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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-000144-MR

JEFFREY W. JENNINGS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 04-CR-00145

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Jeffrey W. Jennings (Jennings) brings this appeal from a judgment of the Henderson Circuit Court entered December 29, 2004, upon a jury verdict. He was adjudged guilty of intimidating a witness<sup>2</sup> and first-degree wanton endangerment,<sup>3</sup> both enhanced on convictions of first-degree

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

<sup>2</sup> Kentucky Revised Statutes 524.040, class D felony.

<sup>3</sup> Kentucky Revised Statutes 508.060, class D felony.

persistent felony offender (PFO I),<sup>4</sup> and sentenced to concurrent ten-year and fifteen-year terms of imprisonment, for a total of fifteen years. He was also adjudged guilty of misdemeanor third-degree terroristic threatening<sup>5</sup> and sentenced to a concurrent nine month term of imprisonment.<sup>6</sup> We affirm.

On February 22, 2004, Jennings had lived with his girlfriend Cindy Simpson (Simpson) for five months. On that morning Jennings questioned Simpson, as he had on numerous previous occasions, about her resuming a relationship with an ex-boyfriend named Ricky, a relationship which Simpson had repeatedly denied. That morning, as Simpson continued denying the relationship, Jennings' anger increased. Jennings sent Simpson's six-year old child outside to play. He grabbed a large carving knife off of the divider between the kitchen and living room, carried it into the living room, and set it on the coffee table, repeating his demand. Simpson felt that Jennings brought out the knife to scare her. Jennings looked out the front door to check on the six-year old. As Simpson continued to deny the relationship with Ricky, Jennings grabbed the knife, walked behind Simpson, and extended his arm over her shoulder with the knife in his hand at her throat, with the blade facing

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<sup>4</sup> Kentucky Revised Statutes 532.080.

<sup>5</sup> Kentucky Revised Statutes 508.080, class A misdemeanor.

<sup>6</sup> The jury found Jennings not guilty of Kentucky Revised Statutes 508.030, fourth-degree assault, a class A misdemeanor.

away. Although at trial Simpson did not recall telling the police that at this point Jennings threatened to kill her if she did not tell the truth, she would not dispute that this is what she told the police. (On cross-examination, Simpson admitted that Jennings picked up the knife and threatened to kill her that day if she did not tell him the truth). Scared, and fearful for her life, Simpson admitted that she had been with Ricky while she and Jennings were split up. Jennings put the knife down, asking Simpson why she did not tell the truth from the beginning.

When Jennings went to the front door to again check on the child playing outside, Simpson, still scared, ran to the back door, stumbling and falling as she got to the door. Jennings chased after her and asked her to come back in the house, which she refused to do. A struggle ensued at the door. At trial, Simpson could not recall telling the police that Jennings kicked her in the leg while they were struggling at the back door, but did not dispute that is what she told them. She yelled out the back door for her thirteen-year old, who was staying at a neighbor's, to call the police. She suffered bruises on her legs.

Although Jennings wanted Simpson to return to the house, Simpson told him she was going to her mother's so things could calm down. She asked him to get the car keys and put the

six-year old in the car. When Simpson got to the car, Jennings was in the car with the six-year old. Simpson was still scared of Jennings. Jennings told Simpson not to go to her mom's. She did not recall telling the police that Jennings told her she could not leave if she were going to call the police. As she began driving Jennings convinced her to drive to a particular parking lot so they could either talk or he could get out of the car.

Once in the parking lot, Simpson turned off the car's engine. Jennings removed the keys from the ignition. He questioned Simpson about whether she had also lied to him about the six-year old visiting her ex-husband, Mike, at his house. (Apparently Jennings did not like the fact that the six-year old and Mike, who was not the child's biological father, had a close relationship.) Simpson admitted the lie. She did not recall telling the police that Jennings then told her he would kill her before the day was over. She also did not recall telling the police that Jennings threw the car keys back at her before he got out of the car and walked or ran away, wearing only his boxer shorts and a t-shirt. Simpson did admit that, at some point during the argument this day, Jennings threatened to kill her, although she did not believe it at the time.

Simpson drove to her mother's house, and upon her mother's advice, called the police. Jennings called Simpson

several times from payphones and finally from Simpson's friend's house. One time he wanted to know if she was all right; another if she had called the police; and another to see if she would bring him clothes. With her thirteen year-old in the car, she met Jennings at a roadside spot, dropped off some clothes, and left him. Upon the plea of the upset thirteen-year old, Simpson returned and took Jennings back to the home they shared. She then returned to her mother's. Based on information provided by Simpson, arrest warrants were issued on Jennings for the four charges upon which he was ultimately indicted.

Two days later, Simpson, still afraid of Jennings, called the police and reported that Jennings called her that day, threatening to kill her if she did not go to the county attorney's office to drop the charges. At trial, however, she did not recall telling this to the police.

That same day, Jennings was arrested on the charges. Once Jennings was in custody, Simpson asked for and obtained an emergency protective order (EPO) against Jennings. In the EPO petition, Simpson affirmed that earlier that same day, Jennings had threatened to kill her, her kids and her parents if she did not help him get out of the charges. The petition also asserted that on February 22, 2004, after he beat her and held a butcher knife to her throat, he stated that he was going to burn her house with her and the kids in it.

At the time of the trial, Simpson and Jennings had reconciled. She prepared an affidavit for his benefit, and testified that she could not recall much if any of what the police reported she had said about the incidents.

Before us, Jennings argues that the trial court abused its discretion in overruling his motions 1) for a mistrial based on the introduction into evidence of two references to Jennings' prior criminal history;<sup>7</sup> 2) for a directed verdict as Simpson's contradictory testimony proved insufficient and violative of federal and state due process;<sup>8</sup> and 3) for insufficient evidence of competency violative of federal and state due process.<sup>9</sup>

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). As we conclude that the findings of the circuit court are supported by substantial evidence and are not an abuse of discretion, and that the court correctly applied the law, we affirm.

Jennings first argues an abuse of discretion by the trial court in refusing to declare a mistrial regarding admission of evidence in violation of Kentucky Rules of Evidence

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<sup>7</sup> Jennings withdrew one claim of evidentiary error following the Commonwealth's argument that it was not preserved for our review.

<sup>8</sup> U.S. CONST. amend. V and XIV; KY. CONST. § § 2, 11, 14.

<sup>9</sup> U.S. CONST. amend. V and XIV; KY. CONST. § § 2, 11, 14.

(KRE) 404(b). Specifically, he complains of the admission of testimony by the investigating officer that, when asked what Simpson told him after running to the back door, she reported that Jennings told her that morning not to call the police because he did not want to go "back to jail," on the basis that at trial, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." KRE 404(b).

As stated in Sherroan v. Commonwealth, 142 S.W.3d 7, 17 (Ky. 2004):

A mistrial is unwarranted absent a "manifest" or "real necessity" for such an extraordinary remedy. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 82 (2000) (internal quotations omitted). This high standard results from the presumption that an admonition "can cure a defect in testimony." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997). See also Price v. Commonwealth, Ky., 59 S.W.3d 878, 881 (2001). The presumption is overcome in only two situations: (1) when an overwhelming probability exists that the jury is incapable of following the admonition and a strong likelihood exists that the impermissible evidence would be devastating to the defendant; or (2) when the question was not premised on a factual basis and "was 'inflammatory' or 'highly prejudicial.'" Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 441 (2003) (citations omitted). This standard is the same where the movant waives the protections of an admonition due to oversight or as a matter of trial strategy. *If an admonition is*

*offered in response to a timely objection but rejected by the aggrieved party as insufficient, the only question on appeal is whether the admonition would have cured the alleged error. Graves v. Commonwealth, Ky., 17 S.W.3d 858, 865 (2000) (no error in refusing to grant mistrial because admission of impermissible evidence could have been cured by an admonition, which defendant did not request).*

Emphasis added. Thus, the question before us is whether the offered admonition would have cured the alleged error.

Following from Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003), it is difficult to conclude based on the evidence before the jury that the jury was incapable of ignoring the brief reference to Jennings' desire not to go "back to jail," and even more questionable to conclude that the comment was "devastating" to Jennings' defense. See generally Caudill v. Commonwealth, 120 S.W.3d 635, 660 (Ky. 2003); Bledsoe v. State, 21 S.W.3d 615, 624 (Tex.Ct.App. 2000).

The second exception is inapplicable as well, as the remark was unsolicited, thus the requirement that the impermissible testimony originate from a question lacking a factual basis is unmet. Also, because there was no reference to the underlying reason why Jennings could have been in jail, the testimony was not "inflammatory." Johnson, supra, at 441. There was no manifest necessity warranting a mistrial.

Jennings next argues a violation of federal and state due process in the trial court's failure to grant his motion for a directed verdict.<sup>10</sup> Specifically, Jennings argues that Simpson's contradictory testimony resulted in her being a witness with no credibility whose testimony should have been rejected as a matter of law, and thus was insufficient to sustain a guilty verdict. As to sufficiency of the evidence, our standard of review is as follows:

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 juror to believe beyond 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 the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Following from Benham, *supra*, under the evidence as a whole it was not clearly unreasonable for the jury to find Jennings guilty as charged. Although Simpson vacillated, she

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<sup>10</sup> Despite the Commonwealth's argument that this issue is not preserved, we conclude from our review of Jennings' motion for a directed verdict that the issue is ripe for our review.

did testify that Jennings threatened to kill her if she did not go to the county attorney's office to drop the charges, supporting the intimidating a witness charge; that Jennings held a knife to her throat putting her in danger of death or serious physical injury in extreme indifference to human life, supporting the first-degree wanton endangerment charge; and that Jennings threatened injury or death to Simpson, supporting the third-degree terroristic threatening charge.

Additionally, Simpson's prior inconsistent statements were admitted for substantive as well as impeachment purposes. Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969); KRE 801A(a). Simpson told the police that Jennings threatened to kill her; held a knife to her throat, threatening to kill her; and threatened to kill her if she did not go to the county attorney's office and drop the charges. These statements were sufficient evidence for reasonable jurors to find Jennings guilty beyond a reasonable doubt as charged. Benham, *supra*. It has long been held that it is not within our purview to disturb the jury's determination of the weight of conflicting evidence and witness credibility, unless it is so improbable on its face as to require rejection as a matter of law. Taylor v. Commonwealth, 301 Ky. 109, 190 S.W.2d 1003 (Ky. 1945). The evidence herein does not meet that standard. There was no error

by the trial court in overruling Jennings' directed verdict motion.

Jennings lastly complains that the trial court abused its discretion in finding him competent, contending that the examining doctor conducted insufficient testing and investigation given Jennings' history of a prior head injury during an assault and possible mental health issues. The sole witness at Jennings' competency hearing was Clinical Psychologist Robert B. Sivley, Jr., Psy.D. Dr. Sivley was appointed by the court upon an agreed order to examine Jennings for criminal responsibility and competency. In so doing, he interviewed and tested Jennings, and reviewed court documents and Jennings' medical and mental health history. With regard to criminal responsibility, Dr. Sivley found that Jennings was functioning in the moderately mentally retarded range of intellectual capabilities. Because at one time he had a higher (albeit borderline) reading, Dr. Sivley opined that the current reading possibly resulted from a previous brain injury from an assault with a baseball bat, but in any event, the lower reading did not prevent Jennings from understanding that the criminal behaviors with which he was charged were illegal at the time of their alleged occurrence. Additionally, although Jennings had a history of behavioral problems resulting in several diagnoses, none of the diagnoses suggested that Jennings had ever had

difficulty perceiving reality or experienced psychotic symptoms, beyond depression and anxiety, and as such, Dr. Sivley concluded that Jennings did not have a mental illness which prevented him from comprehending the nature of the law or conforming his behavior to it. Additionally, Dr. Sivley found that Jennings demonstrated a reasonably good understanding of the charges against him, his particular legal situation, and legal issues in general, including the roles of the various parties in the criminal justice system, and as such, concluded that he was capable of participating rationally in his own defense.

Based on the above, the court stated:

Let the record reflect the court after hearing Dr. Sivley's testimony here today and also the report dated June 15, 2004, where the author of that was Dr. Sivley the court is going to find that after considering all evidence that Mr. Jennings, as the doctor has testified, he understands the charges against him. He's also aware that the role of the defense attorney, the prosecutor, the jury, and then after talking to him the judge, the court is going to find that Mr. Jennings is capable of participating rationally in his own defense and therefore, not only that, I'm just pulling out some of the significant areas, but after considering the entire report the court is going to find that Jeffrey W. Jennings is competent to stand trial.

Upon Jennings' objection to the court's findings, contending that the investigation and testing for anxiety, depression and intelligence was insufficient because of his history of head

injury, multiple personality, possibility of bipolar disorder, and schizophrenia, the court further stated:

The court understood that was a potential issue for you and the doctor said that he felt that additional testing in reference to the issues that you raised were not necessary in order for him to come to his medical conclusion that he did make in his report.

According to Hopewell v. Commonwealth, 641 S.W.2d 744, 748 (Ky. 1982):

The trial court has a broad discretion in determining whether a defendant has the ability to participate rationally in his defense.

The defense carries the burden of incompetency. Jacobs v. Commonwealth, 58 S.W.3d 435, 440 (Ky. 2001). As Dr. Sivley was the only witness, his testimony and conclusions were not disputed. It is clear, therefore, that the trial court's findings are supported by the record and that the court correctly applied the law; thus there was no abuse of discretion by the court in finding Jennings competent to stand trial.

For the foregoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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