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RENDERED: FEBRUARY 14, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000131-MR

MOSES KUHBANDER — APPELLANT

V.

ON APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 13-CR-00132

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jessamine County jury convicted Moses Kuhbander of one count first-degree sexual abuse and being a first-degree persistent felony offender (PFO). Kuhbander was sentenced to twenty years' imprisonment. On direct appeal to this Court, we reversed and remanded for a new penalty phase because of the Commonwealth's improper statements to the jury. On remand, Kuhbander received a new penalty phase and was, again, given a sentence of twenty years in prison. He now appeals, arguing five points of error: (1) the jury was unduly prejudiced by the appearance of Kuhbander in shackles; (2) the jury was unduly prejudiced by the introduction of facts and circumstances of Kuhbander's prior convictions; (3) the trial court erred when it denied

Kuhbander a hearing to determine whether a conflict existed with his defense counsel; (4) the Commonwealth committed prosecutorial misconduct by appealing to the jury's local or sectional prejudices; and (5) cumulative error. After careful review, we affirm the judgment and sentence.

I. BACKGROUND

This Court has previously reviewed the facts of Kuhbander's conviction in depth on his first direct appeal. *See Kuhbander v. Commonwealth*, No. 2015-SC-000149-MR, 2017 WL 1538524 (Ky. April 27, 2017). For the sake of brevity, we merely restate here that Kuhbander was convicted of the sexual abuse of his girlfriend's daughter, Sarah,[1] during a weekend trip to Nicholasville, Kentucky. *Id.* at *1. As stated, we affirmed the conviction but remanded for a new sentencing due to prosecutorial misconduct during the original penalty phase.

Upon remand for a new sentencing, the Commonwealth introduced exhibits of Kuhbander's prior convictions as part of its case-in-chief. Kuhbander testified on his own behalf. The jury once again recommended the maximum sentence of ten years' imprisonment for the first-degree sexual abuse conviction, enhanced to the maximum of twenty years' imprisonment after the jury's finding that Kuhbander was a PFO in the first degree. Kuhbander appeals as a matter of right.

[1] We reuse the pseudonyms used by the Court in the first direct appeal to protect the privacy of the victim.

II. ANALYSIS

A. THERE WAS NO REVERSIBLE ERROR IN KUHBANDER BEING SHACKLED BEFORE THE JURY.

Prior to the beginning of the penalty retrial, counsel and the trial judge met in chambers to discuss several issues. Among these was whether Kuhbander was to be restrained during any of the trial. Defense counsel stated its request that Kuhbander remain unencumbered, especially since he planned on testifying before the jury. Rather than referring to specific reasons for shackling, the trial court referenced that it was common practice to restrain prisoners for sentencing. However, the judge called in one of the law enforcement officers from the courtroom to ask whether there was sufficient personnel in the courtroom to leave Kuhbander unrestrained. The officer stated that they did not plan to have any shackles or restraints on him. At that point, then, it seemed to be the agreement that Kuhbander was not to be restrained through the penalty phase.

At the beginning of the presentation of evidence, Kuhbander can be seen on the record walking back and forth to the bench without any restraints. Later that morning, after the court had recessed to discuss jury instructions, the parties returned for instructions to the jury and closing arguments. Before defense counsel presented his closing, the parties approached the bench. At that point, Kuhbander's ankles were shackled. It is unclear when exactly the restraints were placed on Kuhbander, or why the restraints were placed on him. Kuhbander joined the attorneys at that bench and requested that the shackles on him be removed. The court denied the request, again noting that

during sentencing, prisoners are restrained. The trial court did not give any fact-specific reasons for the need for shackles in Kuhbander's case. Defense counsel noted an objection for the record, thereby preserving this allegation of error.

"Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." Kentucky Rule of Criminal Procedure (RCr) 8.28(5). This rule "bars the routine shackling of a defendant, absent a showing of good cause, whenever he will be seen by the jury." *Barbour v. Commonwealth*, 204 S.W.3d 606, 612 (Ky. 2006). "Thus, ... even though [Kuhbander] is challenging his shackling during the unique setting of a remanded PFO proceeding, we must still determine whether there was sufficient good cause in this case to justify shackling [Kuhbander] during the PFO proceeding." *Id.*

"Shackling of a defendant in a jury trial is allowed only in 'the presence of extraordinary circumstances.'" *Id.* (quoting *Peterson v. Commonwealth*, 160 S.W.3d 730, 733 (Ky. 2005)). "[T]he use of shackles to restrain certain defendants has been necessary in cases where the trial court appears to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials." *Commonwealth v. Conley*, 959 S.W.2d 77, 78 (Ky. 1997). The decision to restrain a defendant "rests in the 'sound and reasonable discretion' of the trial judge." *Id.* (quoting *Tunget v. Commonwealth*, 198 S.W.2d 785 (Ky. 1947)). However, "[e]ach decision that involves the shackling of a defendant during trial must be given careful and

thorough judicial scrutiny." *Conley*, 959 S.W.2d at 79. In *Conley*, this Court upheld a trial court's decision to restrain a defendant in shackles after his escape from the courtroom at his arraignment. *Id.* at 78. There, this Court determined that "the record demonstrate[d] that the trial judge carefully considered all the available alternatives ... [and] thoroughly examined and admonished prospective jurors regarding the presumption of innocence and its relationship to the restraints placed on Conley." *Id.* Thus, the Court found no abuse of discretion. *Id.*

In contrast, in *Barbour*, "the shackling of [Barbour] was not based on any specific finding that he was violent or a flight risk." *Barbour*, 204 S.W.3d at 613. Considering "the lack of any substantive evidence or finding by the trial court that [Barbour] was either violent or a flight risk, it is clear that the decision to require [Barbour] to appear at the PFO hearing in shackles was not justified." *Id.* at 614. Thus, the trial court's decision was an abuse of discretion. *Id.*

Like in *Barbour*, the trial court here made no substantive findings regarding the need for shackles. The court did not explain, other than the common practice, why Kuhbander needed to be restrained. There is no explanation in the record of any "good cause" for this decision. As such, we must hold that the decision was an abuse of discretion. However, this error is subject to harmless error review. *Barbour*, 204 S.W.3d at 614; *see also Ordway v. Commonwealth*, 2014-SC-000535-MR, 2016 WL 5245099, *16-18

(Ky. Sept. 22, 2016) ("The violation of RCr 8.28(5) is subject to harmless error analysis." (citation omitted)).

Barbour is instructive here as it too was a remanded PFO proceeding. There, the Court noted that "the PFO proceeding is essentially a status determination." *Barbour*, 204 S.W.3d at 615. Given the "overwhelming, unrebutted evidence that [Barbour] met the statutory requirements of being a PFO [second degree], [the Court] conclude[d] that the outcome would not have been different had [Barbour] appeared before the jury free of shackles." *Id.* at 616 (citing *Lakin v. Stine*, 431 F.3d 959, 966 (6th Cir. 2005)). Given the nature of a PFO proceeding, the Court stated that "it [was] unlikely that [Barbour]'s shackles contributed in any way to the jury's finding." *Barbour*, 204 S.W.3d at 616.

We hold that the error here was harmless beyond a reasonable doubt.[2] Kuhbander had already been found guilty of sexual abuse in the first degree. The jury was given a long list of his fourteen prior convictions. He was argumentative from the witness stand, repeatedly stating that everyone was conspiring to prevent him from having a fair trial. Kuhbander was not shackled throughout the entire proceeding; it is unclear from the record exactly how long he was shackled and how often the jury saw him in those shackles.

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[2] Kuhbander alleges this error was constitutional in nature and, thus, we shall apply the harmless error test for constitutional errors here. *See Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010) (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 n. 1 (Ky. 2009) (citing *Chapman v. California*, 386 U.S. 18 (1967))) ("As to those preserved constitutional errors which are subject to harmless error review, they must be shown to be 'harmless beyond a reasonable doubt' in order to be deemed harmless.").

The potential for prejudice was slight. Given the overwhelming evidence of Kuhbander's criminal history, we have no hesitation in holding that the short appearance of him in ankle shackles did not affect the outcome of his penalty proceeding. Thus, we find no reversible error in the trial court's decision here.

B. THERE WAS NO PALPABLE ERROR IN THE SENTENCING EXHIBITS PRESENTED TO THE JURY.

In lieu of witnesses, the Commonwealth presented seventeen exhibits to the jury as its case-in-chief. It presented the Department of Corrections explanation of parole eligibility; fourteen separate certified convictions; the indictment in the underlying case; and the jury instructions and findings from the original trial, convicting Kuhbander of first-degree sexual abuse. The Commonwealth introduced all these exhibits without objection from the defense. Thus, we will only review the alleged errors here for palpable error pursuant to RCr 10.26. As such, we will only reverse "upon a determination that manifest injustice has resulted from the error." RCr 10.26.

Kuhbander now alleges that the certified records of his prior convictions contained inadmissible and prejudicial material. This material can be divided into: (1) references to being appointed a public defender; (2) a finding of contempt and orders of temporary protection; (3) names and addresses of victims, as well as a clear reference to a *minor* victim; (4) references to the entering of a guilty plea; (5) failures to appear; and (6) that Kuhbander did not have a high school diploma. The Commonwealth concedes that this information was contained within the exhibits but argues that no palpable error resulted from the presentation of the evidence to the jury.

Pursuant to Kentucky Revised Statute (KRS) 532.055(2)(a)(2), the Commonwealth may offer evidence of "[t[]he nature of prior offenses for which [defendant] was convicted" at sentencing. This Court has held that "the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). However, "[t]he purpose of Kentucky's Truth-in-Sentencing legislation is to provide the jury with relevant information necessary to determine an appropriate sentence for a particular offender." *Miller v. Commonwealth*, 394 S.W.3d 402, 405 (Ky. 2011) (citing *Williams v. Commonwealth*, 810 S.W.2d 511 (Ky. 1991)). "The jury is not required to 'sentence in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent.'" *Miller*, 394 S.W.3d at 405-06 (quoting *Commonwealth v. Reneer*, 734 S.W.2d 794, 797 (Ky. 1987)).

For this reason, the list of exhibits admissible by the Commonwealth during sentencing in KRS 532.055 "is not exhaustive." *Miller*, 394 S.W.3d at 406 (citing *Cornelison v. Commonwealth*, 990 S.W.2d 609 (Ky. 1999)). "A court may also allow evidence that is 'similarly and equally 'relevant to sentencing' as those types of evidence the statute explicitly mentions.'" *Miller*, 394 S.W.3d at 406 (quoting *Garrison v. Commonwealth*, 338 S.W.3d 257, 260 (Ky. 2011)). "Trial courts are further guided by Kentucky Rules of Evidence (KRE) 401 and 403, which set the threshold requirement that evidence must be relevant to be admissible and provide that a trial court may nevertheless exclude relevant evidence if its probative value is substantially outweighed by the danger of

undue prejudice, confusing the issues or misleading the jury." *Miller*, 394 S.W.3d at 406.

References to Public Defender

The certified convictions, undisputedly, contained references in several cases to Kuhbander being appointed a public defender. However, "[t]here is nothing inherently prejudicial about having an attorney who is a public defender." *Barnett v. Commonwealth*, 317 S.W.3d 49, 62 (Ky. 2010). It seems commonly accepted that the nature of indigent representation is inadmissible to a jury; however, this exclusion stems from its irrelevant nature under KRE 401 rather than any inherent prejudice. Clearly, under KRE 401, the fact that Kuhbander's attorney for any of these convictions was provided by the state is absolutely irrelevant and inadmissible.

Finding of Contempt and Orders of Temporary Protection

As stated, "evidence that is 'similarly and equally 'relevant to sentencing' as those types of evidence the statute explicitly mentions'" is admissible. *Miller*, 394 S.W.3d at 406 (quoting *Garrison*, 338 S.W.3d at 260). We have held that "a defendant's parole violations may be introduced during the penalty phase of trial, notwithstanding their absence from the evidentiary categories listed in KRS 532.055(2)(a)." *Miller*, 394 S.W.3d at 407 (citing *Garrison*, 338 S.W.3d at 260). As in *Garrison*, evidence of contempt findings and protection orders are substantially similar in nature to prior convictions. We cannot expect juries to determine an appropriate sentence "in a vacuum." *Miller*, 394 S.W.3d at 405-06 (quoting *Reneer*, 734 S.W.2d at 797). Kuhbander's respect

for the court, danger to others as exhibited by orders of protection, and willingness to comply with court orders are relevant to the jury's final sentencing determination. We discern no error in the admission of these facts.

Victim Information

This Court has clearly stated: "The trial court should avoid identifiers, such as naming of victims, which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes." *Mullikan*, 341 S.W.3d at 109. In *Webb v. Commonwealth*, 387 S.W.3d 319, 329 (Ky. 2012), the Commonwealth read the names of eight victims in prior cases in which the defendant had been found guilty. Five of the victims were law enforcement officers. *Id.* The Commonwealth also recited "details other than the elements of the charged offense." *Id.* Under *Mullikan*, this Court held "that the Commonwealth exceeded the scope of KRS 532.055 and introduced improper evidence during the penalty phase." *Id.* at 330. The Court further found that error to be palpable. *Id.* Clearly, the admission of the identifying information of the victims here was contrary to the dictates of *Mullikan* and erroneous.

Guilty Pleas

We have affirmed admission of prior certified records that included guilty pleas, although the issue presented was not the fact that it was a *plea* rather than a conviction by trial. *See Jackson v. Commonwealth*, 481 S.W.3d 794, 799 (Ky. 2016); *see also Basham v. Commonwealth*, 2004-SC-0112-MR, 2006 WL 1650688, at *4 (Ky. June 15, 2006) (citing *Cook v. Commonwealth*, 129

S.W.3d 351, 364-65 (Ky. 2004)) ("A guilty plea is a 'conviction' for purposes of KRS 532.055(2)(a).") and *Palmer v. Commonwealth*, 2014-CA-001017-MR, 2017 WL 836152, at *3 (Ky. App. Mar. 3, 2017), *reh'g denied* (May 10, 2017), *review denied* (Sept. 20, 2017). A guilty plea is relevant to the prior conviction admitted into evidence. We see no error in the admission of the conviction record showing that it was sustained through a plea rather than a trial.

Failures to Appear

Like findings of contempt and orders of protection, we hold that a defendant's failure to appear is also relevant for a jury's sentencing recommendation. It, likewise, shows the defendant's willingness to comply with court orders and the law, generally. It is also substantially similar to other offenses and convictions. As such, we hold this information is also relevant and admissible under KRS 532.055, in the absence of some other substantially prejudicial context.

Educational History

The educational history of a defendant can often be relevant for a jury's sentencing recommendation. The defendant's intelligence, education, and any degrees provide contextual background information for the jury in making its recommendation. Importantly, the sentence of a defendant is not an isolated term of years that a jury makes without any context; it is the sentence of a living, breathing person. In this setting, education of the defendant can provide helpful information to the jury in making its recommendation. Here, we decline to find that Kuhbander's educational background was inadmissible;

it may be more prejudicial than relevant in some cases but we see no reason to make such a finding here.

Palpable Error

The references to appointment of a public defender and identifying victim information were irrelevant to Kuhbander's sentencing. Thus, admission was in error. But, Kuhbander failed to preserve this error by objecting and we must now determine whether the admission constitutes *palpable* error. "A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, ... and the error must have resulted in 'manifest injustice.' " *Webb*, 387 S.W.3d at 329 (quoting *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005) (citing *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997))).

> A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis boils down to is whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error. If not, the error cannot be palpable. Finally, when reviewing claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings.

Doneghy v. Commonwealth, 410 S.W.3d 95, 106 (Ky. 2013) (citing *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). "The appellate court must 'plumb the depths of the proceeding' to determine whether the error is so 'manifest, fundamental and unambiguous' as to seriously threaten the 'fairness, integrity or public reputation of judicial proceedings.'" *Miller*, 394

S.W.3d at 408 (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3-5 (Ky. 2006)).

In *Miller*, we held that admission of prior uncharged acts of misconduct during the penalty phase was in error but "not so fundamental an error as to threaten Miller's entitlement to due process of law." *Miller*, 394 S.W.3d at 408 (citing *Martin*, 207 S.W.3d at 3-5). In that case, the jury was presented with evidence of "three prior convictions on six counts of trafficking in a controlled substance in the first degree, the fact that he had been granted and violated parole on three separate occasions and evidence that he continued his illegal drug activity each time he was released on parole." *Miller*, 394 S.W.3d at 408. Thus, we determined that "[t]he jury's recommended penalty was more likely the result of Miller's multiple felony convictions, his repeated parole violations, his continuous return to illegal activity, and the information concerning parole eligibility than it was the result of hearing Miller himself admit he sold drugs on more than just the six occasions for which he was convicted." *Id.*

In *Martin*, the court erroneously allowed exhibits that "contain[ed] references to original charges that were ultimately dismissed or amended to lesser offenses" to be presented to the jury. *Martin v. Commonwealth*, 409 S.W.3d 340, 348 (Ky. 2013). The Court noted that the clerk testified as to prior convictions and only stated "the actual charges for which a conviction was adjudged." *Id.* "Neither the trial court nor the prosecutor made any references to charges other than those for which a final conviction was entered." *Id.* The jury did, however, sentence Martin to the maximum allowable sentence for his

underlying charge of trafficking a controlled substance in the first degree and persistent felony offender in the first degree. *Id.* The Court still held that the error was not palpable. *Id.* at 349. "[W]e believe it is unlikely that such knowledge affected the resulting sentence. [Martin] had six prior felony convictions, some of which were for drug-related offenses, including trafficking." *Id.* "The circumstances of this case strongly suggest that the maximum sentence resulted from the nature of this particular conviction in combination with [Martin]'s several prior convictions for drug-related crimes, rather than the jury's awareness of the dismissed or amended charges underlying his criminal past." *Id.* The Court held "manifest injustice did not result" from the erroneous admission of evidence. *Id.*

In *Parker v. Commonwealth*, as in *Martin*, although the witness and prosecutor made no inadmissible comments regarding prior convictions, the certified documents admitted into evidence included multiple details that should not have been admitted. *Parker v. Commonwealth*, 482 S.W.3d 394, 407 (Ky. 2016). The documents detailed "a number of amended charges, plea agreements, and prior offense details (such as the names of victims)." *Id.* The Court emphasized that the prosecutor did "not rely on or refer to the improper evidence[.]" *Id.* at 408. The Court emphasized that "[Parker] was convicted of two armed robberies (in one of which Parker put a loaded gun to the victim's head), both Class B crimes punishable as Class A crimes .... Because of Parker's PFO status." *Id.* "Additionally, the admissible criminal-history evidence consisted of five prior felonies, including a prior robbery, and showed

that the current offenses marked the second time Parker had reoffended while on probation." *Id.* Given this context, the Court found no discernible possibility that any prejudice resulted from this admission error. *Id.* The Court held that his "sentencing was also fundamentally fair." *Id.*

As in *Miller*, *Martin*, and *Parker*, we hold that Kuhbander's sentencing was fundamentally fair and no prejudice resulted from the erroneous admission of information in these certified records. Although the jury saw references to inadmissible information—appointment of public defenders and identities of non-local victims—in the certified records, there are several facts that mitigate this error. First, the prosecutor did not emphasize or mention these inadmissible facts. Second, the trial court made no mention of those inadmissible facts. Third, the victims are non-local and, thus, are less likely to "trigger memories of jurors who may ... have prior knowledge about the crimes." *Mullikan*, 341 S.W.3d at 109.[3] Fourth, the Commonwealth presented evidence of *fourteen* prior convictions, including several violent convictions such as assault and domestic violence. The severity of the jury's sentence was in all likelihood a result of this criminal history as well as the nature of the instant offense, a sex crime against a child under twelve years of age. Fifth, Kuhbander's own statements did nothing to mitigate the lengthy nature of his criminal history. He stated of his prior convictions that "I usually get probation

[3] *See also Handle v. Commonwealth*, No. 2012-SC-000374-MR, 2013 WL 6729962, at *9-10 (Ky. Dec. 19, 2013) ([I]n the present case the identifying information involved victims who were not from the area in which the case was being tried and were not in any way similar or related to the victims of the present crime, and thus, we find it to be distinguishable from *Webb* in which the victims were local police officers, and likely known by the jurors.").

and walk it off." Rather than explaining himself to the jury, he chose to repeatedly accuse the court of denying him a fair trial. The jury ultimately declined to accept that statement. Sixth, any references to having a "public defender" were vague, may not have had any knowledgeable impact on the jury (as many members of the general public are not aware what a "public defender" is), and Kuhbander himself referenced the office of "public advocacy" represented him in the case at hand while he testified. Given the context of the sentencing hearing as a whole, and after having "plumb[ed] the depths of the proceeding," we hold that Kuhbander's sentencing was fundamentally fair and he was not prejudiced by the erroneous admission of the aforementioned facts. There is nothing in this record to support a finding of palpable error.

C. THE TRIAL COURT DID NOT ERR IN ITS HANDLING OF KUHBANDER'S COMPLAINT REGARDING APPOINTED COUNSEL.

During a pretrial conference, Kuhbander complained to the trial court that he felt his public defender had a conflict in representing him further. As stated, the underage victim, Sarah, was Kuhbander's then-girlfriend's daughter. Kuhbander stated that a public defender had represented Sarah's mother in an unrelated matter. Both of Kuhbander's attorneys stated that they have never represented her but could not state for sure that no one in their office had.

Kuhbander stated that Sarah's mother was a witness in his case, that he had attempted to subpoena her in the underlying guilt phase of his case, and she had failed to appear for trial. However, the attorneys expressed the belief that, because Sarah's mother would not be testifying at the sentencing, there

was no conflict. The prosecutor actually stated to the court that on the most recent case with Sarah's mother that he could recall, she was not represented by the same office (from the record, it also sounded like there was a reference to it being a child support case). Kuhbander reiterated, however, that he felt there was a conflict and he should be appointed another attorney to represent him.

The trial court stated that he did not see a conflict. However, he attempted to ascertain the gist of Khubander's argument in the following exchange:

> TJ:[4] I don't see the potential here unless you're – unless you're seeing something that we aren't, it doesn't seem like she's going—
> MK:[5] I mean obviously, I'm seeing a whole lot that this court is not. I'm not very happy with what's going on with my life, so ...
> TJ: Well, as – it relates to this one issue, uh how could that be a conflict when she's not being called as a witness?
> MK: I'm going to drop this issue and just say, can we get to my trial? I'm definitely trying to [*unintelligible*] for another rehearing and my appeal. I just want to get this over with.
> TJ: Well we do too, so we'll do it on October 2nd.

The pretrial then ended. Kuhbander did not raise the issue again until the actual sentencing trial. Kuhbander expressed his dissatisfaction again during his testimony, stating that he believed he'd been forced to be represented by conflicted attorneys from the office of public advocacy.

"[A] defendant who is represented by a public defender or appointed counsel does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel and the

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[4] Trial judge

[5] Kuhbander

appointment of substitute counsel except for adequate reasons or a clear abuse by counsel." *Henderson v. Commonwealth*, 636 S.W.2d 648, 651 (Ky. 1982) (citations omitted). "When an indigent defendant seeks to change his appointed counsel, he carries the burden of demonstrating to the court that there exists 'good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict." ' *Stinnett v. Commonwealth*, 364 S.W.3d 70, 81 (Ky. 2011) (quoting *Shegog v. Commonwealth*, 142 S.W.3d 101, 105 (Ky. 2004)). The Court has "further described good cause as '(1) a complete breakdown of communications between counsel and defendant; (2) a conflict of interest; and (3) where the legitimate interests of the defendant are being prejudiced.' " *Stinnett*, 364 S.W.3d at 81 (quoting *Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005) (citing *Baker v. Commonwealth*, 574 S.W.2d 325, 326-27 (Ky. App. 1978))). Whether there is such "good cause" for substitute counsel is a matter within the discretion of the trial court. *See Pillersdorf v. Department of Public Advocacy*, 890 S.W.2d 616, 621 (Ky. 1994) (decided under now-repealed KRS 31.130 on "Assignment of substitute attorney").

Kuhbander now argues that the trial court failed to adequately develop the record to determine whether an actual conflict existed. Yet this is an inaccurate interpretation of the record. The trial judge was specifically attempting to understand Kuhbander's allegation that a conflict existed. Rather than explaining the conflict, so the trial judge could rule on the issue and determine if there was a conflict, Kuhbander chose to abandon his argument and waive any alleged conflict.

"[A] party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise, the issue may not be raised on appeal." *Blount v. Commonwealth*, 392 S.W.3d 393, 398 (Ky. 2013) (citing *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989)). Our Court has recognized that certain errors can be considered a "waiver, *i.e.*, invitations that reflect the party's *knowing relinquishment* of a right[.]" *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011) (emphasis added) (citing *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)). Kuhbander intentionally and unequivocally chose to abandon and waive this issue. He specifically said he was going to "drop it." Rather than providing more information to the court and allowing the court to make a knowledgeable ruling, Kuhbander chose to waive the issue and move on. This waivable error is not reviewable on appeal. Kuhbander knowingly relinquished any right he had to raise an alleged conflict of counsel.

Additionally, even without a waiver, the legitimacy of any conflict claim is highly questionable. "Simply and only because [both attorneys in question] were both public defenders in the same office is not enough" to establish a conflict of interest. *Samuels v. Commonwealth*, 512 S.W.3d 709, 716 (Ky. 2017). Both of Kuhbander's attorneys stated conclusively on the record that they had not represented Sarah's mother in any matters and were unfamiliar with any of her cases. Thus, the only possible allegation of a conflict arises from being in the same office as another attorney who *may* have handled a case with Sarah's mother. This is simply insufficient to create a conflict of

interest under Rules of the Supreme Court (SCR) 3.130. At the very least, even absent the waiver, Kuhbander failed to meet his burden under *Stinnett*, 364 S.W.3d at 81 and *Shegog*, 142 S.W.3d at 105, to establish "good cause" for the appointment of a different public advocate.

D. THE COMMONWEALTH DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

Kuhbander next alleges that the Commonwealth committed prosecutorial misconduct during its closing argument to the jury. During its closing, the Commonwealth stated to the jury:

> CW:[6] Like [defense counsel] said, this is not a game ... nor is it a game for the Commonwealth. This is extremely serious. We have a career criminal, we will go through his records, who comes into Jessamine County and gets convicted of sexually abusing a girl less than twelve years of age. This is extremely serious. [Defense counsel] said he thinks ten years is enough. We'll rattle through his previous convictions but, at some point, enough is enough. Enough with racking up these – this body of work, enough with giving chance after chance after chance, enough with coming into our jurisdiction and being –
> DC:[7] Judge –
> CW: -- convicted of sexual abuse. So let's look at what he's been convicted of –
> TJ: Mr. Sims, let me have you all approach the bench about something that I'm anticipating in closing.

The ensuing eight second bench conference is completely unintelligible on the record.[8] The prosecutor then continued in his closing argument to the jury.

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[6] Commonwealth

[7] Defense counsel

[8] Defense counsel argues this objection was about the remarks of coming into this jurisdiction, thereby preserving the error for appeal. The Commonwealth argues there was no preservation of this issue. Because we find no error to examine, we do not turn to whether the issue must be reviewed only under the palpable error standard.

"Prosecutorial misconduct is '[a] prosecutor's improper or illegal act ... involving an attempt to ... persuade the jury to wrongly convict a defendant or assess an unjustified punishment.'" *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011) (quoting *Black's Law Dictionary* (9th ed. 2009)). We reverse for prosecutorial misconduct "only if the misconduct was 'flagrant' or if we find ...: (1) the proof of guilt is not overwhelming; (2) a contemporaneous objection was made, and (3) the trial court failed to cure the misconduct with a sufficient admonition." *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (citing *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010)). As in *Dickerson*, the evidence against Kuhbander was overwhelming and thus only flagrant prosecutorial misconduct would substantiate a need for reversal. *See Dickerson*, 485 S.W.3d at 329. We have developed a four-factor test in determining if alleged misconduct is flagrant: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Id.* (quoting *Mayo*, 322 S.W.3d at 56 (quoting *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010))).

"Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial." *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001) (citing *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996)). "In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Stopher*,

57 S.W.3d at 805 (citing *Summit v. Bordenkircher*, 608 F.2d 247 (6th Cir. 1979) and *Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995)).

Prosecutors are given wide latitude in closing argument. *Stopher*, 57 S.W.3d at 805-06 (citing *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987), *cert. denied*, 490 U.S. 1113 (1989)). However, this does not mean that prosecutors are given free rein to state whatever he or she wishes, so long as it is within the realm of closing argument. "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. ... Likewise, ... appeals to local or sectional prejudices, to the self-interest of jurors as taxpayers, ... are highly improper and are not to be condoned." *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969) (quoting 53 Am. Jur. Trial § 499).

Kuhbander relies heavily upon *Taulbee* in his allegation that the Commonwealth's statements here are prosecutorial misconduct requiring reversal. However, the statements made by the prosecution in *Taulbee* were far more flagrant. There, the prosecutor stated:

> If you want a Clark County lawyer to come over here to defend a Clark County thief who breaks into and steals from an Estill County place of business, then that is your own business, and if you want that you will find this thief here not guilty.
> ...
> We have an attorney from Winchester representing a client in a case of thieving.
> ...
> I just hope if the jury turns him loose that he leaves and that he won't be back here in Estill County robbing and stealing from our people over here.

Taulbee, 438 S.W.2d at 777-78. Defense counsel objected multiple times to this line of argument, but to no avail. *Id.* This Court determined that it was "plain that the prosecutor's reference to the fact that the defendant and his counsel hailed from Clark County and appeared in Estill County could have had no purpose other than to arouse the local or sectional prejudice of the jury." *Id.* at 779. The Court was "persuaded that the overall impact of the remarks of the prosecuting attorney, when considered in light of the colloquy between the lawyers and the trial judge, was such as to require reversal of the judgment based on the verdict." *Id.*

We find the statements made by the prosecutor in this case markedly different. The statements were isolated, vague, and made in the context of speaking to Kuhbander's overall criminal history. Additionally, the prosecutor quickly moved on from any mention of "coming into" Jessamine County and focused on Kuhbander's past convictions. We hold that these statements were not flagrant, nor did they affect the fundamental fairness of Kuhbander's trial. Given the context of the closing argument as a whole, these statements were not an incitement of local prejudice. While we caution prosecutors to stringently guard the boundary into improper closing arguments, we find that the statements made here do not rise to the level of flagrant prosecutorial misconduct.

E. THERE IS NO CUMULATIVE ERROR

Kuhbander also alleges that the cumulative effect of the errors in his sentencing retrial require reversal. Cumulative error is "the doctrine under

which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). "We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Id.* (citing *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992)). "If the errors have not 'individually raised any real question of prejudice,' then cumulative error is not implicated." *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012) (citing *Brown*, 313 S.W.3d at 631).

We have found error in the trial court's decision in shackling Kuhbander before the jury and in the Commonwealth's presentation of inadmissible evidence in its sentencing exhibits, namely, that Kuhbander had been appointed a public defender in previous cases and the names and addresses of non-local victims. We have determined that each of these errors was non-prejudicial or not palpable and did not require reversal. The effect of these two errors together also does not rise to the level of cumulative error. We discern no cumulative error in Kuhbander's case.

III. CONCLUSION

For the foregoing reasons, the judgment and sentence of the Jessamine Circuit Court is affirmed.

Minton, C.J.; Hughes, Keller, Lambert, VanMeter and Wright, JJ., sitting. All concur.

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