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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000849-MR

MACK MATTHEWS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 15-CR-003365

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, NICKELL AND L. THOMPSON, JUDGES.

NICKELL, JUDGE: Mack Matthews challenges a complicity to first-degree robbery[1] conviction for which the Jefferson Circuit Court imposed the jury's recommended sentence of twelve years. Matthews claims the trial court twice

[1] Kentucky Revised Statutes (KRS) 502.020(1), 515.020, a Class B felony.

abused its discretion. First by denying his pretrial request to be tried separately from co-defendant Anthony Ball[2] and then by denying a requested mistrial after Ball suggested police violated the law prompting another jury admonition from the bench. Having reviewed the record, briefs and law, we affirm.

FACTS

Matthews and Ball[3] were jointly indicted on charges of complicity to commit both first-degree robbery and attempted murder.[4] In statements given to police on arrest, both men confessed to holding up the Seventh Street Food Mart in Louisville, Kentucky. Each man implicated himself and his co-defendant. In a nearly seven-hour police interview Ball admitted being the triggerman and shooting store employee David Bryant in the neck to "eliminate the threat." Matthews' own words, along with in-store video and footage from neighborhood cameras, placed Matthews inside the store as an active armed participant.

Ball filed several *pro se* motions, including one asking to serve as hybrid counsel[5] while being represented by appointed counsel. When the motion

[2] Ball filed a separate notice of appeal. He is not a party to this appeal.

[3] Ball was indicted on additional charges.

[4] KRS 506.010, a Class B felony.

[5] Akin to "acting pro se in part" with court permission. *Swan v. Commonwealth*, 384 S.W.3d 77, 93 (Ky. 2012), *as corrected* (Sept. 11, 2012), *as modified on denial of reh'g* (Dec. 20, 2012).

was heard, the trial court spoke candidly to Ball telling him acting as hybrid counsel is "rarely" a good idea and his attorney was in the best position to evaluate his options and potential outcomes. The court told Ball his motions were "nonsense" and "borderline frivolous," his theories were "wrong," there was no reason for him to be dissatisfied with counsel, and while Ball's concerns were "perfectly legitimate" they were not "based in fact." Finding Ball's request to be knowingly, voluntarily and intelligently made, the court granted the motion allowing Ball to serve as hybrid counsel and set ground rules for the representation to which Ball responded, "I'm definitely gonna try not to be difficult." At trial, Ball personally cross-examined most Commonwealth witnesses and gave his own closing argument.

During multiple pretrial conferences Ball never misbehaved. He did not use foul language or exhibit bad conduct. Being unfamiliar with court rules and practices he carefully observed the attorneys in the room. He modeled their actions but did not always grasp the nuances of their actions.

Both defendants moved pretrial for separate trials arguing the co-defendant's statement—both of which the Commonwealth planned to offer into evidence—could not be sufficiently redacted. Each man argued if the co-defendant did not testify he would be denied his Sixth Amendment right to confront his accuser. Matthews renewed his motion to sever trial during multiple

pretrial conferences and throughout the four-day trial. Matthews also moved to exclude his own redacted statement as well as that of Ball. Each motion was denied. Following redaction of each man's statement, the two were tried together.

A jury acquitted Matthews of complicity to commit attempted murder and first-degree assault but convicted him of being complicit in the first-degree robbery. The jury recommended Matthews serve the near-minimum penalty of twelve years which the court imposed.

In contrast, Ball was convicted of three substantive counts and being a first-degree persistent felony offender (PFO I). He received twenty years for first-degree robbery enhanced to fifty years; twenty years for attempted first-degree murder enhanced to life; and, ten years for being a convicted felon in possession of a handgun enhanced to twenty years. Enhancement resulted from Ball's PFO I status. All terms were run consecutively for a total of life plus seventy years.

Matthews offered no proof at trial; Ball offered a single witness. Matthews moved for a directed verdict at the close of the Commonwealth's proof and renewed the motion at the close of all proof. Matthews sought a mistrial based on trial court admonitions counsel alleges "bolster[ed] the testimony of [police] officers."

Prior to sentencing, Matthews timely moved for acquittal or a new trial. Neither was granted. We consider whether the trial court abused its discretion by denying Matthews' requests for a separate trial and a mistrial.

ANALYSIS

Matthews' first claim of error combines two arguments, only one of which is preserved. Pretrial and throughout trial he argued he should be tried separately from Ball. That claim is properly before us.

As part of this same error, he claims reversal is mandated by *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (introduction of non-testifying co-defendant's statement at joint trial denies defendant right of confrontation). While Ball cross-examined Detective Chris Middleton, Ball read aloud a line from his own police interview which had been redacted. While no contemporaneous objection was made at trial, Matthews requested palpable error review in his reply brief which is sufficient to trigger our consideration. *Commonwealth v. Jones*, 283 S.W.3d 665, 670 (Ky. 2009).

In advance of trial, Matthews repeatedly sought to be tried alone. However, "[a] criminal defendant is not entitled to severance unless there is a positive showing prior to trial that joinder would be unduly prejudicial."

Humphrey v. Commonwealth, 836 S.W.2d 865, 868 (Ky. 1992) (citing RCr[6] 9.16;[7] *Commonwealth v. Rogers*, 698 S.W.2d 839 (Ky. 1985)). A trial judge has considerable discretion in weighing a motion to sever. *Wilson v. Commonwealth*, 695 S.W.2d 854 (Ky. 1985); *Rachel v. Commonwealth*, 523 S.W.2d 395 (Ky. 1975). We will reverse only if we find an abuse of discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006). The test is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995); *cf. Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)).

RCr 6.20 allows joinder of two or more defendants for trial when each is "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Matthews and Ball were both accused of complicity to commit first-degree robbery and attempted murder at the Seventh Street Food Mart. *Ratliff*, 194 S.W.3d at 264, holds a joint trial is appropriate when co-defendants are alleged to have been involved in the same illegal activity. Joinder was appropriate under RCr 6.20, but that rule does not operate in a vacuum.

[6] Kentucky Rules of Criminal Procedure.

[7] RCr 9.16 was deleted as of January 1, 2015. RCr 8.31 is the current version of the rule.

RCr 6.20 must be read in tandem with RCr 8.31 which requires separate trials when "it appears that a defendant or the Commonwealth is or will be prejudiced" by joinder. A defendant seeking severance must demonstrate "joinder would be so prejudicial as to be unfair or unnecessarily or unreasonably hurtful." *Elam v. Commonwealth*, 500 S.W.3d 818, 822 (Ky. 2016) (citing *Ratliff*, 194 S.W.3d at 264)).

Matthews' and Ball's role in the hold-up was captured on both in-store and neighborhood video. Both men confessed their involvement to police—each implicating himself and his co-defendant. Their participation was beyond doubt.

Citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), Matthews argued Ball's statement could not be adequately redacted to eliminate prejudice to Matthews and if Ball did not testify, Matthews could not cross-examine his accuser. As an alternative to separate trials, Matthews asked for exclusion of Ball's statement. The Commonwealth opposed severance and exclusion, arguing references to Matthews could be adequately removed from Ball's statement and vice versa. Once redaction was completed in open court, the motion to sever was denied.

Other than unsatisfactory redaction of Ball's statement—and the potential denial of cross-examination—Matthews offered no support for his pretrial motion to sever. Because the statements of both men were redacted, and the morning the jury was selected Ball floated the idea of testifying in a limited capacity, Matthews did not satisfy *Elam*, 500 S.W.3d at 822. Separate trials were not mandated.

On appeal, Matthews argues Ball's pretrial behavior put the court on notice his service as hybrid counsel would be problematic. We disagree.

First, Ball asked to serve as hybrid counsel. That was an option he voluntarily, intelligently and knowingly chose to exercise and the trial court granted. *Nunn v. Commonwealth*, 461 S.W.3d 741, 748 (Ky. 2015).

Second, a single trial was consistent with RCr 6.20. There was no need to devote twice as many resources to separate trials where the charges and proof would be the same.

Third, Matthews describes Ball as exhibiting pretrial "recalcitrant tendencies," showing an "intent to play a difficult role in the case," "want[ing] to 'force' his way into the proceedings," and making "manipulative attempts to commandeer the litigation." In fourteen pretrial hearings we saw no such behavior. Ball was courteous and respectful throughout. There was simply no indication before trial Ball was or would be "unable or unwilling to abide by

courtroom protocol" or sought hybrid status "purely as a tactic to disrupt or delay proceedings." *Allen v. Commonwealth*, 410 S.W.3d 125, 134 (Ky. 2013).

Fourth, filing *pro se* motions—without more—does not require severance. Both defendants filed *pro se* motions. Ball closely observed the attorneys and mimicked what he saw them do as evidenced by a suppression hearing set for November 17, 2017. The suppression motion was not heard as planned because it was believed Ball had filed a competing motion without noticing it for a hearing. Ball calmly questioned how it was he had just observed counsel for Matthews walk a motion to the bench and it was heard that day, but his motion was not being heard when his filing bore notice for a hearing. On closer inspection of the record, the court discovered the error was not made by Ball, but rather was made by the clerk's office in considering the document to be a letter rather than a motion and not placing it on the docket.

During that same court date, Matthews attempted to independently place into the record a statement of his nationality and proclaim his name. Because such a document is not contemplated by Kentucky court rules, the trial court determined Matthews' attorney should review such documents and, if appropriate, place them in the record at Matthews' behest.[8] Were we to hold the filing of a *pro se* motion mandates separate trials, a defendant could easily manipulate the court.

[8] Ultimately seven such *pro se* documents bearing Matthews' name were placed into the record.

Fifth, asking to serve as hybrid counsel—without more—does not require separate trials. Were that the case, similar to filing a *pro se* motion, a defendant could easily ask to be named hybrid counsel, secure a separate trial, and then do nothing in total reliance on appointed counsel. Again, we will not expose the court to such manipulation.

> Several federal courts have held that, while "pregnant with the possibility of prejudice," a trial involving a pro se defendant and a represented co-defendant is not prejudicial per se. *United States v. Veteto*, 701 F.2d 136, 138–39 (11th Cir. 1983); *see also Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988); *United States v. Oglesby*, 764 F.2d 1273, 1275-76 (7th Cir. 1985); *United States v. Sacco*, 563 F.2d 552, 555-56 (2nd Cir. 1977); *State v. Canedo–Astorga*, 79 Wash. App. 518, 903 P.2d 500, 504 (1995). Rather than automatically granting a severance in such cases, these courts have suggested that certain precautionary measures be employed to minimize the possibility of prejudice, including
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> > appointing standby counsel, warning the pro se defendant that he will be held to the rules of law and evidence and that he should refrain from speaking in the first person in his comments on the evidence, and instructing the jury prior to the closing remarks, during summation and in final instructions, that nothing the lawyer said is evidence in this case. [T]he district judge should also make clear to the jury at the outset that anything the pro se defendant says in his 'lawyer role' is not evidence and should instruct the pro se defendant beforehand that he should both avoid reference to co-defendants in any opening statement or summation without prior

> permission of the court and refrain from commenting on matters not in evidence or solely within his personal knowledge or belief.
>
> *Veteto*, 701 F.2d at 138-39; *Oglesby*, 764 F.2d at 1275; *Sacco*, 563 F.2d at 556-57; *Canedo-Astorga*, 903 P.2d at 506. These courts have emphasized that such precautionary measures are "suggestions, not requirements, for preventing the possibility of prejudice from ripening into actuality" in a trial involving a pro se defendant and a represented co-defendant. *Veteto*, 701 F.2d at 138. We agree that these precautionary measures should be employed when a pro se defendant and a represented co-defendant are tried jointly.

State v. Carruthers, 35 S.W.3d 516, 553 (Tenn. 2000). The trial court employed the federal court suggestions quoted above. On the record before us, Matthews showed neither pretrial reason to sever nor abuse of trial court discretion. *English*, 993 S.W.2d at 945.

Sixth, Matthews maintains the trial court set no boundaries on Ball's role as hybrid counsel. Again, we disagree. When the court granted Ball's request it immediately set ground rules but left much for Ball and his attorney to decide. Serving as hybrid counsel is rare and no two cases are alike. Our Supreme Court has recognized, "there are countless variations on how the duties of the defense will be divided between a defendant and his hybrid counsel." *Nunn*, 461 S.W.3d at 750. Here, the trial court specified: if Ball's attorney disagreed with a motion proposed by Ball, the attorney would not file it; Ball and appointed counsel would

determine who would handle each witness; counsel—not Ball—would speak during bench conferences; and, Ball would be treated as an attorney which included following court rules and procedures.

As trial unfolded, the court exerted and retained control. Before beginning jury selection, all agreed the trial court would handle the bulk of *voir dire*. The trial court reiterated to Ball he should inquire of his attorney before asking any question of which he was unsure. The trial court cautioned Ball to be careful because there were boundaries he had to respect. The court also apprised all counsel it would direct jurors to neither favor nor reject Ball due to his self-representation.

One of the first items the court told jurors was Ball had elected to represent himself. During *voir dire*, one prospective juror asked whether it would be better to have two separate trials, prompting the court to explain two separate trials were occurring simultaneously. Once the jury was sworn, the trial court gave jurors a road map of what to expect. He specifically told them opening statement, closing argument and questions posed by lawyers are not evidence.

The trial court's control of the case was especially evident during Ball's cross-examination of Detective Matthew Crouch. The court called a recess, excused the jury from the courtroom and talked to the co-defendants and all counsel, primarily directing his comments to Ball. He began by telling Ball a good

faith basis is required for all questions and he could not invite the jury to infer police had broken the law. The court stated it did not allow attorneys to do such and would not allow Ball to do it. The court then took the opportunity to address other mistakes Ball was committing such as making comments and testifying rather than asking questions. The trial court forcefully stated,

> I can't protect you from you. But I have to protect Mr. Matthews from you. And I'm concerned that at some point that's gonna be a problem. We're not there yet, but, and I have great confidence in the jury's ability to understand this is *Commonwealth v. Ball*. This is *Commonwealth v. Matthews*. There are two different cases that we're trying at once. We talked about that during *voir dire*.
>
> But I need the record to reflect for purposes of review the great efforts to which counsel, and the court, and even the Commonwealth have gone, and will go, to make sure that the fact that Mr. Ball is representing himself is not the reason he gets convicted. This decision needs to be based on the evidence and the law. Period.
>
> But at some point you're gonna wear this jury out. And it's going to be—I'm assuming they're going to be able to do it because jurors are amazing creatures—but a court of review might not have the same level of faith in a jury that I do and they might think that particularly in a case—and this is not that case—but in case it were—if it were a really close case this might make a difference to what a court of review might think.
>
> So I'm taking the time now to say that you have asked for the opportunity to represent yourself. There are consequences associated with that and you cannot shield yourself from those consequences if you do a terrible job. And that's that.

. . .

> I'm telling you that I'm gonna call you out every time you do something in bad faith, or even, and I don't mean this unkindly, but through ignorance. Because the effect is the same. If you do something on purpose that has a—that could have a negative impact on the jury or you do it through ignorance—it's still a negative impact on the jury and I have to protect everyone from that.
>
> So, take some time before you ask the next questions. Take, use the advantage you have to have Ms. Kleier there to help you understand when you're probably doing something you're not supposed to do and that could either come back on you or require me to involve myself.
>
> When you talk about [police regulations] like they are matters of law . . . that gets me involved. So if you didn't do that or did it differently, you'd be better off. I'm imploring you to talk to Ms. Kleier about how better to approach those subjects—if you think they're things that you're bound to talk about. If there's problems, I can't ignore them. I can't do it.

In light of the foregoing warning, the trial court clearly recognized the situation and restricted Ball's conduct accordingly. While Ball often questioned witnesses about minutiae and revealed details only someone involved in the crime would likely know, the vast difference in sentence recommendations shows the jury did not hold Ball's conduct against Matthews. Ball was convicted on all counts and received the near-maximum sentence whereas Matthews was found guilty of a single charge and received the near-minimum. Furthermore, both men had already confessed involvement and were captured on videotape leaving no doubt of guilt.

The trial court is to be commended for navigating this case from return of the indictment on December 22, 2015, through entry of judgment and final conviction on May 31, 2018. At times the case was steered through murky waters which are inevitable anytime an untrained criminal defendant chooses to act as hybrid counsel. While a criminal defendant may have spent considerable time inside a courtroom, including Ball who has a lengthy criminal record, that does not make him a seasoned trial attorney. Still, he may choose to represent himself.

Few Kentucky cases address whether a co-defendant's self-representation mandates separate trials. *Humphrey*, 836 S.W.2d 865, cited by Matthews, is such a case but is factually distinct. Humphrey claimed the trial court should have *sua sponte* ordered her to be tried separately from her co-defendant because his *pro se* self-representation denied her a fair trial. The Supreme Court of Kentucky disagreed holding severance may be granted only when a defendant moves for a separate trial and before trial positively shows joinder would be unduly prejudicial. Additionally, the Court held no manifest injustice or prejudice resulted from a statement Humphrey's co-defendant made during closing argument which was unsupported by any proof. Just as in this case, jurors being told in Humphrey's trial opening and closing statements are not proof prevented manifest error. *Id.* at 868-69.

Just as *Humphrey* does not require reversal, neither does *Carruthers*, 35 S.W.3d 516, another capital case cited by Matthews. Carruthers and Montgomery were tried together. Carruthers engaged in "extreme and egregious" pretrial antics which included threatening his appointed defense team. *Id*. at 550. Such conduct ramped up as each trial date approached resulting in appointment of new counsel each time. When Carruthers repeated the ploy with his fifth and sixth attorneys—whom the trial court told him would be the attorneys representing him at trial—it was determined Carruthers had forfeited the right to counsel and would—and did—represent himself at trial. *Id.* at 551. Like Matthews in this case, Montgomery moved for severance before, during and after trial.

The judge in *Carruthers* tried to "accommodate the interest of judicial economy" and protect Montgomery from Carruthers, but he could not do both. *Id.* at 554. Carruthers introduced "statements . . . that would not have been admissible at a separate trial[,]" presented his case in a "grossly prejudicial fashion," used "offensive mannerisms," questioned witnesses so as to "elicit[] incriminating evidence," and called a particular witness whose testimony the government then used in summation. *Id.* at 552-54. The Supreme Court of Tennessee held those circumstances denied Montgomery a fair trial and ordered he be tried anew and alone.

Ball did nothing like Carruthers to prejudice Matthews. The appointed attorney who sat with Ball at trial was his second attorney, but there is no indication the attorney shuffle was initiated to deliberately delay trial.

Attempting to establish prejudice in this case, Matthews points to a single exchange between Ball and Detective Middleton.

> Ball: Detective, according to this transcript, did Mr. Ball say that he knew by the amount of blood that F-er's going to die, so we left so he could live?
>
> Officer: I don't have the transcript in front of me . . . but um, I would agree that you said something to that effect.

During redaction, use of the word "we" in Ball's original statement was removed, but Ball read it aloud while questioning the officer. Characterizing this as a *Bruton* violation—because Ball did not testify and was not subject to cross-examination—Matthews argues reversal is necessary. No contemporaneous objection was voiced at trial, but we review the claim for palpable error as requested.

> For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. If not, the error cannot be palpable.

Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (footnotes omitted). A *Bruton* error, as alleged here, is subject to harmless error analysis. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 747 (Ky. 2009) (citations omitted).

We begin by noting Matthews is complaining about a single question in a four-day trial in which jurors saw video of Ball and Matthews arrive at and enter the Seventh Street Food Mart. The video shows them with guns drawn engage people inside the store and then quickly exit the store. Jurors also heard recorded statements given by both men describing events inside the store during which Ball admitted shooting a man in the neck. One fleeting mention of the word "we" by Ball did not seal Matthews' fate and convict him of a single charge in a multi-count indictment for which he received almost the minimum sentence. Furthermore, the word "we" was not uttered until *after* jurors had already heard Matthews' recorded statement in which he personally admitted pointing a gun at the store's owner. Moreover, jurors had been admonished Ball's questions were not evidence.

There was no chance of a different result. The "integrity of the judicial process" was not threatened. *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006), *as modified* (May 23, 2006). Any error was harmless at most and far from palpable. No prejudice from a joint trial—before, during or after—was shown.

Matthews' second claim of error is that Ball's self-representation was so extreme the trial court should have imposed the extreme remedy of declaring a mistrial. We review the trial court's denial of a mistrial for an abuse of discretion. *English*, 993 S.W.2d at 945.

"Manifest necessity," also described as an "urgent or real necessity," is the threshold which must be surpassed for a trial court to declare a mistrial. *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000). Because lack of manifest necessity may prevent retrial, a criminal case should not be lightly taken from a jury. *Nichols v. Commonwealth*, 657 S.W.2d 932, 933 (Ky. 1983) (citing *United States v. Perez*, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824); *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)).

Matthews argues a mistrial was necessary for the same reason he claims he should have been tried separately—Ball's actions as hybrid counsel infringed his right to a fair trial. This claim appears to be based on admonitions the trial court gave in the wake of Ball attempting to show his confession was coerced. The Commonwealth objected and at the bench Ball admitted he had no proof of coercion. The trial court warned Ball he could not impugn the integrity of the investigation and could not urge jurors to base their decision on something other than whether the Commonwealth had proved the elements of its case. In the wake

of Ball's questions to officers, the trial court gave the following limiting admonition about use of this testimony.

> Folks, I think we've, we've touched on this a couple times before. The line of questioning from Mr. Ball to the detectives about their conduct may be considered by you to the extent that you think that their conduct affects their credibility. You may not consider that testimony to either expressly or implicitly suggest that they did anything that was unlawful or unconstitutional.
>
> The danger is, that if you were to think that, that you might nullify your obligations as jurors. And that you might decide—you're not really going to do this by the way—it's just the danger that, that you might disregard the evidence and the law because you don't like what the police officers did. And that you think that it should be done differently, or better, or something else.
>
> So, I'm obliged to tell you they did not violate the Constitution of the United States; did not violate the Constitution of Kentucky; they broke no laws. They did nothing at all that would give you cause to believe that their actions were inappropriate.
>
> But you may consider those actions to infer or to inform your opinion about them individually as people and you may use that opinion to screen their testimony to decide whether you believe what they're saying is true or not.
>
> That's like six years of law school, and law school only lasts three years, and we've done it in thirty seconds. But, but you all got what I'm talking about, right? Is there anybody who's confused about that? Sometimes evidence comes in and you can consider it for one purpose but not another.

On the heels of the admonition, counsel for Matthews asked to approach the bench. She expressed ongoing concern the trial court's admonitions during Ball's questioning appeared to be "potentially inappropriate bolstering" of the police officers and was "negatively affecting" Matthews. She lodged a formal objection and requested a mistrial. The trial court noted and denied the objection saying it was preserved for appeal. The court then stated,

> I think the purpose [of the admonition] is appropriate, and more to the point, it is exactly what I would do with anybody.
>
> Besides, Mr. Ball was doing what Mr. Ball was doing. You can introduce evidence for one purpose but not another. It's not unusual for a court to direct a jury to do so.
>
> So, I appreciate what you're saying, but I, if I had concerns it was affecting Mr. Matthews to the point that he wasn't getting a fair trial, I'd do something about it, but we're just not there.

KRE[9] 105(a) supports the giving of an admonition restricting use of evidence for a proper purpose. "[A]dmonitions are preferred over mistrials[.]" *St. Clair v. Commonwealth*, 455 S.W.3d 869, 892 (Ky. 2015) (citing *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)). A mistrial "should be granted sparingly and only 'if [the] harmful event is of such magnitude that a litigant

[9] Kentucky Rules of Evidence.

would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way[.]'" *Id*. Here, the trial court's limiting admonition properly restricted the jury's use of testimony while avoiding a mistrial. There was no abuse of discretion.

For the reasons expressed herein, the decision of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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