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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 13, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000162-MR

GEORGE WALKER — APPELLANT

V.

ON APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NO. 16-CR-00017

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, George M. Walker, was convicted by a Logan Circuit Court jury of murder and tampering with physical evidence. In accordance with the jury's recommendation, Appellant received a total sentence of fifty-five years' imprisonment. Appellant now appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), alleging two claims of error: (1) the trial court erred by not granting a mistrial after the jury heard recorded testimony from an officer asking him to submit to a polygraph examination and (2) Appellant's confession should have been suppressed *ab initio* as a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). For the following reasons, we affirm.

I. BACKGROUND

Appellant, George Walker, had been living with his older brother, Chris Walker, and his sister-in-law, Allison Walker, in a rental house in Adairville. On Monday, December 21, 2015, Chris Walker called the sheriff's office to

report his wife, Allison, missing. The next day, law enforcement officers were on the property, as Allison was still missing. Police suspected Chris of being involved in Allison's disappearance and took him to the sheriff's office for an interview.

While on the property, the police initiated a field interview with Appellant to establish a timeline and gather more information. A deputy sheriff told Appellant he was "not under arrest," but Appellant was given *Miranda* warnings. Throughout this interview on the property, the officer reiterated to Appellant numerous times that he was under no obligation to continue the interview. Specifically, the officer told Appellant at different points during the interview the following: "do you want to talk to me or do you not?"; "do you want to talk to me now or do you not?"; "you're still under the same rights I read you—do you still wish to talk with me?"; "if you don't want to talk to me, that's your right"; "you can stop the questioning at any time"; and "you do realize you still have the right to stop talking to me."

At all times during this field interview, Appellant knew he was not under arrest and made comments indicating his understanding of that fact. A few times during the interview, Appellant implied or stated that he was unsure about continuing with the interview; however, each time he would persist in engaging in conversation with the police. Specifically, after indicating he was unsure about continuing to answer the officer's questions, Appellant engaged the officer further in such ways as asking for clarification, discussing the seriousness of the situation, or telling the police to continue. Regardless of

whether Appellant reinitiated the conversation or if officers continued questioning him, we note Appellant was not in custody at the time.

Evidence of the voluntariness of this interview was further demonstrated when the officer asked Appellant, "do you want to walk down here to the river?" and he replied, "we can." After they went to the river, Appellant assisted law enforcement with locating Allison's body.

While still around the river, Appellant confessed to committing the murder. After Appellant's confession, the officer detained him, placed him in handcuffs, and read Appellant his *Miranda* rights again. Appellant waived his *Miranda* rights and repeated his confession to the murder. Afterward, during continued questioning, police informed Appellant of his rights twice more.

Appellant was indicted for murder and tampering with physical evidence. During trial, the Commonwealth presented footage from an officer's body camera. This footage allowed the jury to hear the officer ask Appellant if he would be willing to take a polygraph examination. The parties agree this error was inadvertent and unintentional. Prior to trial, the parties had agreed to redact that portion of the video. The Commonwealth muted the video immediately following the question. Then, it continued to play the rest of the video. Appellant's counsel requested a mistrial because the jury heard the portion of the footage where the officer asked the Appellant to submit to a polygraph examination.

Appellant's counsel supported this request by stating that the jury could draw an inference that the Appellant did not want the jury to know the truth.

Further, Appellant's counsel argued that an admonition would direct attention to the polygraph examination. The Commonwealth countered that there was no indication Appellant either agreed or disagreed to take the polygraph. The trial court denied the motion and issued an admonition. The trial court allowed both parties to contribute language for the admonition, and both parties agreed on the language of the admonition before it was issued to the jury.

Appellant was ultimately convicted and the jury recommended fifty years' imprisonment for murder and five years' imprisonment for tampering with physical evidence, to be served consecutively. The trial court adopted the jury's recommendation and sentenced Appellant to fifty-five years' imprisonment.

II. ANALYSIS

A. The trial court was within its discretion to deny Appellant's motion for a mistrial.

Appellant asks this Court to reverse the trial court's denial of his motion for a mistrial due to the jury accidentally hearing a section of video recording wherein an officer asked Appellant if he would be willing to submit to a polygraph examination. However, "[a] mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

"A party claiming that the trial court erroneously denied a motion for a mistrial must show that 'any prejudicial effect could be removed in no other way.'" *Bartley v. Commonwealth*, 485 S.W.3d 335, 343 (Ky. 2016) (quoting *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002)). Further, "[a] trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion." *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We hold that the trial court did not abuse its discretion in denying Appellant's motion for a mistrial.

Prior to trial, the Commonwealth and Appellant agreed to redact a section of the officer's body camera recording where Appellant was asked if he would be willing to submit to a polygraph examination. Unfortunately, the Commonwealth could not get the video to skip, and the jury heard the question, "would you be willing to go to the sheriff's office and take a polygraph, a lie detector test?" The jury did not hear the Appellant's response to the question as the video was then muted.

Appellant's counsel moved for a mistrial, arguing "the jury could draw an inference that the defense did not want the jury to know what the truth is." The trial court believed an admonition would cure the mistake, and the Commonwealth agreed since there was no indication as to whether Appellant agreed to or declined the polygraph. As such, the trial court denied Appellant's

motion for a mistrial and provided an admonition, which incorporated language from both Appellant and the Commonwealth.

In admonishing the jury, the trial court stated:

> I told you we were going to skip over some stuff because it was a waste of time. One of the things we agreed to skip was a discussion about a polygraph . . . . Polygraphs don't come into evidence in any court because they are worthless. The results are worthless . . . we, in our wisdom, have never been able to invent a machine that tells you if someone is telling the truth or not. It doesn't exist as a reliable machine. In this case, I will admonish you that *this defendant did not refuse to take a polygraph and none was given.* That's why it was a waste of time to bring it up. But since it inadvertently got brought up, the instruction is, forget about it, it's worthless, not helpful one way or the other.

"A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

> [O]nly two circumstances [exist] 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. (internal citations and quotations omitted). Since neither of the two exceptions exist in this case, the trial court was well within its discretion to presume the admonition cured the defect. The admonition explained to the jury that polygraphs are "worthless" and inadmissible. In addition, the admonition told the jury that the Appellant did not refuse to take a polygraph, which most likely would have been viewed *favorably* toward Appellant. As such, Appellant did not suffer prejudice from the section of video accidentally played during trial.

B. Appellant's *Miranda* rights were not violated.

Next, Appellant alleges his confession should have been suppressed *ab initio* as a violation of *Miranda*, even though he acknowledges this issue was not preserved for review. However, he asks this Court to conduct a palpable error analysis pursuant to RCr 10.26. "Palpable error affects the substantial rights of the party and results in manifest injustice. Furthermore, an appellant claiming palpable error must show that the error was more likely than ordinary error to have affected the jury." *Boyd v. Commonwealth*, 439 S.W.3d 126, 129-30 (Ky. 2014). The "required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Here, there is no such probability of a different result necessitating a finding of palpable error.

We have consistently reiterated "*Miranda* warnings are required only where there has been such a restriction on the freedom of an individual as to render him in custody." *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006); *Wells v. Commonwealth*, 512 S.W.3d 720, 722 (Ky. 2017). As such, "[w]hen an interrogation is non-custodial, police need not give a *Miranda* warning." *Wells*, 512 S.W.3d at 724. "[C]ustody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*, 132 S. Ct. 1181, 1189 (2012). "[C]ourts must examine all of the circumstances surrounding the interrogation and ask whether a reasonable person would have felt he or she was at liberty to

terminate the interrogation and leave." *Wells*, 512 S.W.3d at 722 (internal citations and quotation marks omitted).

Here, by Appellant's own admission, "Deputy Harvey said specifically that [Appellant] was not under arrest," "Deputy Harvey [] read [Appellant] his *Miranda* rights and proceeded to interview him," and "each time Deputy Harvey restarted the recording, he either Mirandized [Appellant] or asked him to acknowledge he had been advised of his rights."

In fact, Appellant was advised at least four separate times that he did not have to answer questions and could stop talking to the deputy. The officer informed Appellant that he had the right to an attorney on more than one occasion. Furthermore, when Appellant was interacting with the police, he was not the primary suspect. The police suspected Appellant's brother was to blame and were merely talking with Appellant to assist with *that* investigation. Although he may now regret it, Appellant made the voluntary decision to talk with police. Consequently, Appellant was in a non-custodial interview, and the police did not have to provide him a *Miranda* warning in the first place.

We do not punish police officers for advising the public of their Constitutional rights. In fact, the United States Court of Appeals for the Sixth Circuit has noted, "[t]he precaution of giving *Miranda* rights in what is thought could be a noncustodial interview should not be deterred by interpreting the giving of such rights as a restraint on the suspect, converting a non-custodial interview into a custodial interrogation for *Miranda* purposes." *United States v. Lewis*, 556 F.2d 446, 449 (6th Cir. 1977). We agree with the Sixth Circuit and

do not want to discourage law enforcement from advising the public of their Constitutional rights.

III. CONCLUSION

For the reasons stated herein, we affirm the trial court.

All sitting. All concur.

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