to kidnap and hurt Muse: he blamed her — correctly or incorrectly — for his previous imprisonment. Thus, evidence of Appellant's prior incarceration is clearly relevant and quite probative because it strongly suggests a motive for the kidnapping. It is well settled that the Commonwealth is allowed to paint a full picture of the crime it is prosecuting and this includes the defendant's motive. *See Clark v. Commonwealth*, 267 S.W.3d 668 (Ky. 2008) (holding that the Commonwealth is allowed to present a complete and unfragmented picture of the circumstances of a crime).

Balancing the probativeness of the evidence against the prejudice Appellant suffered as a result of its admission leads us to conclude that the trial judge's evidentiary ruling was correct. No doubt, the evidence had an unfavorable impact upon Appellant's case. But, this prejudice is far outweighed by the importance of allowing the Commonwealth to prove what Appellant's motive might have been for committing the crime. Further, despite the jury being informed of Appellant's prior incarceration, they nevertheless found him not guilty of two of the charges against him, providing an indication

that they properly considered the evidence and did not convict Appellant based solely because of his prior record. We find no error in the admission of evidence regarding Appellant's prior incarceration.

III. THE TRIAL JUDGE DID NOT NEED TO RECUSE HIMSELF FROM THE CASE

Appellant next argues that the judge presiding over his trial, Bourbon Circuit Judge Robert G. Johnson, should have recused himself from the proceeding. Prior to trial, Appellant filed a motion to have Judge Johnson recuse because he was the judge who accepted his original guilty plea which was reversed by this Court. *See Covington I*, 295 S.W.3d 814. Appellant argues that Judge Johnson's involvement in the earlier plea left him biased against Appellant, and therefore unable to serve as a fair and impartial judge during the jury trial. Appellant notes that prior to the reversal in *Covington I*, Judge Johnson referred to Appellant as a "dangerous man," who had "the ability to hurt people," and was "a danger to society." He also notes that at the guilty plea proceeding that led to *Covington I*, Judge Johnson imposed a sentence in excess of the Commonwealth's recommendation of twenty years.

Of course, "[a] criminal defendant in a state prosecution is constitutionally entitled to a neutral and detached judge" *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). A judge however, is presumed to be impartial. To show that a judge should have recused there must be facts which prove that he could not be impartial and that his judgment was swayed. *Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961). The mere belief that

a judge will not afford a fair and impartial trial is insufficient grounds for recusal. *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995). Further, opinions that a judge forms during a trial do not show his lack of impartiality unless they show a deep seated favoritism or antagonism against a party which would make a fair judgment impossible. *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009).

The facts in this matter do not lead to the conclusion that Judge Johnson was biased against Appellant. Judge Johnson's comments about Appellant at the initial sentencing hearing were based upon judicially acquired knowledge that he learned from review of the victim impact statement, the pre-sentence investigation, the sexual offender evaluation, and the record as it then existed. The comments were not outside the standards of judicial propriety and they suggest no personal animosity or prejudice against Appellant. Moreover, we see no indication that the earlier proceeding which we reversed in *Covington I* in any way affected the judge's evidentiary rulings in the subsequent jury trial or the judge's attitude and disposition toward Appellant. For a variety of reasons trial judges routinely find it necessary to retrace their steps, and deal anew with old cases. They generally do so in a professionally competent manner with no personal interest in the outcome, and Judge Johnson's role in these proceedings appears to be no exception. Appellant has shown us no grounds for Judge Johnson's recusal, and we will not presume bias in the absence of such a showing. We find no error in the judge's refusal to recuse.

IV. APPELLANT'S RIGHT OF CONFRONTATION WITH REGARD TO THE VICTIM'S DRUG TEST

Appellant next argues that his Sixth Amendment right of confrontation was violated because the Commonwealth introduced into evidence through the testimony of two Kentucky State Police troopers the results of a drug test taken by Muse. Appellant correctly contends that the results of Muse's drug test should have been introduced through the lab technician who performed the analysis so that he or she could be subjected to cross-examination. We held in *Peters v. Commonwealth*, 345 S.W.3d 838, 842 (Ky. 2011), relying upon *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) that a defendant's Sixth Amendment right to confront the witnesses against him was violated when a police lab report and its conclusions were admitted at trial in the absence of the technician who made the report. Our holding in *Peters* is consistent with the contemporaneous decision of the United States Supreme Court in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.")² However, because Appellant did not object to the testimony, his only avenue for relief is by way of palpable error review under RCr 10.26.

RCr 10.26 allows for appropriate relief from unpreserved error upon a determination that manifest injustice has resulted from the error. A party

² In *Whittle v. Commonwealth*, 352 S.W.3d 898, 902 (Ky. 2011) we determined that *Melendez-Diaz* and *Bullcoming*, and by implication *Peters*, apply retroactively.

claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

Appellant argues that he suffered prejudice as a result of this error because the test results indicating that Muse was not under the influence of drugs, showed that he lied to the police when he told them that he was with Muse to use cocaine with her. However, Appellant fails to present any argument showing that the admission of the drug test results without cross-examination actually led him to suffer a “manifest injustice.” Appellant’s statement to police about Muse’s purported drug use, which he chose not to repeat at trial, was never credible. In his closing argument, Appellant’s attorney recognized the folly of that claim. He told the jury, “that the Appellant made some things up in his statement to the police; the most preposterous was that he did cocaine with the victim. No one thinks this happened. We know this didn’t happen.” Muse’s boyfriend heard nothing about cocaine as he listened via his cell phone to the conversation between Appellant and Muse. No drugs or cocaine residue were found in Muse’s car. Appellant’s defense was in no way compromised by the improper testimony. Thus, while it was a violation of Appellant’s Confrontation Clause rights to admit the drug test through the state troopers’ testimony rather than the technician who performed it, any error in introducing the drug test results was not palpable, and in no way deprived Appellant of his right to a fair trial.

V. ANY VIOLATION OF RCR 9.74 WAS NOT PALPABLE ERROR

Finally, Appellant argues that the trial court violated RCr 9.74 by permitting the consideration of a question from the jury outside of his presence. Because he did not object to the alleged violation at trial, he requests palpable error analysis under RCr 10.26. During its deliberation, the jury asked to review Muse's statement to a KSP trooper. However, while that statement had been recorded, it was never introduced into evidence. The jury was brought into the courtroom and told that the rules of evidence would not allow the statement to be played for them and that they would have to rely on Muse's in-court testimony. The trial court and counsel then realized that Appellant had not been brought back into the courtroom. Appellant's counsel told the court that this was not a problem and that the Appellant could be brought back in when the jury reconvened.

Other than his allegation that RCr 9.74 was violated, Appellant presents no argument or evidence that he was harmed. Thus, being presented with no compelling reason to find that Appellant was prejudiced, any error which occurred was harmless.

VI. CONCLUSION

Thus, for the above stated reasons, Appellant's convictions and sentence are affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Courtney J. Hightower
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204