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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2022-SC-0116-MR

THEODORE FRIENDLY

APPELLANT

v. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
NO. 20-CR-001500

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Theodore Friendly (Friendly) shot and killed Michael Nellom (Nellom). At trial, Friendly claimed he acted in self-defense. A jury found Friendly guilty of wanton murder. The trial court sentenced Friendly to twenty-five years in prison for committing that crime. Upon appeal, Friendly brings five claims of error. Friendly claims the trial court erred by (1) instructing the jury on the theory of wanton murder; (2) allowing the Commonwealth to cross-examine him concerning his post-arrest silence; (3) declining to grant a mistrial after evidence previously ruled inadmissible was introduced; (4) allowing the jury to take into deliberations an exhibit which included material previously ruled inadmissible; and (5) allowing the introduction of an uncharged offense into evidence despite the Commonwealth's failure to provide Kentucky Rule of

Evidence (KRE) 404(c) notice. Upon review, we affirm the Jefferson Circuit Court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 24, 2020, Michael Nellom and two friends were traveling down Jefferson Street in Louisville when they saw a man – Friendly – beating a woman. Nellom stopped the vehicle and jumped out to help the victim and his friends got out after him. Friendly shot and killed Nellom. Friendly ran away and was apprehended by officers a short time later. A second gun was found on the scene of the shooting, but law enforcement was unable to determine where the gun came from; no witness said that either Nellom or his friends had it in their possession.

On October 7, 2020, a Jefferson County grand jury indicted Friendly for murder and possession of a handgun by a convicted felon. A jury trial was held December 7-9, 2021. During the trial, Friendly claimed that he acted in self-defense when he shot Nellom because he believed the three men were going to attack him. He claimed they ran up on him from behind, threatened him, and that the man in front had a gun in his hand. The jury found Friendly guilty of wanton murder. Friendly pled guilty to the severed handgun charge.

In accordance with the jury's recommendation, the trial court sentenced Friendly to prison for twenty-five years for murdering Nellom. The trial court also imposed upon Friendly a five-year concurrent sentence for being a convicted felon in possession of a handgun. This appeal followed. Friendly's five claims of error are addressed in turn.

ANALYSIS

I. The trial court did not abuse its discretion by giving the jury a wanton murder instruction.

The jury was instructed on both intentional murder and wanton murder. The jury found Friendly guilty of wanton murder. Friendly argues that the trial court erred by giving a wanton murder instruction since it was unsupported by the evidence.

A claim that the trial court gave an unwarranted instruction is reviewed for an abuse of discretion.¹ The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.² "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it."³

A person is guilty of wanton murder when, under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.⁴ Pertinently, a person acts wantonly or with a wanton mental state when "with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously

¹ *Commonwealth v. Caudill*, 540 S.W.3d 364, 367 (Ky. 2018) (citation omitted).

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

³ *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015) (citation omitted), *overruled on other grounds by Univ. Med. Ctr., Inc. v. Shwab*, 628 S.W.3d 112 (Ky. 2021)).

⁴ Kentucky Revised Statute (KRS) 507.020(b).

disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.”⁵

Friendly argues that his conduct could only be considered intentional since he quickly fired the gun at close range at Nellom and nothing about his conduct was wanton. In regard to his conduct, he states that after he separated from the female he assaulted, he was chased by Nellom and his two friends and with his back to the fence, he pulled his gun out of a backpack, and he acted intentionally in aiming it and pulling the trigger. Furthermore, Friendly points out that he testified that he shot Nellom to stop Nellom from hurting or killing him. Friendly contends that there is no evidence, including his expression of remorse and description of the shooting as an accident, from which a reasonable juror could find that his actions were anything but intentional, or that he fired for some reason other than doing harm to the men charging him. He claims that under the circumstances and the necessity for quick action, there was no time to think, evaluate or consider consequences, so a reasonable juror could not believe that he consciously disregarded a substantial and unjustifiable risk of results or circumstances.

Citing *Elliott v. Commonwealth*,⁶ the Commonwealth counters Friendly’s argument with a basic criminal law principle, i.e., “it is not a defendant’s *act* which determines whether his crime is classified as intentional or

⁵ KRS 501.020(3).

⁶ 976 S.W.2d 416, 422 (Ky. 1998).

unintentional, but his *state of mind with respect to the result of his act.*”⁷ While Friendly argues that there is no evidence upon which a reasonable juror could find that he acted wantonly, with regard to the requisite mental state, the Commonwealth points to Friendly’s testimony that he did not aim, that he did not intend to kill Nellom, and that he just wanted to stop Nellom. We agree with the Commonwealth that this was sufficient for the jury to believe that Friendly acted wantonly with respect to firing his gun and that he did not intend to kill Nellom, despite firing at close range. Thus, with evidence to sustain the Commonwealth’s theory, the trial court did not abuse its discretion when it instructed the jury on wanton murder.

II. Even if the trial court improperly permitted the prosecutor to question Friendly about his post-arrest silence, palpable error relief is not warranted.

Friendly contends that the trial court improperly permitted the Commonwealth to cross-examine him on his post-arrest silence after he had been advised of his rights and requested counsel. This claim of error is unpreserved so Friendly requests palpable error review.⁸

In particular, Friendly argues that the Commonwealth’s use of his silence to impeach him unfairly gutted his claim of self defense and violated his due process rights. The Commonwealth argues that the prosecutor’s questions did not amount to palpable error and that Friendly conflates two things: (1) his

⁷ *Id.*

⁸ Friendly objected to the playing of the footage at issue, but not on the grounds now argued in this appeal.

spontaneous statements to arresting officers; and (2) the prosecutor's comments on his silence with the detective after receiving *Miranda*⁹ warnings.

The night of the shooting, Friendly talked with the arresting officers about the events of the crime. One officer told Friendly to "save it for the detective." Later, Friendly was taken for a formal interview with a detective. The detective read Friendly his *Miranda* rights. Friendly declined to sign a waiver and asked for an attorney.

At trial, Friendly testified that he saw a gun in Nellon's hand as he and his friends were charging and that made him afraid for his life. During cross-examination, the prosecutor asked Friendly whether he had told the police that he saw Nellon with a gun. Friendly stated that he did not know whether he had or not. The Commonwealth then played body camera footage showing the arrest. Friendly, without being asked by officers, can be heard talking about the three men jumping out of an SUV and running up on him. After being told to "save it for the detective," Friendly continued talking with the officers and stated that he was not going to let anyone "roll up on [him]." After listening to the footage, Friendly agreed that he did not tell the arresting officers that anyone had a gun. He also agreed that he did not tell the detective that anyone had a gun.

Friendly asserts that because he was in custody when the police on the scene advised Friendly he should save his description of events for the

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

detective, that advice served implicitly as a *Miranda* warning and his silence – not telling the officers about Nellon having a gun – could not be used against him. *Fletcher v. Weir*¹⁰ explains:

In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings [that silence will carry no penalty], we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant’s own testimony.

In contrast to *Friendly*, the Commonwealth, citing *Ordway v. Commonwealth*,¹¹ describes *Friendly*’s statements to the arresting officers as spontaneous comments which were not induced by government action and that there was no implied assurance via *Miranda* that his invocation of silence would not be used against him.

In order for *Friendly* to receive relief under Kentucky Rule of Criminal Procedure (RCr) 10.26,¹² an error “must be easily perceptible, plain, obvious and readily noticeable.”¹³ “Implicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act

¹⁰ 455 U.S. 603, 607 (1982).

¹¹ 391 S.W.3d 762, 778 (Ky. 2013).

¹² RCr 10.26 states:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

¹³ *Nami Res. Co. v. Asher Land & Mineral Ltd.*, 554 S.W.3d 323, 338 (Ky. 2018), (quoting *Brewer v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017)).

upon it *sua sponte*.”¹⁴ Furthermore, there must be a showing of manifest injustice. “[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law. (Manifest injustice is found if the error seriously affected the fairness, integrity, or public reputation of the proceeding.)”¹⁵

Here, we agree with the Commonwealth that palpable error relief is not warranted in this case. First, as to the prosecutor’s questioning Friendly about the content of his statements to the arresting officers, there was no plain or obvious error which the trial court could have been expected to act upon. The officer’s statement to Friendly to save his description of events for the detective did not provide affirmative assurances that Friendly’s silence would carry no penalty. With these circumstances not presenting an obvious violation of Friendly’s Fifth Amendment rights, and we find none, the use of Friendly’s omissions concerning the gun when describing the circumstances of the shooting to the arresting officers cannot warrant palpable error relief.

Second, as the Commonwealth concedes, the trial court’s failure to act on the prosecution’s question about Friendly’s silence about the gun after receiving the *Miranda* warning from the detective may be viewed as an error. However, there is no showing that the trial court’s failure to act resulted in manifest injustice. Friendly fails to show a probability that he would not have

¹⁴ *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017).

¹⁵ *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013) (quoting *McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky. 2012)).

been found guilty of wanton murder if the prosecutor did not question him about omitting to tell the detective that Nellom had a gun. Here, Friendly's credibility was first impeached in regard to his testimony that Nellom had a gun when the prosecutor questioned him about his statements to the arresting officers, and across the questioning about Friendly's statements to the arresting officers and the detective, the bulk occurred in regard to Friendly's statements to the arresting officers. Because of the failure to show that a probability of a different result without the error or that the error was of a magnitude to be shocking or jurisprudentially intolerable, we conclude palpable error relief is not warranted.

III. The trial court did not abuse its discretion by denying a mistrial.

Friendly argues that the trial court should have granted a mistrial after evidence that was previously ruled inadmissible was presented to the jury. The Commonwealth contends that the trial court acted within its discretion when determining that a mistrial was not warranted.

Friendly moved on the morning of trial to exclude from the police body-camera video any references to Friendly possessing "spice," a synthetic form of marijuana. The trial court granted the motion. The Commonwealth was tasked with removing any reference to "spice" in the video it planned to play. Although Friendly moved to exclude the "spice" references, he did not have time stamp information at that point to provide the Commonwealth.

During trial, when the Commonwealth prepared to play the video, Friendly questioned whether the references were removed. The Commonwealth

reviewed the video again, finding instances when “spice” was referenced. The Commonwealth intended to mute or skip the “spice” references. However, when the video was played for the jury and the first “spice” reference was encountered, the Commonwealth did not successfully mute the video. The jury heard an officer ask Friendly, “What do you got in the sock there?” and Friendly reply, “Some spice.” The Commonwealth stopped the video at that point. Friendly moved for a mistrial. The trial court denied the motion. The trial court offered to provide an admonition instead and defense counsel agreed. The trial court admonished the jury to disregard that portion of the video. The trial court explained that there were no allegations that Friendly was using drugs, that the prosecution had not charged Friendly with a drug offense, and that portion of the video was not relevant to Friendly’s trial for murder. The jury agreed that it would disregard the “spice” reference.

Friendly argues that introduction of his statement about the illegal drug was too prejudicial to be cured by an admonition. He particularly argues that a reasonable juror who believed that he was carrying illegal drugs would doubt his credibility.

It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.^[16]

¹⁶ *Wright v. Commonwealth*, 590 S.W.3d 255, 260 (Ky. 2019) (citation omitted).

In regard to the removal of prejudicial effect, “an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition.”¹⁷ “[T]he presumption that a jury will follow a curative admonition is overcome only when there is an overwhelming likelihood that the jury will be incapable of following the admonition and the impermissible testimony would be devastating to the appellant.”¹⁸

The Commonwealth argues that the reference to “spice” was fleeting in a three-day trial and that there were no other allegations that Friendly used or was on drugs at the time of the shooting. Upon review, we find no reason to conclude that there was an overwhelming likelihood that the jury was incapable of following the admonition, or that the prejudicial inferences that might reasonably be drawn from Friendly’s statement that he possessed “spice” imposed a fundamental defect in the proceedings resulting in a manifest injustice. The trial court did not abuse its discretion by denying Friendly’s motion for a mistrial.

IV. Even if the trial court erred, allowing the unredacted video to be given to the jury for deliberation was harmless error.

Friendly argues that the trial court erred when it permitted a video containing two references to “spice” to go with the jury for deliberations. The Commonwealth contends that Friendly’s argument is without merit because

¹⁷ *St. Clair v. Commonwealth*, 455 S.W.3d 869, 892 (Ky. 2015) (quoting *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)).

¹⁸ *Id.* (citation omitted).

even though the unredacted video was part of the exhibits given to the jury for deliberations, there is no evidence that the jury watched the video.

As discussed above, there were two references to “spice” in the officer’s body camera video. When the Commonwealth played the video on the first day of trial and failed to mute the first and prominent “spice” reference, the trial court, explaining its irrelevancy, admonished the jury to disregard it. However, when the video was played again on the second day and third day of trial, during an officer’s testimony and Friendly’s testimony, respectively, the Commonwealth failed to mute the second “spice” reference. Friendly, however, did not make an objection. He complains that the jury was allowed to hear the reference to “spice” at least three times and then, because the Commonwealth failed to redact the video, could listen all it wanted during deliberations.

As a preliminary matter, we address the preservation of the claim that the trial court erred by allowing the video to be part of the exhibits given to the jury. Friendly asserts this claim is preserved under RCr 9.22.¹⁹ However, Friendly requests palpable error review in the event the Court disagrees.

¹⁹ RCr 9.22 states in full:

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or any objection to the action of the court, and on request of the court, the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party.

RCr 9.22 states in part that “if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party.” Friendly argues that he relied upon the Commonwealth’s promise to redact the video and without knowledge that it was not redacted before it was given to the jury, he lacked the ability to object, so the error is preserved. The Commonwealth, on the other hand, asserts that the claim should be reviewed for palpable error because Friendly had the opportunity to object prior to any exhibits going to the jury and he did not do so. However, neither party addresses that the claim of error here stems from Friendly’s successful motion to suppress from the video the references to “spice.” Nevertheless, even if the claim of error is deemed preserved, we conclude Friendly is not entitled to relief because the error was harmless, i.e., it was an error or defect in the proceeding which did not affect his substantial rights.²⁰ A preserved, non-constitutional error is harmless “if one [can] say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially

²⁰ RCr 9.24. RCr 9.24 states in full:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

swayed by the error”²¹ If the error had a substantial influence on the conviction, or if one is left in grave doubt of its influence, the conviction cannot stand.²²

While it is undisputed that the unredacted video was given to the jury for deliberation, there is no evidence that the exhibit affected the jury’s deliberations. First, no evidence is presented that the jury played the video. The jury deliberated in the courtroom, did not seek help from the Court to watch the video, and it is otherwise unclear that the jury had any way of playing the video without the trial court and parties being present.

Friendly admitted to shooting Nellom. The questions for the jury were whether the shooting was intentional or wanton and whether it was done in self-defense. As the trial court had plainly explained to the jury and as noted by the Commonwealth above, there were no allegations that Friendly used or was on drugs at the time of the shooting. Even if the jury watched the unredacted video during deliberations, we can say with fair assurance that the jury’s finding of guilt was not substantially swayed by the references to “spice” on the body camera video.

Friendly also complains that only the portion of the video played on the first day of trial was properly admitted as an exhibit, yet the complete video was entered into evidence, allowing the Commonwealth’s repeated use of the

²¹ *Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750 (1946)).

²² *Id.* (citing *Kotteakos*, 328 U.S. at 765).

reference to “spice.” Because Friendly did not object to the video being entered into evidence after its playing on the second and third days of trial and because we have concluded that it harmless error for the unredacted video to be given to the jury for deliberation, we simply note that any possible error in this regard was not of a palpable nature.

V. Even if the trial court abused its discretion by allowing facts of the female victim’s assault into evidence, it was harmless error.

Friendly’s last claim of error is that the trial court erred when it allowed into evidence testimony related to Friendly’s assault on the female victim, despite the Commonwealth not complying with the pretrial notice requirement of KRE 404(c). The Commonwealth argues that the trial court properly permitted facts related to the assault into evidence. A trial court’s evidentiary rulings are reviewed for an abuse of discretion.²³

On the first day of trial, defense counsel moved *in limine* to exclude any mention of Friendly striking the female victim and stated no notice under KRE 404(c) was provided. The Commonwealth argued that the assault of the female victim was completely intertwined with the shooting since the reason Nellom stopped was to intervene in the assault. The trial court concluded that the assault on the female victim was not a prior bad act, the assault was inextricably intertwined with the events to which Friendly was charged, and as allowed the defense, the prosecution is allowed to provide context to the

²³ *Ward v. Commonwealth*, 587 S.W.3d 312, 332 (Ky. 2019).

allegations. As we explained in *St. Clair*,²⁴ the jury “cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge,” and thus the prosecution is allowed to prove “the ‘setting’ of a case.”

KRE 404(b) and (c) provide:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

. . . .

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

“The intent of KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to deal with the reliability and prejudice problems at trial.”²⁵

Friendly argues that while the trial court commented that he should have brought a pretrial motion to exclude facts related to the assault of the female

²⁴ 455 S.W.3d at 885 (citation omitted).

²⁵ *Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky. 1997) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25 (3d ed. 1993)).

victim, it was the Commonwealth's burden to give notice, even if the evidence of the assault was intertwined with the murder charge. Friendly contends that the Commonwealth did not make an attempt to show good cause for its failure to provide KRE 404(c) notice. The Commonwealth counters Friendly's argument with the response that defense counsel had some notice that the Commonwealth intended to introduce Friendly's assault of the female victim because defense counsel moved *in limine* to exclude the evidence prior to the start of voir dire. The Commonwealth also argues that Friendly has failed to show how he was prejudiced.²⁶

We view the Commonwealth's response that Friendly had "some notice" as a concession that the Commonwealth failed to give KRE 404(c) notice of its intent to use evidence of other crimes or bad acts. Nevertheless, we conclude that the error and the trial court's evidentiary decision, if erroneous, was harmless. Friendly's motion *in limine* provided him an opportunity to challenge the admissibility of the assault evidence. When the trial court allowed the assault event into evidence under KRE 404(b)(2), Friendly did not seek a continuance of the trial or other remedy to avoid unfair prejudice caused by the Commonwealth's failure to give notice. Furthermore, Friendly has not otherwise shown prejudice by the Commonwealth's failure to give notice. We conclude any error related to the Commonwealth's failure to give notice was harmless error.

²⁶ See *Dant v. Commonwealth*, 258 S.W.3d 12, 22 (Ky. 2008).

CONCLUSION

For the foregoing reasons, the Jefferson Circuit's judgment is affirmed.

All sitting. VanMeter, C.J.; Bisig, Conley, Keller, Lambert and Nickell, JJ., concur. Thompson, J., concurs in result only.

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