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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 16, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000167-MR

JUAN RAFAEL PELEGRIN VIDAL — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES LOUIS CUNNINGHAM, JR., JUDGE
NO. 02-CI-002886

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In 2007, a jury convicted Juan Rafael Pelegrin Vidal of murder and burglary, and the court sentenced him to life in prison without the possibility of parole. This Court, in a plurality opinion, reversed that conviction.[1] The Commonwealth retried Pelegrin Vidal in 2014 and a jury again convicted him of murder and burglary. The court, consistent with the second jury's recommendation, sentenced Pelegrin Vidal to 30 years' imprisonment. Pelegrin Vidal appeals this second conviction arguing that the trial court erred by: (1) denying his motions for directed verdict; (2) permitting the Commonwealth to introduce into evidence photographs from the victim's autopsy; (3) failing to instruct the jury on extreme emotional disturbance and first-degree

[1] *Pelegrin Vidal v. Commonwealth*, 2007-SC-000848-MR, 2010 WL 1006277 (Ky. Mar. 18, 2010).

manslaughter; and (4) excluding evidence of a possible alternative perpetrator. Pelegrin Vidal also argues that he was unduly prejudiced when two witnesses mentioned the first trial and when the Commonwealth's attorney improperly interjected herself into the trial by "testifying." Having reviewed the record and the arguments of counsel, we affirm.

I. BACKGROUND.

Pelegrin Vidal emigrated from Cuba to the United States in 1995. He began a relationship with Sonia Ramos-Rivera (Sonia) and the two began living together in 1999.[2] In July 2002, Pelegrin Vidal began a relationship with Elaine Fonseca (Elaine), and he separated from Sonia in August 2002. Elaine, who was twenty years younger than Pelegrin Vidal, lived at home, and the couple initially kept the relationship a secret from her parents.

Sometime in the fall of 2002, Elaine got pregnant, and, on December 9, 2002, Pelegrin Vidal and Elaine disclosed their relationship and her pregnancy to Elaine's mother. According to a statement Pelegrin Vidal gave to the police, Elaine's mother then kicked him out of the house, would not let him speak with Elaine, and forced Elaine to schedule an abortion.

The next day, Elaine asked her friend, Zaurys Batista, to accompany her to a clinic on December 11, where Elaine planned to have an abortion. The morning of the 11th, after Elaine had been taken back for the procedure,

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[2] We note that in the 2010 opinion the plurality states that Sonia and Pelegrin Vidal were married. However, it appears from Sonia's testimony during the second trial that the two lived together but were not married.

Pelegrin Vidal arrived at the clinic. He began questioning Batista, who was in the waiting room, and he tried to get back to the procedure room to stop Elaine from having the abortion. Clinic personnel asked Pelegrin Vidal to leave, which he did. Pelegrin Vidal then went to Elaine's father's workplace and told the father about the abortion. The father asked Pelegrin Vidal to leave, saying there was nothing he could do and that Pelegrin Vidal had disrespected his family and home.

After the abortion, Elaine went to Batista's house, where she stayed until her mother got off work. Elaine then went home and went to sleep. Batista testified that Elaine intended to end the relationship and that Pelegrin Vidal called Elaine a number of times that afternoon, but she refused to speak with him. The next morning, December 12, Elaine's father left for work at 6:00 a.m., and her mother left for work at 6:20 a.m. Pelegrin Vidal, who admitted to police that he was in the neighborhood at a laundromat, called Elaine at approximately 6:30 a.m. According to Pelegrin Vidal, Elaine told him not to be upset about the abortion, that they would be able to work out their relationship, and that her parents would ultimately accept it. We note that this is contrary to Batista's testimony that Elaine intended to end the relationship.

At 6:39 a.m., the 911 dispatch center received a call from the Fonseca residence. The caller indicated that someone was breaking into the house and said, "Please no, Rafa," before the call disconnected. When first responders arrived at the scene shortly thereafter, they discovered Elaine lying on the living room floor in a pool of blood and barely breathing. Elaine was

transported to the hospital, where she died at approximately 8:30 a.m. The autopsy revealed that Elaine had been beaten severely with a blunt instrument, suffering two skull fractures, upper body contusions, and defensive wounds to the upper extremities.

In his statement to police, Pelegrin Vidal said that, after his 6:30 a.m. phone call to Elaine, he drove past the Fonseca house. However, because he saw a number of emergency personnel there, he did not stop. Furthermore, he did not go to work or to a physician's appointment he had scheduled for that afternoon. Rather, he fled to Texas, where he stayed with Sonia's son. At some point in 2003, Pelegrin Vidal left Texas and went to Hialeah, Florida to stay with a former brother-in-law, Angel Serrano-Garcia,[3] and his family. In the meantime, a detective with the Louisville police department, Det. Virola, "befriended" Sonia in an attempt to learn where Pelegrin Vidal had fled. Det. Virola eventually determined that Pelegrin Vidal was staying with the Serrano-Garcias, and she contacted the Hialeah police department. Two detectives from that department went to the Serrano-Garcias' house, found Pelegrin Vidal there, and arrested him.

The detectives then conducted an extensive interview of Pelegrin Vidal. During the interview, Pelegrin Vidal admitted to being in the neighborhood the morning Elaine was murdered, but he denied any involvement. When asked why he did not stop at the Fonseca residence the morning of Elaine's murder,

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[3] The Commonwealth, in its brief, spells the name "Cerrano" and "Sorano." We use "Serrano," which is the spelling used by the Court in its 2010 opinion.

Pelegrin Vidal said that he thought Elaine's father had done something to her mother. He also said he knew that he might be implicated, which is why he fled to Texas.

During the course of the investigation, the police did not find any physical evidence tying Pelegrin Vidal to Elaine's murder. However, they did recover photographs from Pelegrin Vidal's apartment with statements written on the back expressing Elaine's love for "Rafi." Additionally, the police found a hair with blood on it in the Fonsecas' bathtub, which contained DNA from two individuals – Elaine's father and an unknown person. The police also found a cigarette butt in the Fonsecas' front yard, which also contained DNA from an unknown person.

During the first trial, the Commonwealth played the 911 recording and the parties provided competing transcripts of that recording. The Commonwealth's transcript indicated that Elaine said "Vidal . . . please no Rafa" while Pelegrin Vidal's transcript indicated that what preceded "please no Rafa" was inaudible. The plurality agreed with Pelegrin Vidal and held that inclusion of the two inconsistent transcripts constituted reversible error. We set forth additional background information as necessary below.

II. STANDARD OF REVIEW.

The issues raised by Pelegrin Vidal have differing standards of review; therefore, we set forth the appropriate standard as necessary in the analysis of each issue.

III. ANALYSIS.

A. Directed Verdict.

> On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Pelegrin Vidal is correct that there was no physical evidence, i.e., DNA, blood, fingerprints, etc., tying him to Elaine's murder. However, Pelegrin Vidal's argument to the contrary notwithstanding, there was sufficient circumstantial evidence of his guilt to present this case to the jury. As the Commonwealth notes, in addition to other evidence, it presented evidence of motive and opportunity sufficient to support a jury finding of guilt.

As to motive, the Commonwealth presented evidence that: Elaine intended to end the relationship; Pelegrin Vidal called Elaine multiple times but she would not accept his phone calls; Pelegrin Vidal was opposed to the abortion and tried to stop it by going to the clinic and by speaking with Elaine's father; and Pelegrin Vidal was angry because of the abortion and Elaine's refusal to speak with him. As to opportunity, the Commonwealth presented evidence that: Pelegrin Vidal knew Elaine's parents left for work early in the morning and Elaine would be home alone; and Pelegrin Vidal was in Elaine's

neighborhood and spoke on the phone with her just minutes before the murder. Additionally, the Commonwealth presented evidence that Elaine referred to her attacker as "Rafa" during the 911 call; and that "Rafa" is a derivative of Rafael, Pelegrin Vidal's middle name. Finally, the Commonwealth offered evidence of Pelegrin Vidal's flight, which is evidence of a sense of guilt. *See Day v. Commonwealth*, 361 S.W.3d 299, 303 (Ky. 2012). Pelegrin Vidal presented evidence to the contrary and evidence of a possible alternative perpetrator. However, on directed verdict, the issue is not which party presented the better case, but whether the Commonwealth presented sufficient evidence to meet its burden of proof. Based on the preceding, we hold that the trial court did not err in concluding that the Commonwealth had done so.

B. Autopsy Photographs.

A physician from the medical examiner's office testified about the location and nature of Elaine's wounds and referred to several diagrams and photographs. Pelegrin Vidal objected to two of the photographs, arguing that their prejudicial impact outweighed any probative value. The trial court, after reviewing the photographs, all of which had been admitted in the first trial, found that they had probative value and overruled Pelegrin Vidal's objection. Pelegrin Vidal now argues that all of the autopsy photographs should have been excluded "due to [their] graphic and grisly nature and [because] any probative value was outweighed by substantial prejudice." Furthermore, Pelegrin Vidal argues that the trial court did not undertake the appropriate review before deciding to admit the photographs.

The Commonwealth argues that Pelegrin Vidal waived this issue because he did not raise any issues regarding the photographs in his initial appeal. The Commonwealth also argues that Pelegrin Vidal failed to properly preserve this issue and that, even if preserved, he failed to establish that the trial court abused its discretion. Because we hold that the photographs were properly admitted, we need not address the preservation issues.

We review a trial court's decision to admit photographs into evidence for an abuse of discretion. *Hall v. Commonwealth*, 468 S.W.3d 814, 827 (Ky. 2015). When deciding whether to admit photographs,

> [t]here are three basic inquiries that the trial court must undertake . . . . First, the trial court must assess the probative worth of the proffered evidence; second, it must assess the risk of harmful consequences (*i.e.*, undue prejudice) of the evidence if admitted; and last, it must evaluate whether the probative value is substantially outweighed by the harmful consequences.

Id. at 823.

Pelegrin Vidal argues that the trial court only considered the probative value of the photographs when admitting them. However, as the Commonwealth notes, Pelegrin Vidal argued that the photographs should have been excluded because their prejudicial impact outweighed their probative value. Although the trial court said "probative value" but not "prejudicial impact," it is clear from a review of the record that the court considered both of those factors. Therefore, although the court could have stated its decision with more clarity, the court did undertake the proper analysis.

Furthermore, we have reviewed the autopsy photographs and, although they are gruesome, that does not automatically necessitate exclusion. *Id.*

Elaine had been brutally beaten and the Commonwealth was entitled to show the extent of her wounds, both offensive and defensive. The Commonwealth chose a limited number of photographs to show those wounds, including her skull fractures and upper body contusions, both on and below the skin. The photographs were not repetitive, as in *Hall*, and the trial court examined the photographs individually, rather than admitting them *in toto* without individual examination as the court did in *Hall*. Furthermore, as the Commonwealth notes, all of the photographs had been admitted at the first trial. Based on the preceding, we discern no error in the admission of the autopsy photographs.

C. Jury Instructions.

"We review a trial court's decision not to give an instruction under the abuse of discretion standard." *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010). Pelegrin Vidal argues that the trial court abused its discretion when it refused to instruct the jury regarding extreme emotional disturbance (EED) and first-degree manslaughter. Although Pelegrin Vidal captions these arguments separately, they are inexorably intertwined because his entitlement to the requested manslaughter instruction was premised on his entitlement to an EED instruction. Therefore, we address the two issues together.

> (1) A person is guilty of murder when:
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> (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be . . . .

Kentucky Revised Statute (KRS) 507.020.

> (1) A person is guilty of manslaughter in the first degree when:
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> (b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . .

KRS 507.030. Thus, "[e]xtreme emotional disturbance for which there is a reasonable explanation or excuse does not exonerate or relieve one of criminal responsibility. It simply reduces the degree of a homicide from murder to manslaughter." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986).

In order to be entitled to an instruction on EED and the concomitant first-degree manslaughter instruction, a defendant must prove that: (1) there was a sudden and uninterrupted triggering event; (2) he was extremely emotionally disturbed as a result of that event; and (3) he acted under the influence of that disturbance. *Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2001). To rise to the level of extreme, the emotional disturbance must be more than simple hurt or anger. *Talbott v. Commonwealth*, 968 S.W.2d 76, 85 (Ky. 1998). Absent proof of an extreme level of disturbance, a defendant is not entitled to an instruction regarding EED. *Id.*

Initially we note that the trial court, while discussing the instructions, stated that Pelegrin Vidal was not entitled to an EED instruction, in part, because he did not testify. Pelegrin Vidal argues that this was an incorrect statement of the law. We agree. As we noted in *Benjamin v. Commonwealth*, 266 S.W.3d 775 (Ky. 2008), a defendant may be entitled to an EED instruction

based on statements made to police. However, the trial court did not deny Pelegrin Vidal's requested instructions solely because Pelegrin Vidal did not testify. The court also noted that Pelegrin Vidal had failed to put forth sufficient evidence to support the requested instructions.

Pelegrin Vidal argues that the following evidence supports his entitlement to an instruction regarding EED: (1) Elaine had stated that she was going to end the relationship; (2) Elaine's mother had forbidden the two from seeing each other; (3) the day before her death, Elaine aborted the couple's child; (4) he went to the clinic to stop the abortion, where he was so upset that he had to be asked to leave; (5) he attempted to contact Elaine several times before and after the abortion; (6) he went to Elaine's father's workplace in an attempt to enlist the father's assistance in stopping the abortion; and (7) Elaine suffered a brutal beating. According to Pelegrin Vidal, the preceding are akin to the factors this Court held mandated instructions regarding EED in *Benjamin.* However, *Benjamin* is not dispositive and easily distinguished.

In *Benjamin,* the defendant and his wife had been engaged in an ongoing argument regarding each one's alleged infidelities. *Id.* at 779. The argument escalated, became physical, and the wife attacked the defendant. *Id.* Although the precise details were not clear, the defendant admitted that he had killed his wife "but stated that he did not realize what he was doing at the time." *Id.* The Court determined that this evidence warranted an instruction regarding EED.[4]

[4] Both the Commonwealth and Pelegrin Vidal have cited to a number of cases involving the necessity for an EED instruction: *McClellan,* 715 S.W.2d at 466; *Foster v. Commonwealth,* 827 S.W.2d 670, 676 (Ky. 1991); *Talbott,* 968 S.W.2d at 79; *Springer*

Here, Pelegrin Vidal never admitted killing Elaine, let alone doing so under extreme or any other level of emotional disturbance. In fact, Pelegrin Vidal told detectives that his last conversation with Elaine, which took place only minutes before her death, was a pleasant one. According to Pelegrin Vidal, Elaine told him that everything would be alright, that her parents would ultimately relent, and that they would get past the recent events. Thus, by his own statement, Pelegrin Vidal denied any extreme emotional disturbance at or near the time of Elaine's death, and the trial court did not err in refusing his request for an EED instruction. Because Pelegrin Vidal's request for a first-degree manslaughter instruction was premised on his entitlement to an EED instruction, the trial court also properly denied Pelegrin Vidal's requested manslaughter instruction.

As we noted above, the trial court, while discussing the instructions, stated that Pelegrin Vidal was not entitled to an EED instruction, in part, because he did not testify. In *Benjamin* we determined that a defendant was entitled to an EED instruction based on statements he made to the police. 266 S.W.3d at 783. Therefore, Pelegrin Vidal's failure to testify would not have barred an EED instruction. However, the trial court's citation to one incorrect

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v. Commonwealth, 998 S.W.2d 439, 443 (Ky. 1999), *as modified* (May 3, 1999); *Spears v. Commonwealth*, 30 S.W.3d 152, 154 (Ky. 2000), *as amended* (Jan. 24, 2001); *Fields v. Commonwealth*, 44 S.W.3d 355, 357 (Ky. 2001); *Thomas v. Commonwealth*, 170 S.W.3d 343, 348 (Ky. 2005); *Greene v. Commonwealth*, 197 S.W.3d 76, 84-85 (Ky. 2006); *Benjamin*, 266 S.W.3d at 779. In all of those cases, the defendant admitted, either to the police in a statement or at trial that he or she committed the charged act. Neither the Commonwealth nor Pelegrin Vidal have cited us to any case wherein the defendant sought an EED instruction while denying that he or she committed the charged act.

reason for denying Pelegrin Vidal's request for an EED instruction does not negate the correctness of the court's conclusion because Pelegrin Vidal produced no evidence that he was under the influence of EED.

D. Alternative Perpetrator.

Detective Gary Huffman testified that he canvassed the neighborhood the day Elaine was murdered. In his report, Det. Huffman indicated that he had spoken with a woman who said that she had seen a white male with a reddish beard walking around houses in the neighborhood the day before the murder. When Pelegrin Vidal attempted to question Det. Huffman about this, the Commonwealth objected, arguing that any such testimony would be hearsay. The court sustained that objection, agreeing with the Commonwealth that it would be hearsay and noting that the evidence likely had little probative value. Pelegrin Vidal now argues that the court's ruling prevented him from presenting his defense that someone else killed Elaine. We disagree.

We note that Pelegrin Vidal overstates the court's ruling. The court ruled that Pelegrin Vidal could not introduce the neighbor's statement through Det. Huffman. That ruling was correct. Kentucky Rule of Evidence (KRE) 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." Such a statement is not admissible except as otherwise provided by the rules of evidence or the rules of the Supreme Court. KRE 802. Pelegrin Vidal wanted to question Det. Huffman about what the neighbor said in order to prove that someone, a possible alternative perpetrator, was in the

neighborhood. That testimony would have been classic hearsay, and Pelegrin Vidal has not cited any exception to the rule that would have permitted its introduction. Furthermore, the court did not foreclose Pelegrin Vidal from calling the neighbor to testify. The court simply foreclosed Pelegrin Vidal from presenting the neighbor's statement via an impermissible method.

Finally, as the Commonwealth notes, Pelegrin Vidal did submit alternative perpetrator evidence. He had expert testimony that a cigarette butt, containing an unknown person's DNA, was found in the Fonsecas' front yard; a bloody hair containing DNA from an unknown person was found in the bathtub; and he told the Florida detectives that Elaine's father knew a "hitman" from Cuba named Rafael. Therefore, we discern no merit to Pelegrin Vidal's argument that the court foreclosed him from presenting his alternative perpetrator defense.

E. Mention of First Trial.

Before the second trial began, the parties agreed that there would be no mention of the first trial and that any reference to that trial would be couched in terms of a prior proceeding. The Commonwealth called a representative from the company where Elaine's father worked to testify that the father had been at work when Elaine was murdered. When the Commonwealth asked the witness if she had reviewed anything in preparation for trial, she stated that she had reviewed her testimony from the first trial. Pelegrin Vidal did not object to this testimony.

During Sonia's testimony, the Commonwealth asked her if she remembered part of her prior testimony. Sonia asked, "You mean in the other trial?" Pelegrin Vidal objected and moved for a mistrial. The trial court noted that Pelegrin Vidal had not objected to the first statement and that the witnesses mentioned only a prior trial, not a prior conviction. Therefore, the court determined that the prejudice to Pelegrin Vidal was not so significant that an admonition could not cure it, and the court gave the following admonition:

> You've now heard two witnesses say "in the previous trial." We try not to let you know in cases where there was a previous trial that there was a previous trial because it's a distraction. You start thinking to yourself, "I wonder what happened in the first trial." It has nothing to do with the decision that you have to make. You may have already suspected because you saw the video testimony and it was Judge Clayton it wasn't *moi*, but you probably already suspected this. Now you've heard two witnesses say it. I'm instructing you to give no consideration to the question of what happened in the first trial because it in no way makes what you've got to decide more or less likely. O.K.? Thank you.

Pelegrin Vidal argues that the witnesses' statements were so prejudicial that no admonition could serve as a cure. We disagree.

Pelegrin Vidal preserved one of the preceding statements for our review but not the other; therefore, we would normally undertake a different review for each. However, because we discern no reversible error under any standard, we need not do so.

"[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Woodard v. Commonwealth*, 147 S.W.3d 63, 68

(Ky. 2004) (citation omitted). Pelegrin Vidal argues that the two references to his first trial amounted to such a fundamental defect. We disagree.

While mention of a prior conviction is highly prejudicial and might constitute grounds for a mistrial, isolated references to a prior trial do not. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 34 (Ky. 1998). A witness's mention of a prior trial would not inexorably lead the jury to presume that the prior trial resulted in a conviction. *Id.* It is just as likely that the jury would have inferred that Pelegrin Vidal's first trial had resulted in a mistrial because of a "hung jury" or other procedural reason.

Furthermore, a jury is presumed to follow an admonition. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

> 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.'

Id. (Emphasis in original). The first objected-to response followed a "garden variety" question regarding what preparation the witness had taken prior to testifying. The second objected-to response followed a simple request for the witness to remember prior testimony. Neither question was directed at eliciting any statements regarding the prior trial. Therefore, there was nothing inflammatory or highly prejudicial about either question.

As to the likelihood the jury would not be able to follow the admonition, Pelegrin Vidal cites to *Commonwealth v. Blose*, 160 Pa. Super. 165, 50 A.2d

742 (1947). *Blose* is not persuasive. In *Blose*, a police officer was asked if a photograph fairly depicted the defendant. *Id.* at 743. In response, the officer said, "He is a little better looking now because it was a *penitentiary photograph.*" *Id.* (Emphasis in original). The trial court admonished the jury, but the Pennsylvania Superior Court held that the admonition was ineffective. *Id.* at 745. In doing so, the Court noted that the only inference the jury could draw from the officer's statement was that Blose had previously been imprisoned. *Id.* at 743-44. That inference, coupled with the facts that the case against Blose was purely circumstantial and the jury took six hours to reach a verdict, led the Court to conclude that the admonition was not effective. *Id.* at 745.

Although *Blose* is a sound decision, we are not persuaded that it applies to these facts for four reasons. First, the jury had seen video of testimony by witnesses from the first trial who were unavailable to testify at the second trial.[5] As the trial court noted, it is likely the jurors recognized that testimony took place in the same courtroom, with a different judge, and they had already concluded there had been a previous trial. Second, unlike in *Blose,* there was no mention of a prior conviction, only of a prior trial, which is not, by itself, unduly prejudicial. Third, as noted above, the fact that Pelegrin Vidal had previously been tried did not lead inexorably to the inference that he had been convicted and his conviction had been overturned. Finally, since the murder

[5] Elaine's parents died following the first trial and the Serrano-Garcias could not be located.

took place in 2002 and Pelegrin Vidal was arrested and charged in 2003, it is likely that the jury was aware that a 2014 trial was not the first. Although, the jury herein took eight hours to deliberate and the evidence against Pelegrin Vidal was purely circumstantial, there is not a strong likelihood that the complained of testimony was devastating to Pelegrin Vidal. Therefore, we conclude that the witnesses' testimony did not result in reversible error.

F. "Testimony" by the Commonwealth's Attorney.

During the first trial, the Commonwealth presented the testimony of Elaine's parents and of the Serrano-Garcias, the couple with whom Pelegrin Vidal lived in Florida prior to his arrest. Because Elaine's parents had died and the Commonwealth could not locate the Serrano-Garcias, it filed a motion to use the first-trial video testimony of those witnesses during the second trial. At a pre-trial hearing approximately one week before trial, Pelegrin Vidal asked for time to review the videos to determine if he had any objections. The court provisionally granted the Commonwealth's motion, indicating that it would address any specific objections Pelegrin Vidal had prior to trial. The first morning of the second trial, the court and the parties discussed what issues there were regarding the video testimony. Pelegrin Vidal stated that he wanted to ensure that all of the testimony from Elaine's mother would be played; however, he raised no issues with regard to the other videos.

During her video testimony, Ms. Serrano-Garcia stated that Pelegrin Vidal had not told her that he had been accused of a crime. The Commonwealth's attorney then prompted Ms. Serrano-Garcia, asking if she

remembered "telling me on the telephone a few months ago, and earlier today, during our lunch break, that [Pelegrin Vidal] told you he was accused of the crime in Kentucky?" Ms. Serrano-Garcia then stated that Pelegrin Vidal had told her of the crime a few days before his arrest. When asked if she knew why Pelegrin Vidal had not voluntarily gone to the police, Ms. Serrano-Garcia said she did not. The Commonwealth's attorney again prompted Ms. Serrano-Garcia asking, "Do you remember telling me that [Pelegrin Vidal] said he wanted to talk to his mom on Mother's Day before he turned himself in?" Ms. Serrano-Garcia then stated that Pelegrin Vidal said he wanted to talk with his mother one last time before going to the police.

Pelegrin Vidal argues that the preceding exchanges improperly inserted the Commonwealth's credibility for that of the witness in violation of *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky. 2007). Pelegrin Vidal concedes that this issue is not preserved and requests palpable error review under Kentucky Rule of Criminal Procedure (RCr) 10.26. The Commonwealth argues that Pelegrin Vidal waived any issues with regard to Ms. Serrano-Garcia's testimony when he failed to object to it after his review. We agree with the Commonwealth.

There are essentially two types of unpreserved errors: "forfeited errors, which are subject to plain [or palpable] error review, and waived errors, which are not." *Mullins v. Commonwealth*, 350 S.W.3d 434, 439 (Ky. 2011) citing *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011). Waiver occurs when a party knowingly relinquishes a right or when a party invites the court to err. *Mullins*, 350 S.W.3d at 439.

The majority of invited error/relinquishment of a right cases involve a defendant asking for a jury instruction, the court giving that instruction, and the defendant complaining on appeal that the instruction should not have been given. This case factually differs from those because Pelegrin Vidal did not ask the court to do anything. However, the fact that Pelegrin Vidal advised the court that he would review the videos and identify any issues, and then failed to advise the court of this issue amounts to inviting the court to err.

Furthermore, even if Pelegrin Vidal had not waived this issue, the error was not palpable. An error is palpable if it is so grave as to have seriously affected the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005).

This Court condemned similar questioning by the Commonwealth's attorney in *Holt*. However, *Holt* is distinguishable for four reasons. First, the Commonwealth's attorney in *Holt* asked a witness if Holt had, in essence, confessed. 219 S.W.3d at 733-34. When the witness denied hearing any confession from Holt, the Commonwealth's attorney asked the witness if he remembered previously telling the attorney about the confession. *Id.* The witness denied doing so. *Id.* Thus, the Commonwealth's attorney was forcing the jury to choose whether to believe the attorney's version of events – Holt confessed to the witness – or the witness's version of events – there was no confession. In this case, when the Commonwealth's attorney asked Ms. Serrano-Garcia whether she remembered making the statements, Ms. Serrano-Garcia admitted that she had. Thus, the jury was not forced to choose whether

to believe Ms. Serrano-Garcia or the Commonwealth's attorney because there was only one version of events.

Second, the statement at issue in *Holt,* a confession by the defendant, went to the heart of the prosecution's case. Here, the statements at issue, whether Pelegrin Vidal said he had been charged with a crime and was going to surrender to the police, although arguably inculpatory, were not essential to the Commonwealth's case.

Third, it appears that the witness's statement in *Holt* was the only evidence the jury heard regarding the defendant's confession. Here however, the jury had already heard from Pelegrin Vidal himself, Sonia, and a Louisville detective that Pelegrin Vidal knew he was wanted in connection with Elaine's murder. Furthermore, Sonia and that detective had already testified that Pelegrin Vidal indicated he was going to surrender to the police.

Finally, in *Holt,* the Commonwealth's assertion that the defendant had confessed was "placed before the jury without any witness saying that [the defendant] made such a statement. This goes to the heart of fundamental fairness and due process of law." *Id.* at 739. However, the statements at issue herein were cumulative, and Pelegrin Vidal has not stated how these particular statements were any more damning than testimony the jury had already heard. Therefore, we conclude that, while the questioning by the Commonwealth's attorney was arguably improper, the error was not palpable because it did not seriously affect the fairness of the proceedings.

IV. CONCLUSION.

For the foregoing reasons, the circuit court is affirmed.

All sitting. All concur.

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