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Supreme Court of Kentucky

2008-SC-000479-MR

DOMINIC RAIFSNIDER — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 06-CR-00579

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Dominic Raifsnider, was found guilty by a Kenton Circuit Court jury of murder and robbery in the first degree. Appellant was sentenced to life without parole. He now appeals his convictions as a matter of right. Ky. Const. § 110(2)(b).

I. Background

Evidence of Appellant's guilt was overwhelming, and he concedes as much here. Appellant was convicted of robbing a gas station in Covington, Kentucky at approximately 9:00 a.m. on October 3, 2006, during which the employee, David Joseph, was fatally stabbed twenty-five times to the chest and arm. The robbery and attack was documented on a video surveillance tape and in the presence of several witnesses. Appellant was arrested later that same day and confessed to the crimes. Traces of the victim's blood were later found

in Appellant's recent residence. At trial, the Commonwealth pursued the death penalty and Appellant's primary defense strategy was one of mitigation.

At the conclusion of trial, the jury found Appellant guilty of murder in the course of robbery and of robbery in the first degree. For the count of murder, the jury fixed his punishment at life without parole. For the count of first-degree robbery, the jury fixed his punishment at twenty (30) years imprisonment. The sentences were to run concurrently.

On appeal, Appellant raises four principal allegations of error in his underlying trial: 1) that the trial court erroneously excluded his proposed expert testimony; 2) that the trial court improperly admitted his confession; 3) that the trial court erroneously failed to instruct the jury as to the defense of intoxication and the verdict of guilty but mentally ill; and 4) that the prosecutor engaged in misconduct in his closing argument. For the reasons that follow, we affirm Appellant's convictions.

II. Analysis

A. Exclusion of Defense Expert Testimony

Appellant first argues that the trial court erroneously excluded proposed expert testimony, which further denied him his right to present a defense and his right to confrontation. We, however, cannot agree, as the trial court correctly concluded that the proposed testimony did not satisfy the requirements of KRE 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Prior to trial, the court granted Appellant funds to hire Dr. Eljorn Don Nelson, a clinical pharmacologist, in assisting his defense – namely, by explaining the effects of crack cocaine use. Thereafter, Appellant stated that he might present Dr. Nelson's testimony in both the guilt and penalty phase of his trial. The Commonwealth subsequently moved the trial court for a Daubert hearing regarding Dr. Nelson's proposed testimony.

At the hearing, Dr. Nelson outlined his credentials, including his status as a licensed pharmacist and professor of clinical pharmacology and cell biophysics at the University of Cincinnati. He detailed his extensive experience in conducting individual drug histories and stated that he had interviewed Appellant for approximately one hour and reviewed his related reports.[1] Dr. Nelson's findings indicated that Appellant suffered severe crack cocaine addiction and his primary behavioral goal was to use the drug. Though concluding that Appellant could still be criminally responsible, Dr. Nelson opined that Appellant's drive to use crack cocaine led him to commit the crimes: Dr. Nelson stated, "I am saying that crack motivated the behavior." The trial court then inquired of defense counsel, "Is that the opinion you want to offer?", to which defense counsel replied, "Yes."

At the conclusion of the hearing, the trial court issued its ruling. While the court found that Dr. Nelson was an expert in the field of toxicology and

[1] Dr. Nelson testified that drug histories were essentially one-on-one interviews in which he asks an individual a series of question about his or her developmental and medical history, including prescribed medications and history of drug abuse.

pharmacology, it concluded that the opinions he proposed could not be verified through the methods he applied and, furthermore, were outside his realm of expertise – i.e., Dr. Nelson would be drawing psychological conclusions without necessary science and training. The trial court, therefore, concluded that Dr. Nelson could not testify during the guilt phase of Appellant's trial, though adding that it would consider later whether he could testify in the penalty phase.[2]

This Court has adopted the analysis set forth in Daubert, which established the key considerations for admitting expert testimony under the Federal Rules of Evidence. See Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995) (adopting Daubert) (overruled on other grounds by Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999)). This Court has also adopted Daubert's notable extension in Kumho Tire Co. v. Carmichael, which held that the Daubert may be properly applied "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." 526 U.S. 137, 140-41 (1999); see Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000) (adopting Kumho Tire).

Pursuant to KRE 702, "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an

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[2] Though Appellant also argues that the trial court erroneously excluded Dr. Nelson's testimony during the penalty phase of trial, it does not appear from the record that any attempt was made to renew introduction of the testimony, and thus no ruling was made on the matter. We, therefore, do not consider his argument with respect to the penalty phase. See Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived.") (citing Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971)).

opinion or otherwise" so long as such "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The proposed testimony, however, must be "based upon sufficient facts or data" and be "the product of reliable principles and methods" that have been properly "applied" by the witness to the "facts of the case." Id.

In Stringer v. Commonwealth, this Court succinctly explained the several distinct considerations involved in properly applying KRE 702:

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

956 S.W.2d 883, 891 (Ky. 1997); see also Burton v. CSX Transp., Inc., 269 S.W.3d 1, 6-7 (Ky. 2008).

As to the underlying Daubert determination, it is one concerned with the reliability of the theory or technique on which the proposed opinion relies and involves a consideration of "nonexclusive, flexible factors," including

> (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review or publication; (3) whether there is a known or potential rate of error; and (4) whether the theory or technique has general acceptance within its particular scientific, technical, or other specialized community.

Florence v. Commonwealth, 120 S.W.3d 699, 702 (Ky. 2003) (citing Daubert, 509 U.S. at 593-94); see also Daubert, 509 U.S. at 589 ("[T]he trial judge must

ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable.*") (emphasis added).[3] We review a trial court's findings of fact in this respect for clear error, though the trial court's ultimate decision in admitting the evidence is reviewed for an abuse of discretion. See Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire, 11 S.W.3d at 581 (citing Commonwealth v. English, 993 S.W.2d 941, 945 (1999)).

We do not believe that the trial court erred in excluding Dr. Nelson's opinions. Though Dr. Nelson was qualified in the areas of toxicology and pharmacology, his proposed testimony that Appellant's severe addiction to crack cocaine motivated the crime went plainly beyond the scope of his expert qualifications. That is to say, though Dr. Nelson did, indeed, have extensive academic and real world experience in the study of controlled substances, his qualifications did not establish that he could also drift into psychology and psychiatry, especially upon only a brief interview with Appellant without any physical testing. See Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994) ("The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question."). In this respect, we note that

[3] It is the burden of the party proffering the expert evidence to demonstrate its reliability, "except when the party is offering expert testimony in a field of scientific inquiry so well-established that it has been previously deemed reliable by an appellate court," in which case "the trial court may take judicial notice of the evidence." Commonwealth v. Martin, 290 S.W.3d 59, 66 (Ky. App. 2008).

Appellant presented no evidence regarding the reliability of drug histories to predict particular criminal behavior (such as whether it had been tested or subjected to peer review) and this was, in fact, of particular concern to the trial court.

Moreover, to the extent that Dr. Nelson sought to testify that Appellant was addicted to crack cocaine and experienced the attendant compulsion to use the drug, we do not think this opinion would have assisted the trier of fact in understanding the evidence or in determining a fact in issue. It is by now common knowledge that crack cocaine is one of the most – if not the most – notoriously addictive illegal substances available in the United States and, indeed, has wrecked whole communities with its insidious effects. See Stringer, 956 S.W.2d at 889 ("Generally, expert opinion testimony is admitted . . . when the subject matter is outside the common knowledge of jurors.") (citations omitted). Given that there was ample other evidence demonstrating Appellant was addicted to and used crack cocaine, Dr. Nelson's opinion was simply not useful.

Having concluded that the trial court properly excluded Dr. Nelson's testimony pursuant to KRE 702, Appellant's generalized contentions that he was, nevertheless, denied his right to present a defense and right to confrontation are without merit.

B. Failure to Exclude Confession

Appellant next argues that his confession was involuntary. As such, he claims that the trial court erroneously failed to suppress its admission at trial, thus violating his protections under the Due Process Clause of the Fourteenth Amendment. However, this claim of error is unpreserved. While Appellant concedes that the record is without a ruling on his motion to suppress, he urges this Court to assume that the motion was practically overruled because his confession was, in fact, admitted at trial. Yet, we have long-held that it is the burden of Appellant to request a ruling – in this case, when the confession was offered – and we will not indulge in assumptions otherwise. See Pace, 82 S.W.3d at 895 ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived."); Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994). Appellant does not request palpable error review and we do not address it further.

C. Failure to Instruct Jury

Appellant's third claim of error is that the trial court abused its discretion in failing to instruct the jury as to the defense of intoxication and the verdict of guilty but mentally ill. We find no error in either respect.

"A trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing Manning v. Commonwealth, 23 S.W.3d

610, 614 (Ky. 2000)); see also RCr 9.54(1); Taylor v. Commonwealth, 955 S.W.2d 355, 360 (Ky. 1999) ("A defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions.") (citing Hayes v. Commonwealth, 870 S.W.2d 786 (Ky. 1983)). This requirement includes the right "to have the jury instructed on the merits of any lawful defense which he or she has," Grimes v. McAnulty, 957 S.W.2d 223, 226 (Ky. 1997) (citing Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988); Curtis v. Commonwealth, 169 Ky. 727, 184 S.W. 1105 (1916)), though "the entitlement to an affirmative defense instruction is dependant upon the introduction of some evidence justifying a reasonable inference of the existence of a defense." Id. (citing Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977); Jewell v. Commonwealth, 549 S.W.2d 807, 812 (Ky. 1977)). This Court reviews "a trial court's rulings regarding instructions for an abuse of discretion." Ratliff v. Commonwealth, 194 S.W.3d 258, 274 (Ky. 2006) (citing Johnson v. Commonwealth, 134 S.W.3d 563, 569-70 (Ky. 2004)).

1. Intoxication Defense

Pursuant to KRS 501.080(1), voluntary intoxication may be a defense where it negates "the existence of an element of an offense" – most often, the mens rea, but, even then, only specific intent. See McGuire v. Commonwealth, 885 S.W.2d 931, 934 (Ky. 1994) ("Voluntary intoxication does not negate culpability for a crime requiring a culpable mental state of wantonness or recklessness, but it does negate specific intent."). This Court has held that a

voluntary intoxication instruction is warranted where, "from the evidence presented, a jury could reasonably conclude that the defendant was so intoxicated that he could not have formed the requisite mens rea for the offense." Fredline, 241 S.W.3d at 797 (citing Nichols v. Commonwealth, 142 S.W.3d 683, 689 (Ky. 2004)). Yet, "there must be evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing." Springer v. Commonwealth, 998 S.W.2d 439, 451-52 (Ky. 1999) (citing Stanford v. Commonwealth, 793 S.W.2d 112, 117-18 (Ky. 1990); Meadows v. Commonwealth, 550 S.W.2d 511 (Ky. 1977); Jewell, 549 S.W.2d at 807). Thus, it is often said that "mere drunkenness will not raise the defense of intoxication." Rogers v. Commonwealth, 86 S.W.3d 29, 44 (Ky. 2004) (citing Jewell, 549 S.W.2d at 812).

Though the evidence may have established that Appellant was under the effects of crack cocaine on the morning of the crime, no evidence indicated that Appellant was so impaired or intoxicated that he was unable to form the mens rea for murder (KRS 507.040) or robbery in the first degree (KRS 515.020). Appellant identifies his own confession and the testimony of Bobby Villarreal and Gloria Brown as providing sufficient evidence for a voluntary intoxication instruction.

Villarreal was a friend and occasional employer of Appellant. Villarreal testified that he spoke with Appellant on the morning of October 3, 2006, and though he appeared under the influence of crack cocaine (as he had seen

Appellant before), he did not appear "drunk." Brown knew Appellant for approximately ten years and had also seen him under the influence of crack cocaine. At some time between 8:00 and 9:00 a.m. on the same morning, Brown saw Appellant sitting near a well-known drug-dealer's house and she stated that he appeared edgy, irritable, and stressed, leading her to believe he was under the influence of crack cocaine or perhaps coming down ("geeking") from a drug-induced "high." In his videotaped confession, Appellant stated that he had been smoking crack cocaine all through the previous night. None of this evidence demonstrated that Appellant was under the influence of crack cocaine later that morning – when the offenses were committed – nor does it show that his impairment was at all significant.[4]

2. Guilty but Mentally Ill

A jury may return a verdict of guilty but mentally ill where the prosecution proves beyond a reasonable doubt that the defendant is guilty of an offense and the defendant proves by a preponderance of the evidence that

[4] Appellant relies on several cases dealing with intoxication instructions, but they are all clearly distinguishable. See Lee v. Commonwealth, 329 S.W.2d 57, 58-59 (Ky. 1959) (jailer confiscated a partially filled half-pint bottle of whiskey from a confessing defendant who appeared intoxicated; and several empty half-pint bottles of whiskey were found at the scene of the crime); Callison v. Commonwealth, 706 S.W.2d 434, 436 (Ky. App. 1986) (defendant testified to consuming a quart of whiskey along with other drugs and had no memory of events; witness testified he temporarily lost consciousness; and defendant was taken to hospital after arrest for drug and alcohol overdose); Mishler v. Commonwealth, 556 S.W.2d 676 (Ky. 1977) (defendant stated that he used "speed" and marijuana, could not remember the crime, and would not have committed it had he not been under the influence of the drugs).

he was mentally ill at the time of the offense.[5] KRS 504.130(1); KRS 504.120(4). Kentucky's penal code defines mental illness as "substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors." KRS 504.060(6).

While the evidence may have established that Appellant suffered a troubled life with some psychological affect, the trial court properly denied his requested instruction of guilty but mentally ill because no evidence tended to show that he was mentally ill when the offenses were committed. Appellant bases much of his argument here upon the testimony of Dr. Edward Conner, a licensed clinical psychologist. Dr. Conner examined Appellant during eight different sessions, reviewed the reports of other doctors, and viewed the crime surveillance tape. Though Dr. Conner concluded that Appellant had a schizoaffective bipolar disorder, he also stated that there did not appear to be substantial information indicating that Appellant suffered from a mental illness which would compromise his ability to conform his behavior to the law when the offenses occurred. Cf. Turner v. Commonwealth, 860 S.W.2d 772, 773 (Ky. 1993) (instruction warranted where expert testified that defendant was suffering from paranoid schizophrenia at the time of offense and was not

[5] Pursuant to KRS 504.150, "[i]f the defendant is found guilty but mentally ill, treatment shall be provided the defendant until the treating professional determines that the treatment is no longer necessary or until expiration of his sentence, whichever occurs first."

criminally responsible); Dean v. Commonwealth, 777 S.W.2d 900, 901 (Ky. 1989) (overruled on other grounds by Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003)) (instruction warranted where defendant was "diagnosed as moderately mentally retarded, schizophrenic and in need of regular medication"). Indeed, Dr. Conner ultimately believed that Appellant did have the ability to control his behavior and make proper decisions.[6] The only other relevant evidence presented was insignificant: a reference to a report by a Dr. Jones who, three days after Appellant's arrest, diagnosed him with a psychosis disorder and the testimony of a deputy jailer who booked Appellant and thought he appeared desperate and perhaps a suicide risk.

D. Improper Penalty Phase Closing Argument

Finally, Appellant asserts that the prosecutor, in his penalty phase closing argument, made several improper statements that were substantially prejudicial. Indeed, if this Court (first) determines that a prosecutor engaged in misconduct in closing argument, reversal is required where "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." Matheney v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006) (emphasis in original) (citing Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002)); see also Barnes, 91 S.W.3d at 568 (adopting Sixth Circuit test); United States v.

[6] These views were corroborated by the report of Dr. Steven Simon, who interviewed Appellant at the Kentucky Correctional Psychiatric Center and found no mental illness that would have impaired Appellant's ability to control his behavior at the time of the offenses.

Carroll, 26 F.3d 1380, 1382-90 (6th Cir. 1994) (articulating analysis). The four factors to be considered in determining whether the prosecutor's misconduct was "flagrant" are: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused."[7] Carroll, 26 F.3d at 1385 (citing United States v. Leon, 534 F.2d 667, 679 (6th Cir. 1976)). We, however, do not find that the statements in question amounted to misconduct.

Appellant claims that the prosecutor made an impermissible appeal for the jurors to place themselves in the victim's position, but this argument lacks merit. The record shows that the prosecutor stated, "David [the victim] did not get a second chance," while Appellant had "more than his fair share of second chances." To be sure, this Court has held that it may be misconduct for a prosecutor to engage in a "golden rule" argument in so much as it can "cajole or coerce a jury to reach a verdict." Lycans v. Commonwealth, 562 S.W.2d 303, 306 (Ky. 1978); see also Caudill v. Commonwealth, 120 S.W.3d 635, 675 (Ky. 2003) ("A 'golden rule' argument is one in which the prosecutor asks the jurors to imagine themselves or someone they care about in the position of the crime victim.") (internal citation omitted). We do not, however, believe that, in context, the prosecutor's comments here went so far. He did not explicitly ask the jury to consider themselves in the position of the victim but made reference to Appellant's significant criminal history and the opportunities afforded him to

[7] The "flagrancy" analysis is usually the dispositive inquiry where the misconduct was not objected to. See Matheney, 191 S.W.3d at 606.

re-enter society so as to juxtapose the fate of the victim. This, taken alone, did not exceed the bounds of proper closing argument. See Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987) ("Great leeway is allowed to *both* counsel in a closing argument. It is just that – *an argument.* A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.") (emphasis in original).

Appellant also takes issue with statements the prosecutor made regarding the appropriateness of the death penalty. The relevant remarks were as follows:

> Considering the brutality of this attack, and the criminal history of this defendant, the aggravating circumstance that we've already proven beyond a reasonable doubt, Appellant should forfeit his right to live on this planet. That aggravator brings in those five penalties you have to choose from. There's only one penalty though that brings justice for [the victim]. We've heard enough of excuses and it's now time to hear justice. What I am asking you to do isn't easy. But there's only one penalty that you should impose because there's only one penalty that brings justice.

At this point, Appellant objected and argued that the prosecutor's implicit suggestions that only the death penalty would bring justice was simply not true.

Though perhaps bold, we do not believe these remarks constituted misconduct. We cannot agree with Appellant that the prosecutor was stating or implying a legal argument. Rather, it appears that the prosecutor was merely advocating and arguing for imposition of the death penalty by explaining why the evidence *warranted it over other lesser penalties* for which

the jury was instructed: twenty (20) to fifty years (50) imprisonment; life imprisonment; life imprisonment without probation or parole for twenty-five (25) years; and, life imprisonment without probation or parole.[8] His statements, therefore, did not go so far as to tend to negate the jury's free "option of deciding whether the death penalty [was] appropriate for the particular circumstances of the case." Sanborn, 754 S.W.2d at 545; see also Matthews, 709 S.W.2d at 422 ("[A] prosecutor must be extremely careful to avoid any remarks which could mislead the jury as to its role in the sentencing process.").

Appellant's final two claims of misconduct were not objected to and are, in any event, unpersuasive. At one point in his closing, the prosecutor stated, "In this sentencing phase, we've heard lots of excuses, lots of things to blame other than the defendant: his parents, his bicycle, his grandmother's death, growing up in the projects, his wife, his drugs, his mental health." Contrary to Appellant's contentions, we think that such remarks were fair comment on how much weight should be accorded to the mitigating evidence presented. See Soto v. Commonwealth, 139 S.W.3d 827, 875 (Ky. 2004). As for the prosecutor

[8] This is, after all, generally proper. See Workman v. Commonwealth, 309 Ky. 117, 216 S.W.2d 415, 416-17 (1948) ("The Commonwealth attorney in the performance of his duty is not only justified in urging a conviction of the defendant on trial, but to likewise insist on the degree of punishment which he concludes should be administered, and in doing so he violates no rights of the accused."); see also Matthews v. Commonwealth, 709 S.W.2d 414, 422 (Ky. 1985) ("[T]he prosecutor referred to the jury's responsibility as 'a very heavy burden,' and asked the jury for 'a verdict, a penalty of death by electrocution.' He stated that 'the facts you heard ... warrant a death sentence.' The prosecutor's remarks charged the jury with its responsibility, rather than diminishing it."); but see Sanborn v. Commonwealth, 754 S.W.2d 534, 545 (Ky. 1988) ("[Y]ou have a duty under your oath to return the penalty of death against" the defendant.) (overruled on other grounds by Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006)).

referring to Appellant as a "career criminal" whose record was "offensive," we also do not believe that there was anything improper in the Commonwealth making reasonable comments and inferences, see Garrett v. Commonwealth, 48 S.W.3d 6, 16 (Ky. 2001), based upon evidence that is clearly admissible prior to sentencing. See KRS 532.025(1)(b) (allowing Commonwealth to inform jury of defendant's criminal record).

III. Conclusion

Therefore, for the above stated reasons, we hereby affirm Appellant's convictions and sentence.

Minton, C.J.; Abramson, Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., dissents in part by separate opinion.

NOBLE, J., DISSENTING IN PART: The majority holds that under the evidence in this case, the Appellant was not entitled to an instruction on guilty but mentally ill (GBMI). I disagree.

The problem with the majority opinion is that it describes "mental illness" only in the context of complete criminal responsibility, i.e., the insanity defense, which requires that the defendant lack "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." KRS 504.020(1). But mental illness, for purposes of the guilty but mentally ill statute, KRS 504.130, requires only proof of a "substantial impair[ment] [of the] capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations...." KRS

504.060(6). These are different standards, with one requiring complete incapacity to appreciate the criminality of conduct (insanity) and the other requiring only substantial incapacity related to judgment and self-control (GBMI).

There are also different end results for the instruction on the insanity defense and the instruction for GBMI. Insanity results in a complete *defense* to the charge; GBMI affects how a defendant is treated *after conviction.* The GBMI statute provides for a *guilty* defendant to be given necessary treatment for his mental illness until he is able to function in the general prison population. This statute provides no defense whatsoever. Its effect on a defendant is to help ensure humane treatment in incarceration, and it serves to help the government in the administration and control of the prison population. It might also afford judges with information and tools helpful in making decisions about probation, or the parole board in making decisions about parole.

The cases on which the majority relies address whether there was sufficient evidence to justify an instruction on the insanity defense, which obviously requires a much higher showing of impairment than a claim of guilty but mentally ill. I agree that the Appellant did not make a sufficient showing to pursue an insanity defense, but he did make a sufficient showing to receive an instruction on GBMI.

By diagnosis, Appellant has a schizoaffective bipolar disorder. While this may not have prevented him from appreciating the criminality of his actions at the time of the crime, this is no doubt a disorder that affects behavior and could be problematic in the general prison population. Three days after Appellant's arrest, he was diagnosed by a Dr. Jones as having a psychotic disorder, and the jail was concerned that he was a suicide risk. He had a long history of psychological disorders and anti-social conduct. Clearly, a reasonable jury could have found from this evidence that the Appellant was guilty but was also a mentally ill person.

Consequently, I would reverse because the trial court failed to instruct on GBMI, and remand for a new trial.

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

William Bryan Jones
Assistant Attorney General
Office of the Attorney General
Office of the Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601