IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 23, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000380-MR

DWIGHT D. WISDOM, JR. — APPELLANT

V.

ON APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
NO. 12-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Trigg Circuit Court jury convicted Dwight D. Wisdom, Jr. (Wisdom) of intentional murder. Because the jury could not agree on a sentence, the trial court imposed a twenty-five year prison sentence pursuant to KRS 532.055(4). Wisdom appeals his conviction as a matter of right under Ky. Const. § 110(2)(b). Before this Court, Wisdom argues the trial court committed reversible error: (1) by allowing evidence of flight which was unsupported by evidence, unduly prejudicial, and in violation of his Fifth and Sixth Amendment rights; (2) by permitting the Commonwealth to ask leading questions of its own witness on direct examination; and (3) by permitting the Commonwealth to improperly impeach its own witness. Having reviewed the record and the parties' arguments, we affirm.

I. BACKGROUND.

On December 3, 2011, Will Anderson planned a party at the Trigg County Complex to promote his rap music. Residents from both Trigg and Caldwell counties attended this party. Testimony at trial indicated that individuals from these two counties are often times rivals. Testimony also indicated the number of people who attended this party was as few as twenty or as many as one-hundred twenty. Trigg County residents were the first to arrive; Caldwell residents arrived later in the evening, including then eighteen year old Wisdom, Leon[1] (Wisdom's younger brother), and Kewon Harris (Harris).

The Commonwealth called twenty-six witnesses to testify during its case-in-chief, eleven of whom attended the Trigg County Complex party. The witnesses gave somewhat varying accounts of the facts in question; however, the majority of them agreed on this general set of facts. Leon and Kevin Bingham (Bingham) got into a fight outside the Trigg County Complex. Leon hit Bingham and Bingham went inside the complex. After Bingham went inside, Eric Jones came out and began to fight with Leon. Wisdom approached the two with a gun. Different witnesses testified that they saw Wisdom shoot Jones, saw Wisdom shoot only into the air, or did not see Wisdom shoot at all. Regardless, Jones was shot by a bullet which traveled through his left lung, heart, and right lung before lodging in his right rib cage. This single gunshot ultimately killed Jones.

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[1] We have chosen a pseudonym to protect the identity of the minor child.

Antonio Wharton testified that he tried to break up the fight between Wisdom, Leon, and some people from Trigg County, and that he saw Wisdom run to his car and leave the complex. Wharton testified that he went inside after Wisdom went to this car, heard gun shots, and saw Jones on the ground, but did not see who fired the shots. Wharton further testified that he took Jones to the hospital after he was shot while lines of cars were leaving the complex.

Emily White and Derrick White both testified that they saw Wisdom fire a gun into the air, but they did not see Wisdom fire into the crowd nor did they see Wisdom shoot Jones.

Dallas Hart testified that gunshots were fired after the fight between Leon and Jones started; and that he saw Wisdom fire shots while Jones was still inside the complex. Hart further testified that he thought approximately three to five shots were fired into the air and that additional shots were fired from the middle of the parking lot, subsequent to the fight. Hart testified that he did not see Wisdom shoot Jones. He learned Jones had been shot after hearing screams from the crowd and then witnessing Jones collapse near the entrance of the complex.

Dhayna Cavanaugh, Andrew Street, Bryan Boyd, and Lorenzo Mays all testified that they saw Wisdom shoot Jones. Cavanaugh testified that when Leon and Jones began to fight, Wisdom shot Jones from a few feet away. Cavanaugh also testified that he saw Wisdom run to his car and leave the complex with Harris in a blue Monte Carlo. As Wisdom was leaving,

Cavanaugh heard four or five more shots, but could not determine who was shooting.

Andrew Street testified that he saw Jones come outside and fight with Leon in between cars in the parking lot. As Jones and Leon fought, Street saw Wisdom approach the two and then shoot Jones. Street testified that Wisdom then "pull[ed] off" in a black and blue Monte Carlo, and that the gun in Wisdom's possession was a black and grey or chrome-like automatic pistol. Street also heard shots as cars were leaving.

Bryan Boyd testified that he saw Jones and Leon fight and then Wisdom approached with a gun stating, "Back up. Back Up. Get the fuck back." Boyd further testified that Wisdom was waving the gun when it went off, and that Wisdom shot Jones. Boyd testified that Jones ran towards Boyd and stated, "I got hit; he hit me; he hit me." Boyd also testified that as Jones made those statements, he fell to the ground and began shaking. Boyd testified that after Jones fell to the ground, Wisdom ran off, and Boyd heard additional shots fired as vehicles started to leave the complex, but that he was unsure from where the shots came. Boyd also described Wisdom's gun as silver, chrome, and black in color.

Lorenzo Mays testified that he also saw Jones and Leon fighting and then saw Wisdom shoot Jones from a close distance. Mays then saw Jones fall beside the complex at which time Mays went inside and called 911.

Prior to trial, the Commonwealth filed a notice of its intent to introduce KRE 404(b) evidence that Wisdom fled the crime scene following the shooting

and his whereabouts were unknown until he surrendered to police two days after the shooting. Wisdom filed a response in opposition. The parties addressed the issue at the final pretrial conference.

At that pretrial conference, the Commonwealth first stated it was not sure this issue involved KRE 404(b) and that this evidence of flight was simply admissible. Wisdom's counsel responded to those assertions arguing that: (1) the notice was not timely filed; and (2) because Wisdom sought to exercise his Sixth Amendment rights by attempting to contact an attorney during the two day period, this was not even evidence of flight, and its introduction would preclude a fair trial from occurring. The Commonwealth's response was that the evidence of flight told the story and that Wisdom did not go straight to an attorney, but went missing for two days. The trial judge ruled that although the notice was not timely, the evidence was part of the operative facts of the case and was admissible even without the KRE 404(c) notice. The trial judge also noted this was filed two weeks before trial, not on the eve of trial, and it was therefore less prejudicial than if it had been filed on a later date. He held it was proper under KRE 404(b) as evidence used for some other purpose (e.g. expression of a sense of guilt as in *Rodriguez v. Commonwealth*, 107 S.W.3d 215 (Ky. 2003)); that the probative value outweighed any prejudice against Wisdom; and that Wisdom could explain or deny his flight through cross-examination or direct proof.

On April 15, 2013, as trial was about to begin, Wisdom's counsel renewed his objection to the evidence of flight on the grounds that its

prejudicial effect outweighed any probative value because Wisdom had surrendered, showing he did not in fact flee. The trial court overruled Wisdom's objection.

Wisdom did not testify at trial. His attorney focused his defense on the Commonwealth's lack of evidence and the varying accounts of the events in question. The jury rejected Wisdom's trial strategy and found him guilty of intentional murder. As mentioned above, the jury could not return a penalty phase verdict, so the court imposed a twenty-five year prison sentence under KRS 532.055(4).

II. STANDARD OF REVIEW.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). An abuse of discretion occurs when a 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).

III. ANALYSIS.

A. The Admission of Wisdom's Flight Was Not an Abuse of Discretion.

Although unclear from Wisdom's brief, it appears that he argues the trial court committed reversible error in admitting: (1) the evidence regarding his immediate departure from the Trigg County Complex because everyone else at the complex also left, negating any indication of guilt; and (2) the evidence of his whereabouts and the evidence of the police investigation during the two days after the shooting. The Commonwealth responds to these arguments by

asserting that evidence of flight from the scene was relevant, admissible, and substantiated by the various eye-witnesses' testimony. The Commonwealth also argues that the evidence of the attempts to locate and subsequently arrest Wisdom were properly admitted because it fits into flight evidence, or in the alternative was context evidence under KRE 404(b)(2), or if error, it was harmless.

"It has long been held that proof of flight to elude capture or to prevent discovery is admissible because 'flight is always some evidence of a sense of guilt.'" *Rodriguez*, 107 S.W.3d at 218 *citing Hord v. Commonwealth*, 227 Ky. 439, 13 S.W.2d 244, 246 (1928). In *Rodriguez*, the defendant fled the crime scene in a stolen vehicle minutes after the robbery for which he was charged. We held that the theft of this truck was "spatially and temporally close to the crime charged" and that the theft was done in the plain sight of two police officers, thus evidencing a sense of guilt in an attempt to evade arrest for the robbery. *Rodriguez*, 107 S.W.3d at 219. Wisdom's immediate flight from the complex was both spatially and temporally close to the crime charged. This evidence, coupled with the testimony that Wisdom or someone in his car fired shots as they left the scene, evidenced a sense of guilt and an attempt to evade arrest. Therefore, the trial court did not abuse its discretion in admitting that evidence.

Wisdom's argument against the admissibility of evidence pertaining to events that occurred during the two days after the shooting has some merit. In *Day v. Commonwealth*, 361 S.W.3d 299 (Ky. 2012), reh'g denied (Feb. 23,

2012), we held that evidence of flight was admissible where the defendant was aware he was a person of interest in a police investigation, having met with law enforcement multiple times before moving to West Virginia. Day did not notify his landlord, employer, or police before he absconded. He also left many of his possessions—including his truck—in Kentucky and did not have a job when he moved. Day argued that when he moved, there were no charges pending against him; that police had not informed him he was not to leave Kentucky; that he moved to be close to friends; and that he made no attempts to conceal this behavior or his identity from police. We affirmed the Court of Appeals holding that, although these facts constituted a "close call," the trial court did not abuse its discretion, and Day could have presented evidence or testified to explain his actions. Therefore, admissibility of evidence of Day's flight was not in error and would be admissible on retrial.[2]

Wisdom argued that after he left, there was no evidence admitted that indicated he was aware a police investigation was ongoing, and that any indication of flight was negated when he surrendered to police custody, making his case different from *Day*.

Wisdom also argues that if *Day* constitutes a "close call," then it must be an abuse of discretion to allow evidence of Wisdom's whereabouts or flight, where no evidence exists to suggest a guilty mind sufficient to meet the admissibility requirements of KRE 404(b). Wisdom further argues the

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[2] Day's conviction was reversed and remanded on a jury instruction issue irrelevant to the case before us now.

Commonwealth failed to elicit any evidence at trial that he knew he was a person of interest in its investigation, failed to elicit any evidence that it had interviewed anyone who might possess knowledge of his whereabouts, and failed to go to Wisdom's home to search for him. Because the Commonwealth possessed so little evidence in this regard, Wisdom argues there was nothing for him to rebut through cross-examination.

The Commonwealth notes the size of the investigation and the substantial efforts made to locate Wisdom, through search warrants for cell phones, witness interviews, and a press release. Thus, the Commonwealth argues, it would be not be unreasonable for a jury to infer that he was attempting to avoid apprehension during this two-day time period.

Wisdom's argument that evidence regarding the police investigation during the two day period should not have been admitted also has some merit. We agree that the evidence may have been inadmissible as evidence of flight. However, we held in *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003), that the Commonwealth is permitted to "present a complete, unfragmented picture of the crime and investigation." And a jury "cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." *Kerr v. Commonwealth*, 400 S.W.3d 250, 262 (Ky. 2013) *citing United States v. Moore,* 735 F.2d 289, 292 (8th Cir. 1984). In *Kerr*, we held an arrest warrant was relevant to the context of the investigation to explain why police were observing Kerr's guest room and how the crime was discovered. *Kerr*, 400 S.W.3d at 260.

In the same vein, the actions taken by police herein during the two days after the shooting were relevant to establish a complete and unfragmented picture of the investigation. Furthermore, although the evidence was prejudicial, we cannot say that its prejudicial effect outweighed its probative value. Therefore, although evidence of police actions may not have been admissible as evidence of flight, the court did not abuse its discretion in admitting that evidence as evidence related to the investigation.

Furthermore, we agree with the Commonwealth that, if error occurred in admitting this evidence, it was harmless. This Court has previously held:

> 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 . . . The inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Winstead v. Commonwealth, 283 S.W.3d 678, 688-89 (Ky. 2009) *citing Kotteakos v. United States*, 328 U.S. 750 (1946). In light of the numerous witnesses who testified Wisdom shot Jones, it is difficult to imagine that evidence of what transpired after the shooting contributed in any significant way to the jury's verdict. Therefore, we hold that any error was harmless and reversal is unwarranted.

Finally, we note Wisdom's argument that the admission of this evidence violated his constitutional right to counsel and right to be free from self-incrimination. We note that Wisdom was represented by counsel and that he did not testify. Therefore, his arguments are, at best, attenuated.

Furthermore, because any error related to admission of the contested evidence was harmless, there was no violation of his constitutional rights. *See Quarels v. Commonwealth,* 142 S.W.3d 73, 80 (Ky. 2004).

B. The Trial Court Did Not Err by Permitting the Commonwealth Latitude in its Questions of Kewon Harris.

Wisdom argues that the trial court committed reversible error by: (1) allowing the Commonwealth to cross-examine and aggressively question Harris on direct-examination; and (2) allowing the Commonwealth to impeach Harris, even though he was the Commonwealth's witness. The Commonwealth responds by stating that the trial court properly allowed it to ask Harris leading questions on direct examination because of his reluctance to testify and that the impeachment of Harris was proper.

(1) Aggressive Cross examination.

The Commonwealth asked the trial court for permission to treat Harris as a hostile witness. It claimed, although he had already given relevant information to police, he was now reluctant or afraid to testify. Defense counsel responded, and the trial court agreed, that the Commonwealth should begin questioning Harris on direct examination and then request to proceed on cross-examination if Harris proved to be a hostile witness. After the Commonwealth asked some questions, which are discussed in greater detail below, the trial court indicated at a bench conference that Harris appeared recalcitrant and, because Harris was a childhood friend of Wisdom's, the Commonwealth could treat Harris as a hostile witness.

Our rules of evidence governing leading questions, KRE 611(c), state:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

"[J]udgments [allowing leading questions] will not be reversed because of leading questions unless the trial judge abused his discretion and a shocking miscarriage of justice resulted." *Tamme v. Commonwealth*, 973 S.W.2d 13, 27 (Ky. 1998) (holding victim's wife was properly examined by Commonwealth at capital murder retrial as hostile witness, after she admitted to having had a sexual affair with defendant, she had been convicted of perjury as a result of her testimony during the first trial, and the prosecutor was the chief witness against her at her own trial). We hold that, with the trial court's caution and sound reasoning as to Harris's reluctance and family relationship to Wisdom in mind, the court's ruling was not within the definition of a "shocking miscarriage of justice."

In relation to the issue of badgering, the Commonwealth asked Harris if there had been some discussion of whether people would be checking for weapons at the door. While Harris stated that someone in the car asked that question, he could not remember who asked it. The Commonwealth asked him again, and Harris again answered that he could not remember. Wisdom's counsel objected on the ground that the question had already been asked and answered. The trial court then allowed the Commonwealth to treat Harris as a hostile witness over defense counsel's objection.

The Commonwealth then asked Harris if Wisdom had asked him to carry a gun into the complex. Harris responded that he could not recall. The Commonwealth also asked Harris if, after he took the gun into the Complex, someone asked him for it. Harris responded that someone did ask him for the gun, but he could not remember who. The Commonwealth then asked Harris if he had given the gun to Wisdom. Harris responded that it might have been Wisdom. The Commonwealth asked, "It might have been?" to which Harris responded, "It might have been, I don't know. I don't recall."

Wisdom argues that the above constituted impermissibly aggressive questioning of a witness. This argument is without merit. The Commonwealth should be given the usual latitude given a party during cross examination. In this case, the Commonwealth tried to elicit the answers it desired, asking essentially the same question twice. However, Harris consistently gave the same answer, and therefore, there can be no prejudice to Wisdom.

(2) Impeachment.

Faced with repeated statements by Harris that he could not remember, the Commonwealth asked Harris if he had made prior statements to the contrary. When Harris said that he could not recall, the Commonwealth did not pursue that line of questioning, confront Harris with any prior statement, or attempt to introduce any prior statement into evidence. Wisdom now argues that the Commonwealth was attempting, albeit inferentially, to impeach Harris with a prior inconsistent statement. This argument is without merit for five reasons.

First, if Wisdom believed the Commonwealth's mention of a prior inconsistent statement in a question was so prejudicial, he should have objected. He did not, thus this issue is not properly preserved for our review.

Second, in order for there to be a prior inconsistent statement, there must be a prior statement. The Commonwealth, although it referred to a prior inconsistent statement, did not present one, and no actual impeachment took place.

Third, because the issue was not preserved, Wisdom must show that it constituted palpable error. As previously noted, faced with testimony from multiple eyewitnesses that Wisdom shot Jones, it is doubtful that this one question had any impact on the verdict. Therefore, Wisdom has not established how this one question amounted to palpable error.

Fourth, Wisdom's reliance on *United States v. Rowan*, 518 F.2d 685 (6th Cir. 1975) is misplaced. As Wisdom notes, the Sixth Circuit Court of Appeals stated that it is a better practice for the court to require a prosecutor to "make a showing of the prior inconsistent statements" before questioning a witness about them. *Id.* at 692. However, the Court held that, in light of overwhelming evidence against the defendants, including surveillance photographs, the prosecutor's attempts to impeach three witnesses with unrevealed prior inconsistent statements had a "negligible" impact and "any error committed was harmless beyond a reasonable doubt." *Id.* We agree that it would be better practice for the Commonwealth to establish the existence of a prior inconsistent statement before questioning a witness about it. However, as we

previously stated, the Commonwealth's question was harmless; therefore, any error that occurred was not palpable.

Finally, Wisdom's argument that a juror's groaning during Harris's equivocation and inability to respond to the Commonwealth's questions about the gun is evidence of significant prejudice is without merit. We have reviewed the video, and it is not possible for us to determine who was "groaning" during Harris's testimony. Furthermore, even if a juror was "groaning," that fact alone would not establish that Wisdom suffered manifest injustice.

IV. CONCLUSION.

Because any error that occurred by the admission of the evidence surrounding Wisdom's flight was harmless, and because the trial court did not err in allowing the Commonwealth's questioning of Kewon Harris, we affirm.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Steven Jared Buck
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General