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NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
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DECISION IN THE FILED DOCUMENT AND A COPY OF THE
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2013-SC-000433-MR

BACILIO RUIZ GODINEZ

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
NO. 11-CR-002224

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the fall of 2010, Betty Sullivan rented one of the bedrooms in her two-bedroom apartment to Appellant, Bacilio Ruiz Godinez.¹ Betty, her boyfriend, and infant son, Tony, slept in the apartment's master bedroom, while her eight-year-old daughter, Amy, and three-year-old daughter, Casey, slept on the living room couch. Appellant's bedroom was located between the master bedroom and living room.

Appellant got along well with Betty's children and would often babysit them. However, Betty soon noticed something was amiss. One night, for example, Betty awoke to fix a bottle for Tony and found Appellant standing over Casey and Amy while they were sleeping. Appellant explained that he was covering the children with a blanket.

¹ Pseudonyms are being used for "Betty" and her children in order to protect their anonymity.

In July of 2011, Amy finally told Betty that Appellant had been sexually abusing both her and Casey. Betty took both girls to Kosair Children's Hospital to be examined. Appellant was subsequently interviewed and arrested. On July 21, 2011, a Jefferson County grand jury indicted Appellant on three counts of first-degree rape, three counts of first-degree sodomy, four counts of first-degree sexual abuse, and two counts of distribution of obscene matter to a minor.

A jury trial began on March 18, 2013. On the first day of trial, the court conducted an *in camera* interview of Casey to determine whether she was competent to testify. During the interview, Casey was unwilling to discuss the alleged abuse. Due to her being only six years of age and considering the sensitivity of the subject matter, the trial court ruled that Casey was not competent to testify. Consequently, the trial court dismissed without prejudice those charges which were based on acts Appellant allegedly perpetrated against Casey—one count of first-degree rape, one count of first-degree sodomy, two counts of first-degree sexual abuse, and one count of distribution of obscene matter to a minor. The trial court also instructed the parties and testifying witnesses to refrain from informing the jury of the abuse as it related to Casey.

The jury trial proceeded as expected, with the remaining charges consisting only of those crimes committed against Amy. After the Commonwealth rested its case, the trial court ruled that the evidence was insufficient to prove the elements of first-degree rape. Therefore, the trial court

directed a verdict of acquittal on that charge and, in its place, included an instruction for the lesser included offense of first-degree criminal attempt rape.

A Jefferson Circuit Court jury ultimately found Appellant guilty of first-degree criminal attempt rape, two counts of first-degree sodomy, two counts of first-degree sexual abuse, and distribution of obscene matter to a minor. The jury recommended a sentence of 82 years imprisonment. The trial court, however, adjusted the sentence to comply with the statutory maximum sentence of 70 years imprisonment. Accordingly, on May 31, 2013, the trial court sentenced Appellant to 70 years imprisonment. Appellant now appeals his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution.

Appellant's assignments of error concern the trial court's refusal to grant his two mistrial motions which were based on the improper statements of both Amy and Louisville Metro Police Detective Angela Merrick. Appellant contends that both witnesses informed the jury that Appellant abused Casey, in direct violation of the trial court's orders. We will address each statement in turn, focusing first on those statements preserved by mistrial motions.

Appellant's first motion for a mistrial occurred during Amy's testimony. The Commonwealth inquired as to why she decided to disclose the abuse to her mother after keeping it a secret for so long. Amy replied, "Because my little sister told me that" At the very moment both parties interrupted her testimony and a bench conference ensued. Appellant requested a mistrial, arguing that Amy had improperly informed the jury that Appellant abused

Casey. The trial court denied the motion and instructed the Commonwealth to pose a leading question so as to allow Amy to answer the question without divulging that Casey was also a victim of Appellant's abuse. Accordingly, the trial resumed, during which point the following exchange took place:

Commonwealth: Were you scared because he was doing that to you?
Were you scared for your little sister?

Amy: Yes.

Commonwealth: Is that why you decided to tell?

Amy: Yes.

The second mistrial motion occurred during the testimony of Detective Merrick. During her direct testimony, Detective Merrick explained that she arrived at Kosair Children's Hospital to investigate an unrelated case of possible child abuse. As she was leaving the hospital, Detective Merrick was informed by a nurse that there was another case of "sexual abuse allegations with two young females" and that those "children" had not yet been placed in a hospital room. On its own volition, the trial court interrupted Detective Merrick and ordered the parties to approach the bench. In an attempt to distract the jury from Detective Merrick's improper statement, the trial court acted as if the parties needed to discuss a "procedural matter." The trial court then instructed Detective Merrick to avoid mentioning Casey, after which Appellant motioned the trial court to declare a mistrial. The trial court agreed that the testimony was improper but not severe enough to warrant a mistrial.

Trial courts have wide discretion when determining whether to grant or deny a motion for a mistrial. *Shabazz v. Commonwealth*, 153 S.W.3d 806, 810

(Ky. 2005). Considering that a mistrial is an extreme remedy, it should be resorted to only when there is “a manifest necessity for such an action” *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002) (quoting *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985), *vacated in part by Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000)).

We agree that Amy and Detective Merrick’s statements amounted to improper evidence of Appellant’s prior bad acts, which the trial court had already ruled inadmissible. Even so, not all references to prior bad acts are prejudicial enough to warrant a mistrial. *See Turner v. Commonwealth*, 153 S.W.3d 823, 829-30 (Ky. 2005), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336, 345 (Ky. 2010). This is especially true when the prejudicial effect can be obviated through the use of an admonition. *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002).

After carefully reviewing Amy and Detective Merrick’s testimony, we believe a mistrial would have been a harsh remedy, whereas a carefully constructed admonition would have been the more appropriate method of removing the prejudice caused by the improper statements. *See id.* However, Appellant failed to request an admonition after each complained of statement. Therefore, we cannot now rule that the trial court abused its discretion in refusing to grant Appellant a mistrial. *See Jacobsen v. Commonwealth*, 376 S.W.3d 600, 610 (Ky. 2012) (ruling that a mistrial was improper since admonition, had it been requested, would have cured the improper reference to defendant's prior bad acts); *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky.

2000) (holding that testimony presented at trial stating that the defendant was a convicted felon did not require a mistrial because the error could have been cured by an admonition to disregard the testimony).

Moreover, this Court presumes that a jury will follow an admonition to disregard testimony or evidence unless either of the two following situations presents itself:

(1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was inflammatory or highly prejudicial.

See Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (internal citations and quotations omitted) (emphasis in original) (citing *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993); *Bowler v. Commonwealth*, 558 S.W.2d 169, 171 (Ky. 1977)).

Neither Amy's nor Detective Merrick's statements qualify as "highly prejudicial" or "devastating" to Appellant. In regards to Amy's statement, the jury had no reason to anticipate that Amy was going to finish her sentence by stating that she was fearful Appellant would continue abusing her little sister. In fact, the Commonwealth's follow-up question removed any lingering suspicion the jury may have had that Appellant was abusing Casey. Essentially, Amy clarified that she was fearful that if she did not tell, then the abuse *could* extend to her sister, not that it was already happening to her sister.

Likewise, we do not believe Detective Merrick's statements were highly prejudicial" or "devastating" to Appellant. After Detective Merrick mentioned "two children," the parties gathered at the bench and formulated a plan to ensure that the jurors would not assume that both Amy and Casey were the "two children" Detective Merrick was referring to. Accordingly, when questioning resumed, the Commonwealth explained that Detective Merrick was at the hospital for an unrelated abuse case. The Commonwealth then asked Detective Merrick, "At some point in time in the evening did you become aware that Amy was alleging sexual abuse?" Detective Merrick answered in the affirmative. Therefore, the jury likely disregarded Detective Merrick's minute and fleeting mention of two children, or they possibly assumed the two children were involved in the unrelated case. Yet, even assuming that Detective Merrick's statements caused Appellant to suffer some prejudice, it is not the type of devastating prejudice which would infiltrate the juror's minds so as to prevent them from following an admonition. Finding no abuse of discretion, we affirm.

We now turn to the two remaining statements Appellant claims warranted a mistrial. First, Appellant complains of Detective Merrick's testimony wherein she testified that she had not spoken to the hospital doctor because "*they were* just freshly put into the room when I made contact with them." Appellant also complains of Detective Merrick's subsequent testimony during which she stated, "I gave [Appellant] my business card [and I] told him there was an investigation, there were some allegations made by *some children*

...” Once again, Appellant believes these statements informed the jury that Casey was also a victim of Appellant’s abuse. Appellant, however, did not raise a contemporaneous objection to either of these two statements, nor did he move the court to grant a mistrial. As a result, these two complaints are unpreserved for our review.

Appellant does not request palpable error review either. Even if Appellant did request such a review, we do not believe Detective Merrick’s two statements rose to a level of manifest injustice. Her reference that “they were just freshly put into the room” merely refers to the fact that more than one person was placed in the hospital room. Considering that Amy was accompanied to the hospital by her mother, it is unlikely that the jury inferred that it was Casey that Detective Merrick was referring to.

This Court agrees with Appellant that it was improper for Detective Merrick to testify that there “were some allegations made by some children.” Such a statement does indicate that Amy was not the only victim of Appellant’s abuse. Nonetheless, Detective Merrick did not expand on that statement, nor did she identify who the other child was. The jury likely assumed Detective Merrick misspoke, or the jury may have disregarded the comment all together. Furthermore, any resulting prejudice could have been easily cured by an admonition if Appellant had requested one. Thusly, we find that these statements were not so flagrantly improper or prejudicial so as to render the entire trial fundamentally unfair.

This case contained an investigation of sexual crimes against two siblings which occurred at the same place and roughly during the same times. Both children were medically examined, and the prosecution concerning both those victims was curtailed only at trial with the trial court's ruling. In the dynamics of trial testimony, it can be difficult for the Commonwealth to surgically disjoin its evidence and apply it to just one victim. There is no showing here of any bad faith or intended harm.

In conclusion, the trial court did not abuse its discretion in refusing to grant Appellant's motions for a mistrial, nor has Appellant demonstrated palpable error requiring a reversal of the jury's guilty verdict. For the aforementioned reasons, the Jefferson Circuit Court's judgment is hereby affirmed.

All sitting. All concur.

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