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**NOT TO BE PUBLISHED OPINION**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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
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# Supreme Court of Kentucky

2014-SC-000046-MR  
AND  
2014-SC-000178-TG  
(2013-CA-001728)

THOMAS J. MILLER

APPELLANT

V. ON APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
NO. 11-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Thomas J. Miller appeals from his conviction on two counts of sodomy in the first degree. On appeal, Miller argues that the trial court should have granted his motion for a mistrial and that the Commonwealth introduced impermissible prior bad acts evidence. Having reviewed the record, we affirm.

### I. BACKGROUND.

Miller and Misty Walton were married for approximately two and a half months in 1994. After their divorce, Walton gave birth to their daughter, Ann.<sup>1</sup> Ann lived with Walton for approximately three and a half years then lived with Miller, his second wife, Rene, and their children until 2004, when she returned to live with Walton. From 2004 until 2007 Ann did not have any contact with

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<sup>1</sup> We have chosen a pseudonym to protect the identity of the victim.

Miller;<sup>2</sup> however, in 2007, Ann began regular visitation with Miller, which she continued until late 2009.

In mid-December 2009, Ann, who was then fourteen years old, told her mother that Miller had sexually abused her. Walton took Ann to the sheriff's office and to the Kentucky State Police post where she was interviewed by Det. Gabhart. Ann told Det. Gabhart that, when she was between the ages of five and eight, she and Miller engaged in oral sexual activity a number of times. Det. Gabhart then interviewed Miller, who denied any sexual contact with Ann. Miller stated that he believed Ann had made the allegations because he had told her to stop spending time with a boy she liked. Miller also stated that he had told his son, who went to the same school, to tell the boy to stay away from Ann.

Approximately one month later, Walton advised Det. Gabhart that another girl, Jane,<sup>3</sup> stated that Miller had also sexually abused her. Det. Gabhart interviewed Jane in early May 2010. Jane told Det. Gabhart that, sometime between Thanksgiving and Christmas of 2009, she was at Miller's house when he touched her breasts twice and forced her to perform oral sex on him. Det. Gabhart then re-interviewed Miller. Miller denied touching Jane and

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<sup>2</sup> Although it was not put before the jury, Miller was in jail on an unrelated criminal conviction from 2004 to 2007.

<sup>3</sup> We have chosen a pseudonym to protect the identity of the victim.

stated that he did not know why Jane would make such allegations. We note that, at the time, Miller was being held in the Meade County jail.<sup>4</sup>

In April 2011, a grand jury indicted Miller on one count of first-degree sodomy involving a victim less than 12 years of age for engaging in deviate sexual intercourse with Ann between 2000 and 2003. The grand jury also indicted Miller on one count of sodomy for an act of deviate sexual intercourse with Jane in November or December 2009.<sup>5</sup>

At trial, Det. Gabhart testified generally about the interviews he conducted with Ann, Jane, and Miller. On cross-examination, Miller's counsel asked Det. Gabhart if he advised Miller of his rights before conducting the second interview with him. Det. Gabhart responded as follows: "He was in jail in Meade County, yes sir." Miller immediately moved for a mistrial. The trial court, after conducting an in-chambers discussion with counsel, denied that motion. The court did, however, admonish the jury as follows: "The only thing you are to consider in relationship to his [Det. Gabhart's] last answer is that he did in fact read Mr. Miller his rights."

At trial, Ann, who was 18 at the time, testified that when she was three or four years of age she and Miller were on the couch watching a movie when he began to fondle her vagina and to rub her chest. She also testified that he came into her room at night and fondled her and that he fondled her in the

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<sup>4</sup> Miller was being held on an unrelated drug charge. The nature of the crime for which he was being held was not disclosed to the jury.

<sup>5</sup> The grand jury also indicted Miller for being a persistent felony offender in the second degree, but the Commonwealth dismissed that charge.

bathhtub. According to Ann, Miller called her into his room numerous times and they performed oral sex on each other while watching pornographic videos. Furthermore, Ann testified that Miller attempted to perform anal sex with her but stopped when he got feces on his penis and that he tried to engage her in sexual activity outside but she refused because she feared they would be seen.

When asked why she did not report Miller earlier, Ann said that she was embarrassed and that she felt bad because she had told Miller it felt good. Furthermore, she stated that when she returned to visiting Miller, she feared he would begin abusing her again and that he might start abusing her younger half-sisters. As to the issue regarding her boyfriend, Ann stated that she was upset but that she would not have concocted her story out of anger. Furthermore, she noted that she was living with her mother at the time, and her mother did not have a problem with the relationship.

Jane, who was extremely upset on the witness stand, testified that she and her family were at the Millers' house to celebrate the birthday of Ann's younger half-sister. When asked what happened that night, Jane initially said that she could not remember the details. The judge called a recess and took Jane and the parties into his chambers, where he advised Jane that she needed to try to calm down and to tell the truth about what she remembered. Jane regained some control and, when she returned to the stand, she testified about Miller forcing her to perform oral sex. On cross-examination, Miller pointed out discrepancies between Jane's testimony and her statement to Det.

Gabhart, noting in particular her failure to mention anything about Miller touching her breasts.

In his defense, Miller re-called Det. Gabhart, who also testified about the discrepancies between Jane's statement and her testimony. He noted that, in her statement, Jane said that Miller's nephew was sitting next to her on the couch when Miller touched her breasts. Miller then called his nephew, who stated that he was sitting next to Jane and that he did not see Miller touch her breasts. Miller did not testify.

Based on the preceding, the jury convicted Miller of both charges and recommended a sentence of 70 years' imprisonment, which the court imposed. We set forth additional facts as necessary below.

## **II. ANALYSIS.**

### **A. Evidence of Other Bad Acts.**

Miller argues on appeal that the Commonwealth impermissibly submitted evidence of uncharged crimes. Specifically, Miller argues that, while he was only charged with "deviate sexual intercourse," Ann testified to other sexual acts. Miller did not object to this testimony at trial; therefore, this issue is unpreserved and we review it for palpable error. Kentucky Rule of Criminal Procedure (RCr) 10.26.

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a 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.

*Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)(footnotes omitted).

Kentucky Rule of Evidence (KRE) 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This list of exceptions is illustrative, not exhaustive. We have also recognized that prior bad acts evidence may be admissible to establish a pattern of conduct or *modus operandi*, *Dant v. Commonwealth*, 258 S.W.3d 12, 18-19 (Ky. 2008), and that "evidence of similar acts perpetrated against the same victim are almost always admissible" to prove "intent, plan, or absence of mistake or accident." *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002).

Miller argues that because he was charged with sodomy for engaging in deviate sexual intercourse with Ann, her testimony that he fondled her, attempted to have anal sex with her, and attempted to engage in sexual activity outside were offered only to prove his character in violation of KRE 404(b). We address each activity separately below.

Miller was charged with engaging in deviate sexual activity with Ann. Deviate sexual activity is defined as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another . . . ." KRS 510.010(1). Therefore, evidence of Miller's attempt to engage Ann in anal sexual activity was directly related to the charged crime and admissible.

As noted above, testimony of similar acts perpetrated against the same victim is almost always admissible. Fondling and attempting to engage in other sexual activity are similar to engaging in deviate sexual intercourse in that they are all sexual in nature. Therefore, pursuant to *Noel*, Miller's fondling of Ann was admissible. Furthermore, Ann's testimony that Miller fondled her before engaging in oral sex is evidence of his *modus operandi* or pattern of conduct. Miller repeated that pattern with Jane when he fondled her breasts before forcing her to perform oral sex. Therefore, even if evidence of Miller's fondling of Ann was not admissible as to the charged offenses related to Ann, it was admissible as to the charged offense related to Jane.

As to Ann's testimony that Miller attempted to engage her in sexual activity outside, that testimony was at best unclear. Ann did not specify when it occurred, and she did not provide any details regarding what Miller did or attempted to do. The only detail she provided was that Miller said they could someday have a "threesome" with his wife. In light of all of the other testimony by Ann and Jane, there is not a substantial possibility that the result in this case would have been different had this portion of Ann's testimony been excluded. Therefore, its admission, if error, was not palpable error.

**B. The Trial Court Did Not Err When It Denied Miller's Motion for a Mistrial.**

A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial judge is "best situated intelligently to make such a decision." The trial



court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion.

*Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005), *as modified* (Aug. 25, 2005)(footnotes omitted).

As noted above, Det. Gabhart stated that Miller was in the Meade County jail when he conducted his second interview. Miller moved for a mistrial. The court denied his motion, but it admonished the jury. Miller argues that this testimony by Det. Gabhart was so prejudicial that no admonition could cure it. We disagree.

Initially, we note that Det. Gabhart's testimony, although not in direct response to a question and perhaps inadvertent, was improper and in direct violation of KRE 404(b). *See Wiley v. Commonwealth*, 348 S.W.3d 570, 581 (Ky. 2010). Furthermore, we note that these inadvertent testimonial "slips" by police officers occur with an alarming frequency. It would behoove the Commonwealth's attorneys to advise officers who are going to testify that such "slips" jeopardize the fairness of the judicial process and create unnecessary appellate issues. That being noted, the error here was not such that the trial court was mandated to grant Miller's motion for a mistrial.

As the trial court found, Det. Gabhart's statement, while prejudicial, was not one that created a manifest injustice. It was not in response to a question, it was not highlighted by the Commonwealth, and the trial court gave a well-crafted admonition. A jury is presumed to follow an admonition. *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999).

There are only two circumstances in which the presumptive efficacy of an admonition falters: (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."

*Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

Initially, we note that the second factor does not apply because the issue does not involve a question. It involves an unsolicited response. Therefore, we must determine if the court's admonition falters under the first factor.

In *Johnson*, the defendant was on trial for drug related offenses. The prosecutor asked the defendant's daughter if she knew why he pled guilty, then stopped and asked to approach the bench before going any further. Johnson argued that the question was improper evidence of past conduct and that the parties had agreed that Johnson's past illegal activities would not be brought up unless he testified. The court agreed with Johnson that the question was improper and gave the following admonition:

Ladies and gentlemen. Mr. Coleman started to ask Ms. Johnson if Mr. Johnson, the defendant, had ever pled guilty. He stopped at that point. You all disregard that particular question and the fact that Mr. Johnson may have pled guilty to any offense at any other time. It's not evidence or an indication that he's guilty of the offenses for which he's on trial here today of trafficking marijuana and trafficking methamphetamine or those four counts we are here for today which will be set out in the instructions for you.

*Johnson v. Commonwealth*, 105 S.W.3d 430, 440-41 (Ky. 2003).

We determined that this admonition was sufficient, in part, because the jury could not have discerned from the prosecutor's question the nature of the

crime to which Johnson may have pled. In this case, the jury could not have discerned from Det. Gabhart's response why Miller was in jail. Because the police had been investigating Miller regarding Ann's allegations when the second interview took place, the jury could have assumed he was in jail based on those allegations. Furthermore, unlike the admonition in *Johnson*, the judge herein did not mention the impermissible testimony when giving his admonition. By doing so, the court decreased the impact of the improper testimony while increasing the likelihood that the jury would only attend to the permissible testimony. Therefore, the admonition herein does not falter under the first factor; and, because the admonition was sufficient to cure the error, the trial court did not abuse its discretion when it denied Miller's motion for a mistrial.

### **III. CONCLUSION.**

For the foregoing reasons, we affirm.

All sitting. All concur.

#### **COUNSEL FOR APPELLANT:**

Kathleen Kallaher Schmidt  
Samuel N. Potter  
Department of Public Advocacy

#### **COUNSEL FOR APPELLEE:**

Jack Conway  
Attorney General of Kentucky

Matthew Robert Krygiel  
Assistant Attorney General