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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 29, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000740-MR

MARY RUTH MORRIS — APPELLANT

V.

ON APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
NOS. 13-CR-00060, 13-CR-00061, 13-CR-00062, 13-CR-00063, 13-CR-00064, 13-CR-00065, 13-CR-00066, AND 13-CR-00067

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Mary Ruth Morris appeals as a matter of right from a Judgment of the Letcher Circuit Court convicting her of numerous counts of second-degree possession of a forged instrument and theft by deception. Ky. Const. § 110(2)(b). Morris was also convicted of being a persistent felony offender in the second degree. Morris raises three issues on appeal: 1) that the trial court erred when it denied her motion for mistrial following *voir dire*; 2) that evidence of prior bad acts was erroneously admitted at trial; and 3) that the trial court erred when it ordered that she pay court costs. We now affirm Morris's judgment and sentence.

RELEVANT FACTS

Mary Ruth Morris was employed as a house cleaner and cook for 92-year old Warren Hopkins of Virginia. Morris was introduced to Hopkins through her former mother-in-law, Peggy Polly, who worked as an in-home nurse for the

elderly man. Morris worked three to six days a week, and was paid $100 per day for her services. Hopkins also allowed Morris and her son to live in a house he owned. The arrangement was far from idyllic though, as Hopkins would routinely make sexual advances towards Morris. He would frequently touch Morris's backside, appeared naked in his bed in front of her, and, on one occasion, purchased a sex toy for her.

In February of 2013, Hopkins traveled to his bank in Wise, Virginia to inquire about suspicious activity on his checking account. A large number of checks totaling over $40,000.00 in funds and made out to "Ruthie Polly" had been drawn from his account. Morris sometimes went by the name "Ruthie Polly," with Polly being her surname from a prior marriage. The bank declared that the checks were fraudulently made, and Virginia law enforcement officers opened an investigation. During the course of the investigation, police discovered that 77 checks totaling over $22,000.00 were cashed in Virginia, with additional checks cashed in Kentucky. Virginia officers soon contacted the Kentucky State Police to report what appeared to be fraudulent activity on Hopkins's account in Kentucky. All of the checks under investigation were made out to "Ruthie Polly."

A Letcher County grand jury returned eight indictments against Morris with multiple counts of second-degree possession of a forged instrument, five felony counts of theft by deception over $500.00, multiple misdemeanor counts of theft by deception under $500.00, and eight counts of being a persistent felony offender in the second degree. At trial, Hopkins testified that he had not

written or signed a majority of the checks in question, and had only written and signed checks to Morris for her work in his home. Morris testified that Hopkins had in fact written the checks for her in order to cover extra expenses that she would occasionally incur. She denied ever stealing or forging Hopkins's checks, claiming that Hopkins reported the checks as fraudulent only after she rebuffed his sexual advances.

The jury found Morris guilty on 48 counts of second-degree possession of a forged instrument, five counts of theft by deception over $500, 43 counts of theft by deception under $500 and of second-degree persistent felony offender. The jury recommended that Morris serve fifty-three consecutive ten-year sentences for her felony convictions. The parties agreed to fix the sentences for the misdemeanor counts at 365 days, set to run concurrently with Morris's felony sentences. The trial court applied the statutory cap to reduce the sentence to twenty years. This appeal followed.

ANALYSIS

I. The Trial Court's Reading of the PFO Charge Did Not Result In Manifest Injustice.

While reading Morris's indictments to the venire, the trial court read Morris's PFO charge aloud. After doing so, the judge called counsel to the bench where he proposed that he would only read that one PFO charge to the *voir dire* panel, rather than the PFO charge on each of the eight separate indictments. Both parties agreed, and the trial court continued to read the indictments. Over the course of an hour, the trial court read all of the other

charges from Morris's eight indictments before commencing *voir dire*. Thirty minutes later, the jury recessed for lunch.

After the lunch recess, Morris's counsel moved for a mistrial on the basis that the trial court had read the PFO charge to the jury. Morris's counsel conceded that he should have raised his objection sooner, while noting that the prosecutor also believed that the PFO charge was read in error. The trial court denied the motion, explaining that he would admonish the venire that the wrong case file had been read by clerical error, and that it should disregard Morris's prior conviction. When the venire returned from lunch, the judge offered the following admonition:

> I think I told you the day you were qualified, there are multiple cases set for trial each day. Seven to fourteen cases are set for trial on most days, and when I was reading these, there are of course multiple indictments that I read on Ms. Morris. And by error, I picked up and read on the last one that she was charged with being a persistent felony offender due to previous convictions. That was picked up and read by mistake. You are to disregard it and shall not consider it in anyway.

Morris raised the argument anew in her motion for a new trial, arguing that the admonition could not have cured the prejudice caused by the erroneous reading of the PFO charge. The trial court denied the motion for a new trial. On appeal, Morris argues that the trial court erred when it denied her motion for mistrial on the grounds that the admonition concerning the reading of the PFO charge did not cure the resulting prejudice. We agree that the trial court's reading of the PFO charge was erroneous. However, we decline to reverse under our unpreserved error standard based on these facts.

As noted by the Commonwealth, a party seeking a mistrial must make a timely request so that the trial court can afford the appropriate relief. *Blount v. Commonwealth*, 392 S.W.3d 393, 398 (Ky. 2013). Failure to make a timely motion for a mistrial renders the issue unpreserved. *Id.* Here, Morris waited nearly three hours after the PFO issue arose to bring the matter to the trial court's attention. Kentucky Rule of Criminal Procedure ("RCr") 9.22 mandates that a motion for a mistrial must be sought "at the time the ruling or order of the court is made." As such, the motion for a mistrial was not timely made. Pursuant to RCr 10.26, this Court may review an unpreserved error in order to determine whether manifest injustice has resulted from the alleged error. *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). Under this standard, we will reverse when the error affects the overall fairness of the proceeding and undermines the outcome of the case. *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013).

The trial court's reading of the PFO charge was unquestionably error under Kentucky precedent. Information concerning a defendant's prior offenses, including the reading of a PFO charge in the indictment, must be reserved for the sentencing phase of the trial to avoid the injection of prejudice into the guilt-phase proceeding. *Clay v. Commonwealth*, 818 S.W.2d 264, 265 (Ky. 1991). Here, the trial clearly erred in informing the potential jurors during *voir dire* about Morris's prior felony conviction. Because this issue was not

properly preserved,[1] it can be a ground for reversal only if it constitutes palpable error, which, as explained *infra*, requires a finding of manifest injustice resulting from the error. There is no manifest injustice here.

Admonitions given by the trial judge are generally deemed sufficient because "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). The general rule does have an exception where 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.* Here, in clear violation of our law, the trial judge, *not* a witness for the Commonwealth, told the jurors that Morris was a convicted felon. For jurors to disregard that fact (which strikes at the heart of the presumption of innocence for most people) would be extremely difficult, not only because of the information conveyed ("Morris is a convicted felon"), but also because it came from the voice of authority in the courtroom, the judge. In short, the above-referenced exception to the *Johnson* rule regarding the efficacy of admonitions applies.

Nevertheless, there was no reversible error on these facts because Morris testified and was subject to being questioned on this very issue pursuant to Kentucky Rule of Evidence ("KRE") 609, the rule allowing for impeachment by

[1] Morris contends that the motion was timely and proper due to the length of time it took the trial court to read through all of the indictments. She further asserts that since it was the judge who elicited the error, and not the Commonwealth, the motion was sufficient to preserve the error. Neither of these arguments is persuasive in light of RCr 9.22's stringent requirement that a motion for a mistrial must be contemporaneously made.

evidence of conviction of crime. The fact that she was not asked about her convicted felon status undoubtedly was due to the discomfort of both the defense and Commonwealth with the trial court's improperly divulging that information in *voir dire*; indeed, both counsel thought there were grounds for a mistrial based on the judge's error during *voir dire*. However, later, Morris took the stand to testify, and in the final analysis the jurors learned nothing more from the judge's error during *voir dire* than they would have gleaned pursuant to the standard questioning under KRE 609. There is no manifest injustice in these circumstances.

Furthermore, we cannot see how the trial court's admonition contained a lie or falsehood (as Morris alternatively suggests) that would cause the jury to think they had been misled when they arrived at the penalty phase and were properly informed of Morris's prior conviction. In his admonition, the judge harkened back to the fact that he had told the jurors earlier that there are multiple cases set for trial each day and he then noted that "there are of course *multiple indictments that I read on Ms. Morris*" (emphasis supplied). The judge's very next words were then "and by error, I picked up and read *on the last one* that she was charged with being a persistent felony offender . . ." (emphasis supplied). That is true; it was error to pick up and read the charge on one of Morris's indictments. He did not say that the PFO charge was on another defendant's case or that Morris did not have such a charge; he simply stated that he had read something (the PFO charge on "the last one") to them in error, and then he directed them to disregard what was "picked up and read by

mistake." At one point, apparently as counsel discussed how to deal with the matter, there was a suggestion that the judge would attribute the PFO charge to another defendant's case but that is not what he actually said to the jury. He simply said twice that he made an error (or mistake) when he "picked up and read" the PFO charge.

In sum, the information conveyed to the jury in the trial court's admonition was sufficient to cure the error. Moreover, we find no lie or falsehood in the trial court's admonition. Given that Morris testified in her own defense, her prior felony conviction was appropriate information for the jury to consider. There is no manifest injustice on these facts.

II. The Trial Court Did Not Err In Allowing Testimony About Checks Cashed In Virginia.

Morris next claims that the trial court erred in allowing evidence that she also cashed checks in Virginia. She claims this proof, which showed checks in excess of $22,000, more even than she cashed in Kentucky, was offered only to show that she was a bad person with a criminal propensity. This, she argues, violated KRE 404(b).

Morris objected to any proof of the Virginia checks. The Assistant Commonwealth's Attorney stated that she only wanted to show how the checks were first reported as forgeries to Kentucky authorities, along with general information that there were other checks in Virginia, that the total of all the checks was over $50,000, and the Kentucky checks totaled only $14,000. The trial court allowed the evidence, though it urged the Commonwealth to be careful in how it introduced the evidence.

The Commonwealth's evidence largely complied with its stated intentions. The Commonwealth first called the Virginia police officer who spoke with Hopkins when he reported money missing from his bank account. The officer testified that he discovered 77 checks totaling $22,400 that had been cashed in Wise, Virginia, and that he contacted Kentucky police upon finding checks cashed in Kentucky.

The Commonwealth also called an employee of Hopkins's bank in Virginia who testified about Hopkins's bank records and the fact that Hopkins reported the checks as fraudulent to the bank. On cross-examination, Morris's counsel elicited testimony from the employee that over $40,000 had been drawn from the account. The employee was re-called in rebuttal—after Morris had put on proof that Hopkins allegedly wrote numerous checks for non-work expenses, such as Morris's car repairs and house payments. At that point, he testified that 241 checks had been written to Morris totaling $58,718, though he did not know how many of the checks had been challenged as fraudulent in total. He did, however, confirm that the number—48—offered by the Commonwealth as the number of allegedly forged checks cashed in Kentucky sounded correct.

KRE 404(b), of course, generally prohibits the admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." This rule basically bars the admission of a defendant's other criminal conduct if offered only to prove a criminal disposition or propensity. Such proof may be admissible, however "(1) [i]f

offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or (2) [i]f so inextricably intertwined with other evidence essential to the case that separation of the two . . . could not be accomplished without serious adverse effect on the offering party." KRE 404(b).

Even if the proof is offered for a permissible "other" purpose, however, it must still pass the rigors of KRE 403, which requires balancing the probative value of the evidence against the danger of undue prejudice. We have acknowledged that "the degree of potential prejudice associated with evidence of this nature is significantly higher" than that of other types of evidence. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). For that reason, we have commanded trial courts to "apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." *Id.*

Morris argues that the proof of her other alleged forgeries in Virginia was not offered for any purpose other than to show her criminal propensity. Alternatively, she claims that the prejudicial effect of this proof outweighed its probative value. We disagree as to both claims.

First, it is evident that the acts in Virginia were part of a common scheme or plan of forgery. Although "common scheme" was not specifically included as one of the "other purposes" in KRE 404(b)(1), whereas it had been its own exception as common law, "plan" specifically was included in the rule. And as this Court has held: "We do not interpret this omission or variance in

terminology as intending an alteration of this long-standing legal concept, for the specifically listed purposes are illustrative rather than exhaustive." *Commonwealth v. English*, 993 S.W.2d 941, 943 (Ky. 1999) (quoting *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998)). Some authorities have urged that allowing evidence of a common scheme risks allowing exactly the type of propensity evidence that the rule was intended to avoid. *See, e.g.*, Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.30[4][g], at 159-60 (5th ed. 2013).

But this case does not raise that risk. The uncharged crimes were not remote in time or of a different character than those on trial. Indeed, the only reason the Virginia charges were not tried with the Kentucky charges is that they were from a different jurisdiction. Had the Virginia checks instead been cashed in Kentucky (and in the same county as the Kentucky checks), all those charges could have been brought and tried together, just as the more than 100 counts based on the Kentucky checks were tried together. The Virginia and Kentucky checks were all cashed in the same time period. There is little question that the checks in Virginia were part of the same scheme—the same series of transactions—as the Kentucky checks.

Second, the evidence of the Virginia checks was, at least to some extent, inextricably intertwined with the evidence of the Kentucky checks. *See United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989) (allowing admission of 31 uncharged embezzlement checks in addition to proof of 20 charged checks). Hopkins lived in Virginia; his bank was located there; and

Morris worked for him there. No doubt, the reason some of the checks were cashed in Kentucky is because Letcher County, where the Kentucky crimes occurred, is just across the state line from Wise, Virginia. The Kentucky checks were only revealed as possible forgeries by the investigation in Virginia. Explaining the Kentucky checks necessarily required some reference to the events in Virginia. Essentially, evidence of the Virginia checks, which outnumbered the Kentucky checks both in number and amount drawn, was crucial to show a full picture of the conduct surrounding the checks. Whereas Hopkins might have forgotten or been mistaken about a small number of checks written for non-employment purposes, it is unlikely that he would have forgotten such a large number of checks. This, in turn, tended to show lack of mistake on his part and intent on Morris's part, still other KRE 404(b) exceptions, and to generally undermine Morris's claim that she innocently possessed the checks. *See United States v. Holloway*, 740 F.2d 1373, 1377 (6th Cir. 1984) ("[T]he recurrence of similar acts incrementally reduces the possibility that the given instance . . . is the result of inadvertence, mistake, or other innocent event." (quoting *United States v. Semak*, 536 F.2d 1142, 1145 (6th Cir. 1976)).

Morris's complaint about this evidence at trial focused in part on the fact that the checks were cashed in another state (and could be prosecuted there) and her claim that the "sheer volume" of the checks was prejudicial. The mere fact that the Virginia checks might be prosecuted in that state does not render them inadmissible in the Kentucky prosecution. And though the number of

Virginia checks was greater that the number of Kentucky checks, that fact alone does not give rise to prejudice. The proof of the Virginia checks was limited to a general description overall and did not get into the specifics of the individual checks, as the proof of the Kentucky checks did. And the proof was probative of Morris's guilt of the crimes in Virginia. Indeed, even Morris herself admitted to cashing all the checks, even those in Virginia. That fact, combined with the proper inferences that can be drawn from the Virginia checks (as laid out above), showed significant probative value. This Court cannot say that the danger of undue prejudice substantially outweighed the probative value of this evidence.

The testimony about the Virginia checks was offered for a proper, relevant purpose other than criminal propensity; was probative of Morris's guilt; and the danger of undue prejudice did not substantially outweigh the probative value of the evidence. Thus, this Court cannot say the trial court abused its discretion in admitting this proof.

III. The Trial Court Did Not Err In Imposing Court Costs.

As the third and final issue on appeal, Morris contends that the trial court's imposition of court costs constituted palpable error[2] because she was an indigent defendant. We disagree. This Court's recent decision in *Spicer v. Commonwealth* is dispositive on the issue of court costs:

> If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be an indigent or poor person before imposing

[2] Morris requests palpable error review pursuant to RCr 10.26.

> court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established, and court costs assessed contrary to that status, that we have a genuine "sentencing error" to correct on appeal.

442 S.W.3d 26, 35 (Ky. 2014). In this case, there was no request for the trial judge to determine Morris's "poor person" status as required for obtaining exemption from court costs under KRS 23A.205 and KRS 453.190. Because Morris's financial status was never established, there is no sentencing error to correct. *Id.* Therefore, we decline to remand for a hearing on Morris's "poor person" status because there was no "affront to justice" here. *Id.*

CONCLUSION

The judgment and sentence of the Letcher Circuit Court are hereby affirmed.

All sitting. Minton, C.J.; Abramson, Barber, Keller, Noble, and Venters, JJ., concur. Cunningham, J., concurs in result only.

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