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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000252-MR

CHRISTIAN MARTINEZ

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
NO. 09-CR-003213

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Christian Martinez appeals from his conviction of complicity to commit murder and tampering with physical evidence. Appellant raises as error (1) the trial court's denial of his motion for a directed verdict on the murder charge; (2) the trial court's denial of his motions for a mistrial; and (3) the admission of inadmissible hearsay identifying him as a gang member. This Court affirms.

I. Background

Just after 3 p.m., on Saturday, November 29, 2008, Louisville Metro Police Officer Justin Hardy responded to a call that a crowbar, with what appeared to be dried blood on it, had been found near a dumpster on Utah Avenue in Louisville. Officer Hardy collected the crowbar and contacted the homicide unit. About a half hour later, he received a call that a deceased male had been found in the trunk of a car on Oleanda Street, approximately a half-

mile to a mile from where the crowbar was found. The body in the trunk was identified as Pedro Gonzalez, and the car belonged to him. A t-shirt, naming a gang called "ACA XIII" and with the names of its members handwritten thereon, was found in the trunk with the body. This led police to believe the killing may have been gang-related.

Deputy Michael Smith and Detective Roy Stalvy went to the dumpster where the crowbar was found, and saw a bloody blanket in the dumpster. Deputy Smith investigated the area and found the faceplate to a vehicle stereo in the grass; this was significant because the vehicle in which Gonzalez's body was found was missing the stereo faceplate. Smith also saw what appeared to be dried blood in the grass.

At a nearby apartment, Deputy Smith spoke with Appellant and another Hispanic male, Ivan Orantes Pierce. Other men began running from the apartment through another door. Another man, Trey Skaggs, stayed in the apartment. Seeing blood inside the apartment, Smith obtained a search warrant.

Numerous blood stains were found in the kitchen, living room, bathroom and bedroom. In the living room, a sofa had a significant amount of blood on it, and there was blood spatter on the window blinds and on an electric heater. A bloody shoe print was seen in a bedroom. In the hallway leading to the bathroom, blood had been wiped down on the wall, the baseboards, and the doorway to the bathroom. In the bathroom blood had been cleaned around the toilet, and a bloody rag was on the floor.

Appellant, Pierce, and Skaggs were taken to the police station, where Appellant and Pierce were interrogated by Detective Keith Roberts.¹ Pierce stated he arrived at the apartment around 4 p.m. on Friday, November 28, played video games, drank beer, and left around 5 p.m. He returned around 9 p.m., and observed a lot of blood in the apartment. He said that he stayed and helped clean, and took out some garbage bags and went to sleep. Detective Roberts noticed what appeared to be blood on Pierce's shoe, and Pierce stated he believed he got it on his shoe when he took out the garbage or walked in the bathroom.

Appellant stated that he occasionally stayed at the apartment, and that he had arrived around 4 or 5 a.m. on Saturday, November 29, cooked something, took out three bags of garbage to the dumpster, and went to bed. He initially denied seeing any blood in the apartment, but later indicated that he might have seen some possible blood on the couch, but did not know if it was blood.

The medical examiner determined the cause of Pedro Gonzalez's death was multiple physical injuries from an altercation, and that the manner of his death was a homicide. Gonzalez had sustained multiple blunt force trauma and stab wounds to his face, head, neck, shoulders, arms, chest, abdomen, buttocks, genitalia, and legs. The blunt force trauma to the head was consistent with a blow from a crow bar. His right ear, except for the ear lobe, had been amputated. The medical examiner testified that Gonzalez's death

¹ Skaggs was not interrogated until several months later.

could have been caused by the stab wounds to the carotid artery, a stab wound to his diaphragm, brain swelling from blunt force trauma to the head, or strangulation.

Eight months after the murder, on July 23, 2009, Appellant was interviewed again. He told police that he knew some of the people who had been in the apartment when Gonzalez was killed, and he admitted taking some black garbage bags containing bloody clothing to the dumpster.

He was interviewed again a month later, on August 13, 2009. In this interview, he told police he had been at the apartment between 4 and 8 p.m. on Friday, November 28, then returned the next morning at 4 or 5 a.m. At this time he encountered an individual named "Ricardo" and observed blood in the bathroom and on the walls and couch in the living room and saw a bloody knife in the kitchen that had been washed. Appellant stated that he took two garbage bags containing bloody items, such as clothing, and a white bag, containing cans and bottles, to the dumpster. He did not admit to being involved in the murder.

Appellant and Ivan Orantes Pierce, and another individual, Santino Fox, were ultimately charged with Gonzalez's murder. Fox pleaded guilty to two counts of tampering with physical evidence, in exchange for testifying against Appellant and Pierce. Appellant and Pierce were tried jointly in January 2012.

At trial, Santino Fox testified that in November 2008, he and Pierce had known each other about a year and a half and were best friends. About a

month before, Pierce had introduced him to Appellant, whom he knew as “Brujo.”

Fox testified that on Friday, November 28, 2008, he and Pierce went to the apartment near the dumpster. Appellant was there, along with another person Fox did not know. Fox believed the person’s name was Ricardo.

The victim, Pedro Gonzalez, whom Fox did not know, arrived at the apartment around 10:30 p.m. Appellant, Pierce, Ricardo and Gonzalez talked to each other in Spanish, which Fox did not understand at the time.

About a half-hour later, Pierce and Gonzalez got into an argument, but Fox did not know what they were arguing about. Pierce had told Fox earlier that he was going to get some money from Gonzalez by selling him drugs. Before Gonzalez arrived, Pierce had shown Fox some fake drugs, a small bag with a white substance in it.

Fox could tell that a fight was going to occur because “people were mad and they started to pick up beer bottles and hitting [Gonzalez].” Fox believed “all of them” (referring to Appellant, Pierce, and Ricardo) were hitting Gonzalez with beer bottles. Someone then hit Gonzalez with a crow bar. Fox did not remember who did this, but believed it might have been Ricardo. The beating of Gonzalez with the beer bottles and crow bar went on for about ten minutes.

After the fight broke out, Fox went into the kitchen. While he was in the kitchen, he could hear Gonzalez screaming in the living room, and then the screaming stopped. When he looked in the living room, he saw that Gonzalez had been moved into the bathroom. About five minutes later, Pierce came into

the kitchen, got a knife out of a drawer, left the kitchen and went back to the bathroom. Fox heard a sawing sound.

Pierce called for Fox, who started to the bathroom, but was met by Pierce in the living room. Appellant and Ricardo were sitting in the living room. Pierce was holding a bloody body part and told Fox it was Gonzalez's ear. Pierce then went back into the bathroom and Fox returned to the kitchen.

About five minutes later, Pierce came into the kitchen with the knife, which had broken. He washed it in the sink, got another knife out of the drawer, and went back to the bathroom. After a few minutes "they" called Fox in to help drag Gonzalez's body to the kitchen. The body was unclothed and lying on the bathroom floor, and there were pools of blood on the floor. They then dragged Gonzalez's body to the kitchen, where they put a blanket around it.

Pierce then took Gonzalez's car keys and left to get his car. He backed Gonzalez's car up to the back steps of the apartment around midnight. Appellant, Pierce, Ricardo, and Fox picked Gonzalez's body up and put it into the trunk of the car, which Pierce drove away.

After Pierce left, Appellant told Fox to start cleaning the apartment. Pierce returned about ten minutes later, and they used paper towels to clean blood from the living room and bathroom. They cleaned for about a half-hour to an hour, and put the paper towels in black trash bags, which Pierce took out. Fox testified that he sat in a recliner in the apartment the rest of the night, and then found change in the couch for bus fare the next morning and went home.

After being approached by an FBI agent in October 2010, Fox told the agent what happened. A few days later Fox was interviewed by Detective Keith Roberts and gave a tape recorded statement. At some point, Fox called the FBI agent to tell him that he had notebooks which Pierce had given him after the murder, in which Pierce had written ACA XIII gang member names, contacts, ranks, and rules. Fox denied being a member of the gang, although his name was listed in the notebooks and on the t-shirt found in the trunk.

Trey Skaggs testified that he walked over to the apartment on Saturday, November 29, and saw Pierce, Appellant, "another Mexican," and a white female sitting on the front porch. Pierce told him to come inside, and showed him blood stains. Skaggs testified that Pierce told him that the night before, he had tried to sell fake cocaine to a crack addict. When Pierce would not let him try it, the addict got mad and said, "f--- him, f--- his mother and father, f--- ACA XIII." This upset Pierce because his parents were deceased. Pierce also told Skaggs that "we got real emotional over" someone saying "f--- our gang". Pierce went on to tell Skaggs that he beat the man, stabbed him and cut off his ear in the bathroom.

The Commonwealth presented testimony from a number of other individuals, ACA XIII members, to whom Pierce had also confessed different versions of having committed the murder. Neither Appellant nor Pierce testified at trial.

The jury found Appellant guilty of complicity to murder and tampering with physical evidence.² Appellant was ultimately sentenced to 50 years' imprisonment for the murder conviction, and five years for the tampering conviction, with the sentences to run consecutively for a total of 55 years' imprisonment. He appeals to this Court as a matter of right.

II. Analysis

A. The trial court did not err in denying Appellant's motion for a directed verdict.

Appellant first argues that the trial court erred in denying his motion for a directed verdict on the murder charge. Appellant argues that, while there was overwhelming evidence that Pierce intentionally killed Pedro Gonzalez, there was no evidence that he either intended to kill or was complicit with Pierce in killing Pedro Gonzalez.

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.

² Pierce was also found guilty of murder (complicity) and tampering with physical evidence. He received a sentence of life for murder and five years for tampering.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

KRS 507.020 provides, in relevant part:

- (1) A person is guilty of murder when:
 - (a) With intent to cause the death of another person, he causes the death of such person

KRS 502.020 provides, in relevant part:

- (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
 - (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
 - (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

. . . .

- (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

- (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
- (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

. . . .

Appellant argues that, in the light most favorable to the Commonwealth, the evidence showed that, at most, he was at the scene of the murder. He notes that despite a large number of items tested, his fingerprints and DNA were found only on three beer cans found in the apartment. No evidence connected

him to any weapon, including the crowbar, a metal pipe that was found in the living room, or the one broken beer bottle that was found in the apartment. A switchblade knife that he had been seen throwing on the table the day after the murder had no blood on it.

Appellant is correct that “[o]ne’s mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission.” *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (quoting *Rose v. Commonwealth*, 385 S.W.2d 202, 204 (Ky. 1964)). Additionally, “mere knowledge that a crime is occurring is insufficient to support a conviction of that crime, as is mere association with the persons involved at the time of its commission.” *Hayes v. Commonwealth*, 175 S.W.3d 574, 590 (Ky. 2005) (citation omitted).

The evidence here, however, permits a reasonable inference that Appellant was involved in the murder, and was not merely present. Santino Fox testified that he witnessed the men hit Gonzalez with beer bottles. Accordingly, from this testimony a reasonable juror could infer that Appellant aided in the murder by helping to injure and incapacitate Gonzalez. While Appellant argued that the lack of his fingerprints or DNA on the broken beer bottle found in the apartment showed he was not involved in the murder, he admitted taking a trash bag of bottles and cans to the dumpster, from which a jury could infer he was attempting to dispose of evidence linking him to the murder. Appellant also admitted to throwing away a trash bag containing bloody clothing. Further, Santino Fox testified that Appellant ordered him to help clean the

apartment, and helped drag the body from the bathroom, wrap it in a blanket, and put it in the trunk of the car.

Taken in the light most favorable to the Commonwealth, the evidence established more than Appellant's "mere presence" at the scene, and was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Appellant was guilty of complicity to murder. *Benham*, 816 S.W.2d at 187. Accordingly, the trial court did not err in denying Appellant's motion for a directed verdict.

B. The trial court did not err in denying Appellant's four motions for a mistrial.

Appellant next argues that the trial court erred in denying his motions for a mistrial. Ivan Orantes Pierce, Santino Fox, and Appellant were indicted for the murder of Pedro Gonzalez. Because both Pierce and Fox gave statements placing Appellant at the apartment during the murder, Appellant's counsel moved for a separate trial, and alternatively, redaction of statements, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), and *Crawford v. Washington*, 541 U.S. 36 (2004). With Fox pleading guilty and testifying at trial, and with the redaction of Pierce's statements to police, the trial court denied the motion for a separate trial.

In addition to the statements Pierce gave to police incriminating himself in the murder, he had also confessed his involvement to various friends, fellow ACA XIII gang members. Because these gang members were likely to be called as witnesses against Pierce at trial, Appellant's counsel renewed his motion for a separate trial due to the potential for inadmissible and prejudicial hearsay if

the friends related not only Pierce's confessions about what he (Pierce) did but also related what Pierce said others did (i.e. Appellant), in the context of "them" and "we," thus implicating Appellant without Appellant's ability to cross-examine the declarant, his non-testifying co-defendant Pierce. The trial court denied the motion for separate trial and defense counsel's motion *in limine* for the Commonwealth to admonish their lay witnesses to only relate what Pierce had said that Pierce had done and to not use the words "we" and "they."

Among Pierce's friends to testify were Marco Ortiz, Trey Skaggs, and Pierce's cousin, Alexis Herrera. None of the three were present when the murder occurred, and they testified as to what Pierce told them he did in committing the murder. Appellant contends that the three also improperly related statements by Pierce which implicated Appellant in the murder. Appellant moved for a mistrial after each occurrence, and again after the Commonwealth repeated the inadmissible hearsay in its closing. The trial court denied the motions.

Pierce's friend Marco Ortiz testified that Pierce told him that a guy had come up to him wanting to buy crack. When Pierce said he did not have any, the guy pulled a knife on him and said to give him some money. When Pierce said he didn't have any, the guy then said he was just "playing." The following exchange then occurred:

Commonwealth: The guy pulled a knife on [Ivan Orantes Pierce] by his car?

Marco: Yes.

Commonwealth: By the guy's car?

Marco: Yes.

Commonwealth: And Ivan says, "I don't have any money." Right, is that what you're telling us?

Marco: Uh-huh.

Commonwealth: Then Ivan told you that the guy then said, "I was just kidding"?

Marco: Yeah, he tried to pretend like it was nothing.

Commonwealth: OK. And then where does Ivan and the guy that got killed go?

Marco: There were, I think that he went, they tried to go back in the hallway.

Commonwealth: In the hallway of what?

Marco: Of some apartment. I don't know where they were. I don't know.

Commonwealth: They tried to go back into the hallway of some apartment, yes, and then what did Ivan tell you happened?

Marco: He was walking up the stairs to get to the other side and the guy like pulled a knife on him again.

Commonwealth: And then what did Ivan say he did?

Marco: He just like, tried to get on, he's like "calm down," tried to push his hand away and then hit him because he pulled a knife on him two times already.

Commonwealth: Okay. So then Ivan hit the guy?

Marco: Yeah.

Commonwealth: And then what happened? What did Ivan tell you happened next?

Marco: That he started backing away—*some other guys hit him*, I don't know who.

Commonwealth: Did he say what some other guys hit him with?

Appellant's counsel: Can we approach please?

(Emphasis added.)

Appellant's counsel moved for a mistrial and alternatively for an admonition. The trial court denied the motion for a mistrial and admonished the jury to disregard the answer and to only consider what Pierce told the witness that he did, not anything else. The trial court admonished Marco Ortiz to testify only as to what Pierce told him that Pierce did.

Before Pierce's friend Trey Skaggs testified, the trial court admonished him to testify only as to what Pierce told him that Pierce did. Skaggs testified that Pierce told him he was trying to sell fake cocaine to a crack addict, who got mad when Pierce would not let him try it. According to Skaggs, Pierce said that the addict then disrespected Pierce, Pierce's parents (who were deceased), and ACA XIII, and that Pierce then told the addict that he could try the cocaine in the back room. After recounting these statements, Skaggs said:

When they got to the back room Ivan punched the guy. I believe after he punched him once or twice I believe he said the guy fell down and when he fell down Ivan started kicking him *and either Christian or the other Mexican*

(Emphasis added.) Appellant's counsel objected and moved for a mistrial. The trial court denied the motion and admonished the jury to only use what the witness said that Pierce told him that Pierce did.

Alexis Herrera, Pierce's cousin, was also admonished before he testified to only testify as to what Pierce told him that Pierce did, and that he could not say that Pierce said that somebody else did something. Alexis then testified as follows.

Commonwealth: What do you remember [Pierce] telling you?

Alexis: That he was at some party or some get together or something with some friends and someone had came over and start ... like I'm guessing starting to start some trouble ... and

Commonwealth: Are you guessing or is that what he told you?

Alexis: Well I'm guessing that's what happened because that is what he told me.

Commonwealth: Okay. And started some trouble, and did he tell you anything else?

Alexis: Like, things got out of hand and *they* decided, uh

Court: You need to talk about what Ivan told you Ivan did.

Alexis: I don't remember for sure. Not very accurate, what he told me.

Court: But not anything else about anybody at all.

Alexis: No sir.

Court: Okay. So if you want to ask the question again ...

Commonwealth: Yeah. What did Ivan tell you he did, if anything, to this guy?

Alexis: To?

Commonwealth: To the guy at the party that you were just referring to, the guy that got killed.

Alexis: I remember Ivan telling me that he said some stuff about his parents and they passed away and I guess he got mad *and him and his friends like ...*

Commonwealth: What did Ivan do?

Court: Approach the bench please . . .

Alexis: I don't know what he did.

Court: Time out.

(Emphasis added.) Appellant's counsel again moved for a mistrial. The trial court denied the motion and admonished the jury to disregard the answer.

In addition, the Commonwealth referred to these statements in its closing argument, prompting another motion for a mistrial and admonition:

Commonwealth: Santino Fox. He's going to put himself in a murder for Trey Skaggs. That's really going to happen. That's how you know it's not lying. Trey really wanted something so bad he would have made himself the eyewitness. He was there that day when the cops got there—he was there. If he's so smart he could have easily said "I was there the night before and I saw the whole thing go down." Instead he gives the name of someone. And that's it. And what he tells us is that Ivan told him—Ivan told him—when he got there that day he, Ivan himself, Christian, and some Mexican guy with a name starting with an "R"—name starting with an "R." Now if him and Santino had it all planned then why isn't he telling it's some guy named Ricardo? You know why? Because he couldn't remember the name. He couldn't remember the name. Ivan told him. He couldn't remember who it was. But he knows Ivan and he knows [Appellant]. He tells you that Ivan told him that Ivan brings him inside. Santino isn't there which is consistent with what Santino tells you. Santino left in the morning. Trey gets there on Saturday - later in the day. And he tells you that he's brought in the house by Ivan who brags to him about what happened.

What does he tell him? There was a crack addict there. I tried to sell fake drugs to him. He insulted "ACA XIII," he insulted my mom, and *we* beat him down. *We* punched him, *we* kicked him, *we* hit him with a crow bar.

Appellant's counsel: Can we approach please?

Court: Approach please.

[At the bench]

Appellant's counsel: That's the ... well ...

Court: Did you?

Appellant's counsel: Well I assumed that it was a mistake when she said that Trey gave the name Christian—I assumed that was a mistake, now I'm hearing "we" "we" "we" "we" "we" so I would like an admonishment again.

Court: I didn't hear that. That was the first time I heard it because you talked about what they—he saw "them" I think is what you said.

Commonwealth: OK.

Appellant's counsel: She said Trey said Christian and that is not something that is in evidence and not something that is allowed to be said so I'm actually moving for a mistrial. We've talked about this so many times, Judge, if you're going to overrule my mistrial motion ...

Court: You're going to have to—I'm here to tell you—I was listening but it was lost on me what the problem with ...

Appellant's counsel: Trey gave me the names Santino, Christian and an "R." That is not what Trey said in evidence. That is what ...

Court: I think she meant Santino.

Appellant's counsel: I think that's what she meant.

Commonwealth: Santino. That's what I meant. I said Trey—I apologize.

Appellant's counsel: But then she kept saying "we" "we" "we" which is exactly what...

Commonwealth: I apologize. I did say the wrong name.

Court: It was entirely inadvertent and it's ...

Appellant's counsel: I assume that but it's the "we" that's the problem.

Commonwealth: I'll fix it.

Court: Well I heard "them," not "we."

Appellant's counsel: No, it was "we."

Court: OK. Cause in the last statement I thought she said that "they" or "them"—either one's a problem, then the jury's been admonished both to attribute statements made by one of the defendants only against a defendant. They've also been told to rely on their recollection of what the evidence is as opposed to the Commonwealth's recollection. I'll give you a chance to clean that up.

Commonwealth: Okay.

Appellant's counsel: Is my motion overruled?

Court: Your motion is overruled.

Appellant's counsel: Thank you, sir.

The prosecutor attempted to fix her mistake in mixing up Trey and Santino's names by stating, "Earlier I said that Trey said something but it was actually Santino that said something." When the prosecutor completed her closing, Appellant's counsel once again objected:

Appellant's counsel: Judge, may we approach please?

Court: Yes, sir.

At the bench:

Court: Yes, sir.

Appellant's counsel: Judge, the court's already overruled my motion for a mistrial.

Court: Uh huh.

Appellant's counsel: I don't feel that that was cleaned up the way that it needed to be. The statement went from Trey said Christian to "I said something about Trey, I meant Santino, you know what I meant."

Commonwealth: I don't know what you want me to say. I would have said whatever you told me.

Appellant's counsel: I understand, but I think the court needs to admonish the jury again, and that's what my request is. Now that the Commonwealth has closed their statement then the statements are to be—the same admonishment the court has given several times already. That's my request at this time.

Court: Okay. So the issue is that [the prosecutor] misspoke when she said that Trey identified Christian as being what?

Appellant's counsel: Well the issue is she said Trey gave me three names—

Court: Ivan, Christian and an "R."

Commonwealth: [inaudible] Should have been Santino.

Appellant's counsel: Santino, Santino. Then she said that. Then there was the "we" "we" "we" after that. Then she went back and said "I earlier said something about something Trey said—I meant Santino—you know what I'm talking about."

Court: OK.

Appellant's counsel: So I just think the same admonishment would be ...

Court: I don't have a problem with that.

Appellant's counsel: Thank you.

Thereafter, the trial court admonished the jury that the prosecutor erred when she said that Trey, instead of Santino, gave the police Appellant's name.

Appellant argues on appeal that Pierce's statements inculcating Appellant testified to by Marco Ortiz, Trey Skaggs, and Alexis Herrera, were inadmissible hearsay. Appellant argues that the trial court erred in its refusal to grant a mistrial, and that its attempt at curative admonitions was insufficient. The Commonwealth does not dispute that the statements were inadmissible, but contends that the trial court's admonitions were sufficient to cure the errors. It is well settled that "an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition." *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005) (citation footnotes omitted). Admonitions are preferred over mistrials, which should be granted sparingly and only "if [the] harmful event is 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" or if there is "a manifest, urgent, or real necessity for a mistrial." *Id.* The trial court has broad discretion in this decision, and its "decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion." *Id.*

The presumption that a jury will follow a curative admonition is overcome only when there is an overwhelming likelihood that the jury will be

incapable of following the admonition and the impermissible testimony would be devastating to the appellant.³ *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003); *Terry v. Commonwealth*, 153 S.W.3d 794, 800-01 (Ky. 2005). Appellant argues that such is the case here, that the cumulative effect of the inadmissible hearsay—which identified Appellant both by name and in a group (“we,” “they”) as being at the scene and as a participant in the murder, as well as the Commonwealth’s closing argument repeating the hearsay—is so devastating that it cannot be overcome by admonition.

Even though the trial court’s final admonition was not fully responsive to the real reason for the request for the admonition (all the previous admonitions were for the use of “we” or “they”), this Court cannot say that there is an overwhelming likelihood that the jury could not follow the trial court’s admonitions in this case. The trial court clearly and emphatically admonished the jury immediately after every incident.⁴ With the exception of Trey Skaggs’s

³ An admonition is also ineffective “if the question was asked without a factual basis and was ‘inflammatory’ or ‘highly prejudicial.’” *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). There is no suggestion, however, that this standard applies in this case, nor is there any factual support for such a claim.

⁴ For example, after the error in Trey Skaggs testimony, the trial court admonished the jury as follows:

We’re in the same situation we were before. When a witness is quoting what a defendant said, that statement may only be used against that defendant. They can’t talk about anybody else or whether there was anybody else. That is incredibly important. I know that, and have great faith in your all’s ability to keep that separate. You are to disregard what the witness just said, and only use what he says Ivan said, to the extent you believe him, against Ivan. You have to police yourselves, and police each other about that, and that cannot, anything other than that, any use of that statement is absolutely unfair and will result in an

statement, Appellant was not referred to by name. Skaggs was cut off before he could finish and did not say anything incriminating. Although the use of the words “we” and “they” was clearly improper, there was evidence that persons other than Appellant were at the apartment. Nor can we say, in light of the testimony of Santino Fox, who was an eyewitness to the fight preceding the murder, that this improper testimony was “devastating” to Appellant. “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky.1999)). For the reasons above, we cannot say that the trial court abused its discretion denying Appellant’s motions for a mistrial.

C. Admission of evidence suggesting Appellant was a gang member was harmless error.

It was uncontroverted that Ivan Orantes Pierce had started the gang “ACA XIII,” and made t-shirts listing the street names of gang members. One of these t-shirts was found with Gonzalez’s body. Pierce also authored notebooks listing members’ names and gang hierarchy. Appellant was listed as a gang member on the t-shirt and in the notebooks by his street name, “Brujo.”

The trial court denied Appellant’s motions to exclude this proof as inadmissible hearsay and violation of his confrontation rights, and as

injustice. It’s that important. Is everybody okay with that?
And is everybody confident in their ability to do that? Very
good, thank you.

inadmissible evidence of other crimes under KRE 404(b). The trial court also denied Appellant's motion for redaction of his name from this evidence.

At trial, the Commonwealth introduced the ACA XIII t-shirt and Pierce's ACA XIII gang notebooks that he had given to Fox for safekeeping. Appellant's street name "Brujo" was listed on the t-shirt and in the notebooks. The Commonwealth presented no other proof that Appellant was part of ACA XIII.

On appeal, Appellant argues that the admission of his name on Pierce's t-shirt and gang notebooks was hearsay, as these were out-of-court statements made by Pierce and offered into evidence to prove that Appellant was a member of ACA XIII. Appellant argues that this hearsay was not admissible under any exception.⁵ Appellant further argues that as evidence of other bad acts, KRE 404(b), given that it was inadmissible hearsay, it had no probative value. The Commonwealth argues that the t-shirt was properly admitted into evidence because it was discovered with Gonzalez's body and was identified by witnesses as a shirt belonging to Pierce. The Commonwealth further argues that the t-shirt and notebooks were not hearsay, as they were not used to prove Appellant's membership in ACA XIII, but only to prove the existence of ACA XIII in general. The Commonwealth further argues that the evidence was properly admitted under KRE 404(b), as it tended to prove a motive for the murder, as there was evidence that Gonzalez disparaged ACA XIII.

⁵ Including that for adoptive admissions as there is no evidence that Appellant saw, understood and remained silent as to Pierce's listing him as a member of ACA XIII on the t-shirt and in the notebooks. KRE 801A(b)(2).

At the close of the evidence, the trial court admonished the jury that it could not use the gang evidence as evidence of bad character, but could only consider it for two things—for identification of one or both of the defendants and for motive. While such an admonition may suffice to allow compliance with KRE 404(b), it does not automatically make the proof admissible.

For such proof to be admissible it would have to satisfy all of the applicable evidentiary rules, including the hearsay rules, since these are out-of-court statements. But the statements do not fit under any hearsay exception. Appellant is therefore correct that his name on the t-shirt and notebooks was impermissible hearsay—out-of-court statements made by Pierce, and used to prove that Appellant was a member of ACA XIII. Accordingly, while the evidence was clearly admissible against Pierce, the admission of this evidence against Appellant was error.

A non-constitutional evidentiary error may be deemed harmless, “if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009). Evidence of gang activity unrelated to the charged crime can inflame the jury, leading it to convict on the notion that gang members are generally criminals. Based on the evidence in the record, however, it is clear that is not what happened here. The proof was direct, especially Santino Fox’s eyewitness testimony, that Appellant participated in the assault. Fox specifically testified to seeing Appellant hit Gonzalez with the beer bottle. He also testified that Appellant ordered him to help clean up and that Appellant

helped dispose of the body. Moreover, there was proof of Appellant's own admissions that he helped dispose of bloody clothing. In light of the weight of this evidence, as opposed to mere gang membership, this Court cannot say that the judgment was substantially swayed by the error.⁶

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

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Keller, J., concurs, and notes that, while she understands the concern for judicial economy, a number of these evidentiary issues could have been eliminated by trying these defendants separately.

⁶ Appellant also argues that the "statements" on the t-shirt and in the notebooks violated his constitutional right to confront witnesses against him. Such an error, if there was one, would entitle him to a higher standard for harmless-error review, namely, whether the error was harmless beyond a reasonable doubt. There is no question, however, that his right to confront was not implicated, because the statements were not testimonial in nature. *See generally Crawford v. Washington*, 541 U.S. 36 (2004).

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