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# Supreme Court of Kentucky

2023-SC-0145-MR

CHRISTOPHER NUNNALLY

APPELLANT

V. ON APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE DAVIS, JUDGE  
NO. 19-CR-00637-001

COMMONWEALTH OF KENTUCKY

APPELLEE

## **MEMORANDUM OPINION OF THE COURT**

### **AFFIRMING**

A jury of the Boyd Circuit Court found Appellant Christopher Nunnally guilty of first-degree assault and being a second-degree persistent felony offender. The jury recommended a sentence of twenty years, enhanced to thirty-eight years on the persistent felony offender conviction. The trial court imposed the recommended total sentence of thirty-eight years. Nunnally now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). After careful review, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Appellant Nunnally had an on-again, off-again relationship with Casey Ward that began in 2014 and lasted for the next five years. Nunnally and Ward lived together in Ashland, during which time their relationship was

marred by incidents of domestic violence. Ward left Nunnally for good in December 2018.

Nunnally then moved in with his cousin, Syrell Nunnally, and her girlfriend, Laquasha Jones, in Louisville. Over the next six months Nunnally and Ward continued to communicate via social media. On May 9, 2019, Ward messaged Nunnally. The conversation became heated as it devolved into Nunnally questioning Ward about who she was seeing. Nunnally also threatened violence. Ward told Nunnally to come to Ashland, and Nunnally said he would. A few hours later, Nunnally texted Ward and asked if he could see her, a request he repeated over the next few hours. Eventually, Ward asked Nunnally where to meet him. Later that evening, Nunnally texted Ward and told her to meet him on Ringo Street, in front of her mother's apartment, at a mutual friend's house.

Ward left her mother's apartment and began walking down Ringo Street. When Ward was about halfway down the street towards the mutual friend's house, a female—later identified as Laquasha—approached her, said “You're Casey, right?” and asked to use Ward's lighter. After lighting her cigarette, Laquasha threw a cup of liquid, later determined to be a strong acid, in Ward's face. Laquasha then turned around and took off running. Ward testified at trial that at the same time, she heard Nunnally yell out “Now you can die, bitch!” A security camera partially captured the attack and showed the attacker running back to a car and leaving the scene.

Ward stood in the street for a brief moment, during which her clothes began melting off. Unable to breathe, she turned back and began to run to her mother's apartment. However, realizing she could not make it that far, she instead ran into a nearby house, ran to the kitchen, and immediately placed her head under water to wash off the acid. Ward told the home's occupant that Nunnally had lured her to a car and thrown acid on her. The occupant called 911. Over the next half hour, Nunnally texted Ward asking where she was and if she had stood him up. When law enforcement arrived, Ward told the officer she was supposed to meet Nunnally and he had thrown acid on her.

The officer testified that Ward's skin was falling off her face and neck. Ward was transported to a local hospital, and then to a burn unit in Cincinnati where she remained for over a month and a half. She was heavily sedated for the first week, and her head was sewn to her shoulders at one point. Her pain was very difficult to manage, ultimately requiring five milligrams of ketamine per hour which still did not completely ease the pain. Her injuries required multiple surgeries and skin grafts. She was bandaged in a gauze burn wrap for almost six months from the top of her neck to the bottom of her stomach.

During the course of law enforcement's investigation, Ward identified Laquasha from a photograph as the female who had thrown acid on her. At trial, Laquasha testified that she carried out the attack at Nunnally's direction and that she thought the liquid in the cup was water. Michelle Gollihue, one of Nunnally's "friends with benefits," also testified at trial that Nunnally arrived at her residence the evening of the attack with his cousin and her girlfriend.

According to Gollihue, the girls left to go to a store while she and Nunnally stayed in the residence and had sex. Gollihue testified the three visitors left later that evening to go back home to Louisville and she did not see them again that night.

The jury found Nunnally guilty of first-degree assault and recommended a total sentence of thirty-eight years. The trial court imposed the recommended sentence, and Nunnally now appeals as a matter of right.

### **ANALYSIS**

Nunnally raises three issues for our review: (1) whether the Commonwealth's failure to timely disclose favorable evidence warrants reversal; (2) whether the trial court erred in admitting evidence of Nunnally's prior domestic violence and of his severe intoxication at the time of arrest requiring hospitalization and police guard; and (3) whether the brief handcuffing of Nunnally in the presence of the jury during the penalty phase requires reversal. We review each issue in turn, providing additional facts as necessary.

#### **I. The Commonwealth's Late Disclosure Of Favorable Evidence Did Not Result In Prejudice And Does Not Warrant Reversal.**

Nunnally first argues his conviction should be reversed because the Commonwealth failed to disclose favorable evidence until shortly before trial. We do not agree that reversal is warranted.

During the course of its investigation, law enforcement interviewed Laquasha on three separate occasions. In the first interview, Laquasha told law enforcement she and Nunnally dropped Syrell off before driving to the scene of the attack. In a second interview, Laquasha stated that she and

Nunnally travelled alone to Ashland while Syrell remained back in Louisville. However, during her third interview, which was taken in February 2022 approximately eight months before trial and recorded, Laquasha stated Syrell drove all three of them to the scene of the attack. Though Laquasha's third interview was therefore inconsistent with her first and second interviews as to Syrell's involvement in the attack, and thus could be used to question Laquasha's credibility, the Commonwealth did not disclose the third interview to Nunnally's counsel until twelve days before trial.<sup>1</sup> The Commonwealth was also unable to locate the recording of the interview.

After opening statements, Nunnally moved for dismissal because the Commonwealth had failed to timely provide Laquasha's third interview. Nunnally argued that the third interview was favorable to his defense, but because the Commonwealth failed to disclose the interview for eight months and because Syrell had subsequently been indicted for her involvement in the attack, he could no longer interview Syrell to determine if he could prove she was not the driver as Laquasha now stated. Nunnally further argued he was not seeking to have the evidence excluded as it was ultimately useful to impeach Laquasha. He also argued a continuance would not be helpful as he could in no event interview Syrell about the inconsistencies in Laquasha's interview. Nunnally therefore argued dismissal was the appropriate remedy.

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<sup>1</sup> Defense counsel stated he was unaware of the interview until the day before trial, but accepted the Commonwealth's representation that the interview had been disclosed twelve days before trial.

The Commonwealth responded that the recording of the interview was lost, and that it did not know why the interview had not been disclosed sooner, but that the failure was not intentional. The trial court noted that the Commonwealth had indeed violated the court's discovery order by failing to disclose the interview until after the required time to do so. However, the trial court concluded that the withheld evidence was ultimately helpful to Nunnally given the inconsistencies in Laquasha's interviews, and thus the disclosure of the evidence was therefore beneficial rather than prejudicial to Nunnally. The trial court therefore denied Nunnally's motion to dismiss. The trial court also later denied Nunnally's motions for judgment of acquittal and for a new trial raising the same arguments.

Nunnally raised the issue of the Commonwealth's late discovery disclosure below by a motion to dismiss. The issue is therefore preserved for our review. RCr<sup>2</sup> 9.22 (“[I]t 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.”). “We review issues concerning alleged discovery violations for abuse of discretion.” *Stieritz v. Commonwealth*, 671 S.W.3d 353, 368 (Ky. 2023).

RCr 7.24 governs discovery during the course of criminal proceedings, together with other provisions of the Rules and orders entered by the trial court. In the present case, the trial court entered an order pursuant to RCr

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<sup>2</sup> Kentucky Rule of Criminal Procedure.

7.24 on January 24, 2020 requiring the Commonwealth to, among other things, “permit the Defendant to inspect and copy or photograph books, papers, documents or tangible objects or copies or portions thereof that are in the possession, custody or control of the Commonwealth material to the defense’s preparation.” The order further provided that the Commonwealth had “a duty seasonably to supplement or amend their discovery.” The Commonwealth had a recording of its third interview with Laquasha in its possession that it failed to disclose to Nunnally for eight months and ultimately was unable to locate. Like the trial court, we conclude the Commonwealth’s failure to seasonably supplement its discovery or provide a copy of the recorded interview—which it ultimately was unable to locate—was a violation of the trial court’s discovery order.

However, while we find the Commonwealth violated the trial court’s discovery order, we do not find that reversal is warranted. “The overarching purpose of our criminal discovery rules is to prevent ‘[a] cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused.’” *Stieritz*, 671 S.W.3d at 368 (quoting *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972)). RCr 7.24 thus includes a number of sanctions to address failures to comply with discovery rules and orders during the course of a criminal proceeding:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party



from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

RCr 7.24(11).

This provision affords trial courts “broad remedial powers” to address discovery violations. *Stieritz*, 671 S.W.3d at 368. However, “a discovery violation does not automatically mandate reversal” of a criminal conviction. *Id.* Rather, reversal is warranted only upon a showing of “sufficient resulting prejudice” flowing from the discovery violation. *Id.* Such prejudice may arise where the discovery violation is “a surprise attack on an unsuspecting defense counsel’s entire defense strategy.” *Id.* (quoting *Trigg v. Commonwealth*, 460 S.W.3d 322, 327 (Ky. 2015)). Or it may arise where the discovery violation causes “a lack of adequate notice resulting in a defendant’s inability to effectively challenge the veracity of evidence through cross-examination or otherwise conduct a pre-trial inquiry of other witnesses with relevant knowledge.” *Id.* Ultimately, reversal of a conviction on grounds of a discovery violation is warranted only where there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different. *Id.*

In the present case, the evidence the Commonwealth failed to timely disclose was an inconsistent subsequent interview of a material witness in the case. Laquasha stated in her original interview that she and Nunnally dropped Syrell off before driving to the scene of the attack, and in a second interview that Syrell did not travel to Ashland with her and Nunnally. Nunnally learned the day before trial, however, that Laquasha had given a subsequent

inconsistent interview in which she said she, Nunnally, and Syrell all drove to the scene. This evidence was material as it demonstrated an inconsistency in Laquasha's statements to law enforcement and thus could be used to attack her credibility. This was highly significant to Nunnally's defense as Laquasha of course testified that she attacked Ward at Nunnally's direction. Indeed, she was the prosecution's star witness against Nunnally.

However, while this late-disclosed evidence was significant to Nunnally's defense, we perceive no prejudice flowing from the Commonwealth's violation of the discovery order by failing to produce the evidence until shortly before trial. First, the late disclosure did not involve a sudden and unexpected revelation of information *harmful* to Nunnally's defense, but rather of information *helpful* to his defense. That is, the late revelation did not result in an unexpected obstacle to Nunnally's defense that might have undermined his trial strategy, but rather was a last-minute addition to arguments he could make to the jury that Laquasha's testimony was not trustworthy.

Second, Nunnally was able to effectively use the late disclosed evidence at trial to show the inconsistencies in Laquasha's statements and therefore call into question her credibility before the jury. Indeed, when Laquasha testified at trial, both the Commonwealth and Nunnally questioned her about the changes in her story regarding who actually proceeded to the scene of the attack in the car. Nunnally also mentioned Laquasha's inconsistent stories in his closing argument before the jury. In short, though he only belatedly

learned of Laquasha's inconsistent third statement, he nonetheless was able to use that statement before the jury to undermine her credibility as a witness.

Finally, we find no merit in Nunnally's contention that he was prejudiced because Syrell's indictment on charges related to this case made it impossible to speak with her regarding the case. Even assuming *arguendo* that it would have been impossible for Nunnally's counsel to interview Syrell, that in no way impacted his ability to use the late disclosed interview to undermine Laquasha's credibility.<sup>3</sup> Before the trial court, Nunnally argued that the purported unavailability of Syrell left him unable to ask her about whether she actually was in the car at the scene of the attack. Yet there was no need for Nunnally to show the jury that Syrell disputed Laquasha's statements in order to undermine Laquasha's credibility. Laquasha gave three patently different statements to law enforcement, and Nunnally needed only show those different statements to the jury to drive home his point that Laquasha was inconsistent, unreliable, and untrustworthy. In other words, Laquasha's divergent statements on their own were sufficient to demonstrate her inconsistency, and further information from Syrell as to which story was correct was wholly unnecessary to make that showing to the jury.

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<sup>3</sup> We disagree with Nunnally's assertion that his counsel had no available option to further investigate the changes in Laquasha's story because Syrell was under indictment. For example, Nunnally could have inquired with Syrell's counsel as to whether she would be willing to speak with Nunnally's counsel regarding the attack or at least Laquasha's changing stories. Nunnally, of course, could have also spent time searching for and speaking with other eyewitnesses with information as to Syrell's whereabouts at the time of the attack. Nunnally did not ask the trial court for a continuance to pursue either these or any other options, instead summarily arguing that a continuance would be futile given Syrell's purported unavailability.

In sum, though the Commonwealth's disclosure was late, it resulted in no prejudice to Nunnally, who was able to effectively and fully use the beneficial new evidence in his defense at trial. While there may be circumstances where a late disclosure of evidence favorable to a defendant could result in an unduly prejudicial impact on the defendant's trial strategy or ability to effectively use the evidence to his benefit, this is not such a case. Moreover, given that Nunnally was convicted despite his ability to fully and effectively use the late-disclosed evidence in his defense, we of course find no possibility an earlier disclosure of the evidence would have led to a different result at trial. As such, reversal on grounds of the Commonwealth's discovery violation is not warranted.

**II. The Trial Court Did Not Err In Admitting Evidence Of Prior Domestic Violence, And Its Admission Of Evidence Regarding Nunnally's Intoxication And Hospitalization Was Not Palpable Error.**

Nunnally next argues the trial court erred in violating KRE<sup>4</sup> 404(b) on two separate incidents during trial. The first purported error involves Ward's testimony regarding Nunnally's prior domestic violence against her, which we conclude is preserved. The second alleged error involves testimony regarding Nunnally's intoxication at the time of his arrest, and his subsequent stay in the ICU under police guard. Nunnally acknowledges that this allegation of error is unpreserved. We will address each issue in turn.

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<sup>4</sup> Kentucky Rule of Evidence.

**A. Evidence of Nunnally’s Prior Domestic Violence Against Ward**

The first issue we consider is whether the trial court violated KRE 404(b) in admitting Ward’s testimony regarding Nunnally’s prior domestic violence against her. The Commonwealth contends this issue is unpreserved because Nunnally did not explicitly invoke KRE 404(b) before the trial court, but rather simply moved for a mistrial. The Commonwealth asserts we should therefore apply only palpable error review.

We conclude that Nunnally sufficiently preserved the error. Under KRE 103(a) “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected” and, where the evidence was admitted, there is “a timely objection... stating the specific ground of objection, if the specific ground was not apparent from the context.” While Nunnally’s defense counsel did not explicitly reference KRE 404(b) before the trial court, Nunnally’s counsel did ask for a mistrial. In the trial court, defense counsel stated that they were not given notice that the Commonwealth was going to introduce prior acts of domestic violence evidence against Nunnally. This objection was timely and it is apparent from context that counsel was asserting that admission of the evidence would violate KRE 404(b), as the issue was admission of prior bad acts without notice. As such, we find the error preserved and review the trial court’s ruling for abuse of discretion.

*Benjamin v. Commonwealth*, 266 S.W.3d 775, 791 (Ky. 2008). That is, we ask whether the trial court’s decision was unreasonable, unfair, or unsupported by

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

Turning to the merits, the Commonwealth asked Ward during trial about her lifestyle and relationship with Nunnally. According to the Commonwealth, its question was intended to elicit testimony that Ward and Nunnally had a tumultuous relationship characterized by multiple breakups, but not testimony regarding actual prior incidents of domestic violence. However, Ward unexpectedly responded that her relationship with Nunnally started out great and “then it went downhill really bad. I let him put his hands on me once and it just got worse over and over and over.”

Defense counsel then objected that the Commonwealth gave no pre-trial notice of its intention to introduce evidence of Nunnally’s prior acts of domestic violence at trial. Defense counsel moved for a mistrial and a new trial, which the trial court denied.

We conclude the trial court did not abuse its discretion or otherwise err in admitting Ward’s testimony regarding Nunnally’s prior domestic violence against her, despite the Commonwealth’s failure to provide pre-trial notice such evidence would be introduced. KRE 404 requires the Commonwealth to provide pre-trial notice when it intends to introduce evidence of prior bad acts during its case in chief at trial. KRE 404(c) (“In a criminal case, if the prosecution intends to introduce evidence pursuant to [KRE 404(b)] as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence.”). Admittedly, here the Commonwealth did not

provide pre-trial notice such evidence would be introduced. However, the plain language of KRE 404(c) makes clear that pre-trial notice is required only if the prosecution “intends” to introduce evidence under KRE 404(b). As a corollary—and as a matter of logic—such notice is not required where such evidence is unintentionally introduced at trial. In such cases, the absence of pre-trial notice is not error because the prosecution did not *intend* to introduce the prior bad acts evidence.

In this case, it was not the intention of the Commonwealth to elicit or introduce Ward’s testimony that Nunnally had put his hands on her. Indeed, the prosecution stated before the trial court it had not intended to elicit evidence regarding domestic violence, and we are given no evidence to dispute that showing. As such, the trial court did not err in admitting the testimony despite the lack of pre-trial notice.

We also conclude Ward’s testimony regarding Nunnally’s prior domestic violence against her was admissible under KRE 404(b). Under that rule, the introduction of 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:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (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.

In determining whether admission of prior bad acts evidence violates KRE 404(b), we consider three factors: relevance, probative value, and undue prejudice. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). We also remain mindful that trial courts should admit such evidence “cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime.” *Id.*

In applying the *Bell* Test, we first consider the relevance of the evidence. KRE 401 defines relevance as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” To be admissible under KRE 404(b), the prior bad acts evidence must be relevant for a purpose other than simply to prove the “criminal disposition of the accused.” *Rucker v. Commonwealth*, 521 S.W.3d 562, 569 (Ky. 2017). Notably, we have previously held that similar acts “perpetrated against the same victim are almost always admissible,” including to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Harp v. Commonwealth*, 266 S.W.3d 813, 822 (Ky. 2008) (quoting *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)). Indeed, this Court has further held that any contention that evidence of prior assaults perpetrated by the defendant against the victim should be excluded “would border on absurdity.” *Smith v. Commonwealth*, 904 S.W.2d 220, 224 (Ky. 1995).

Here, because Nunnally was charged with perpetrating physical violence against Ward, Ward’s testimony regarding his previous acts of domestic



violence against her is particularly relevant. Ward's statement was relevant not to show Nunnally's conformity with general character evidence, but rather, as proof of motive to harm her and exert power and control by means of physical violence. *See Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006) (“[E]vidence of other assaults perpetrated by a defendant against the same victim is generally admissible to prove intent and motive with respect to the subsequent assault.”). Thus, Ward's testimony satisfies the relevance factor of the *Bell* test.

The second factor of the *Bell* test requires us to consider whether “evidence of the uncharged crime [is] sufficiently probative of its commission by the accused to warrant its introduction into evidence[.]” *Bell*, 875 S.W.2d at 890. Here, Ward testified under oath that Nunnally had placed his hands on her “over and over,” and no evidence was introduced to dispute that testimony. As such, the evidence of Nunnally's prior domestic violence against Ward was sufficiently probative of its commission to satisfy the probative factor of the *Bell* test.

Finally, having found Ward's testimony relevant and probative, we next consider whether its prejudicial impact substantially outweighed its probative value. *Id.* KRE 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Thus, to determine whether evidence should be admitted, one must conduct a balancing test between its prejudicial impact and probative value.

Probative value is measured by how much the evidence tends to make the fact more or less probable. *Hall v. Commonwealth*, 468 S.W.3d 814, 823 (Ky. 2015). In this case, the evidence of Nunnally's prior violence had significant probative value. Ward testified, "I let him put his hands on me once and it just got worse over and over . . . ." This evidence strongly demonstrated Nunnally's motive to harm and control Ward with violence. It was thus highly relevant to determining whether he perpetrated the acid attack on Ward.

We also conclude the highly probative nature of the prior domestic violence evidence heavily outweighed its prejudicial impact. Plainly, evidence of prior domestic violence is always somewhat prejudicial. Here, however, Ward did not reference a specific instance of crime or domestic violence, but rather simply made a conclusory statement that Nunnally had "put his hands on" her over and over. Indeed, her testimony was so devoid of detail that it is difficult to conceive of a less prejudicial reference to intimate partner violence. Thus, given the highly probative value of her testimony and its very limited detail we find the testimony's probative value was not substantially outweighed by the prejudicial impact. As such, the trial court did not err in admitting it.

#### **B. Evidence of Nunnally's Intoxication and Hospitalization**

Nunnally also argues that the trial court erred in admitting evidence that at the time of his arrest, Nunnally was so intoxicated he required a five-day hospitalization under police guard. Nunnally acknowledges this allegation of

error is unpreserved. However, because Nunnally requests palpable error review, we will review the issue under that standard.<sup>5</sup> “[A] palpable error affecting the substantial rights of a party, even if insufficiently raised or preserved, is reviewable, and, upon a determination that it has resulted in manifest injustice, reversible.” *Deemer v. Finger*, 817 S.W.2d 435, 437 (Ky. 1990). In determining whether an error is palpable, we consider

“whether on the whole case there is a substantial possibility that the result would have been any different.” To be palpable, an error must be “easily perceptible, plain, obvious and readily noticeable.” A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. “It should be so egregious that it jumps off the page . . . and cries out for relief.”

*Davis v. Commonwealth*, 620 S.W.3d 16, 30 (Ky. 2021) (citations omitted). We do not find such error here.

By way of background, at trial Deputies Seth Hatfield and Allen Bowling testified regarding the facts surrounding Nunnally’s arrest. They testified that they were called to an apartment on a welfare check for a very intoxicated individual. The individual turned out to be Nunnally, who was lethargic and appeared to be intoxicated when they arrived. Deputy Hatfield testified that Nunnally was removed from the apartment and that, due to his level of intoxication, had to be carried on either side. After Nunnally’s name was

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<sup>5</sup> Though Nunnally did not request palpable error review in his initial briefing, he does request it in his reply, which is sufficient to allow our review of the issue for palpable error. *See Commonwealth v. Jones*, 283 S.W.3d 665, 670 (Ky. 2009) (“Generally, an appellant is not obliged to anticipate that the Commonwealth will challenge preservation, and once it does he is free under the rule to reply to the Commonwealth’s point by arguing that, even if unpreserved, the error is one that may be noticed as palpable.”).

processed through dispatch, the deputies discovered that he had a warrant for his arrest. Nunnally was escorted to King's Daughter Medical Center, where he became increasingly intoxicated. Deputy Hatfield referenced that Nunnally was unable to stay awake. The jury also heard that the Cattletsburg Police Department stayed on guard in the hospital with Nunnally until he awakened five days later.

As with the evidence of prior domestic violence, we must apply the *Bell* test to determine if this prior bad act evidence was admissible under KRE 404(b) using the *Bell* test's three balancing factors: relevance, probative value, and undue prejudice. *Bell*, 875 S.W.2d at 889. Regarding relevance, circumstances of an arrest can sometimes be presented at trial. *See Kerr v. Commonwealth*, 400 S.W.3d 250, 262-63 (Ky. 2013). Here, however, the specific evidence of the intoxication and hospitalization attendant to his arrest was not relevant. Neither Nunnally's levels of intoxication, nor the length of his stay in the ICU is related to the crime in question. Nor was it necessary to provide that information to the jury in order for them to understand the relevant circumstances of his arrest. Thus, because the evidence was simply not relevant, it was not admissible under KRE 404(b).

However, while this evidence should not have been admitted, the resulting error does not amount to a palpable error nor a substantial miscarriage of justice. The other evidence of Nunnally's guilt presented at trial was strong, and thus we cannot find a substantial possibility there would have been a different result had the jury not heard about Nunnally's intoxication or

hospitalization. First, the jury heard testimony that Ward had a planned meeting with Nunnally at the time of the attack. Second, Ward testified at trial that she heard Nunnally yell “Now you can die, bitch!” at the time of the attack. Third, Ward identified Nunnally’s cousin’s girlfriend Laquasha as the person who threw acid on her. Fourth, Laquasha testified she perpetrated the attack on Ward at Nunnally’s request. Finally, the jury also heard that Nunnally had previously engaged in domestic violence against Ward. Given the overwhelming weight of this evidence, we cannot conclude there is a substantial possibility the jury might have reached a different verdict had it not heard the improper testimony regarding Nunnally’s intoxication and hospitalization.

In sum, while the police testimony surrounding Nunnally’s arrest should not have been admitted as evidence, the outcome of the case would not have been different without the admission of such evidence. The trial court’s error did not result in manifest injustice. Thus, there was no palpable error.

**III. The Brief Handcuffing Of Nunnally In The Presence Of The Jury During The Penalty Phase Does Not Warrant Reversal.**

During the penalty phase, at the conclusion of the defense’s case the trial court released the jury for a break prior to closing arguments. As the jury was standing up and walking out of the court room, the bailiff walked over to Nunnally and placed him in handcuffs. Once the jury exited the court room, defense counsel informed the trial court and immediately requested a mistrial. Both the trial court and the Commonwealth were unaware that Nunnally was placed in handcuffs in the jury’s presence. The trial court called another bailiff

to the bench and that bailiff stated he told the other bailiff to place Nunnally in handcuffs.

Despite defense counsel's argument that the handcuffs created a presumption of dangerousness, the trial court denied the motion for a mistrial. Before the jury was brought back into the court room, the trial court ordered the bailiff to remove Nunnally's handcuffs. The trial court explained:

I don't think it matters. I will state this again for the record. He's a convicted felon at this point right here. Deemed a security risk and a flight risk. I typically don't get in the way of telling bailiffs how to secure the courtroom there and until the guilt phase, it would matter but it doesn't matter now. I mean he's a convicted felon. But in the interest of the sentencing here, I'll have him out of cuffs but after this is over, he's going right back in.<sup>6</sup>

While deliberating, the jury sent a note to the trial court asking if it could elect a new foreperson. The trial court told the jury they could not, then asked defense counsel if they wanted to question the jury as to whether they saw Nunnally in handcuffs. Defense counsel declined and stated that it was recorded on video. The trial court acknowledged an opportunity to question the jury to see if the handcuffs influenced anyone, and defense counsel stated it could be resolved as a post-conviction matter. The trial court stated:

I think the court has the ability to control order within its four walls. And certainly, cuffing him with the jury on its way out. I don't know if they saw anything, but even if they did, I don't think it . . . it goes toward guilt. Penalty phase is going to be what

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<sup>6</sup> We take this opportunity to note that while bailiffs are tasked with securing defendants during criminal proceedings, it is ultimately the trial court's responsibility to control the court room and ensure that all applicable procedures and rules are followed and enforced. The trial court should always ensure a criminal defendant receives a fair trial in accordance with constitutional requirements.

penalty phase is. I don't think it shows any inference that he's dangerous. He . . . in the past has proven dangerous.

The jury ultimately recommended a thirty-eight-year sentence. Nunnally argues it was prejudicial for him to be placed in handcuffs in front of the jury, emphasizing that the sentence imposed by the jury was nearly double the minimum sentence he could have received.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *Wright v. Commonwealth*, 590 S.W.3d 255, 260 (Ky. 2019).

[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.

*Id.* (quoting *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996)) (emphasis omitted).

RCr 8.28(5) provides that “[e]xcept 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.” In *Barbour v. Commonwealth*, 204 S.W.3d 606, 612 (Ky. 2006), this Court interpreted RCr 8.28(5) and its prohibition on shackling “to all jury-observed aspects of a criminal trial” and determined that shackling is only permitted in “extraordinary circumstances.” *Id.* This includes the penalty phase, absent a trial court determination that restraints are justified by a state interest specific to a particular trial. *Deal v. Commonwealth*, 607 S.W.3d 652, 660-61 (Ky. 2020).

Here, the trial court failed to articulate “good cause” for allowing Nunnally to be placed in handcuffs during the penalty phase and in the presence of the jury. We recognize that the trial court did not order the bailiff to place Nunnally in handcuffs and it is unclear whether the jurors saw it happen since they were exiting the court room. The trial court and the prosecution did not notice Nunnally being handcuffed. The video record indicates that it took approximately fifteen seconds for the jury to exit the court room and during the entirety of that time period, a bailiff was placing Nunnally in handcuffs. In any event, allowing Nunnally to be placed in handcuffs in the presence of the jury was an abuse of discretion.

However, this error is subject to harmless error analysis under RCr 9.24, which states we “must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.” In *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009), we noted that a non-constitutional error is harmless “if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). After reviewing all the circumstances, we do not believe the handcuffs, assuming the jury was able to see them, substantially impacted the sentence that Nunnally received. The admittedly serious sentence Nunnally received is unsurprising given the egregious nature of the crimes charged and ultimate convictions. Therefore, this error was harmless.



## **CONCLUSION**

For the foregoing reasons, we affirm the judgment and sentence of the Boyd Circuit Court.

All sitting. All concur.

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