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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 22, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000190-MR

JOSEPH M. DOBBINS — APPELLANT

V.

ON APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
NO. 13-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury in the Caldwell Circuit Court convicted Joseph Dobbins (Dobbins) of first-degree rape. Consistent with the jury's sentencing recommendations, the trial court fixed his sentence at forty years' imprisonment.

Dobbins now appeals as a matter of right, Kentucky Constitution § 110(2)(b), arguing that the trial court erred by: (1) admitting statements he made to a police officer without first being properly Mirandized; (2) denying his motion to strike the jury based on a *Batson* violation; (3) overruling his motion for mistrial based on the jury pool having been tainted; (4) refusing to ask a witness questions posed by jurors; and (5) allowing the Commonwealth to make improper comments during its closing argument. For the reasons set forth below, we affirm.

I. BACKGROUND

The following facts are not in dispute. In April 2012, Dobbins traveled with his then-girlfriend Edie Gray (Gray) from their home in Braxton County, West Virginia, to Caldwell County, Kentucky, to attend the funeral of Gray's grandmother. The day after the funeral, Dobbins and Gray went to the house of the victim, Jane,[1] who was eleven years old at the time.

While at Jane's house, Gray and Jane went for a walk; Dobbins stayed behind. While walking, Gray texted Dobbins and told him to meet them at a nearby school. When the three returned to Jane's house, Jane was crying. Dobbins and Gray stayed at Jane's house for thirty minutes to an hour longer. The next day, Jane began talking with family members about committing suicide. Dobbins left Kentucky for West Virginia early the next morning.

The following week, at school, Jane again talked about killing herself. She was taken to Pennyrile Mental Health before being admitted to Cumberland Hall for a 72-hour evaluation. Approximately two weeks later, Jane stated that Dobbins had raped her. As a result, Dr. Travis Calhoun at the Pennyrile Children's Advocacy Center examined Jane and noted a tear to her hymen that was consistent with sexual trauma.

Although it is not clear from the record, it appears that someone from the Caldwell County Sheriff's office requested that the West Virginia State Troopers' office interview Dobbins. Pursuant to that request, West Virginia State Trooper Huff (Trooper Huff) interviewed Dobbins and Dobbins admitted to

[1] A pseudonym is used to protect the victim's identity.

inserting his penis inside Jane. Dobbins was arrested and tried in Caldwell County, Kentucky, where he was found guilty of first-degree rape. We set forth additional facts as necessary below.

II. ANALYSIS

A. Dobbins was not in police custody while being interviewed by West Virginia State Trooper Huff.

Prior to trial, Dobbins made a motion to suppress the statement he made to Trooper Huff. The trial court denied the motion, and Dobbins now contends that that denial was error because the statements were elicited during a custodial interrogation without Dobbins having been properly Mirandized. *See Miranda v. Arizona*, 384 U.S. 436 (1966). We discern that Trooper Huff gave sufficient *Miranda* warnings prior to speaking with Dobbins; therefore, the question of whether Dobbins was in custody at the time he made those statements is moot. However, because the trial court found that the statements were admissible based on its conclusion that Dobbins was not in police custody, we continue our analysis.

For the reasons set forth below, we hold that the trial court did not err because: 1) Trooper Huff gave Dobbins sufficient *Miranda* warning; and 2) Dobbins was not in custody at the time he made his statement.

In his patrol car, while on the way to the police station, Trooper Huff read Dobbins his *Miranda* rights and emphasized that Dobbins was not under arrest. After having heard his rights, Dobbins continued making statements to Trooper Huff. At no point in the interview did Dobbins indicate he did not want

to speak to Trooper Huff; therefore, based on our review of the record, Trooper Huff's *Miranda* warnings were appropriate.

We note that Dobbins contends he was drunk when Trooper Huff interviewed him. However, at the time, Dobbins stated to Trooper Huff that he was not drunk, and Trooper Huff noted that Dobbins was not slurring his words or "walking all crazy." Additionally, after being read his rights, Dobbins continued speaking with Trooper Huff; thus, the trial court had sufficient evidence to find the *Miranda* warnings were proper.

In reviewing the trial court's order denying Dobbins's motion to suppress, "our task is to determine if the trial court correctly found that [Dobbins] was not in custody when he spoke to the authorities." *Beckham v. Commonwealth*, 248 S.W.3d 547, 551 (Ky. 2008). "The factual findings made by the trial court on this issue are conclusive if they are supported by substantial evidence." *Id.* However, because the question of whether a defendant is in custody is a mixed question of law and fact, we review the trial court's decision *de novo*. *Commonwealth. v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006), *as modified* (Aug. 2, 2006); *see Thompson v. Keohane*, 516 U.S. 99, 101 (1995) ("We hold that the issue whether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review.")

Miranda warnings are only required when the suspect being questioned is "in custody." *Thompson*, 516 U.S. at 99. The United States Supreme Court has defined "custodial interrogation" as "questioning initiated by law

enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." *Id.* at 107. This inquiry turns on "whether the person was under formal arrest[,] . . . there was a restraint of his freedom[,] or . . . there was a restraint on freedom of movement to the degree associated with formal arrest." *Lucas*, 195 S.W.3d at 405 (Ky. 2006) (citing *Thompson*, 516 U.S. at 112). Custody, to be sure, does not occur until the police restrain the liberty of an individual, either by some form of physical force or show of authority. *Id.*

A court is required to consider the surrounding circumstances and determine whether a reasonable person would have believed he or she was free to leave. *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999) (citing *United States v. Mendenhall*, 446 U.S. 544, 545 (1980)). "The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994).

The United States Supreme Court has identified several factors that suggest a person is in custody: "the threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person of the suspect, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554-55.

Here, there is nothing to suggest that Dobbins was in police custody when he made his statement to Trooper Huff. On the day in question, Trooper

Huff informed Dobbins that he needed to speak with him. Trooper Huff offered him a ride to the police station and told Dobbins he would take him back to his residence following the interview, a distance of twelve to fourteen miles. Dobbins agreed to ride with Trooper Huff; thus, his participation was voluntary.

After arriving at the police station, Trooper Huff and another West Virginia State Trooper were the only police officers in the room while Dobbins was being interviewed. Dobbins was not taken to an interrogation room, rather, he was interviewed in the station's open-office area. Dobbins argues that, because he was "outnumbered" by police officers, a reasonable person in his situation would believe he was not free to end the interview. We disagree. The mere fact that another officer is in the police station does not, in and of itself, constitute a show of authority that would lead a reasonable person to believe he was not free to end the interview.

Dobbins also argues that ending the interview would have been "awkward," given that Dobbins would be required to return to his residence in Trooper Huff's patrol car. However, Dobbins's fear of awkwardness does not equate to the compulsion necessary to establish custody.

Lastly, as the trial court recognized, Dobbins was interviewed for a reasonable duration of time: one and a half hours; he was interviewed at a reasonable time; and he was never physically restrained or met with aggression or intimidation on the part of any officer.

Based on the preceding, we conclude that Dobbins was not in custody when he made his statement to Trooper Huff and *Miranda* warnings, even though appropriately given, were not required. Therefore, the trial court did not err by denying Dobbins's motion to suppress.

B. The trial court properly denied the defense's *Batson* challenge.

During *voir dire*, the Commonwealth made the following statement to the jury pool:

> Along the past years, I've put many people in prison, and I've represented many victims. And when you handle that many cases there will be people that are unhappy with your actions, and I don't want something that I have done or something that my predecessor has done or something that my office has done to interfere with this trial here today. So if I hold my breath on this because I always hope there's not anything that I've done, but if there is anything like that that is bothering you, that is also something that we need to know today.

Following this statement, one juror, an African-American, approached the bench and disclosed that the Commonwealth Attorney's father prosecuted his brother and his brother died while in jail. Because of this, the juror did not think he could be impartial. The court excused the juror, leaving one African-American on the jury panel. The Commonwealth then peremptorily struck that juror, and Dobbins challenged the strike under *Batson*.

Dobbins contends that the trial court erred in denying his *Batson* challenge. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court's ruling on Dobbins's *Batson* challenge will only be disturbed if the ruling was clearly erroneous. *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000). For

the reasons below, we hold that the trial court's ruling was not clearly erroneous.

In *Batson*, the U.S. Supreme Court outlined a three-step process for evaluating claims that a juror was struck solely on the basis of race:

> First, the defendant must make a prima facie showing of racial bias for the peremptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate 'clear and reasonably specific' race-neutral reasons for its use of a peremptory challenge. . . . Finally, the trial court has a duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination.

Washington v. Commonwealth, 34 S.W.3d 376, 379 (Ky. 2000). In reviewing the validity of the Commonwealth's race-neutral reasons for a peremptory strike, we give great deference to the trial court's findings of fact. *See Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992) (internal citation omitted).

Following Dobbins's *Batson* challenge, the trial court asked the Commonwealth to provide race-neutral reasons for its strike. The Commonwealth responded:

> His cousin . . . is currently under indictment in Lyon County, where I'm prosecuting – I'm responsible for prosecuting the case. He is also a relative of [another man] who has been a defendant in the courts, in addition, I would also add that [the juror in question] has seemed very disinterested in the proceedings throughout the whole *voir dire* process but the main reasons being his relation to the two defendants who have – at least one has a current felony case.

Once "the prosecutor offer[s] a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of

intentional discrimination, the preliminary issue of whether the defendant had made a *prima facia* showing . . . becomes moot"; thus, the Commonwealth, by offering a race-neutral explanation, rendered moot *Batson*'s step one requirement. *See Snodgrass*, 831 S.W.2d at 179. The burden then shifts to the Commonwealth under step two. At this step, the Commonwealth must demonstrate a racially neutral reason for exercising its peremptory challenge. *Gray v. Commonwealth*, 203 S.W.3d 679, 690 (Ky. 2006). To meet its burden, the Commonwealth is only required to show that its articulated reason for exercising a peremptory challenge is racially neutral on its face. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

Here, the Commonwealth stated two reasons for peremptorily striking the sole African-American juror: 1) he had relatives then in the criminal justice system; and 2) he seemed disinterested during the *voir dire* process. The trial court accepted the reasons articulated as being racially neutral. Thus, Dobbins then had the obligation to attack the Commonwealth's reasons under step three.

The third step in a *Batson* analysis requires the court to determine if Dobbins met his burden of proving "purposeful discrimination." *Hernandez*, 500 U.S. at 359. At this step, the court must separate the step two and step three inquiries of *Batson*. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (holding that the court "erred by combining *Batson*'s second and third steps into one . .

. ."). As the United States Supreme Court stated in *Purkett*, "It is not until the *third* step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* (citing *Batson*, 476 U.S. at 98) (emphasis in original). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Dobbins attacks the Commonwealth's strike by arguing that it did not ask the juror about his family relationships during *voir dire*. The absence of colloquy with the juror, standing alone, hardly proves purposeful discrimination. However, the trial court certainly could have found differently "depending on the demeanor and credibility of the prosecutor." *Snodgrass*, 831 S.W.2d at 179.

Because the trial court had two permissible views of the evidence before it and, because we give great deference to the trial court's finding of fact, we hold that the trial court did not err in denying Dobbins's *Batson* challenge.

C. The trial court did not err by denying Dobbins's motion for a mistrial.

This Court reviews a trial court's denial of a motion for mistrial for abuse of discretion. *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). Only where the record reveals a "manifest necessity for a mistrial [will] such an extraordinary remedy . . . be granted." *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result

in a manifest injustice." *Gould v. Commonwealth*, 929 S.W.2d 734, 738 (Ky. 1996). Furthermore, the event complained of "must be of such character and magnitude that a litigant will be denied a fair and impartial trial[,] and the prejudicial effect can be removed in no other way." *Id.*

Here, a juror was asked how she knew about the case. She replied, before the entire jury pool, "I work at the Caldwell County Jail." Dobbins asserts that this tainted the jury by giving the panel the impression of Dobbins's guilt before he was able to mount a defense. We disagree.

Initially, we note that the juror merely stated that she had heard of this matter at her workplace which, in this case, happened to be the Caldwell County Jail. The juror did not state that Dobbins was in jail or that she had seen him in jail. Given that, by this point in the trial, the jury had heard the indictment against Dobbins, we think the possibility of inferential prejudice due to the juror's statement was quite low.

Furthermore, any "prejudicial effect" could have been removed in other ways, i.e., by admonition. *See id.* In fact, the statement that Dobbins complains of is precisely the type that admonition is designed to cure; accordingly, the trial court asked Dobbins if he wanted an admonition. However, Dobbins's attorney declined.

Considering the charges against Dobbins and the evidence heard by the jury, the brief insinuation that he may have been in jail at some point in his past would not have materially affected the jury's assessment of Dobbins's

guilt. Thus, for the reasons above, we hold that the trial court did not abuse its discretion when it denied Dobbins's motion for mistrial.

D. The trial court's decision to deny asking a witness two questions posed by jurors was not erroneous.

Dobbins next contends that the trial court erred in denying two questions posed by the jury to Gray. We hold that the trial court's ruling was not in error.

On the night that the rape occurred, Jane, Gray, and Dobbins had walked to a local school. Dobbins was found to have raped Jane while in the school's soccer field. After the rape, Jane, Gray, and Dobbins returned to Jane's house. During trial, the jury heard that, when the three returned to Jane's house, Jane was crying and Dobbins and Gray were laughing at her.[2]

At trial, the jury submitted three questions to be posed to Gray. Only two of the questions are of consequence here. The jury requested the court to ask: 1) "Did [Gray], the defendant, and Jane ever smoke pot or take pills together?" and 2) "Could Jane have been scared because Jane and [Gray] did something illegal, like smoke pot?"

The Commonwealth argues that this issue was not properly preserved; however, we need not address its preservation argument because there was no error here. The promulgation of a jury's question is within the discretion of the trial court. *See Commonwealth v. Collins*, 933 S.W.2d 811, 816 (Ky. 1996)

---

[2] There is conflicting testimony from Jane's father that, when Gray and Jane returned to Jane's house, both Jane *and Gray* were "crying and running, saying that they'd seen a ghost . . . . And Joseph [Dobbins] was right behind them and he was laughing at it."

("[W]e defer to the discretion of the trial court in determining that the juror's questions were properly submitted"). At the time the juror's questions were posed, the trial judge summoned the parties to the bench before finding both questions improper.

The juror's first question, "Did [Gray], the defendant, and Jane *ever* smoke pot or take pills together?" was temporally unlimited; therefore, it was irrelevant as to what occurred that night. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Kentucky Rule of Evidence (KRE) 401. "Evidence which is not relevant is not admissible." KRE 402. Given the vagueness of the question, which was "did they *ever* smoke pot or take pills together," the answer Gray gave would not have had a tendency to make any consequential fact more or less probable. Thus, the trial court, within its discretion, properly ruled that the question was improper.

The juror's second question, "Could Jane have been scared because Jane and [Gray] did something illegal, like smoke pot?" calls for speculation. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." KRE 602. The question was posed by the jury to Gray, not Jane. Whether or not Jane could have been scared and why she was scared would have required Gray to speculate. Again, the trial court, within its discretion properly ruled that this question was inadmissible.

For the reasons preceding, we find that the trial court's decision to deny the juror's questions to Gray was not in error.

E. The Commonwealth's statements to the jury in its penalty phase closing argument were improper but did not constitute palpable error.

During the penalty phase closing argument, the Commonwealth made the following statement to the jury:

> He came into this town, and he raped a child. And you heard his prior criminal history. You heard that in West Virginia he's required to be on the sex offender registry. And he's been convicted of a felony because he's failed to comply with that. Tell him we are not going to tolerate this conduct in Princeton, Kentucky.

Dobbins contends that the above statement improperly argued regional prejudice, which constituted error. Dobbins admits that this error is unpreserved. As stated above, this Court reviews unpreserved claims of error for palpable error. *Martin*, 207 S.W.3d 1 (*see supra* for discussion of our palpable error standard).

Dobbins cites to *Taulbee v. Commonwealth*, 438 S.W.2d 777 (Ky. 1969), to support his contention that the Commonwealth's statements constituted prejudicial error. In *Taulbee*, the Commonwealth made multiple improper statements to the jury during the guilt phase suggesting the guilt of the defendant and doubting the competency of the defense attorney, each based on the fact that the individuals hailed from a neighboring county. *Id.* at 777-78.

> Counsel, in argument to the jury, should avoid saying anything designed as, or having the effect of, an appeal to the social, class, or sectional prejudices of the jury. Appeals to class prejudices and appeals to local or sectional prejudices are highly improper and are not to be condoned.

75A AM. JUR. 2d *Trial* § 548 (2016) (internal citation omitted). As the *Taulbee* Court noted, our jurisprudence is "replete with instances [in] which consideration has been given to complaints against arguments made by prosecutors in criminal cases." *Taulbee*, 438 S.W.2d at 778. The conduct complained of, even though it has been determined to be improper, often does not constitute prejudicial error. In the cases where prejudicial error is not found, this Court has many times noted concurrently that "the jury meted less than the maximum penalty" or "the presumed common sense of the jury [acted] as a bulwark against inordinate reaction to inflammatory remarks." *Id.* at 778-79.

We first note that *Taulbee* concerned improper statements by the Commonwealth during the guilt phase, whereas, here, the statement occurred during the penalty phase. While this discrepancy does not render *Taulbee* completely inapplicable to the present matter, it does minimize its persuasiveness. Additionally, as the Commonwealth points out, while the *Taulbee* Court did hold that the Commonwealth's appeal to local prejudice amounted to reversible error, Taulbee's claim of error was preserved for appellate review. This is not the case here, where there was no objection at the time of the prosecutor's alleged misconduct. We will reverse "only where the misconduct was flagrant and was such as to render the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010).

Having noted the preceding, we hold that the Commonwealth's statements were improper. The Commonwealth's suggestion is disingenuous

that the statement, "Tell him we are not going to tolerate this conduct in Princeton, Kentucky," simply references the location of the trial. That statement was clearly intended to draw on local biases to the detriment of Dobbins's non-resident status. The Commonwealth's statements were improper and, as admonished by this Court on prior occasions, the Commonwealth should refrain from repeating this misconduct in the future. However, those statements do not equate to palpable error.

In reaching our conclusion, we note that the weight of the evidence presented at trial was such that there is no probability of a different sentence, even if the improper statements had not occurred. *See Martin,* 207 S.W.3d at 3. Furthermore, the fact that the jury did not recommend the maximum sentence is evidence that the misconduct was not so fundamental as to threaten [Dobbins's] entitlement to due process of law. *Id.* Therefore, although the Commonwealth's statements were improper, we discern no palpable error.

III. CONCLUSION

For the foregoing reasons, the judgment of the Caldwell Circuit Court in this matter is affirmed.

All sitting. All concur.

COUNSEL FOR DOBBINS:

Molly Mattingly
Assistant Public Advocate
Department of Public Advocacy

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph Todd Henning
Assistant Attorney General
Office of Criminal Appeals