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**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000213-MR

PETER MBUGUA

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE DANIEL T. GUIDUGLI, SPECIAL JUDGE  
ACTION NO. 08-CR-00276

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS, AND WINE, JUDGES.

ACREE, JUDGE: On November 21, 2008, a Boone Circuit Court jury found the appellant, Peter Mbugua, guilty of second-degree manslaughter. The Boone Circuit Court entered a judgment consistent with the jury's verdict and sentenced Mbugua to nine (9) years imprisonment. Mbugua now appeals his conviction to this Court, asserting four claims of reversible error: (1) he was entitled to a

judgment of acquittal because the Commonwealth failed to establish that he acted wantonly, the required *mens rea* for second-degree manslaughter; (2) he was denied the right to effective cross examination and a fair opportunity to introduce character evidence; (3) he was unduly prejudiced by the admission of irrelevant evidence admitted contrary to KRE<sup>1</sup> 404(b); and (4) he was denied due process during the trial's penalty phase as a result of the prosecutor's misleading statement of law during the Commonwealth's closing argument. Finding no error, we affirm.

### **I. FACTS AND PROCEDURE**

On March 4, 2008, Mbugua, a sixty-year-old truck driver, was involved in a motor vehicle accident that resulted in the death of twenty-two year old Joseph Lonneman. The accident occurred when Mbugua's was unable to bring his tractor-trailer to a stop after he exited Interstate 75 and proceeded down the Richwood exit ramp. As he proceeded toward the intersection at the end of the ramp, Mbugua swerved into the ramp's left-hand shoulder. Mbugua entered the intersection, running the red light, and collided with Lonneman who was riding a motorcycle. Lonneman died shortly thereafter at a nearby hospital.

After the accident, members of the Boone County Sheriff's office investigated. Mbugua informed them that his brakes had failed. The officers instructed Mbugua to follow them on the interstate highway to a nearby weigh station. Mbugua did so, traveling at a speed of approximately thirty miles per hour.

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<sup>1</sup> Kentucky Rules of Evidence.

An inspection of the tractor and trailer at the weigh station revealed multiple violations of state law and of the Federal Motor Carrier Safety Regulations, 49 C.F.R.<sup>2</sup> §§ 392, 393, 396 (2010). Twenty-three violations were cited, nine of which were brake-related. Combined, Mbugua's tractor and trailer had ten sets of pneumatic brakes, six on the tractor and four on the trailer, corresponding to the tractor's three axles and the two axles on the trailer. The trailer's brakes were completely inoperative as a result of a disconnected airline. Only three of the tractor's brakes were fully operational, two were out of adjustment, and one was completely inoperable.

In May of 2008, Mbugua was indicted on a charge of second-degree manslaughter. Mbugua's case proceeded to trial. At the conclusion of the Commonwealth's case, Mbugua moved for a directed verdict of acquittal on the grounds that the Commonwealth failed to prove Mbugua caused Lonneman's death by wanton or reckless conduct. The court denied Mbugua's motion. He was convicted and sentenced to a prison term of nine years. Mbugua then filed a motion for judgment notwithstanding the verdict which was also denied. This appeal followed. As additional facts become relevant, they will be discussed.

## **II. ANALYSIS**

Mbugua argues he was entitled to a directed verdict of acquittal because the Commonwealth failed to prove he acted either wantonly or recklessly. Mbugua also contends multiple evidentiary errors occurred during the trial's guilt phase.

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<sup>2</sup> Code of Federal Regulations.

Finally, Mbugua asserts that the prosecutor's misconduct during the Commonwealth's closing argument in the trial's penalty phase warrants reversal. We examine each of Mbugua's claims of error in turn.

#### **A. Directed Verdict of Acquittal**

Mbugua contends the Commonwealth failed to produce any evidence that he wantonly or recklessly caused Lonneman's death. We disagree.

“The Commonwealth bears a burden of proof in establishing each element of the charged crime, else a motion for a directed verdict by the defendant must be properly entertained.” *Williams v. Commonwealth*, 721 S.W.2d 710, 712 (Ky. 1986). On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

*Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, he is entitled to a directed verdict of acquittal.

*Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). The same standard is applied when this Court reviews a trial court's denial of a motion for judgment notwithstanding the verdict. *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007).

Having reviewed the record, we decline to reverse Mbugua's conviction because the Commonwealth presented sufficient evidence that Mbugua acted

wantonly resulting in the death of another human being. Consequently, it was reasonable for the jury to convict Mbugua of second-degree manslaughter.

At trial, the Commonwealth presented testimony from two deputies of the Boone County Sheriff's Office, John Christmann and Frank Faulkner, who inspected Mbugua's tractor-trailer immediately following the accident.

Deputy Christmann, a certified commercial vehicle inspector, testified that after Mbugua arrived at the weigh station, he inspected the undercarriage of Mbugua's tractor-trailer. He explained to the jury that of the ten sets of brakes on Mbugua's vehicle, only three sets of brakes were operable under federal standards. Deputy Christmann testified that the four brakes located on the trailer were completely inoperable as a result of a disconnected blue airline. As for the tractor's brakes, Deputy Christmann explained three were fully operational, two were out of adjustment, and one was completely inoperable.

Deputy Christmann addressed federal regulations that establish the standard for brakes on commercial vehicles, explaining specifically how each brake met or failed to meet the standard. The only fully operational brakes were the two brakes located on axle one, the front steering axle, and the left brake on the tractor's axle two. Deputy Christmann also testified how braking efficiency is reduced when brakes are out of adjustment. He explained that drivers can feel that brakes are not tight and fully operational by pressing the pedal. He further indicated that several of Mbugua's brakes were rusted over from lack of friction.

Deputy Frank Faulkner, an accident reconstructionist, testified that he was unable to determine the speed of Mbugua's truck as it entered the intersection because no skid marks were visible. In fact, he could find no evidence of braking at the scene of the accident. Deputy Faulkner did testify, however, that he observed Mbugua driving to the weigh station and saw that Mbugua did brake upon entering the scales and was able to stop. When Deputy Faulkner arrived at the weigh station, he questioned Mbugua about the state of his tractor-trailer, and reviewed Mbugua's log book. Mbugua informed Deputy Faulkner that, on the day of the collision, he conducted the pre-trip inspection of his tractor-trailer, as required by federal law,<sup>3</sup> which included checking the truck's brakes, but found nothing wrong. Mbugua's inspection was reflected in his log book which he had signed that day. Mbugua's log book contained daily notations indicating Mbugua had been driving the truck for several days before the accident.

After the interview, Deputy Faulkner examined Mbugua's tractor-trailer, including the brakes. He confirmed Deputy Christmann's testimony concerning the condition of Mbugua's brakes. Deputy Faulkner testified that in all his years he had never seen brakes in such poor condition. Additionally, Deputy Faulkner testified that the rust on Mbugua's brakes indicated inadequate pressure and friction for stopping.

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<sup>3</sup> 49 C.F.R. § 396.13 states that "[b]efore driving a motor vehicle, the driver shall (a) [b]e satisfied that the motor vehicle is in safe operating condition." *See also Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 825 (Tenn. 1994) (noting that 49 C.F.R. § 396.13(a) requires a truck driver to "perform a pre-trip inspection which satisfies the driver that certain critical parts of the truck are operating properly").

Upon seeing the poor condition of Mbugua's brakes, Deputy Faulkner was compelled to investigate further. Consequently, he collected repair receipts from Mbugua and began contacting service centers that worked on Mbugua's tractor-trailer prior to the accident.

Matthew Perkins, a prior manager at Traveler's Center of America in Pennsylvania, testified that on February 21, 2008, Mbugua brought his truck to the Traveler's Center and asked a mechanic to disconnect the battery and reset the brake indicator light that would not go out. Perkins complied with Mbugua's request and also performed a routine oil change. As part of the oil change, a mechanic typically conducts a visual inspection of the vehicles' brakes. Perkins confirmed, however, that the Traveler's Center did not service Mbugua's brakes and was unaware if the brake indicator light remained on after being reset.

Carl Spencer, from the Virginia Truck Center, testified that on February 27, 2008, Mbugua brought his truck to the Truck Center to have the front left steer axle repaired. Spencer testified that Mbugua's tractor-trailer was in "rough" condition having been brought to the truck center on a wrecker after the left tire and axle had been damaged and caught fire. Spencer indicated that Mbugua should have felt the problem with the steering axle and had the truck repaired sooner. Instead, Mbugua continued to drive the truck until the more significant damage occurred. Consequently, the repair which would have cost \$500 to \$1000 dollars ultimately cost \$3,845.20 dollars.

On March 2, 2008, Mbugua had his truck repaired at Traveler's Center of America in New York. Curt Novak testified to quoting Mbugua a price for the replacement of his red emergency air line that connects the tractor to the trailer's brakes. However, Mbugua was not satisfied with the price and left. Several hours later, Mbugua returned and had the Traveler's Center replace the red air line. Later that day, Mbugua called and complained that his blue air line was broken. Novak told Mbugua the truck would need to be towed in order to get it safely back to the shop. The next day, Mbugua showed up at the repair station driving the truck. Mbugua showed Novak the broken blue air line, but declined to have it replaced because the Traveler's Center would not repair it for free. Novak identified the disconnected blue air line taken from the scene of the accident as the same blue air line Mbugua previously brought to the Traveler's Center repair shop.

A witness for the defense and a certified mechanic, Wayne Smith, testified regarding Mbugua's ability to brake. Smith stated that stopping distance is increased when brakes are out of adjustment and testified that brakes were in ideal adjustment when "pushrods" stick out of the brakes between one inch and one and one-fourth inches. Prior prosecution testimony was that pushrods on two of the tractor's sets of brakes exceeded the federal regulatory maximum of two inches. Smith believed Mbugua's brakes were so far out of adjustment that they provided "no braking whatsoever." He also testified that when properly adjusted, trailer brakes were not needed to stop because the tractor brakes should do most of the stopping. Therefore, he postulated that if the all Mbugua's tractor brakes had



worked properly, the accident would not have occurred despite the fact that the trailer brakes were disconnected.

Additional testimony was presented regarding the brakes and their repair history, but we have set forth a sufficient sampling for our purposes.

“Second-degree manslaughter requires proof that the defendant ‘wantonly cause[d] the death of another person.’” *Elliott v. Commonwealth*, 976 S.W.2d 416, 418 (Ky. 1998) (quoting KRS<sup>4</sup> 507.040(1)). “A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists” and the defendant’s conduct constitutes a gross deviation from the applicable standard of care. KRS 501.020(3). Wantonness “presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor’s conduct serves.” *Brown v. Commonwealth*, 174 S.W.3d 421, 425 (Ky. 2005). Accordingly, for a jury to find a defendant guilty of second-degree manslaughter, the Commonwealth must prove: (1) the conduct in question involved a substantial and unjustifiable risk of death to human life; (2) the defendant, in causing the death in question, was aware of and consciously disregarded that risk; and (3) his disregard constituted a gross deviation from the standard of conduct that a reasonable person would have observed in the situation. KRS 501.020 (1974 cmt.); KRS 507.040(1).

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

Alternatively, reckless homicide requires the jury to find that a defendant caused the death of another through recklessness. KRS 507.050(1). “A person acts recklessly with respect to a result or to a circumstance . . . when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” KRS 501.020(4). The difference between wanton conduct and reckless conduct turns on the defendant’s state of mind. More simply, “wanton conduct involves conscious risk-taking while reckless conduct involves inadvertent risk-creation.” KRS 501.020 (1974 cmt).

While the Commonwealth must prove “every element of the defendant’s guilty beyond a reasonable doubt . . . we have long held that *mens rea*, specifically intent, can be inferred from circumstances.” *Commonwealth v. Wolford*, 4 S.W.3d 534, 539 (Ky. 1999); *see also Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002) (emphasizing that “because a person is presumed to intend the logical and probable consequences of his conduct, a person’s state of mind may be inferred from his actions preceding and following the charged offense”). “The testimony of a single witness which is assigned a likelihood of truth is sufficient to support a finding of guilty and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all the evidence in the case, the factfinder assigns greater belief to the accuracy and reliability of the one witness.” *Beaumont v. Commonwealth*, 295 S.W.3d 60, 67 (Ky. 2009) (quoting *Murphy v. Sowders*, 801 F.2d 205, 210 (6th Cir. 1986)). This Court lacks the authority to re-weigh the evidence or insert its

judgment in place of the jury. *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky.

1994). As explained by the United States Supreme Court, appellate review

does not require a court to “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.” *Woodby v. INS*, 385 U.S., at 282, 87 S.Ct., at 486 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

*Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In the case before us, we must determine whether there was sufficient evidence to support a finding that Mbugua wantonly caused Lonneman’s death. The conduct in question is Mbugua’s act of driving a tractor-trailer on public roadways with inoperable and inadequate brakes. The jury could reasonably conclude that driving such a vehicle on an interstate with only three out of ten sets of brakes properly functioning under non-emergency circumstances constituted a “substantial and unjustifiable risk of death to human life.” *See Brown*, 174 S.W.3d at 427 (stating that the “homicidal risk of entering an intersection against a red light at a high rate of speed is obviously high” and the defendant lacked a social utility justifying driving his vehicle in such a manner, “*e.g.*, rushing a dying person to a hospital”). As noted by Deputy Faulkner, tractor-trailers are not designed to stop on a dime, which is one of the reasons they are equipped with multiple sets of

brakes. Further, Smith confirmed that brakes that are out of adjustment provide no braking whatsoever and had all tractor brakes worked properly, the accident would not have occurred. Driving a tractor-trailer on a public highway with inadequate brakes presents “a risk too great to be deemed justifiable by any valid purpose.”

*Brown*, 174 S.W.3d at 425.

Sufficient evidence also was presented from which the jury could reasonably conclude that Mbugua was aware of and intentionally disregarded that risk. Eleven days before the accident, Mbugua informed a mechanic that his brake indicator light was on, alerting Mbugua that his brakes needed attention, but asked the mechanic to re-set his brake light rather than service the brakes. Just two days before the accident Mbugua informed another mechanic that his blue airline was disconnected, thereby disabling the trailer’s brakes. And yet Mbugua continued to drive the vehicle for two more days during which, according to testimony, he should have been able to feel the reduced braking ability when he attempted to apply the brakes. On the day of the accident, he had conducted a pre-trip inspection which included checking the truck’s brakes.

The jury was free to consider this evidence in combination with evidence of the numerous safety violations found upon inspection immediately after the accident, and the testimony from multiple mechanics regarding Mbugua’s prior unwillingness to repair his truck. Based on the record, we cannot say that it was unreasonable for the jury to infer that Mbugua was aware of the poor condition of his vehicle, including his brakes, and that yet he chose to drive the truck on public

highways and endanger the public. Furthermore, it was not unreasonable for the jury to conclude that Mbugua's disregard of the risk constituted a gross deviation from the standard of conduct that a reasonable person would have observed in the situation. *See Hookie v. State*, 136 S.W.3d 671, 676 (Tex. App. 2004) (finding that a "jury could have reasonably concluded [that a truck driver's'] continued operation of the truck with brakes out of adjustment constituted a gross deviation from the standard of care an ordinary person would have exercised under those circumstances").

Viewing all fair and reasonable inferences from the evidence in favor of the Commonwealth, and deferring to the jury's determinations as to the credibility of the witnesses and the weight of the testimony, we find that the Commonwealth presented sufficient evidence for the jury to reasonably conclude that Mbugua was aware of and consciously disregarded a substantial and unjustifiable risk that his inoperable and inadequate brakes would cause the injury or the death of another person. *See Beaumont v. Commonwealth*, 295 S.W.3d 60, 70-71 (Ky. 2009). Therefore, the trial court did not err in denying Mbugua's motion for a directed verdict of acquittal and motion for a judgment notwithstanding the verdict.<sup>5</sup>

## **B. Court's Refusal to Allow Mbugua's Introduction of Character Evidence**

Mbugua next argues that the trial court abused its discretion by not allowing him to adequately refute improper character evidence. Specifically, Mbugua

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<sup>5</sup> Based on our conclusion, Mbugua's additional argument is moot that the Commonwealth presented insufficient evidence that he recklessly caused Lonneman's death.

contends that the Commonwealth “opened the door” to character evidence normally excluded by KRE 404(a) when its witness, Andy McBeak, a personal friend of Lonneman, testified on direct examination regarding Lonneman’s good character. Consequently, Mbugua asserts he was entitled to rebut the improper character evidence by inquiring into Lonneman’s prior traffic history on cross-examination. We disagree.

The Commonwealth elicited the following testimony from McBeak on direct examination, without objection.

Q. Was [Lonneman] a fairly responsible guy?

A. Of course, yes. I felt safer with him, more than anybody else, even my own family members. He was my “big brother.” And I felt safe with him no matter what.

...

Q. In your opinion, could [Lonneman] handle his bike pretty well?

A. Oh yeah. Oh yeah. [Lonneman] was one of the types that he could. Didn’t matter what he hopped in – car, truck, construction vehicle – if it could be driven he could drive it and he could drive it flawlessly. For some he just had that niche.

In reviewing a trial court’s evidentiary ruling, we apply an abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion 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).

KRE 404 provides, in pertinent part:

(a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(2). Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

KRE 404(a)(2) prohibits the Commonwealth from introducing evidence of the victim's good character for the purpose of proving conduct in conformity therewith unless and until the defendant has put the victim's character in issue. *Caudill v. Commonwealth*, 120 S.W.3d 635, 659-60 (Ky. 2003); Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.15[4][c] (4th ed. LexisNexis 2003) ("The prosecution may not introduce evidence of a victim's character until the accused initiates an issue over the victim's character by calling witnesses to testify to the victim's bad character.").

The Commonwealth argues it was proper for it to extract testimony regarding Lonneman's good character to refute Mbugua's claim that Lonneman's irresponsible and poor driving skills contributed to the accident. However, prior to McBeak, no testimony had been offered by Mbugua regarding Lonneman's character. Under similar circumstances, such testimony has been deemed inadmissible. *See Caudill*, 120 S.W.3d at 659-60 (finding it was error for the Commonwealth to admit evidence of the victim's cautious character prior to the defendant making the victim's character an issue); *Fairrow v. Commonwealth*, 175

S.W.3d 601, 604-05 (Ky. 2005). However, Mbugua did not object to this testimony and its admissibility is not directly in issue.

Rather, Mbugua contends that the Commonwealth's introduction of improper character evidence permitted him, pursuant to the doctrine of curative admissibility, to ask McBeak about Lonneman's specific traffic violations. The trial court's refusal to allow such cross-examination, Mbugua argues, was reversible error. We disagree.

The Kentucky Supreme Court has described the doctrine of curative admissibility as follows:

Wigmore distilled the issue to this question: "If the one party offers an inadmissible fact that is received, may the opponent afterwards offer similar facts whose only claim to admission is that they negative or explain or counterbalance the prior inadmissible fact?" *See* 1 Wigmore, *Evidence in Trials at Common Law*, 731 (Tillers' rev.1983). In a typical case, a witness will make an inadmissible assertion and the opposing party is then permitted to introduce evidence to the contrary.

*Norris v. Commonwealth*, 89 S.W.3d 411, 414 (Ky. 2002); *see also Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003) (finding the introduction of inadmissible character evidence may open the door to otherwise inadmissible evidence of specific instances of conduct offered by the opposing party to negate, explain, or counterbalance). Additionally, KRE 405(b) provides that "[o]n cross-examination of a character witness, it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct." [KRE 405\(b\)](#); Lawson, *The Kentucky Evidence Law Handbook* § 2.15[4][c] ("[C]ross-examers



may ask character witnesses if they have heard *or* know about specific acts that are relevant to the character trait to which they have testified on direct.”).

Under the abuse of discretion standard, “trial courts retain broad discretion to regulate cross-examination” and set appropriate boundaries. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997); *Bratcher v. Commonwealth*, 151 S.W.3d 332, 342 (Ky. 2004). In setting such boundaries, the trial court must remain cognizant of the remaining rules of evidence, particularly KRE 403. *See Commonwealth v. Prater*, 324 S.W.3d 393, 400 (Ky. 2010) (emphasizing trial court’s retention of discretion to allow Commonwealth to attack the witness’s statement or to require “that the matter drop on grounds of issue proliferation, jury confusion, or waste of time”); *see also Bearint ex rel. Bearint v. Dorel Juvenile Group*, 389 F.3d 1339, 1349 (11th Cir. 2004) (“[E]xtent to which otherwise inadmissible evidence is permitted must correspond to the unfair prejudice created [and] trial court must also weigh the need for and the value of the rebuttal evidence against the prejudice for undue delay, confusion and prejudice.”); *Manual v. City of Chicago*, 335 F.3d 592, 597 (7th Cir. 2003) (“Even after the door has been opened, the district court is required to weigh the need for and value of curative admissibility of previously inadmissible evidence . . . against the potential for undue delay, confusion, and prejudice.”).

The Commonwealth “opened the door” when its witness, McBeak, offered impermissible character evidence regarding Lonneman. On cross-examination, the trial court allowed Mbugua to ask McBeak if he was aware of Lonneman’s traffic

history and the existence of traffic violations, but prohibited Mbugua from eliciting further specifics. Consequently, despite Mbugua's argument to the contrary, he was permitted to introduce evidence that Lonnenman had a history of traffic violations to deflect the Commonwealth's character evidence that Lonnenman was a responsible person and a safe driver. The trial court, in permitting this line of inquiry, simply exercised its discretion by regulating the scope of Mbugua's cross-examination to limit jury confusion and waste of time.

We find no abuse of discretion in the trial court's evidentiary ruling.

### **C. KRE 404(b) Other Wrongs or Bad Acts Evidence**

Mbugua contends he was unduly prejudiced by the admission of Deputy Christmann's vehicle examination report which disclosed twenty-three violations of state and federal laws, nine of which were brake related.<sup>6</sup> Specifically, Mbugua contends that Deputy Christmann's testimony regarding the non-brake related violations and the vehicle examination report setting forth such violations contravened KRE 404(b), resulting in the admission of irrelevant and unduly prejudicial evidence.

The trial court questioned whether the disputed evidence constituted KRE 404(b) evidence, but ultimately determined that Deputy Christmann's testimony regarding the non-brake violations and the vehicle examination report were

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<sup>6</sup> The remaining violations pertained to administrative and other equipment failures, including inoperable brake lights, an oil/grease leak on axle two, a cracked windshield, an inadequate fire extinguisher, defective lamps, and decal, registration, and tax violations.

relevant and probative to show Mbugua's overall disregard for the upkeep of his tractor and trailer, and not unduly prejudicial. We agree.

“[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). However, this rule does not prohibit the admissibility of evidence (1) offered to prove something other than one's conformity with a particular character trait, or (2) that is so “inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.” *Id.* In determining admissibility under KRE 404(b), the trial court must employ a balancing test and only admit such evidence that it is relevant, probative, and not outweighed by the potential prejudicial effect. *Bell v. Commonwealth*, 875 S.W.2d 882, 888-91 (Ky. 1994); *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). The United States Supreme Court has explained the interplay between 404(b) evidence and relevancy.

Rules 401 and 402 establish the broad principle that relevant evidence – evidence that makes the existence of any fact at issue more or less probable – is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, “its probative value is substantially outweighed by the danger of unfair prejudice.” Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is

necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as [relevancy, probativeness, and prejudice].

*Huddleston v. United States*, 485 U.S. 681, 687-88, 108 S.Ct. 1496 (1988).

The trial court's decision that evidence was relevant, probative, and not substantially outweighed by prejudice will only be disturbed upon a showing of an abuse of discretion. *Burton v. Commonwealth*, 300 S.W.3d 126, 136-37 (Ky. 2009) (acknowledging that determining whether evidence is relevant and if its probative value is substantially outweighed by its prejudicial effect is a "task properly reserved for the sound discretion of the trial judge"); *Cook v. Commonwealth*, 129 S.W.3d 351, 361-62 (Ky. 2004) (noting "the outcome a KRE 403 balancing test is within the sound discretion of the trial judge"). As noted, a trial court abuses its discretion when it has acted arbitrarily, unreasonably, unfairly or without support from sound legal principles. *English*, 993 S.W.2d at 945.

Considering its relevance, probativeness, and prejudice, we cannot conclude that the trial court abused its discretion by admitting this evidence.

### **(1) Relevance**

Evidence is relevant if it has any tendency to make a fact more or less likely than it would be without the evidence. KRE 401. KRE 404(b)(1) lists several uses for prior bad acts or other wrongs evidence, other than to prove character, including proof of intent, motive, plan, and absence of mistake. As previously explained by this Court:

[W]here evidence is admissible to provide [a] full presentation of the offense [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae* [or the whole picture]. As further pointed out by Lawson, the case law from which the language utilized in KRE 404(b)(2) is extracted suggests that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective.

*Norton v. Commonwealth*, 890 S.W.2d 632, 638 (Ky. App. 1994) (internal quotation marks omitted).

The vehicle examination report revealing multiple violations of state and federal law and Deputy Christmann's testimony regarding such violations were relevant to Mbugua's mental state because the evidence illustrated Mbugua's overall disregard for the maintenance and safe operation of his tractor and trailer. Additionally, the numerous violations tended to establish that Mbugua was aware of the poor condition of his tractor and trailer, including the condition of his brakes. Further, Deputy Christmann's testimony supplies the jury with necessary background information concerning how he conducted his investigation and ultimately discovered the condition of Mbugua's brakes. The thoroughness of Deputy Christmann's investigation lends weight to his testimony and the Commonwealth's case was simply incomplete without this explanation.

## **(2) Probativeness**

Relevant evidence that falls under a KRE 404(b) exception must still survive KRE 403's probative-versus-prejudice analysis. *Billings*, 843 S.W.2d at 892. "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences." *Huddleston*, 485 U.S. at 685, 108 S.Ct. 1496. Evidence of other wrongs or acts is probative if "the jury could reasonably infer that the prior bad acts occurred and [the defendant] committed such acts." *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997).

In this case, Deputy Christmann's testimony and the vehicle examination report were probative of Mbugua's *mens rea*; *i.e.* whether he was aware of and consciously disregarded the substantial and unjustifiable risk that the unsafe condition of his tractor-trailer would result in the death of another human being. The evidence provided the jury with circumstantial evidence from which it could surmise that Mbugua was aware of the poor condition of his truck, including its brakes. Additionally, the jury could reasonably infer from the vehicle inspection report, the deputies' testimony regarding the report and Mbugua's exclusive operation of the vehicle for twelve days preceding the accident, that Mbugua was responsible for these violations.

### **(3) Prejudice**

Finally, the trial court must still exclude relevant and probative evidence if its prejudicial effect outweighs its probative value. *Billings*, 843 S.W.2d at 892.

The Kentucky Supreme Court has cautioned trial courts to admit KRE 404(b) evidence with care as it is “inherently and [often] highly prejudicial to a defendant.” *Bell*, 875 S.W.2d at 890. Courts often exclude evidence whose sole purpose is to inflame the jury. *See Funk v. Commonwealth*, 842 S.W.2d 476, 480-81 (Ky. 1992) (excluding evidence of the defendant’s previous sexual assault of a small child because *inter alia* it would almost inevitably inflame the jury).

The evidence in this case is more informative than inflammatory in nature. As explained above, the purpose of this evidence was to supply the jury with relevant background information regarding Deputy Christmann’s investigation, as well as provide the jury with circumstantial evidence from which it could reasonably infer Mbugua’s mental state at the time of the accident. Further, in light of all the evidence admitted at trial concerning Mbugua’s activities leading up to the accident, as well as the condition of Mbugua’s brakes at the time of the accident, the prejudice to Mbugua was minimal.

Considering the relevance and probativeness of Deputy Christmann’s testimony and the investigative report as weighed against its prejudicial effect, we find the trial court did not abuse its discretion in admitting the vehicle examination report and Deputy Christmann’s testimony concerning the non-brake violations.

#### **D. Prosecutorial Misconduct During Closing Argument**

Finally, Mbugua argues that the prosecutor misstated the law in his closing argument during the trial’s penalty phase. “A claim that the prosecutor misstated

the law in closing argument is a claim of prosecutorial misconduct.” *Matheney v. Commonwealth*, 191 S.W.3d 599, 606 (Ky. 2006).

Our Supreme Court has adopted the Sixth Circuit’s analysis to determine whether comments in closing arguments constitute reversible error.

We reverse for prosecutorial misconduct in a closing argument only if the misconduct is “flagrant” *or* if each of the following three conditions is satisfied:  
(1) Proof of defendant’s guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

*Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (emphasis in original) (citing *Carroll*, 26 F.3d at 1390). Whether under the “flagrant” analysis or the three-part test, the error must be preserved before this Court will review it. In this case, the error was not preserved because defense counsel did not object at the time the prosecutor made the alleged misstatement. Instead, Mbugua’s counsel waited until the prosecutor’s closing argument was finished. Our Supreme Court has said that “a claim of improper argument by the prosecution is not preserved for review if an objection is not made during the course of the argument.” *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83, 89 (Ky. 1991) (citations omitted). If a defendant waits to “object on this ground until after the conclusion of the prosecution’s argument[,] . . . the error is not preserved.” *Id.*

Therefore, we decline to address the argument.

### III. CONCLUSION



The judgment of conviction was supported by substantial evidence, the trial court's evidentiary rulings did not constitute an abuse of discretion, and there was insufficient basis upon which to reverse on for prosecutorial misconduct. The judgment of the Boone Circuit Court is affirmed.

WINE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Irvin J. Halbleib  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Joshua D. Farley  
Assistant Attorney General  
Frankfort, Kentucky