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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000072-MR

DERRICK D. JAMES — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 08-CR-00552

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2013-SC-000128-MR

JORDAN YOUNG — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 08-CR-00536

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Derrick James and Jordan Young, Appellants, appeal as a matter of right, Ky. Const. § 110(2)(b), from judgments of the Christian Circuit Court convicting them of murder. Each was sentenced to fifty years' imprisonment. On appeal, James and Young both assert that: 1) the pretrial delay violated their rights to a speedy trial, 2) the trial court improperly admitted

inadmissible hearsay, 3) a mistrial should have been granted after the jury was given an exhibit from a different trial, 4) the trial court improperly admitted a witness's prior statement, and 5) the trial court improperly admitted prejudicial opinion testimony. Additionally, Young individually argues that: 6) the trial court erred by not granting him a directed verdict. Because Appellants were tried together, their cases have been consolidated for the purpose of this opinion.

I. BACKGROUND

The victim, Shyara Olavarria, was romantically linked to Kenneth Hudson, a member of the "Bloods" gang in Clarksville, Tennessee. Hudson's fellow gang members included James and Young. During the investigation of a burglary in Clarksville, Detective Kevin Shaw of the Clarksville Police Department discovered video evidence of Olavarria and James pawning an Xbox stolen in the burglary at a local pawn shop.

Detective Shaw spoke with Olavarria, who told him that she was at a friend's house when James and Young had asked her for a ride to the pawn shop. She admitted she was the one who pawned the Xbox when the three of them arrived at the shop. Detective Shaw charged her with aggravated burglary and placed her under arrest.

Detective Shaw questioned James next, but James denied any knowledge of the burglary and was released. Subsequently, Detective Shaw spoke to one of Olavarria's friends, who corroborated her story about James and Young

asking Olavarria for a ride to the pawn shop. At that point, Detective Shaw obtained a warrant for James's arrest.

Some time in the month after the issuance of the warrant, Hudson, James, Young, and two other friends were together at Hudson's house, where Olavarria came up in discussion. The parties believed that Olavarria had told the police who had been involved in the burglary, and that she had been the origin of the warrant for James's arrest. Hudson recalled hearing James say, "she gone get what's coming to her."

Around the same time, Olavarria told her friend Alex Verissimo that she had gotten into some trouble. Upon further questioning by Verissimo, Olavarria said she had been involved in a "burglary thing" and that she wanted to "make everything right." Verissimo understood this to mean that Olavarria intended to testify about the incident.

On Friday, May 30, 2008—approximately one month after Detective Shaw spoke with Olavarria about the burglary—Olavarria sent Verissimo a text saying that she was going to tell her boss she was sick so that she could leave work early and pick up Hudson. Hudson remembered the time Olavarria picked him up as being around 10 or 11 p.m. The two of them had not planned to go to a particular place at that point.

They eventually decided to go to Ghost Bridge, a secluded area near the town of Oak Grove in Christian County, Kentucky. On the way to Ghost Bridge, Hudson received a call from James, who asked Hudson what he was doing. Hudson told James where he and Olavarria were headed. James asked

Hudson who else knew this, and Hudson told him "nobody." James told Hudson that he would talk to him later, and ended the call.

Hudson and Olavarria arrived at the bridge and parked in a "cut" on the side of the road. They talked for about ten minutes before seeing James and Young drive up and park just past them in a car they had borrowed from a friend, Sherrika Epps. Recognizing them, Hudson stepped out of Olavarria's car to greet them and shake hands. Olavarria also stepped out of her car. James and Young got out of Epps's car, and all four approached a spot on the side of the road.

Upon shaking hands with James and Young, Hudson realized that both of them were carrying guns. James had a silver .38 caliber revolver that Hudson had seen in James's possession on prior occasions, and Young had a .40 caliber Glock pistol that Hudson had likewise known him to carry. Upon seeing the guns, Hudson "pretty much figured" what was about to happen but was not sure whether the guns were meant for him, Olavarria, or both of them.

James and Young ordered Hudson to get into Epps's car, and Hudson climbed into the back seat and then turned his back so that he did not see what happened next. At that point, Hudson heard a "whole lot" of gunshots. He did not turn around to see what was happening because he already understood they were shooting Olavarria. Moments later, Young got into the passenger side of Epps's car and set his Glock pistol on the center armrest. James asked Young whether Young's pistol was empty. Young said "I don't think so." James then grabbed Young's gun and emptied it, firing three shots.

After those last three shots, James got into the car with Young and Hudson and they left. Hudson did not look back. He recalled hearing James say, "this is what happens to snitches."

A neighbor who lived nearby heard the shots and was able to count them. She heard twelve shots initially, then a pause, then another three shots, for a total of fifteen. After Olavarria's body was discovered, police arrived and identified the victim and found the casings and bullets. Olavarria's body had nine bullet paths through it, with four bullets still remaining in the body.

Later that same night, James and Young were involved in a second altercation in Clarksville with a rival gang member, "Juice" Marbury. That encounter resulted in Young shooting Marbury in the torso. An expert firearms examiner determined that the cartridge casings found at the scene of Olavarria's murder and the casing found at Marbury's shooting were all fired from the same gun.

In August of 2008, the Christian County grand jury indicted James and Young for the murder of Olavarria. The two were tried together in a trial that began on September 24, 2012 and concluded four days later. The jury found both James and Young guilty of murder, and recommended that each serve a sentence of fifty years' imprisonment. The trial court accepted the jury's recommendation and sentenced James and Young accordingly in January 2013. James and Young now appeal their convictions to this Court as a matter of right. For the following reasons, we affirm the convictions.

II. ANALYSIS

A. Right to a Speedy Trial

Appellants' first argument on appeal is that they were denied their constitutional right to a speedy trial. The Sixth Amendment to the United States Constitution guarantees criminal defendants "the right to a speedy and public trial."[1] The right to a "speedy public trial" is also guaranteed by the Kentucky Constitution. Ky. Const. § 11.

To determine whether the Appellants' speedy trial rights have been violated, we balance the following four factors: (1) the length of the delay, (2) the reasons for the delay, (3) Appellants' assertion of their rights, and (4) the prejudice to the Appellants. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). "We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533.

Appellants argue that this case would have been tried in November 2009 but for the Commonwealth's seeking hair analysis and the wait for Hudson to be available to testify. Ultimately, this case was not tried until September 2012, almost four years from James's incarceration and over four years from Young's incarceration.

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[1] "This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Smith v. Commonwealth*, 361 S.W.3d 908, 914 (Ky. 2012) (citing *Barker v. Wingo*, 407 U.S. 514, 515 (1972), *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967)).

1. Length of Delay

Under the *Barker* analysis, we begin by asking whether the length of the delay was presumptively prejudicial: "[t]he length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors . . . ." *Id.* at 530. However, no precise amount of time is presumptively prejudicial, as the length of delay must be considered within the particular context of each case. *McDonald v. Commonwealth*, 569 S.W.2d 134, 136 (Ky. 1978).

The length of delay is measured as "the time between the earlier of the arrest or the indictment and the time trial begins." *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001) (citing *Dillingham v. United States*, 423 U.S. 64 (1975)). Here, James and Young were arrested before their indictments, so the delay is measured from the times of their arrests. James was incarcerated from December 2008 to the start of his trial in September 2012, for a total of forty-five months. Young was incarcerated six months earlier than James—in June 2008, for a total of fifty-one months.

Each delay must be considered within its own context. *Barker, supra.* A delay that can be tolerated for an ordinary street crime is considerably less than for a more serious charge. *Id.* at 531. Nonetheless, this Court has previously held that eighteen months constituted presumptive prejudice in a complex murder case. *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004). Thus, we find that a forty-five month delay and a fifty-one month delay both amount to presumptive prejudice here. However, a finding of presumptive

prejudice does not establish actual prejudice, it only establishes that the delay was long enough to trigger further inquiry into the remaining three *Barker* factors, to which we now turn. *Doggett v. United States*, 505 U.S. 647 (1992).

2. Reasons for the Delay

The second prong of the *Barker* analysis seeks to weigh the reasons for the delay. "Different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. For example, deliberate delays by the government in order to hamper the defense should be weighed more heavily against the government than neutral reasons for delay such as overcrowded courts. *Id.* Moreover, "a valid reason for delay, such as a missing witness, should serve to justify appropriate delay." *Id.* Essentially, "[t]he purpose of our analysis is to establish 'whether the government or the criminal defendant is more to blame for the delay.'" *Stacy v. Commonwealth*, 396 S.W.3d 787, 796-98 (Ky. 2013) (citing *Doggett*, 505 U.S. at 651).

Appellants argue that in this case the Commonwealth is solely to blame for the delay. In beginning our analysis, we note that although the total delay in this case was approximately four years, it can be broken down into three smaller parts: 1) the delay for discovery, 2) the delay for hair analysis, and 3) the delay for Hudson's appeal.

a. Delay for Discovery

The first scheduled trial date in this case was November 19, 2009. The initial part of the delay—from the start of Appellants' incarceration until the first scheduled trial date—was a time used by both parties to consolidate the

cases, complete discovery related to phone records, ballistics, and witness statements, and to litigate 404(b) issues. Thus, Appellants contributed to and acquiesced in approximately the first year of the delay.[2] *See Warren v. Commonwealth*, 2007 WL 541918, *3 (Ky. 2007) (holding that because discovery was still being completed during first year after appellant's arrest, that part of the delay could not be weighed against the Commonwealth); *see also Gabow v. Commonwealth*, 34 S.W.3d 63, 70 (Ky. 2000) ("If a defendant acquiesces in a delay, he cannot be heard to complain about the delay"). Thus, this part of the delay cannot be weighed against the Commonwealth.

b. Delay for Hair Analysis

We next turn to the following twelve months of delay. The Commonwealth requested a continuance in October of 2009 in order to get a lab analysis of some hairs found in Olavarria's car. James agreed to the continuance, with his attorney going so far as to say that he believed more time would be beneficial to his client's case. Young objected and wished to keep the November 2009 trial date. The trial judge continued the trial to February 22, 2010.

After preliminary examinations of the hair samples were completed in January 2010, the crime lab informed the prosecution of several potentially important findings—findings which created a new theory of the case for the Commonwealth. The prosecutor relayed to the trial court that the lab would

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[2] For James, the first part of the delay was eleven months, for Young, it was seventeen months.

require six additional months to complete further testing. A full hearing on the matter was held in February 2010.

At the February hearing, both James and Young orally objected to this second continuance. However, a few days later, the trial court entered an agreed order—tendered by the prosecution and agreed to by both defendants—cancelling the February 22, 2010 trial date. This second continuance resulted in a pre-trial conference being set for May 5, 2010, and, ultimately, a new trial being set for November 2010.

As previously stated, "if a defendant acquiesces in a delay, he cannot be heard to complain about the delay." *Gabow,* 34 S.W.3d at 70. James fully agreed and acquiesced with the first continuance. Although Young objected to the first continuance—which accounted for three months of the delay—he and James both entered into an agreed order for the second continuance. That order did not set a new specific trial date, but merely a pre-trial conference for May 5, 2010. Thus, not only did James and Young agree to a continuance of their trial, but to an indefinite one, as no new trial date was set at the time of their agreement.

Consequently, out of the second year of delay, at best only three months—measuring from Young's objection to hair analysis in November 2009 until the February 2010 hearing—can be weighed at all against the Commonwealth in Young's case. The remaining nine months, and in James's case all twelve months, cannot be counted against the Commonwealth because

of Appellants' signed agreement acquiescing to the delay. *Gabow,* 34 S.W.3d at 70.

c. Delay for Hudson's Appeal

Finally, we turn to the last part of the delay. Hudson was originally set to be tried as a co-defendant with James and Young, but his case was separated and tried independently in November 2009. Hudson was convicted of complicity to murder and sentenced to twenty-five years' imprisonment.[3] The Commonwealth believed, and the trial court agreed, that Hudson would be unavailable to testify at the trial of James and Young until his Fifth Amendment rights were extinguished at the conclusion of his appellate process.[4]

Appellants blame the Commonwealth for these last twenty-two months of delay because it was the Commonwealth who wished to postpone the trial until Hudson would be available to testify. Hudson was a vital part of the proof presented in the Commonwealth's case, and was described by Appellants as the Commonwealth's "star witness."

A witness who has a privilege against testifying under the Fifth Amendment is considered an unavailable witness. *Marshall v. Commonwealth,* 60 S.W.3d 513, 519 (Ky. 2001). Thus, the trial court correctly determined that Hudson was unavailable pending finality in his own case. As previously noted, a valid reason for a delay, such as a missing witness, should serve to justify the

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[3] *Hudson v. Commonwealth,* 385 S.W.3d 411 (Ky. 2012).

[4] The Fifth Amendment to the U.S. Constitution provides that: "no person shall . . . be compelled in any criminal case to be a witness against himself."

delay. *Barker*, 407 U.S. at 531. Therefore, delay for the purpose of waiting for Hudson to be available to testify at trial was a valid reason justifying the last twenty-two months of delay, and it cannot be weighed for or against the Commonwealth.

Overall, we find that Appellants' acquiescence to the first half of the delay, and the legitimate cause for the last half of the delay cancels out all but a mere three months of the total time before trial, and then only in Young's case. Thus, we find this factor does not weigh against the Commonwealth at all in James's case, and only minimally weighs against the Commonwealth in Young's case.

3. Appellants' Assertion of Their Rights

The third *Barker* factor is the defendant's assertion of his right to a speedy trial. Here, Appellants undeniably asserted the right to a speedy trial both orally, and in James's case, in a written motion to the trial court.[5] However, this Court has previously found that where a defendant agreed to an order delaying his trial by as little as one month, it "cast[ed] doubt on the sincerity of his demand for a speedy trial." *Stacy v. Commonwealth*, 396 S.W.3d 787, 798 (Ky. 2013) (citing *United States v. Brown*, 169 F.3d 344, 350 (6th Cir. 1999)).

In *Stacy*, the total delay before trial was twenty months. *Id* at 796. The defendant in that case asserted his right to a speedy trial with both oral objections and written motions to the trial court. *Id.* at 798. However, this

[5] James filed a written motion objecting to further continuance of his trial on March 3, 2011.

Court held that as a result of the defendant agreeing to an order that moved his trial date back by just one month, we would recognize "that he did in fact assert his right to a speedy trial, [but that] he did not vigorously do so. As a result, we cannot say that this [third *Barker*] factor weighs in Appellant's favor." *Id.*

As previously noted, both Appellants in this case agreed to an order that not only cancelled their scheduled trial date of November 2010, but also continued the trial indefinitely—there was no new trial date set in the agreed order, merely a pre-trial conference set for three months later. Thus, although Appellants did assert their right to a speedy trial, they did not vigorously do so. Consequently, as in *Stacy*, this factor does not weigh in Appellants' favor.

4. Prejudice to the Defendant

The last factor in the *Barker* analysis asks whether Appellants were actually prejudiced by the delay. The United States Supreme Court has identified three relevant interests that the Sixth Amendment's speedy trial right was designed to protect: (1) the prevention of oppressive pretrial incarceration, (2) the minimization of the anxiety and concern of the accused, and (3) the possibility that the defense will be impaired. *Barker*, 407 U.S. at 543. Of these, the most serious is the last. *Id.*

Appellants claim that all three prejudicial interests arise here. James's pretrial incarceration lasted forty-five months, while Young's lasted fifty-one months. With respect to the first interest, Appellants claim that they were unable to assist their attorneys in their own defense during this time.

However, they make no actual showing of how they were concretely prejudiced by their incarceration.

Regarding the first interest, *Barker* explains the potential disadvantages for the accused who cannot obtain his release: "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker*, 407 U.S. at 532. Furthermore, an accused "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533.

We have consistently held that "[t]he possibility of prejudice alone is not sufficient to support the position that speedy trial rights have been violated. It is the burden of the defendant to establish actual prejudice." *Miller v. Commonwealth*, 283 S.W.3d 690, 703 (Ky. 2009) (citing *Preston v. Commonwealth*, 898 S.W.2d 504, 507 (Ky. App. 1995); *see also Bratcher*, 151 S.W.3d at 345 ("[a] long delay, while creating 'presumptive prejudice' sufficient to continue the *Barker* analysis, does not necessarily create real prejudice to a defendant."). Here, because Appellants do no more than make generic claims of how they were unable to assist counsel in their defense, we do not find real prejudice with regard to this first interest.

With respect to the second interest—the minimization of anxiety and concern—Appellants' counsel point to the fact that James and Young were nineteen years old and seventeen years old, respectively, when they were first incarcerated. Appellants offer no specific evidence of James or Young actually suffering any unusual amount of anxiety and concern during their

incarceration, and make only general assumptions about them having suffered anxiety due to their young ages.

As with the first factor, generic assumptions are not enough to show prejudice: "[c]omplaining in general terms about suffering anxiety is insufficient to state a cognizable claim." *Smith v. Commonwealth*, 361 S.W.3d 908, 918 (Ky. 2012) (internal citations omitted). There must be "an affirmative showing of unusual anxiety which extends beyond that which is inevitable in a criminal case." *Id.* Here, we do not find that there is any evidence that Appellants suffered an unusual amount of anxiety or concern beyond the inevitable. Simply stating their ages is not sufficient to show prejudice in connection with this second interest.

The third and most important interest bearing on prejudice is the possibility of an impaired defense. Here, James claims that during the four-year delay he was unable to assist his attorney in mounting a defense, and that the delay is "undoubtedly" what led Hudson to strike a deal with the Commonwealth to testify at Appellants' trial.

Young claims that his defense was impaired because he could not assist in securing witnesses to corroborate his father's testimony that Young was at home at the time of the shooting. Young also claims that the delay severely weakened the memories of the witnesses—stating that Epps could not remember when James and Young had returned her car to her (sometime between 11:30 p.m. and 1:00 a.m. on the night of the shooting), and that the officer who received the report about shots being fired at Ghost Bridge could

not remember if it was at 11:15 p.m. or 11:45 p.m. Young argues that if not for the delay, it is possible Epps might have remembered that Young returned her car by 11:30 p.m., and that the officer might have remembered he got the call about the shooting at 11:45 p.m.

Once again, "speculative or generic claims are insufficient to support a claim of prejudice." *Miller v. Commonwealth*, 283 S.W.3d 690, 702 (Ky. 2009); *see also Bratcher*, 151 S.W.3d at 345 ("Conclusory claims about the trauma of incarceration, without proof of such trauma, and the *possibility* of an impaired defense are not sufficient to show prejudice."). In other words, Appellants must demonstrate *actual* prejudice that impaired their defense. *Smith*, 361 S.W.3d at 919.

Here, James and Young both make generic and speculative claims. James merely states that he was unable to assist his attorney without showing how he would have been able to assist his attorney if not for his incarceration, or how that inability to assist his attorney prejudiced him. His claim that Hudson made a deal with Commonwealth to testify because of the delay is merely conjecture as to Hudson's motives.

Young also makes a speculative claim about what hypothetical witnesses *might* have been able to testify about if, in fact, these witnesses existed. He does not point to a specific witness he could have secured to corroborate his father's testimony. Furthermore, it is equally as likely that Epps could have remembered her car being returned after midnight, and the police officer could have remembered the shooting report coming in at 11:15 p.m. Indeed, the

vagueness of the time frame was actually used in aid of Young's defense, as Young's counsel pointed out in his closing argument Epps's inability to recall precise timing in order to cast doubt on his client's guilt.

Although not authoritative as precedent, we find this scenario similar to the one addressed by the Court of Appeals in *Preston v. Commonwealth*, 898 S.W.2d 504 (Ky. App. 1995). In *Preston*, the defendant alleged that a witness who died during the delay before his trial *could* have been a material witness on his behalf. *Id.* at 507. However, he was unable to show with any level of certainty that the witness would have in fact aided his defense: "[f]rom the record, it appears just as likely that the witness would have been hostile to the defense." *Id.* Thus, his claim of prejudice failed because he did not show his defense to have actually been impaired by the loss of the witness. *Id.* Here, Young fails to show that his defense was impaired by two witnesses' memory loss. Like in *Preston*, these witnesses—had they fully remembered the details of the night of the shooting—could just as easily have hurt him as they might have helped him. Thus, neither James nor Young shows that he suffered actual prejudice with respect to this third interest.

In sum, although Appellants' pretrial incarceration time is presumptively prejudicial, Appellants fail to show real prejudice as a result of it. *Bratcher, supra.* Thus, this factor does not weigh in favor of Appellants.

5. *Balancing the Four* Barker *Factors*

Having considered each *Barker* factor individually, we must now weigh them together. First, it is clear the four-year delay is extraordinary and amounted to presumptive prejudice sufficient to trigger a *Barker* inquiry. However, at most only three months of the delay can be "blamed" solely on the Commonwealth. Furthermore, although Appellants asserted their right to a speedy trial, their compliance in agreeing to an order that continued the trial indefinitely casts serious doubt on their desire for a speedy trial. *Stacy, supra.*

And finally, no serious prejudice was shown as a result of their pretrial incarceration, as Appellants' claims of prejudice were general and speculative. Thus, we conclude our *Barker* analysis by finding that Appellants have not been deprived of their due process rights to a speedy trial. We now turn to examine the other issues on appeal.

B. Hearsay Statements from Alex Verissimo and Detective Shaw

Appellants' second issue on appeal concerns testimony given by Alex Verissimo and Detective Shaw. At trial, both testified as to statements made by Olavarria during the time leading up to her shooting. Appellants argue that these statements were inadmissible hearsay, and that the trial court erred by admitting them.

Evidentiary rulings are reviewed for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co.*

v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

1. Testimony of Alex Verissimo

Appellants' first objection is to the testimony of Olavarria's friend, Alex Verissimo. Verissimo testified that after the burglary had taken place, Olavarria told her she wanted to make things right by testifying in court. The trial court held this was an admissible statement under KRE 803(3) as a statement regarding state of mind. [6]

We have consistently held that out-of-court statements pertaining to the declarant's then-existing mental or emotional state and casting light upon future intentions as opposed to past events are admissible under KRE 803(3). *Ernst v. Commonwealth*, 160 S.W.3d 744, 753 (Ky. 2005); *Hampton v. Commonwealth*, 133 S.W.3d 438 (Ky. 2004). The declarant's state of mind must be relevant in order for the statement to be admissible under this exception. *Ernst*, 160 S.W.3d at 753 (Ky. 2005) (citing *Blair v. Commonwealth*, 144 S.W.3d 801, 805 (Ky. 2004)).

The statement at issue here relates to Olavarria's then-existing mental condition because it shows that she intended to testify about the burglary that likely involved James and Young and resulted in them asking her to pawn a

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[6] KRE 803(3) provides that the following is not excluded by the hearsay rules: "Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

stolen Xbox. Her state-of-mind was relevant in this case to establish a motive for her murder—evidence of Olavarria's intention to testify corroborates Hudson's statement that James and Young wanted to punish her for being a "snitch." As such, the trial court did not abuse its discretion by admitting this testimony as a statement regarding Olavarria's state of mind.

2. Testimony of Detective Shaw

Appellants' second objection is to the testimony of Detective Shaw, who interviewed Olavarria during his investigation into the theft of the Xbox. Olavarria told Detective Shaw that she gave James and Young a ride to the pawn shop and pawned the Xbox for them. Olavarria was then charged with aggravated burglary.

Based on Olavarria's statement, Detective Shaw sought out and interviewed James, who denied any knowledge of the burglary. However, subsequently, Detective Shaw spoke with a friend of Olavarria's who was able to corroborate her story that James and Young had showed up asking her for a ride to the pawn shop. Based on that information, Detective Shaw obtained a warrant for James's arrest.

Appellants objected to Detective Shaw's testimony on both hearsay and confrontation grounds, claiming the statement did not fall under a hearsay exception and was also testimonial in nature, meaning admission of the statement at trial would violate the U.S. Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 46 (2003). *Crawford* held that testimonial, out-of-court statements by witnesses are barred from admission at trial under the

Confrontation Clause of the U.S. Constitution unless the defendant had a previous opportunity to cross-examine the witness regarding the statement.[7] *Crawford*, 541 U.S. at 51. "Testimonial hearsay" applies to "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.*

The trial court held that *Crawford* was not applicable in this instance because the statement concerned a collateral matter and was not offered to prove that Appellants had committed a separate crime. It found that instead, the statements were relevant to show that Olavarria had talked to the police, and thus went toward establishing a motive for her murder. Therefore, the statement was not hearsay, because it was not offered to prove the truth of the matter asserted—that Appellants committed burglary—but rather, to show motive for Olavarria's murder. The trial court admitted the statements under KRE 404(b).

KRE 404(b) provides that evidence of other crimes, wrongs or acts may be admissible if offered to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. "Evidence offered to prove a defendant's motive to commit a charged crime (and thus to have committed that crime) often reveals to the jury the commission of uncharged crimes by the defendant, which accounts for the fact that 'motive' is one of the specifically listed purposes of KRE 404(b)(1)." Robert G. Lawson, *Kentucky Evidence Law Handbook* § 2.30 (2013 5th ed.); *see also Brown v.*

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[7] The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Commonwealth, 983 S.W.2d 513 (Ky. 1999) (holding that evidence showing the victim had caused the defendant to be indicted for a separate crime was admissible to show motive for the charged crime).

We agree with the trial court that *Crawford* is not at issue here because the statement was about a collateral matter; and we agree that the statement is not barred by the hearsay rule, as it was not offered to prove the truth of the matter asserted (that Olavarria gave James and Young a ride to the pawn shop). *See Crawford* 541 U.S. at 59 n.9 (noting that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted). Olavarria's statement to the police that led to the warrant for James's arrest was offered as evidence of a motive for James and Young to kill her. We therefore find that the trial judge did not abuse his discretion in allowing the statement to be admitted into evidence under KRE 404(b).

C. Jury Received Exhibit from Hudson's Case

Appellants' third argument on appeal is that a mistrial should have been granted after jury members were allowed to read a letter from Hudson's trial that was not an exhibit in the instant case. The letter in question was from Hudson's cellmate and reads as follows:

> 10/6/09
> Commonwealth Attorney Lynn Pryor
> RE: Olavarria Case
>
> I was in the cell with Ken Hudson at CC jail and he told me he was a ranking person in his gang. He ordered or told the two others to kill Ms. Olavarria. He told them where he would be with her. He only wanted sex from her, and she told the police about an

item they had stolen and pawned. I guess she was pregnant by Hudson so I guess he wanted to get rid of her and her unborn child. If you can get me out of here, and dismiss my charges, and give me witness protection, I can testify for you.

Sincerely,
J.D.Wyatt
#224910
KSR D-6-B
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P.S. – He thought since he didn't pull the trigger he'd get off.

A "post-it" note stuck to the top of the letter read: "Not used in the trial of James and Young."

Approximately twenty minutes after the jury had begun its deliberations, it discovered the letter in the exhibits box. The court ceased deliberations, and each juror was brought into chambers individually, where the trial judge conducted *voir dire* about the letter. Some jurors had gotten a chance to read or hear the contents of the letter while others had not.

Appellants made motions for a mistrial, which the trial court denied. James's counsel and the Commonwealth then both requested that the jury be admonished, and the court complied. The court gave the following admonition to the jury:

> Ladies and gentlemen, first of all, please accept our apologies for inadvertently allowing a piece of information to go back to the jury room with you that is not part of your – the evidence that you are to consider. Appreciate everyone's candor in telling us what your exposure was to the information, and it's my belief after hearing everyone that no one is going to allow this information to influence your responsibilities as jurors in this case. And you all have promised me, and I am admonishing you, to only consider the evidence that is legitimately before you in this case as you continue

to deliberate toward a verdict. I am satisfied that that's what everyone intends to do.

The parties all agreed that the admonition was sufficient.

It is "a fundamental principle that the state must establish guilt solely on the basis of evidence produced in the courtroom under safeguards assuring a fair trial." *Smith v. Commonwealth*, 645 S.W.2d 707, 710 (Ky. 1983). Thus, it was clearly error for the jury members to receive the letter. However, this error was cured by the reading of the admonition: "[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).

We note it is possible for an admonition to be insufficient. We have recognized that "the presumptive efficacy of an admonition falters . . . 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 . . ." *Id.* Appellants argue here that the efficacy of the trial court's admonition faltered, and that the "bell could simply not be unrung" once the jury was exposed to Mr. Wyatt's letter. We disagree.

Appellants have not shown an overwhelming probability the jury would be unable to follow the admonition. Not only did the admonition come after individual meetings with all of the jurors, but it clearly states: "you all have promised me, and I am admonishing you, to only consider

the evidence that is legitimately before you in this case as you continue to deliberate toward a verdict." This statement unequivocally directs the jurors to consider only legitimate exhibits, which would exclude the letter. Moreover, the parties agreed at trial that this admonition was sufficient.

"We use the abuse of discretion standard when reviewing a trial court's decision to deny a mistrial." *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009). A mistrial is an "extreme remedy" and "[a] court should grant a mistrial only if it is manifestly necessary to do so." *Id.* While it was obviously error for Mr. Wyatt's letter to have fallen into the hands of the jury, the trial court's admonition corrected this error. We do not find it was an abuse of the trial court's discretion to deny Appellants the extreme remedy of a mistrial where there was an acceptable admonition in this case.

D. Tape of Kenneth Hudson's Statement to Police

Appellants' fourth issue on appeal concerns a tape of Kenneth Hudson's statement to the police in 2008 about his involvement in the shooting, which was played for the jury after Hudson had testified and been cross-examined at trial. During cross-examination, the defense had implied that Hudson was improperly influenced to testify in court based on an agreement with the Commonwealth to reduce his charge of complicity to murder down to a charge of facilitation. This resulted in his sentence being reduced from twenty-five years down to five.

The Commonwealth moved to play the tape as a prior consistent statement offered to rebut an allegation of recent fabrication, pursuant to KRE 801(A)(a)(2). KRE 801(A)(a)(2) provides that:

> A statement is not excluded by the hearsay rule, even though declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

The defense objected, arguing that the prior consistent statement must predate the motive to fabricate, and that Hudson's motivation both in making the statement to police in 2008 and in testifying at trial was to "go home."

The trial court granted the Commonwealth's motion to play the statement, finding that Hudson's motive for testifying had been sufficiently questioned on cross-examination to justify playing the tape as a rebuttal. The trial court rejected the defense's counterargument, finding that a generic motive of "going home" belied the serious difference between the motive of the police letting him go home after questioning in 2008 and the reduction of a twenty-five year sentence down to five years for his testimony in court.

As previously stated, this Court reviews evidentiary rulings under the abuse of discretion standard. *Goodyear Tire, supra.* We hold that the trial court here did not abuse its discretion in admitting the tape of Hudson's 2008 statement to police into evidence. "Under [KRE 801A] and KRE 802 (the rule against hearsay), a witness's out-of-court prior consistent statement is not admissible merely to corroborate the witness's in-court testimony." *Winstead*

v. Commonwealth, 283 S.W.3d 678, 688 (Ky. 2009). However, such a statement may be used to rehabilitate a witness whose credibility has been attacked on the basis of recent fabrication, or improper influence. *Hoff v. Commonwealth*, 394 S.W.3d 368, 380 (Ky. 2011). This hearsay exception "is only available if the prior consistent statement was made 'before the alleged motive to fabricate came into existence.'" *Id.* (quoting *Slaven v. Commonwealth*, 962 S.W.2d 845, 858 (Ky. 1997).

In this case, the defense implied during its cross-examination of Hudson that Hudson was motivated to fabricate his testimony based on his agreement with the Commonwealth for a lesser charge and reduced sentence. Hudson's prior statement to police was admissible to rebut this implication, and it was made years prior to his deal with the Commonwealth. Hudson's wanting to "go home" while talking to the police in 2008 is not the same as him wanting to reduce his sentence by twenty years. Thus, the trial court did not abuse its discretion.

E. Prejudicial Opinion Testimony

Appellants' fifth issue on appeal concerns the opinion testimony of Don Carman, who testified at trial that the gun used to shoot "Juice" Marbury was the same gun used to shoot Olavarria. Appellants admit this issue is unpreserved, but request palpable error review pursuant to RCr 10.26.

RCr 10.26 provides:

> 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.

"For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. . . . A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings." *Brewer v.* Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotations omitted). In other words, "what the palpable error analysis boils down to is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error. If not, the error cannot be palpable." *Id.*

Appellants did not object to Carman's testimony at trial or request a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579.[8] Where a defendant does not object to expert testimony at trial and does not request a *Daubert* hearing, he is "essentially arguing that the trial court should have conducted a *sua sponte Daubert* hearing." *Clay v. Commonwealth*, 291 S.W.3d 210, 217 (Ky. 2008). However, we have previously declined to "speculate on the outcome of an unrequested *Daubert* hearing, or to hold that the failure to conduct such a hearing *sua sponte* constitutes palpable error." *Tharp v. Commonwealth*, 40 S.W.3d 356 (Ky. 2000).

Here, Appellants claim they are not faulting the trial court for failure to conduct a *sua sponte Daubert* hearing, but rather, are asking

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[8] *Daubert* sets forth the factors for determining the admissibility of expert scientific testimony. *Daubert*, 509 U.S. at 593.

the Court to consider whether evidence that was introduced without objection—the expert claimed he could "match" shell casings so well it left "no doubt" that Young's gun was used to shoot all of the .40 caliber shells—created a manifest injustice. Appellants contend that allowing the jury to hear there was "no doubt" the gun used to shoot Marbury was the same gun used to shoot Olavarria was so prejudicial as to be considered a manifest injustice. Appellants claim that a firearms expert may not testify that his conclusions are "a matter of scientific certainty." *United States v. Taylor*, 663 F.Supp.2d 1170, 1179 (D.N.M. 2009). Furthermore, Appellants add that their due process rights to confrontation were violated because Carman also stated during his testimony that another examiner named Shelly Betz verified his opinion that all the casings were fired from the same gun.

As stated, an error cannot be palpable unless there is a "substantial possibility" that the outcome of the case would have been different if not for the error. *Brewer, supra.* We note that here, Carman qualified his opinion by stating during his testimony: "[y]our opinions are based on objective criteria, but really in the end based on your training and experience. *It is subjective.*" (emphasis added). Even allowing that Appellants are not asking for this Court to speculate on the outcome of a *Daubert* hearing, we hold that Carman's testimony does not amount to palpable error causing a manifest injustice because he explicitly admitted his opinion as to matching the shell casings was subjective. He

did not testify that his conclusions were of scientific certainty. *Taylor, supra.* Carman's phrasing that there was "no doubt" about the casings matching in his opinion, as well as his mentioning another examiner agreeing with him, did not "seriously affect the fairness of the proceedings" in this case or create a substantial possibility of a different outcome. *Brewer, supra.*

F. Directed Verdict

Finally, Young raises a sixth issue on appeal by claiming there was insufficient evidence that he lethally shot Olavarria, and that consequently the trial court should have granted his motion for direct verdict. Specifically, Young points to the fact that Hudson could only say that Young "most likely" shot Olavarria, and that there was no proof that any bullet fired by Young killed Olavarria.

Young claims the jury had no evidentiary basis for finding beyond a reasonable doubt that he fired any of the lethal shots. He points out that nine bullets entered Olavarria's body, creating nine bullet paths, but only four bullets were recovered in her body—all four from James's gun. According to Hudson, James's .38 revolver could shoot five rounds, and Young's .40 caliber gun could shoot ten rounds. Also according to Hudson's statement, James shot Young's gun three times in order to finish off the rounds. Young proposes that James could have created eight of the nine bullet paths by shooting the extra three rounds into Olavarria's body, leaving only one made by Young. Young claims that the medical examiner said that out of the four "immediately

lethal" bullet paths, at least two had James's bullets left in them, and were definitely caused by James.

Young's counsel presents the theory that given the evidence, Young could have faked his participation in this murder by purposely firing one or more non-lethal shots through Olavarria and/or by firing at least six shots into the ground. He could have wanted to be perceived as participating at the time in order to gain rank in his gang.

The Commonwealth's counterargument is that Hudson did not testify that James actually shot Olavarria when he emptied the remaining three rounds from Young's gun. Hudson's testimony could just as easily imply that James fired the gun randomly rather than into Olavarria's body, meaning that only five out of nine bullet paths could be James's. The medical examiner found bullets from James's revolver in four of the bullet paths—two lethal and two non-lethal, which would mean that at least one of the two remaining "immediately lethal" bullet paths was created by Young. Moreover, the medical examiner did not use the term "immediately lethal" but rather "absolutely lethal," which would imply that other bullet paths could have been lethal as well.

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. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). The evidence is viewed in the light most favorable to the Commonwealth. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). Here, in viewing the evidence in the light most

favorable to the Commonwealth, we affirm the trial court's denial of a directed verdict in Young's case. A jury could have concluded beyond a reasonable doubt that at least one of the nine bullet paths was created by Young, and that that bullet path was lethal.

III. CONCLUSION

Having reviewed all of Appellants' issues on appeal and for the reasons stated above, we affirm the convictions and corresponding sentences of James and Young.

All sitting. All concur.

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