

Supreme Court of Kentucky

2025-SC-0175-MR

VICTOR EUGENE GARDNER

APPELLANT

V. ON APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE JOE W. HENDRICKS, JR., JUDGE
NO. 22-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE CONLEY

AFFIRMING

Victor Eugene Gardner appeals as a matter of right from a judgment of the Logan Circuit Court convicting him of first-degree rape, second-degree unlawful transaction with a minor, two counts of third-degree unlawful transaction with a minor, and of being a first-degree persistent felony offender. The trial court sentenced Gardner to life imprisonment in accordance with the jury's recommendation.

Gardner raises five claims of error. He argues that: (1) the trial court should have declared a mistrial due to the lead detective's contact with prospective jurors and jurors' premature discussion of testimony; (2) the trial court committed palpable error by admitting records of Snapchat communications; (3) the Commonwealth improperly used those communications to impeach N.T.; (4) the prosecution recalled Detective

Edmonds to bolster testimony; and (5) the trial court should have directed a verdict on the first-degree rape charge.

The most significant issue is that of the premature discussion by jurors. Considering the evidence as a whole, the trial court created a record sufficient to assess the nature and probable effect of the misconduct. It therefore did not abuse its discretion by denying the motion for a mistrial. Gardner's remaining claims likewise establish no reversible error. We affirm.

I. Facts and Procedural History

M.L. testified that Gardner forced her into sexual intercourse during an overnight stay at N.T.'s home. M.L. and N.T. testified, as did several other witnesses. The Commonwealth also presented digital communications, investigative testimony from law enforcement, and medical evidence. Gardner's defense hinged on inconsistencies among the witness accounts, as well as limitations in the medical evidence.

One irregularity occurred right away. Before voir dire began, Detective Edmonds spotted a former teacher in the jury pool. The two acknowledged one another and even hugged briefly while speaking. Other prospective jurors were present to witness this interaction. The trial court characterized the interaction as improper, and defense counsel questioned the panel about it. Two prospective jurors said they had seen the hug but insisted it would not affect their fairness. The court apparently erred on the side of caution and excused

each of them. The prospective juror whom Edmonds hugged was also not seated on the jury.

During trial, the Commonwealth questioned N.T. about Snapchat communications involving her account, confronted her with particular messages, and presented three exhibits containing records of those communications after she identified them. N.T. identified some of the communications and testified about conversations in which she participated, but she did not authenticate entries across all the pages she was presented. She disagreed with some of the Commonwealth's characterizations and offered her own version of the communications. Detective Edmonds explained that the records had been obtained through the investigation in response to legal process, although he was not very familiar with their format. The certificate from Snapchat that should have accompanied its production of the communications was not introduced, and the messages were confusingly read in reverse chronological order. Gardner did not object to the admission of the exhibits or to the Commonwealth's questioning of N.T.

L.D. testified that she overheard a telephone conversation involving Gardner. When questioned about whether Gardner made an incriminating statement concerning M.L., L.D. hesitated, then said she had told Detective Edmonds about the remark. She similarly acknowledged, with qualification, the location she had previously identified. The Commonwealth later recalled Edmonds, who—over Gardner's objection—testified that L.D. showed no similar

hesitation during her first interview and clearly mentioned the incriminating statement and location.

The most significant irregularity emerged on the final day of trial, after the Commonwealth rested. Juror P.P. sent a note requesting to speak with the trial court. P.P. reported that, during a break in M.L.'s testimony, jurors had discussed it in the jury room. He stated that "there was nothing of, like, a verdict that was discussed," but that jurors made comments concerning "their interpretation" of what had occurred on the witness stand. VR 2025-01-23_12.36.23.092 at 17:00–18:00. P.P. returned to the jury room but was brought back for follow-up questions. He stated that although only about three to five jurors were actual participants, the conversation occurred in front of the whole jury. He estimated that the discussion lasted one to two minutes.

The court asked whether the participating jurors had formed any conclusions, but also instructed P.P. not to identify what that conclusion was, if any. P.P. said a conclusion was strongly suggested but denied hearing explicit discussion of one: "it can be heavily implied what the conclusion could be based on what they said." *Id.* at 20:00–21:00.

Gardner moved for a mistrial, but the Commonwealth suggested, and defense counsel agreed, that the court first question the jurors individually. The judge called each juror in separately, keeping previously questioned panelists apart from the group. Three other jurors in addition to P.P. recalled hearing some discussion of witnesses by fellow jurors. One recalled comments concerning the emotional effect of seeing M.L. testify. Another remembered

someone noting inconsistencies between some witnesses. A third recalled a fellow juror questioning whether a witness's memory could be reliable given the time that had passed. None of the three remembered hearing any discussion concerning conclusions about witness credibility or ultimate issues in the case. None said that they had participated in an inappropriate conversation, only that they overheard comments from others. The remaining jurors said they did not recall any inappropriate conversations or that they were not listening.

No juror reported that the jury had discussed a verdict. No juror stated that the jury had agreed upon Gardner's guilt or innocence. And no juror stated that the discussion had caused them to form an opinion about a witness or the case that could not be set aside. Following this inquiry, Gardner renewed his mistrial motion. The Commonwealth argued that although some improper conversation had occurred, no prejudice had resulted in light of the inquiry. The trial court denied Gardner's motion.

The jury convicted Gardner of first-degree rape, second-degree unlawful transaction with a minor, two counts of third-degree unlawful transaction with a minor, and also of being a first-degree persistent felony offender. The jury recommended a life sentence, which the trial court imposed. This appeal followed.

II. ANALYSIS

A. The trial court properly exercised its discretion when it refused Gardner's mistrial requests.

Gardner's initial argument concerns two separate incidents. The first occurred before voir dire, when Detective Edmonds spoke to potential jurors. The second occurred during trial, when a group of jurors talked about testimony before the court gave them the case.

We review denial of a mistrial for abuse of discretion. A trial court abuses its discretion where its ruling is arbitrary, unreasonable, unfair, or unsupported by the evidence. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). While both incidents raised by Gardner were improper, under the totality of the circumstances they did not rise to the level of requiring termination of the trial.

1. Detective Edmonds's encounter with potential jurors

The trial court correctly characterized the interaction as improper. But improper conduct does not itself require a mistrial. The question is whether the incident caused a problem that jury selection could not fix, or that a more rigorous process of selection left untried could have fixed. "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." *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996). A mistrial is an extraordinary remedy appropriate only when a fundamental

defect in the proceedings creates a manifest necessity to terminate the trial. *Sutton v. Commonwealth*, 627 S.W.3d 836, 856 (Ky. 2021). “It is the prejudice that is of import in making the mistrial decision.” *Commonwealth v. Padgett*, 563 S.W.3d 639, 647 (Ky. 2018). “[I]f an otherwise flagrant violation of a court order leaves the jury merely unaffected, or is cured by admonition, then a mistrial is improper, even given a party's impermissible breach of court order.” *Id.*

Much as in *Wright v. Commonwealth*, 590 S.W.3d 255, 260–61 (Ky. 2019), Gardner has not shown that any juror who decided the case was influenced improperly—or even at all—by this incident. The trial court investigated and dismissed the prospective jurors who admitted witnessing it. The prospective juror whom Edmonds hugged was also not seated. The trial court declined to discharge the entire panel, and that decision was not an abuse of its discretion.

2. The premature discussion of witness testimony

Jurors who, contrary to the judge’s instructions, discuss the evidence before the case is submitted to them for deliberation commit misconduct. *Graham v. Commonwealth*, 319 S.W.3d 331, 340 (Ky. 2010); RCr 9.70; KRS 29A.310(1). When credible information comes to the court that jurors may have engaged in meaningful inappropriate discussion about the case, the court must investigate further. The right to an impartial jury requires “a jury capable and willing to decide the case solely on the evidence before it,” as well as “a trial judge ever watchful to prevent prejudicial occurrences and to determine the

effect of such occurrences when they happen.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

After conducting an adequate inquiry, the court is required to grant a mistrial only if the juror misconduct creates a reasonable likelihood of impact on the verdict. *Conyers v. Commonwealth*, 530 S.W.3d 413, 427 (Ky. 2017). This depends on the circumstances of the particular case, and we have not adopted a fixed test for determining when premature juror discussion specifically creates a reasonable likelihood of prejudice. “Each case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting.” *Id.* In addition to this prejudice analysis, some juror misconduct might effectively cause one or more members of the jury to become partial or biased. Were that to happen, the error is structural error, and prejudice is presumed. *Commonwealth v. Douglas*, 553 S.W.3d 795, 799–800 (Ky. 2018).

In this case, the testimony of the jurors provided a sufficient basis to find that misconduct had occurred. At least some jurors heard other jurors discussing testimony before the case was submitted to them. The Commonwealth acknowledged that the issue was whether the misconduct rose to the level of prejudice, not whether misconduct had taken place. The question is whether the trial court abused its discretion by finding that the misconduct did not rise to that level.

Gardner points to the court’s instruction that P.P. not reveal the “implied conclusion” he believed could be inferred from what he overheard. Gardner

contends that the court prevented itself from learning information that might have demonstrated the prejudicial effect of the misconduct, and that its resulting finding of no prejudice was therefore an abuse of discretion.

To be sure, we do not mandate a particular script. Trial courts have considerable discretion as to the form and scope of the inquiry. That said, we agree with Gardner that a court does not have discretion to avoid learning the information it needs to make its decision. The court must assemble a record that allows it to get to the bottom of what the misconduct was, how serious it was, and its likely effect on the jury.

But the adequacy of the inquiry must be judged based on all the information learned through the questioning of the jurors, not simply what was learned during the initial conversation with P.P. The judge's initial exchange with P.P. was incomplete. The court knew that several jurors were alleged to have discussed a witness's testimony and that P.P. believed their comments implied a conclusion. The court should have asked P.P. to explain what he heard and to describe the comments themselves to the extent he remembered them.

Despite this, the court went on to conduct a more methodical inquiry and questioned every juror one at a time. It identified the handful of comments remembered by jurors other than P.P.: the overheard emotional reaction of one unidentified juror to the testimony of M.L.; the overheard puzzlement of an identified juror about some of the differences in the testimony; and the overheard skepticism of another juror regarding a witness's ability to remember

events. None of these jurors reported an express conclusion about Gardner's guilt or innocence, an agreement about the outcome of the case, or a fixed opinion that could not be set aside.

Their accounts also did not corroborate P.P.'s description of a conversation involving three to five jurors and occurring in front of the entire jury. No other juror described a conversation of that scope. Instead, the other jurors who remembered anything described isolated comments concerning different aspects of the testimony.

The question, then, is whether the record developed after all the jurors were questioned permitted the trial court to find that the misconduct was not of a "degree and pervasiveness" reasonably likely to affect the verdict. *Conyers*, 530 S.W.3d at 427.

Kentucky cases illustrate the range of circumstances that may arise when analyzing possible juror taint. Although *Lawless v. Commonwealth*, 724 S.W.3d 679, 692–94 (Ky. 2025), arose in a different context, it demonstrates circumstances sufficiently severe to establish structural error in the form of a partial jury even if actual prejudice is murky. There, extrajudicial information reached the entire jury during deliberations, communicated the trial court's own adverse assessment of a key witness's credibility, and caused one juror to report an inability to decide the case based solely on the evidence. This Court found the information inherently prejudicial because it rendered the jury no longer impartial and was thus a structural error.

By contrast, in *Woodard v. Commonwealth*, 219 S.W.3d 723, 729–30 (Ky. 2007), a concern about possible premature discussion arose after one juror requested that the defendant provide a handwriting sample. The trial court’s inquiry established that the jury had not discussed the case and that no other juror had joined in the request, and this Court affirmed the denial of a mistrial.

The circumstances here are substantially closer to *Woodard* than to *Lawless*. Unlike in *Woodard*, the inquiry established that some premature discussion of the testimony occurred. But no extrinsic information reached the jury, no juror reported that an express conclusion about Gardner’s guilt or innocence had been stated, and no juror indicated that the discussion had produced a fixed opinion or impaired the ability to decide the case impartially.

Even if the court had allowed P.P. to identify the conclusion he inferred, his answer would have remained one account for the trial court to weigh alongside the materially different accounts given by the other jurors. The court had before it no report of an express conclusion, no account of an agreement about the outcome of the case, and no indication that any juror’s mind had been made up. The record therefore provided a reasonable basis for the trial court to find that the misconduct was not of a degree and pervasiveness reasonably likely to affect the verdict under *Conyers*.

Gardner also characterizes the premature discussion as structural error requiring reversal without a separate showing of prejudice, as described in *Douglas*, 553 S.W.3d at 799-800, and as was found under the facts of *Lawless*. Once a defendant establishes that an actually biased or irreparably tainted jury

decided the case, the resulting denial of an impartial jury is structural and is not subject to harmless-error review. Prejudice is presumed even if it is not clear that the verdict was affected. *Id.* Gardner has not established that predicate violation here. No juror testified to having reached a fixed conclusion before deliberations, and the trial court's inquiry did not otherwise establish that the jury was actually biased or irreparably tainted. The same record that supports the trial court's finding that the misconduct was not reasonably likely to affect the verdict therefore also defeats Gardner's structural-error characterization.

B. Gardner has not established palpable error in the admission of the Snapchat records.

Gardner challenges the admission of three exhibits containing records of Snapchat communications. He argues that they were not properly authenticated and included inadmissible hearsay. Gardner did not object when this evidence was offered, so we review for palpable error under RCr 10.26. Palpable error must be plain, affect substantial rights, and result in manifest injustice. *Davis v. Commonwealth*, 620 S.W.3d 16, 30 (Ky. 2021).

As is sometimes the case when law is practiced in the real world, the presentation of these exhibits was not ideal. Detective Edmonds was not very familiar with the records' format. The certificate from Snapchat that should have accompanied its production of the communications was not introduced. N.T. identified some of the communications but did not authenticate entries

across all pages she was presented. Furthermore, the messages were confusingly read in reverse chronological order.

Those circumstances would have supported a contemporaneous foundational objection, at which point, if sustained, the Commonwealth would have had to do some more work to get the records authenticated. No objection was raised, however, so the Commonwealth had no reason to fix what might have ailed the evidence, as no ailment was suggested.

The existing record does not establish an obvious evidentiary violation. If the defense had objected to these exhibits being admitted on authentication grounds, the trial court's decision whether or not to admit them would be reviewed under an abuse of discretion standard. *Brafman v. Commonwealth*, 612 S.W.3d 850, 866 (Ky. 2020). N.T. identified communications tied to her account and testified about the conversations she participated in. Detective Edmonds explained that the records were obtained through the investigation in response to legal process. With these indicia of authenticity present, we cannot say it would have been an abuse of discretion to admit the exhibits.

In other words, this would have been a fact-dependent authentication issue, to be decided after the Commonwealth did its best to overcome an authentication objection. With no such objection having been made, the evidence does not present a plain and readily perceptible error.

Nor has Gardner shown manifest injustice. The witnesses testified concerning the communications and they were available for cross-examination. The defense was game for cross-examination and exposed the confusion

created by the order and presentation of the messages. Even if we assume that some portion of the exhibits should have been excluded, Gardner has not demonstrated a probability that their admission altered the result of the trial.

No palpable error occurred.

C. Gardner has not established palpable error from the Commonwealth's questioning of N.T.

Gardner separately argues that the Commonwealth improperly used the Snapchat communications to impeach N.T. This claim is also not preserved.

The Commonwealth questioned N.T. about communications involving her account, confronted her with particular messages, and presented the exhibits after she identified them. N.T. disagreed with some of the Commonwealth's characterizations and offered her version. Again, the defense did not object at trial, so the court was never asked to decide whether the questions were proper for a particular purpose allowed under the rules of evidence, such as for impeachment, authentication, refreshed recollection, etc. It does not seem to us that Gardner has identified any obvious violation of KRE 607, KRE 613, or KRE 403 that resulted in manifest injustice. He is not entitled to palpable-error relief.

D. Any error in allowing Detective Edmonds to recount L.D.'s prior statement was harmless.

L.D. testified that she overheard a telephone conversation involving Gardner. When questioned about whether Gardner made an incriminating statement concerning M.L., L.D. hesitated, then said she told Detective

Edmonds about the remark. She similarly acknowledged, with qualification, the location she had previously identified. The Commonwealth later recalled Edmonds, who – over Gardner’s objection – testified that L.D. showed no similar hesitation during her first interview, and clearly mentioned the incriminating statement and location.

Gardner argues that L.D.’s prior account was not inconsistent with her trial testimony because she did not deny making the statements, and so the detective should not have been permitted to testify about the prior account under KRE 801A(a)(1). Gardner also says the detective’s testimony was not permitted as a recalled witness under KRE 613 because it did not introduce any new facts. It merely described how confident she had allegedly been at an earlier time.

We need not decide whether the difference between L.D.’s prior certainty and her trial hesitation was sufficient to permit the detective’s testimony under KRE 613 and KRE 801A(a)(1). Rather, taking the evidence in the light most favorable to Gardner’s argument that its admission was error, we hold that even if the detective’s testimony should not have been permitted, the mistake was harmless. In this case, the very considerations raised by Gardner against its admissibility also indicate harmlessness. After all, the jury knew about the prior statements L.D. had made to police, because L.D. acknowledged she had made them during her testimony before the jury. After all, Detective Edmonds added no substantially new evidence: he mainly described L.D.’s prior

confidence. The jury observed her demeanor and could judge any hesitation for themselves.

A nonconstitutional evidentiary error is harmless when the Court can determine with reasonable confidence that the judgment remained largely unaffected. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). Considering the testimony as a whole, we are satisfied that Detective Edmonds’s minimal testimony about L.D.’s previous certainty did not affect the jury’s decision.

E. The trial court properly denied Gardner’s motion for a directed verdict.

Finally, Gardner argues that the evidence presented at trial was insufficient to sustain the first-degree rape charge and that his motion for a directed verdict on that count should have been sustained.

When deciding a directed-verdict motion, the trial court should draw all reasonable inferences for the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, reversal is appropriate only if, viewing all the evidence, it would have been clearly unreasonable for the jury to find guilt. *Id.*

M.L. testified that Gardner forced her into a sexual encounter that would meet the elements for first-degree rape. Gardner’s defense noted inconsistent witness accounts and evidence that could undercut M.L.’s story, if believed by the jury. But conflicting testimony and proposed contradictions in the evidence goes to credibility and weight. The existence of such issues for the jury to have

to weigh says nothing about whether there is sufficient evidence for a reasonable guilty verdict. The jury had every right to accept M.L.'s account despite evidence that didn't quite match up with, or that seemed contradictory to, that account. The jury's finding Gardner guilty of first-degree rape was reasonable.

The trial court properly denied the directed-verdict motion.

III. CONCLUSION

The jurors' premature discussion violated the trial court's admonition, and the trial court's initial instruction that P.P. not identify the conclusion he believed the comments implied unnecessarily limited the first stage of the inquiry. But the court thereafter questioned every juror individually and developed a record sufficient to determine the nature and scope of the discussion. That record did not establish that the jurors had made up their minds or that Gardner's case was decided by a partial jury.

Because the trial court did not abuse its discretion by denying a mistrial, and because Gardner's other claims do not establish reversible error, the judgment of the Logan Circuit Court is affirmed.

All sitting. All concur.

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