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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001072-MR

JODY PRATER — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
INDICTMENT NO. 04-CR-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.[1]

HUDDLESTON, SENIOR JUDGE: Jody Prater appeals from a Magoffin Circuit Court judgment sentencing her to serve ten years in prison following conviction by a jury for assault, three counts of wanton endangerment and operating a motor vehicle under the influence. Prater contends that the circuit court erred when it failed to declare a mistrial following an improper statement by the Commonwealth's attorney during *voir dire*

[1] Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

referring to her prior driving under the influence conviction, in denying her motion for a new trial, and in denying her motion for a directed verdict based on insufficient evidence.

On the night of November 9, 2003, at approximately 7:00 p.m., three vehicles were traveling westbound on a relatively straight section of the Mountain Parkway in Magoffin County. The lead vehicle was a black 1999 Ford Ranger truck driven by Mark McGinnis, followed by a Camry being driven by Tim Evans, containing his wife Chandra and two children, nine-year-old Ryan and twelve-year-old Ashlynn in the back seat. The third vehicle was a maroon 1994 Ford Ranger truck driven by Justin Hurley. McGinnis saw a white Ford Crown Victoria, which he later learned was being driven by Jodi Prater, approaching him going eastbound traveling approximately 50-55 miles per hour on the shoulder of the westbound lane.

As the Crown Victoria approached, McGinnis was forced to swerve to the left and Prater hit him on the rear passenger side causing the truck to spin. The Crown Victoria then crashed into the Camry head-on in the westbound lane. Hurley turned to the right to avoid the Camry but did graze the rear of the Camry with the front driver's side of his truck.

Neither McGinnis nor Hurley was injured, but all of the Evans family members sustained injuries. Ashlynn was the most seriously injured. She sustained a spinal cord injury resulting in paralysis below the waist. Her bowels and intestines burst resulting in a large portion of her intestines and abdominal muscles being removed. In addition to her paralysis, Ashlynn's intestines protrude on either side of her body and she has a colostomy. She cannot digest solid food and is restricted to liquids for nutrition.

Ashlynn cannot attend school and her activities especially outside the Evans's home are restricted because she is easily fatigued.

Kentucky State Police (KSP) Troopers Sergeant Randy McCarty and Christopher Dials responded to the accident. They conducted an investigation of the scene including interviewing McGinnis and Hurley at the accident site and analyzing the markings on the roadway and damage to the vehicles. The two police officers went to the hospital to interview Prater but she was unable to communicate coherently with them because her speech was slurred and disjointed. Prater had suffered bruising and abrasions on her neck, arm and hips from the seatbelt plus minor swelling of her face from the deployed airbag, but no major trauma. Trooper Dials conducted a gaze-nystagmus test and Prater's eyes did not follow his hand smoothly horizontally and they bounced around when tracking vertically, which suggested possible drug or alcohol intoxication. A nurse at the hospital gave the KSP troopers five complete pills and one pill broken into two pieces that she said had been found in a jacket Prater was wearing. Two urine samples and a blood sample were taken from Prater at the hospital. Later chemical and visual analysis of the pills indicated that two of the pills were oxycodone, a Schedule III narcotic, three were carisoprodol (also known as Soma), a Schedule IV non-narcotic, and the broken pill was alprazolan (known as Xanax), a Schedule IV non-narcotic. The blood sample was found to contain a therapeutic level of Xanax. An analysis of the first urine sample by the hospital resulted in a positive showing for traces of benzodiazepine and opiates, while an analysis of the second urine sample by another laboratory was negative for drugs.

On February 19, 2004, the Magoffin County grand jury indicted Prater on one felony count of assault in the first degree,[2] three misdemeanor counts of wanton endangerment in the second degree,[3] one misdemeanor count of possession of a controlled substance in the first degree,[4] and one misdemeanor count of operating a motor vehicle under the influence (DUI) first offense.[5] In September 2004, the DUI charge was amended to operating a motor vehicle under the influence second offense after Prater was arrested for DUI in July 2004 and convicted in August 2004.[6]

A jury trial was held on March 7, 8 and 9, 2005. The Commonwealth's witnesses included Troopers Randy McCarty and Christopher Dials; Mark McGinnis; Justin Hurley; Chandra Evans; Thomas Rouse, Chandra's father; Patricia Blackburn, a KSP forensic chemical lab technician from Frankfort; and Larry Boggs, another KSP chemical lab technician from Ashland. Prater's witnesses included herself; Tina Helton, Prater's sister; Jacqueline Prater, Prater's niece; Debra Collier, an emergency medical technician; and Carolyn Wood, a substance abuse counselor. The jury found Prater guilty of assault in the first degree, three counts of wanton endangerment in the second degree, and DUI second offense, but acquitted her on the possession of a controlled substance charge. The jury recommended sentences of ten years on the charge of assault in the first degree, six months on each of the wanton endangerment in the first degree counts, and

[2] KRS 508.010.

[3] KRS 508.070.

[4] KRS 218A.1415.

[5] KRS 189A.010(5)(a).

[6] *See* Maggofin District Court case number 04-T-00453.

six months on the DUI count. On March 18, 2005, Prater's new attorney filed a motion for a new trial alleging Prater's trial counsel had failed to call a material witness. On May 5, 2005, the Commonwealth filed a response to the new trial motion. Following a hearing on the same day, the circuit court denied the motion. On May 10, 2005, judgment was entered sentencing Prater, consistent with the jury's verdict, to ten years on the assault in the first degree count and concurrent six month sentences on each of the three misdemeanor wanton endangerment in the second degree counts and the DUI second offense count.[7] This appeal followed.

Prater raises three issues on appeal. First, she claims the circuit court erred in denying her motion for a directed verdict of acquittal. In *Commonwealth v. Benham* [8] the Kentucky Supreme Court delineated the standard for addressing a criminal defendant's motion for directed verdict:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to credibility and weight to be given to such testimony.[9]

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[7] *See* KRS 532.110(1)(a) (misdemeanor sentence runs concurrently with felony sentence).

[8] 816 S.W.2d 186 (Ky. 1991).

[9] *Id*. at 187 (citing *Commonwealth v. Sawhill* 660 S.W.2d 3 (Ky. 1983)). *See also Gray v. Commonwealth*, 203 S.W.3d 679, 692 (Ky. 2006); *Robinson v. Commonwealth*, 181 S.W.3d 30, 35 (Ky. 2005).

A court must be mindful of the rule that the "judgment as to the credibility of witnesses and the weight of the evidence are left exclusively to the jury."[10] Even when the evidence is contradictory, the jury determines the credibility of the witnesses and weight of the evidence.[11] Jurors are free to believe parts and disbelieve other parts of the evidence including the testimony of each witness.[12] Moreover, circumstantial evidence is sufficient to support a criminal conviction.[13] The test for determining sufficiency of the evidence on a motion for directed verdict is the same for circumstantial evidence as it is for direct evidence.[14] The standard for appellate review of a denial of a motion for directed verdict alleging insufficient evidence dictates that if under the evidence taken as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, she is not entitled to a directed verdict of acquittal.[15]

Initially, we note that Prater has failed to show that the issue of sufficiency of the evidence on denial of the motion for directed verdict was properly preserved for

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[10] *Fairrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005). *See also Commonwealth vs. Smith*, 5 S.W.3d 126, 129 (Ky. 1999).

[11] *Roark v. Commonwealth*, 90 S.W.3d 24 38 (Ky. 2002); *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995) (stating that the decision on whether to believe the prosecution's or the defendant's story is an issue for the jury to decide).

[12] *White v. Commonwealth*, 178 S.W.3d 470, 490 (Ky. 2005); *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 775 (Ky. App. 1998).

[13] *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 328 (Ky. 2006); *Bray v. Commonwealth*, 177 S.W.3d 741, 748 (Ky. 2005).

[14] *Id.*

[15] *Gray v. Commonwealth*, 203 S.W.3d 679, 692 (Ky. 2006); *Thacker v. Commonwealth*, 194 S.W.3d 287, 292 (Ky. 2006); *Ratliff v. Commonwealth*, 194 S.W.3d 258, 267 (Ky. 2006).

appeal. Kentucky Rule of Civil Procedure (CR) 76.12 (4)(c)(v), applicable to appeals in criminal cases, requires an appellant to provide a statement with reference to the record showing whether and in what manner an issue was properly preserved for review. Prater states in her brief that the issue of sufficiency of the evidence to support a conviction for wanton conduct was "preserved by way of a motion for directed verdict made both at the close of the prosecution's case and the close of all (sic) evidence." However, the citations to the record only involve the motion for directed verdict at the close of the Commonwealth's case. In fact, the record on appeal does not include the video record of the third day of trial,[16] which allegedly would have shown whether defense counsel renewed his motion for directed verdict. It is well established that a motion for directed verdict made at the close of the prosecution's case is not sufficient to preserve error unless it is renewed that the close of all the evidence.[17] "In other words, a motion for directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence – i.e., after the defense presents it evidence (if it does so) or after the Commonwealth's rebuttal evidence – is insufficient to preserve an error based upon insufficiency of the evidence."[18] Since Prater's reference to the record is inadequate to show that the issue of sufficiency of the evidence was properly preserved, this Court could decline to review this issue. Nevertheless, as discussed below, we

[16] The second day of the trial ended before the defense closed its case-in-chief with defense counsel indicating that he intended to call additional witnesses.

[17] *See Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998) (citing *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977)); *Clemons vs. Commonwealth*, 174 S.W.3d 489, 490 (Ky. 2005).

[18] *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

believe Prater's position can be rejected on the merits.

The charge of assault in the first degree and the three counts of wanton endangerment involved an element of wanton conduct. "A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[19] The assault in the first degree count required the jury to find that Prater wantonly engaged in conduct that created a grave risk of death to another and thereby seriously injured Ashlynn Evans under circumstances manifesting extreme indifference to the value of human life.[20] Prater contends that the evidence did not support a finding of wanton or criminal conduct, and at worst indicated simple negligence on her part. Prater is especially critical of the evidence concerning her alleged drug intoxication as being insufficient.[21]

At the trial, Prater testified that as she was traveling in the eastbound lane she saw a small red truck traveling westbound pull into her lane attempting to pass cars in the westbound lane. She said that as they approached each other, the red truck pulled into

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[19] KRS 501.020(3).

[20] See KRS 508.010(1)b).

[21] Prater states in her brief that she "is serving a ten-year sentence having been convicted of wanton conduct despite the fact that the facts of the car accident were very much in controversy, and despite the fact that there is no controversy that she was *not* under the influence." (Emphasis in original.) Actually, the question of whether Prater was intoxicated was a major issue of controversy at the trial.

her lane and that she grazed the rear of the truck causing her front airbag to deploy. Prater stated the airbag blocked her view and she apparently veered into the westbound lane resulting in her striking the other vehicles. Prater testified that she had only taken one Loritab pill in the morning as prescribed by her physician. Prater denied she was under the influence or impaired in any way and asserted that the trauma of the accident may have caused her to appear to be under the influence.

The Commonwealth presented drug analysis of a urine test performed by the hospital showing traces of benzodiazepine, a nervous system depressant, and opiates, a depressant that includes oxycodone or hydrocodone such as Loritab, and a blood analysis showing therapeutic levels of alprazolam or Xanax, another central nervous system depressant. The two KSP troopers, McCarty and Dials, testified, based on their experience, that Prater appeared to be under the influence given her inability to conduct a conversation, slurred speech, glassy eyes and lethargic mannerisms. Trooper Dials stated that Prater's eye movement during the gaze-nystagmus test he conducted was consistent with some drug intoxication. The troopers were given several pills by a nurse at the hospital reportedly taken from a jacket belonging to Prater that included oxycodone and Xanax. The hospital records showed that Prater had not suffered any acute trauma in the accident.

In addition, Mark McGinnis testified that he saw Prater's vehicle traveling eastbound at approximately 50-55 miles per hour on the *westbound shoulder lane*, and that it had even ventured off of the shoulder causing the dirt to fly up. Both Chandra Evans and Justin Hurley testified that they saw the lights of Prater's vehicle on the

westbound shoulder lane approaching them. Trooper McCarty testified that his analysis of the tire skid marks and the damage to McGinnis's truck on the passenger side clearly indicated that Prater was driving in the westbound shoulder lane, rather than the eastbound lane as Prater claimed, just prior to the accident. Furthermore, McGinnis and Hurley denied seeing any red truck trying to pass vehicles in the westbound lane as described by Prater.

While Prater denied or attempted to counter the allegation of wanton conduct, the Commonwealth presented substantive evidence that she was traveling eastbound on the shoulder of the westbound lane and had traces of at least two drugs in her system that could impair driving. These facts are sufficient to establish that Prater engaged in wanton conduct and not just civil negligence.[22] The jury was free to evaluate the credibility of the witnesses and assess the weight of the evidence in resolving any conflicts in the testimony. The trial court was required to draw all fair and reasonable inferences in favor of the Commonwealth in deciding whether to grant a directed verdict. Viewing the evidence as a whole, Prater has not shown that it was clearly unreasonable for the jury to find her guilty of criminal conduct. Consequently, the circuit court did not err when it denied her motion for directed verdict.

The second issue Prater raises on appeal concerns her motion for mistrial based on prosecutorial misconduct during *voir dire* because the Commonwealth's attorney stated that the charges against Prater included operating a motor vehicle *second*

[22] *See, e.g.*, *Estep v. Commonwealth*, 957 S.W.2d 191 (Ky. 1997) (affirming conviction for wanton murder involving a vehicle accident based on evidence of five types of prescription drugs in the defendant's system).

offense. Defense counsel immediately objected and moved for a mistrial based on prejudice in revealing that Prater had a prior conviction for DUI.[23] The circuit court denied the motion and restated the charges referring to the operating of a motor vehicle under the influence second degree count as simply "driving under the influence." Prater contends that mentioning the fact that she had another DUI conviction introduced "unavoidable prejudice" that requires reversal of her conviction given the lack of evidence on this issue.

A trial court may declare a mistrial based on manifest or urgent necessity.[24] The court should declare a mistrial only if the harmful event is of such a magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.[25] "'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.'"[26] It is the prejudicial impact exposure to harmful information has upon a juror that is determinative, not the exposure itself.[27] The

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[23] *See Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996) (holding prosecution of misdemeanor DUI cases involving enhanced penalties for multiple convictions must utilize bifurcated guilt/penalty pleas and that evidence of previous DUI convictions may not be introduced until guilty verdict is rendered on the underlying DUI charge); *Dedic v. Commonwealth*, 920 S.W.2d 878 (Ky. 1990) (same).

[24] *See Moody v. Commonwealth*, 170 S.W.3d 393, 397 (Ky. 2005); *Turner v. Commonwealth*, 153 S.W.3d 823, 829 (Ky. 2005).

[25] *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005); *Maxie v. Commonwealth*, 82 S.W.3d 860, 862 (Ky. 2002).

[26] *Shabazz v. Commonwealth*, 153 S.W.3d 806, 811 (Ky. 2005) (quoting *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 737 (Ky. 1996)). *See also Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004).

[27] *See Davis v. Commonwealth*, 147 S.W.3d 709, 729 (Ky. 2004); *Gould, id.* at 739.

trial court has broad discretion in determining when a manifest necessity exists because it is best situated to assess the relevant factors to intelligently make such a decision.[28] Since whether to grant a mistrial is within the sound discretion of the trial court, we will not disturb its decision absent an abuse of discretion.[29]

In addition, a jury is presumed to follow a curative admonition so that it removes the prejudice precipitated by the event which brought about the admonition.[30] "There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was 'inflammatory' or 'highly prejudicial.'"[31]

The Commonwealth contends that Prater waived any error in failing to declare a mistrial because her attorney did not object to or request a more detailed admonition. When asked if he was satisfied with the court's restatement of the charges,

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[28] *Matthews, supra,* note 25 at 17; *Douglas v. Commonwealth*, 83 S.W.3d 462, 464 (Ky. 2001).

[29] *See Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005); *Shabazz, supra* note 26 at 811; *Neal v. Commonwealth*, 95 S.W.3d 843, 852 (Ky. 2003).

[30] *See Maxie, supra* note 25 at 863; *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky. 1993), *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997).

[31] *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (citations omitted) (emphasis in original). *See also Combs v. Commonwealth*, 198 S.W.3d 574, 581-82 (Ky. 2006); *Terry v. Commonwealth*, 153 S.W.3d 794, 800 (Ky. 2005).

defense counsel was non-committal but stated he wanted to preserve his right to insist on a mistrial. We do not consider this as an affirmative waiver of the issue.[32]

While the restatement of the charges by the trial court was not a detailed affirmative admonition, it arguably cured the error by implying that the jury should consider only the charge in the present prosecution. Further, neither of the two exceptions to the presumptive efficacy of an admonition apply in this case. The situation in this case did not involve questioning by the prosecutor during the trial so exception number two does not apply. With respect to exception number one, Prater has not shown there is an overwhelming probability that the jury would have been unable to follow the trial court's instruction or that there is a strong likelihood that the effect of the inadmissible evidence was devastating to her given the other evidence of her intoxication.[33] Thus, Prater has not demonstrated that she was entitled to a mistrial.

Furthermore, the Commonwealth argues that any effect of the prosecutor's inadmissible reference to a second DUI conviction was rendered harmless by subsequent events and testimony in the trial. During direct examination, Prater testified that she would not have been driving the night of the accident if she felt she were intoxicated or impaired. The Commonwealth's attorney then asked her several questions on cross-

[32] *See, e.g., Johnson, id.* at 441 (waiver of mistrial issue when defense counsel failed to request further admonition or a mistrial).

[33] *Cf. Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002) (The Court held that while admission of prior DUI convictions during guilt phase was improper such evidence was not sufficient to constitute substantial or palpable error under Ky. R. Crim. Proc. (RCr) 10.26. Even though there was no objective evidence of intoxication, the court held admission of defendant's prior DUI's on cross-examination did not result in manifest injustice because there was not a substantial possibility that the result would have differed had the evidence been excluded).

examination about her prior DUI conviction. Prater's testimony on direct examination, in effect, 'opened the door' for questioning by the prosecutor during cross-examination about her other DUI conviction to rebut her earlier testimony.[34] As a result, even had Prater been entitled to a mistrial, the admission of evidence on Prater's prior DUI conviction during her cross-examination rendered the prosecutor's statement during *voir dire* concerning a prior DUI conviction harmless error.[35]

The third issue Prater raises on appeal involves the denial of her motion for a new trial. On March 18, 2005, Prater filed a motion seeking a new trial. She claimed that her trial counsel had failed to subpoena and call as a witness, Vonda Helton, who allegedly had significant exculpatory information. Attached to the motion were the affidavits of Jarrett Wood, Prater's uncle, and Floyd Prater, Prater's brother. Wood stated that he learned from several sources that Helton had witnessed the accident and was willing to testify that an unidentified red pickup truck had caused the accident by driving in a reckless manner. Wood said that he informed defense counsel of this information along with Helton's address prior to trial, and urged counsel to call Helton as a witness. Floyd Prater stated that he had spoken with Helton at the hospital the night of

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[34] *See Johnson, supra* note 31 at 441 (holding prosecution can inquire about otherwise specific instances of conduct on cross-examination to rebut inadmissible character evidence)(citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 1.10 at 30-33 (3rd ed. Michie 1993) (stating that the introduction of inadmissible evidence by one party opens the door to the introduction of inadmissible evidence by the other party that negates, explains or counterbalances the prior inadmissible facts, especially when the inadmissible evidence is prejudicial)); *Purcell v. Commonwealth*, 149 S.W.3d 382, 399 (Ky. 2004) ("opening the door,' sometimes referred to as 'curative admissibility," occurs when one party introduces inadmissible evidence that 'opens the door' for the other party to introduce equally inadmissible evidence in rebuttal") (quoting *Norris v. Commonwealth*, 89 S.W.3d 411, 414 (Ky. 2002)).

[35] *See* RCr 9.24.

the accident, and Helton said she saw an unidentified red pickup truck come from behind several vehicles and cause the accident.

On May 5, 2005, the Commonwealth filed a response to the motion for new trial stating that Vonda (Helton) Arnett had no information useful to the defense. The Commonwealth attached Arnett's signed affidavit in which she stated that the accident had already occurred when she arrived on the scene and she had no memory of a circumstances related to the accident. Arnett further stated that she had spoken to defense counsel about testifying on behalf of Prater a few days before the trial and told him she was willing to testify but that she did not know anything that would help his case. The circuit court denied the motion for a new trial without explanation on May 5, 2005.

As in initial matter, we note that this issue was not properly preserved because the motion for new trial was untimely. Kentucky Rules of Criminal Procedure (RCr) 10.06 permits the making of a new trial motion based on newly discovered evidence within one year after the entry of a judgment or at a later time upon good cause, but *requires* that new trial motions under RCr 10.02 on all other grounds "shall be *served* not later than five (5) days after return of the *verdict*."[36] In this case, the jury verdict was returned on March 9, 2005,[37] and the motion for new trial was served on March 17, 2005. However, RCr 1.10(1) provides that in computing any period of time prescribed by the

[36] RCr 10.06(1) (emphasis supplied).

[37] The circuit court clerk did not file and enter the jury verdict until the next day, March 10, but the verdict was rendered on March 9, 2005.

criminal rules, the day of the relevant act or event after which the designated period begins to run is not included, the last day of the prescribed period is included unless it falls on a Saturday, Sunday, or legal holiday, and when the prescribed time limitation is less than seven days, and intermediate Saturday, Sunday and legal holidays are excluded from the computation.[38] Utilizing the formula delineated in RCr 1.10, Prater's motion for a new trial had to be served on or before March 16, 2005, because the calculation started on March 10, the intermediate weekend days of March 12 and 13 are not included, and the fifth day, March 16, is included. In addition, the motion concerns information known to Prater and defense counsel prior to trial, so it is not based on newly discovered evidence qualifying for the more extended one year filing period. Therefore, the motion for a new trial could have been denied by the circuit court on procedural grounds without reaching the merits of the motion.

In addition, Prater's motion for a new trial lacks substantive merit as well.[39] A trial court has broad discretion in ruling on a motion for new trial and we will not disturb that ruling absent an abuse of discretion.[40] Prater's complaint about trial counsel's failure to call Arnett as a witness amounts to a claim of ineffective assistance of

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[38] *See also Shadowen v. Commonwealth*, 82 S.W.3d 896 (Ky. 2002) (affirming the computational aspects of RCr 1.10 including the exclusion of intermediate weekends and holidays).

[39] *See, e.g., Bowling v. Commonwealth*, 168 S.W.3d 2, 5 (Ky. 2004) (exercising discretion to address merits of untimely RCr 10.02 motion based on newly discovered evidence involving death penalty.)

[40] *Whelan v. Memory-Swift Homes, Inc*., 315 S.W.2d 593 (Ky. 1958); *Disabled American Veterans, Dep't. of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541, 547 (Ky. App. 2005).

counsel.[41] In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair.[42] The defendant bears the burden of establishing both deficient performance and actual prejudice.[43] In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[44] A court must be highly deferential in reviewing defense counsel's performance and avoid second-guessing counsel's actions based on the benefit of hindsight.[45] The defendant must overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances

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[41] Generally, a claim of ineffective assistance of counsel will not be reviewed on direct appeal because there usually is no record or trial court ruling specifically on the issue and there is a potential problem of conflict of interest for trial counsel filing notices of direct appeal. *See Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998) (indicating the better approach involving claims not preserved by trial counsel is to first file a RCr 10.26 substantial or palpable error motion in the appellate court, and then if unsuccessful, to raise an ineffective assistance of counsel claim in a post-judgment collateral attack); *Hibbs v. Commonwealth*, 570 S.W.2d 642, 643 (Ky. App. 1978). However, where the ineffective assistance claim is specifically raised in a new trial motion and ruled on by the trial court, it may be reviewed on direct appeal. *Humphrey*, *supra*.

[42] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Thompson v. Commonwealth*, 177 S.W.3d 782, 785 (Ky. 2005).

[43] *See Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066; *Simmons v. Commonwealth*, 191 S.W.3d 557, 562 (Ky. 2006).

[44] *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064; *Thompson v. Commonwealth*, 177 S.W.3d 782, 785 (Ky. 2005).

[45] *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003); *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

counsel's action might be considered "trial strategy."[46] In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different.[47] A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.[48]

Prater's claim of ineffective assistance of counsel is refuted by Arnett's affidavit in which she states that she spoke with defense counsel prior to trial and informed him that she had not witnessed the accident and had no useful information. Defense counsel acted reasonably within the wide range of prevailing professional norms by contacting and interviewing Arnett and in deciding not to call her as a witness because she had no beneficial testimony to offer. Similarly, since Arnett did not witness the accident, any testimony she could have provided would not have created a reasonable probability that the outcome of the trial would have been different. Prater has not established either the deficient performance or actual prejudice element of an ineffective assistance of counsel claim. As a result, Prater's motion for a new trial was subject to denial on both substantive and procedural grounds, so she has not shown that the circuit court abused its discretion in denying the motion.

The judgment is affirmed.

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[46] *Simmons, supra,* note 43 at 562; *Moore v. Commonwealth*, 983 S.W.2d 479. 482 (Ky. 1998).

[47] *Roe v. Flores-Orgega*, 528 U.S. 470, 482, 120 S. Ct. 1029, 1037, 145 L. Ed. 3d 985 (2000); *Hodge, supra,* note 45 at 468; *Norton v. Commonwealth*, 63 S.W.3d 175, 177 (Ky. 2001).

[48] *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005); *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001).

ALL CONCUR.

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