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RENDERED: AUGUST 25, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9/15/16 Kim Redmon DC

2015-SC-000213-MR

KENNETH J. MATTINGLY APPELLANT

V.

ON APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, JUDGE
NO. 05-CR-00373

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Kenneth J. Mattingly was convicted by a circuit court jury of first-degree unlawful imprisonment, first-degree wanton endangerment, operating a motor vehicle without a license, possession of a firearm by a convicted felon, and being a first-degree persistent felon offender and sentenced to twenty years' imprisonment. Following an unsuccessful direct appeal of the resulting judgment, he succeeded in having the portion of the judgment imposing punishment set aside for ineffective assistance of trial counsel, resulting in a retrial limited to the issue of punishment. The retrial ended with a jury recommendation of twenty years' imprisonment, and the trial court entered the new judgment accordingly. Mattingly now brings this appeal from the new judgment as a matter of right[1], contending a number of errors rendered the

[1] Ky.Const. § 110(2)(b).

retrial unfair. Because we conclude his allegations of error have no merit, we affirm the sentence imposed by the trial court below.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Mattingly and his wife, Lisa, were separated, and both of them were living with friends. One evening, Mattingly borrowed his friend's truck and drove to the place where Lisa was staying. Discovering a gun left in the truck, he used the weapon to coerce Lisa into the truck by pointing it at her and then threatening to shoot himself if she did not go with him. He then drove them around town, parking behind a bar where they had sex, which Lisa contended was unwanted.

On their way returning to the place where Lisa was staying, the police pulled up and blocked the truck. Mattingly fled while Lisa unsuccessfully attempted to jettison the gun. Police arrested Mattingly and charged him with first-degree unlawful imprisonment, first-degree wanton endangerment, operating a motor vehicle without a license, possession of a firearm by a convicted felon, and being a first-degree persistent felony offender (PFO). A circuit court jury convicted him of all charges and fixed punishment at twenty years' imprisonment. During the course of the trial, the trial court twice found Mattingly in contempt and imposed an additional punishment of 179 days' confinement for each contempt finding (for a total of 358 days). We affirmed the resulting judgment on direct appeal.[2]

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[2] *See Mattingly v. Commonwealth*, 2007-SC-000498 (Ky. 2007).

Mattingly collaterally attacked the judgment with a motion under Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging that his trial counsel was ineffective by failing to present in the penalty phase of his trial, mitigating evidence of his troubled childhood and history of mental illness. The trial court rejected his claims, but the Court of Appeals reversed the trial court's judgment imposing sentence on this ground and remanded the case for a retrial of the sentencing phase. So on remand, the trial court impaneled a new jury that heard testimony from Mattingly's original trial and additional live testimony. This jury ultimately recommended a twenty-year sentence, which was the same sentence fixed by the jury in the original trial.

Mattingly now brings this matter-of-right appeal, presenting four claims of error occurring in the retrial: (1) that the prosecution presented false evidence to the jury; (2) that the trial court improperly restricted his right to hybrid counsel under the Kentucky Constitution; (3) that the trial court violated his right to confront witnesses against him by allowing video testimony from an unavailable witness; and (4) that the trial court's failure to recuse himself from the proceedings resulted in substantial prejudice. Because his complaints of error do not merit reversal, we affirm the judgment below.

II. ANALYSIS.

A. Mattingly's Sentence was not Prejudiced by the Commonwealth's Presenting Inaccurate Parole Information.

Mattingly attacks the legitimacy of the sentence, arguing that the jury was misled by false information presented at trial by the Commonwealth.

Mattingly, specifically, asserts that this false information came in testimony from Probation and Parole Officer Linzie Abell. According to Mattingly's theory, when testifying in support of the Commonwealth's position that Mattingly should receive the maximum sentence of twenty years, Officer Abell declared that because Mattingly had already been incarcerated under the original judgment sentence since 2007, he would be eligible for parole in July 2015. But in fact, he will not be eligible for parole until November 2017. Mattingly claims this misinformation influenced the jury's decision to impose the maximum sentence.

Mattingly failed to preserve this issue at trial for our review. He nevertheless asks us to review it under the palpable-error standard articulated in RCr 10.26. Applying that standard, we will not grant him relief absent a "determination that manifest injustice has resulted from the error."[3] And we conclude that no such injustice occurred here.

In *Robinson v. Commonwealth*, we held that "The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material."[4] This mistake affects the proceeding "irrespective of the good faith or bad faith of the prosecutor."[5] In instances where the Commonwealth knows, or had reason to know, that particular evidence is false, the United States Supreme Court determined these errors are material if

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[3] RCr 10.26.

[4] 181 S.W.3d 30, 38 (Ky. 2005) (referring to *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

[5] *Id. See also Brady v. Maryland*, 373 U.S. 83, 87 (1963).

"there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[6] So to address Mattingly's concern, we must answer three questions: (1) whether the Commonwealth in fact offered false information to the jury; (2) whether the Commonwealth knew, or should have known, that the information was false; and (3) whether this error materially altered the sentence Mattingly received.

At final sentencing in his original case, Mattingly was credited with 277 days for time served. He chose to apply his jail-time credit to his sentence for the contempt convictions. Typically, jail-time credit is applied to the state prison sentence, but he preferred confinement in the state prison to the local jail and did not want to return to the local jail to serve his contempt sentence after completing his stint in prison. Had he applied his custody credit to the prison sentence, he would have faced parole at an earlier date.

Officer Abell's testimony at the retrial was used primarily to explain the general concept of parole. The officer articulated the meaning of good-time credits, the sentencing ranges for the crimes for which Mattingly was convicted, and the "ten years flat" parole eligibility for those convicted of PFO. The specific exchange with which Mattingly takes issue is the following:

> Q: Assuming he's not serving on any other, obviously he had— he's on probation. The records will show he's on probation for—. ***Assuming he wasn't serving any time on probation for anything else***, when in this case will Mr. Mattingly then first be eligible to see the Parole Board?

[6] *United States v. Agurs*, 427 U.S. 97, 103 (1976).

A: It's my understanding that if he gets all credit for the time he served on this case, he will be eligible for parole in July of this year, 2015.

So Mattingly appears to take issue with the use of a hypothetical question posed to Officer Abell. This statement was not made to inform the jury when Mattingly would actually be eligible for parole. The hypothetical was employed to help the jury understand the "ten years flat" parole policy that comes with a PFO conviction. The question itself even cautions the jury ahead of time, prefacing the hypothetical with reassurances that, of course, Mattingly is serving time for other convictions. Officer Abell's answer does not presume to reflect Mattingly's parole-eligibility date as authoritative fact.

With that said, Officer Abell's response to the hypothetical may have still been inaccurate. Even if we applied Mattingly's 277-day credit to his prison sentence, his parole eligibility date would have been much later than July 2015. And if Officer Abell, and by extension, the Commonwealth, had examined this more carefully, he would have discovered this parole-eligibility date was wrong. So it is fair to characterize this error as one the Commonwealth should have known about before Officer Abell's testimony. The critical question is whether this was "material" to Mattingly's sentence.

We cannot say that

Officer Abell's miscalculation in answering the Commonwealth's hypothetical question regarding parole eligibility created a "reasonable likelihood" that the jury would impose the maximum sentence. In *Cox v. Commonwealth*, we refined our "materiality" analysis on palpable-error review,

stating "...an error cannot have been palpable unless it *probably*, not just possibly, affected the outcome of the proceeding, or unless it so fundamentally tainted the proceeding as to "threaten a defendant's entitlement to due process of law."[7] We accordingly held that inaccurate information via testimony from a parole officer during sentencing was not palpable error when the "officer's twenty-five minutes of direct testimony focused largely on the defendant's prior offenses, with only two minutes of testimony regarding credits while on parole."[8]

There are distinct parallels between *Cox* and the present case. Central to our holding that inaccurate testimonial information did not amount to palpable error is a lack of emphasis on the testimony in question. The Commonwealth in *Cox* did not use the misinformation in its attempt to sway the jury, and it bore little impact on the prosecution's ultimate presentation of its case. It is fair similarly to characterize the impact of Office Abell's testimony. The purpose of his testimony was to explain the parole process and parole eligibility generally. His answer to a hypothetical question was not intended as a definitive statement of when Mattingly would in fact be eligible for parole. In the context of the retrial with evidence presented from multiple witnesses, we cannot say that Abell's statement "probably" affected the jury's decision to impose the maximum twenty-year sentence.

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[7] 399 S.W.3d 431, 435 (Ky. 2013).

[8] *Id.* at 436.

B. Any Deprivation of Mattingly's Right to Hybrid Counsel was Harmless Beyond a Reasonable Doubt.

Mattingly contends that the trial court erroneously informed him of his right to hybrid counsel after he expressed his desire to represent himself. He expressed interest in representing himself a number of times with the trial court. The trial court posed *Faretta*[9] questions, and admonished him about his inexperience with both substantive law and the rules of procedure and evidence. As late as the morning the retrial began, Mattingly repeated his desire to represent himself as co-counsel. The trial court granted his motion but informed him that only one attorney may question a witness at a time. He now contends that this statement from the trial court unfairly limited his rights to representation under the United States and Kentucky Constitutions.

To be sure, the right to counsel is a salient part of due process of law under the United States Constitution. The Sixth Amendment affords each criminal defendant "the assistance of counsel for his defense."[10] While the right to trial counsel is a foundational right of the accused in the American criminal justice system, heightened rights, such as the right to hybrid counsel that Mattingly sought here, are not expressly preserved in the federal Bill of Rights. The Kentucky Constitution goes above the federal floor and preserves greater

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[9] *See Faretta v. California*, 422 U.S. 806 (1975).

[10] U.S. Const. amend. VI. This right was incorporated to state prosecutions through the Due Process Clause of the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

representational rights for criminal defendants in state courts of the Commonwealth.

The state constitution provides that "In all criminal prosecutions the accused has the right to be heard by himself and counsel."[11] Going beyond its federal counterpart, this provision of the Kentucky Constitution also preserves both a right to represent oneself and with assistance of counsel. In *Wake v. Baker*, we construed this to mean that "an accused may make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified services."[12] So we have unambiguously held that the right to hybrid representation is well-established under Kentucky constitutional law.

But our position does not mean there can be no limitations on exercising that right. In the same opinion in which we recognized the right to hybrid representation itself, we qualified our holding by limiting the services a defendant may request to those within the "normal scope of counsel services."[13] And we have previously held that a defendant's right to self-representation is not absolute. It is subject to reasonable restrictions imposed by the trial court.[14]

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[11] Ky.Const. § 11.

[12] 514 S.W.2dd 692, 696 (Ky. 1974).

[13] *Id.*

[14] *See Allen v. Commonwealth*, 410 S.W.3d 125, 134 (Ky. 2013).

We recently addressed a nearly identical issue in *Nunn v. Commonwealth.*[15] In *Nunn,* the trial court imposed several restrictions on the defendant's rights to act as hybrid counsel, including a disclaimer stating that, "If, against the advice of hybrid counsel, Appellant chose to ask a particular question of a witness, then he must conduct the entire examination or cross-examination of that witness by himself, without the intervention of hybrid counsel."[16] We readily labeled such a restriction as "problematic," warning that "blanket application of the policy without individualized consideration of the specific case is an abuse of discretion."[17] We viewed the similar restriction employed in *Nunn* as a "Hobson's choice: accordance with the will of hybrid counsel, or question the witness without the help of counsel at all."[18] And we held that such a choice is inconsistent with our notions of the constitutional right to hybrid counsel. We now review Mattingly's hybrid-counsel restriction in light of our decision in *Nunn.*

On first glance, we seemed primarily troubled by what was essentially a hybrid-counsel veto—that Nunn's restrictions in examining witnesses were triggered by hybrid counsel's refusal to ask a particular question. And sure enough, that is a particularly problematic aspect of the arrangement in *Nunn* that is fortunately not present in this case. Here, at the very least, the trial court did not make Mattingly's ability to question witnesses himself dependent

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[15] 461 S.W.3d 741 (Ky. 2015).

[16] *Id.* at 748.

[17] *Id.* at 749.

[18] *Id.*

on the discretion of his hybrid co-counsel. The trial court's directive here was broader, simply informing him that he and his counsel were prohibited from "tag-teaming" a single witness. But even without the hybrid-counsel veto, this generalized prohibition may be equally problematic.

In *Nunn*, we recognized the "trial court's inherent discretion to oversee the management of a trial" and that this discretion may be broad enough to allow a rule limiting questioning to one counselor "on a case-by-case, or witness-by-witness, basis."[19] But we condemned in *Nunn* use of this policy by blanket application, "without individualized consideration of the specific case."[20] For Mattingly, there is certainly ample evidence for the trial court to limit who may question a given witness. By twice being found in contempt of court, Mattingly has demonstrated a pattern of disruptive behavior that provided the trial court ample justification to limit his self-representation in order to maintain the order and integrity of the trial proceedings.

Unfortunately, there is no proof that the trial court made such a finding when he issued this directive to Mattingly. Instead of citing his inappropriate behavior as the basis of his decision to limit questioning of a particular witness to one counsel, the trial court announced this limitation as a simple matter of fact. The trial court broadly and categorically informed Mattingly that if he began questioning a witness, he may receive no assistance from his co-counsel. Although it may be a widely recognized custom in court that attorneys do not

[19] *Id.*

[20] *Id.*

"tag team" witnesses, there is no rule of trial procedure that sets this policy. If the decision to invoke this limitation were based on Mattingly's history of contumacious conduct in the original trial proceeding, the choice is well within the trial court's discretion. But if offered as a reflection of Kentucky law, such a limitation is erroneous. Lacking evidence that the trial court considered Mattingly's individual case, our holding in *Nunn* constrains us to conclude that the trial court abused its discretion, thereby limiting his right to hybrid counsel.

But despite our conclusion that the trial court erroneously informed Mattingly of his right to hybrid counsel under the Kentucky Constitution, constitutional errors may nonetheless be upheld if we conclude the mistake was harmless.[21] The precise standard of review we employ in performing this analysis is whether the trial court's actions were harmless beyond a reasonable doubt.[22] And we again turn to our holding in *Nunn* to aid our analysis in Mattingly's case.

In *Nunn*, we condemned an instruction similar to the one imposed on Mattingly in spite of the trial court's "wide latitude in imposing reasonable limitations on cross-examinations" and limiting examinations that are

[21] *See Crossland v. Commonwealth*, 291 S.W.3d 223, 231 (Ky. 2009) ("Errors of constitutional import—the most fundamental and serious type of errors—are generally analyzed under a harmless error standard.").

[22] *See Winstead v. Commonwealth*, 283 S.W.3d 678, 689 n.1 (Ky. 2009). *See also Chapman v. California*, 386 U.S. 18, 87 (1967).

"harassing, confusing, repetitive, or only marginally relevant."[23] Even though we held this type of instruction is an abuse of discretion, we upheld Nunn's convictions because there was "no indication of how [Nunn] was prejudiced by the order."[24]

The right to hybrid counsel under the Kentucky Constitution is a right of immense scope. Defendants invoking this right are free to practice their cases themselves, pursuing their own strategies and theories. Accordingly, there is an immeasurable number of different paths a particular defendant may follow. This enormous power to defendant-counselors guided our ruling that "It is not too much that we expect a defendant, who claims that the accommodation of his hybrid-counsel arrangement was unduly restrictive, to demonstrate some modicum of harm resulting from the claimed errors."[25]

Like Nunn, Mattingly failed to prove precisely how he was prejudiced by the trial court's instruction limiting his rights to examine witnesses. He has not identified any witnesses he was prevented from questioning, and he has not provided us with any alternate questions he would have asked the witnesses but for the trial court's limitation. Because Mattingly failed present evidence of harm to his case from the error below, we must hold that the trial court's mistake in limiting his hybrid-counsel representative rights was harmless beyond a reasonable doubt.

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[23] *Nunn*, 461 S.W.3d at 749 (quoting *Goncalves v. Commonwealth*, 404 S.W.3d 180, 203 (Ky. 2010)).

[24] *Id.*

[25] *Id.* at 750.

C. There was no Confrontation Clause Violation.

Mattingly next contends that video testimony of Dr. Stephen Free at his second trial violated his Confrontation Clause rights under the Sixth Amendment to the United States Constitution. Dr. Free testified live at Mattingly's RCr 11.42 hearing, but Dr. Free died before the retrial. As an evidentiary ruling, we will review for abuse of discretion the trial court's decision to allow the playing at the retrial of videotape of Dr. Free's prior testimony We will not disturb the ruling below unless we find that the trial court's decision was "arbitrary, unreasonable, and unsupported by sound legal principles."[26]

The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."[27] This right is incorporated into state criminal proceedings through the Due Process Clause of the Fourteenth Amendment.[28] A similar protection is also found in Section 11 of the Kentucky Constitution[29], but we have yet to find this provision contemplates rights more extensive than the Sixth Amendment.

In *Crawford v. Washington*, the United States Supreme Court described how reviewing courts are to apply the Confrontation Clause.[30] The true inquiry in determining whether the Constitution compels live testimony is "whether the

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[26] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[27] U.S. Const. amend. VI.

[28] *See, e.g., Pointer v. Texas*, 380 U.S. 400 (1965).

[29] "In all criminal prosecutions the accused has the right...to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

[30] 541 U.S. 36 (2004).

opportunity to cross-examine the statement when it was made."[31] The Court determined that the "Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."[32] The *Crawford* Court made clear that non-testimonial statements coming from unavailable witnesses may still be admitted, but similar statements testimonial in nature are barred from evidence, absent a showing that the defendant had a prior opportunity for cross-examination. To guide trial courts in this analysis, the Supreme Court in *Davis v. Washington* clarified the *Crawford* ruling, by holding that "testimonial" statements are those whose "primary purpose" are to "establish or prove past events potentially relevant to later criminal prosecution."[33]

Dr. Free, a staff psychiatrist with the Kentucky Correctional Psychiatric Center, had seen and treated Mattingly there. During Mattingly's RCr 11.42 hearing, the Commonwealth called Dr. Free to testify to Mattingly's mental state. Its questioning focused on whether his professional opinions would be any different if he had access to additional notes from Mattingly's treatment at a local mental-health facility. Essentially, Dr. Free's testimony was used to convince the trial court that if the jury had heard mitigating mental-health evidence during sentencing phase of the original trial, it would have

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[31] Robert G. Lawson, The Kentucky Evidence Law Handbook § 11.30(4)(c) (5th ed. 2013).

[32] *Id.* at 53-54.

[33] 547 U.S. 813, 822 (2006).

recommended the same sentence. Dr. Free's testimony can be summed up as determining that Mattingly was competent to stand trial, that he had no definitive diagnosis of mental illness, and that he could be held criminally responsible for his actions. This testimony, by way of videotape, was replayed during Mattingly's second trial. The testimony was, of course, unchanged from the one offered in his 11.42 hearing. But at the second trial, Mattingly objected to its introduction under the Confrontation Clause because he did not cross-examine Dr. Free himself, and that Dr. Free's testimony was given before a judge rather than a jury.

These arguments are meritless. Because Dr. Free's testimony served no purpose other than to inculpate Mattingly, we begin our analysis by recognizing that his statements are testimonial in nature, triggering the Confrontation Clause cross-examination requirement.

Dr. Free previously testified in court concerning his professional opinion regarding Mattingly's mental stability. Even though that testimony was presented at an RCr 11.42 hearing and not before a jury as part of a trial proceeding, Mattingly's opportunity to cross-examine Dr. Free is the same. The primary argument he asserted to the trial court in objecting to introduction of this testimony is that the prior cross-examination was conducted by a different attorney—most particularly, that he did not cross-examine Dr. Free himself. But the Sixth Amendment contains no such requirement, and rightfully so. Mattingly's counsel purports to represent him in judicial proceedings: counsel is his agent, acting on behalf of Mattingly's best interests and represents his

voice in examining witnesses. All that matters is that Mattingly, or someone standing in Mattingly's place, had an opportunity to challenge by cross-examination the testimony the Commonwealth presented from Dr. Free. And we are more than assured he had that chance in this case.

On appeal, Mattingly presents a new theory supporting his contention that the Confrontation Clause barred Dr. Free's testimony. He suggests the purpose of Dr. Free's testimony at the RCr 11.42 hearing was so different from its purpose in the retrial that the scope of his prior opportunity for cross-examination is meaningless. Primarily, he claims that Dr. Free's testimony during the RCr 11.42 hearing was to convince the trial court that mitigating evidence would not have changed the jury's recommended sentence. He claims this is in sharp contrast to using Dr. Free's same testimony to convince a *jury* not to recommend a lesser sentence as the video testimony was used at the retrial. The scope of cross-examination, he argues, is different for different audiences.

The Commonwealth rightly argues that Mattingly did not raise this issue with the trial court, so this position appears for the first time on appeal. And it is well established that a party raising an error on appeal may not make a different argument than he did at the trial court level.[34] Even if we ignore this rule of issue preservation, the argument carries no weight. Although the type of proceeding was different, and the audience hearing Dr. Free's testimony changed, the purpose of the testimony remained the same—to offer his opinion

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[34] *See Commonwealth v. Jones*, 217 S.W.3d 616, 633 (Ky. 2006).

in support of a tougher penalty for Mattingly's criminal actions. But more importantly, the *type* of cross-examination is unchanged. Mattingly has the same incentive to discredit Dr. Free's opinions in the same manner, whether Free was defending the original sentence or whether his testimony is used in support of a harsher sentence (which was equal to the sentence he was defending).

We are satisfied that the Commonwealth did not violate Mattingly's rights to confrontation of witnesses through use of Dr. Free's video testimony from the RCr 11.42 hearing. The psychiatrist is certainly unavailable, and Mattingly had ample opportunity to cross-examine the exact same findings. So we hold that the trial court did not abuse its discretion in allowing the videotaped testimony at the retrial.

D. The Trial Court Judge Was Not Required to Recuse Himself.

Mattingly asserts that his rights on retrial were jeopardized by the trial judge's denying his motion for the trial judge to recuse himself. Mattingly's motion was premised on the theory that the trial judge could not be impartial because he had twice held Mattingly in contempt of court. Mattingly further suggests the trial court was biased against him because appellate courts determined the trial court abused its discretion in initially denying Mattingly's RCr 11.42 motion. This claim is baseless.

We review a trial court's decision on disqualification for an abuse of discretion.[35] Although "trial before an unbiased judge is essential to due

[35] *See Minks v. Commonwealth*, 427 S.W.3d 802, 806 (Ky. 2014).

process,"[36] on appellate review, we impose a heavy burden on litigants questioning the trial court's impartiality. The burden is an "onerous one," requiring a factual showing "of a character calculated seriously to impair the judge's impartiality and sway his judgment."[37] And "The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal."[38]

Mattingly's contempt charges are not evidence of the trial court's impartiality—rather, they are proof of Mattingly's own unwillingness to cooperate and are examples of inappropriate courtroom decorum. And Mattingly is not contesting the legitimacy or fairness of his contempt citations. It is instead his position that he so thoroughly annoyed the trial court to question the court's own commitment to its judicial duty—that holding him in contempt is per se bias against him in subsequent proceedings.

We do not allow defendants to benefit from their own inappropriate and uncooperative behavior. Mattingly presents no evidence indicating precisely *how* the trial court was prejudiced against him. There is nothing in the record indicating that Mattingly was treated any differently than any other individual appearing before the court, regardless of his prior courtroom behavior. It is ridiculous to suggest that somehow the trial court is culpable for Mattingly's own unwillingness to conduct himself in a manner fitting a court of law.

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[36] *Johnson v. Mississippi*, 403 U.S. 57, 61-62 (1971).

[37] *Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961).

[38] *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995).

We take a similar position with respect to Mattingly's argument that the trial court's impartiality was impaired by the appellate court's reversal of the trial court's decision in Mattingly's RCr 11.42 case. We agree with the Court of Appeals' holding in *Bissell v. Baumgardner* that a "trial court's adverse ruling, even if erroneous, does not provide a basis for finding bias."[39] That a trial court was reversed on appeal is no per se proof of bias. We require additional proof to overcome the defendant's high burden of showing the trial judge failed to treat him and his case with the impartiality expected of a judicial officer.

Mattingly's attack on the fairness of the trial court, absent any additional evidence, is baseless. The trial court properly denied Mattingly's motion for disqualification.

III. CONCLUSION.

Because we conclude there were no reversible errors below, we accordingly affirm the trial court's judgment.

All sitting. All concur.

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[39] 236 S.W.3d 24, 29 (Ky. App. 2007).

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