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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000466-MR

GEORGE GONZALEZ — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN LYNN SCHULTZ, JUDGE
NO. 09-CR-002528

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After a jury trial, Appellant George Gonzalez was convicted of murder, two counts of first-degree assault, four counts of wanton endangerment, tampering with physical evidence, and fleeing or evading police. The convictions arose from a 2009 shooting in Louisville, Kentucky. The trial court sentenced Appellant to seventy years in prison. Appellant raises four issues on appeal. Because the trial court committed no reversible error, his convictions are affirmed.

I. Background

At approximately 1:30 a.m. on August 24, 2009, Appellant went to Gail Smith's home and demanded to speak to Gail's son, Dominique Smith. Appellant was accompanied by an unidentified black male who stood near the fence line by a silver Mustang convertible. Dominique, his sister Demetria Jackson, and his friend Lajuan Smith (who was spending the night) went to the

door. Appellant asked Demetria to have Dominique come outside, but she told Dominique to stay inside because she thought that Appellant and the other man had guns. She shut the door and told everyone to move back because she thought something was about to happen. Gail, seeing this, called the police, but the men had already left.

Also in the home at the time were Gail's fourteen year-old son Darius Smith, her nineteen year-old daughter Delorian Smith, and the children's uncle, Calvin Smith. Everyone went to bed except Gail and Demetria, who were afraid that something might happen.

Ciera Kinnard, who knew Appellant, left Danville, Kentucky around 2:00 a.m. in her mother's gold Ford Taurus going to Louisville. While she drove, she spoke to Appellant on the phone, and they met at a gas station in Louisville. Appellant, driving the silver Mustang, asked to borrow her car, which she refused, but did follow him in the Mustang to an underpass. There, she let Appellant borrow her car. He told her to stay in the Mustang until he returned and left in the Taurus, taking a rifle and another man with him.

Around 4:30 a.m. multiple bullets ripped through Gail Smith's home, targeted mostly at the front bedroom of the house where Dominique and Lajuan were sleeping. After more than a dozen rounds pierced the residence, the gunfire stopped. Lajuan was shot multiple times in his upper and lower torso. He later died from the wounds. Darius was shot in the head, but survived after spending a month in the hospital and two months in a rehabilitation center. Dominique was shot in the leg and required a pin in his leg to walk properly.

During the time of the shooting, Ciera waited for approximately fifteen minutes until Appellant and the other man returned. Appellant got out of the Taurus, put the assault rifle in the passenger seat of the Mustang, and told Ciera to follow him to an apartment complex on the other side of Louisville. There Appellant retrieved the rifle and put it into the Taurus, which he then drove deeper into the apartment complex's parking lot. Ciera stayed behind in the Mustang.

A short time later, Appellant returned driving a Chrysler Concord. Ciera followed him through the apartment complex, where he parked the Chrysler and she parked the Mustang. The two then retrieved Ciera's Taurus and drove to a Quality Inn hotel. Ciera checked in while Appellant remained in the car. Inside, they turned on a local news report about the shooting. Ciera testified that Appellant was excited when he saw the news story. They stayed in the room until approximately 11:00 a.m. when Ciera's brother drove her back to Danville.

Police learned that the Appellant had been to the house earlier that night, perhaps with a gun. They also interviewed a witness that said he had seen a gold Ford Taurus leaving the scene. When police checked Appellant's record, they discovered that he had been cited for running a stop sign in a gold Ford Taurus registered to Ciera's mother four days before the shooting. Police found out that Ciera was usually the one who drove the car, so they interviewed her in Danville, and she eventually told them about the night of the shooting. Based on the information Ciera provided, police arrested Appellant a

few days later after he ran a stop sign in the Mustang and led police on a short pursuit.

Appellant was indicted on fourteen counts: murder, two counts of attempted murder, two counts of first-degree assault, seven counts of first-degree wanton endangerment, one count of tampering with physical evidence, and one count of first-degree fleeing or evading police in a motor vehicle.

At trial, the two counts of attempted murder and three counts of wanton endangerment were dismissed without prejudice. The jury returned guilty verdicts for the remaining counts and recommended thirty years for murder, fifteen years for one count of first-degree assault, twenty years for another count of first-degree assault, five years for each of the four first-degree wanton endangerment counts, two years for tampering with physical evidence, and one year for fleeing and evading. The jury recommended that all sentences be run consecutively for a total of eighty-eight years. The trial court reduced the sentence to the seventy-year maximum allowed by law.

Appellant now appeals his convictions as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

Appellant claims four issues on appeal: (1) that the trial court erred in admitting improper character evidence that unduly prejudiced him; (2) that the trial court erred in allowing inadmissible hearsay statements; (3) that he should have been entitled to jury instructions on first-degree manslaughter and reckless homicide as lesser-included offenses; and (4) that he was entitled to a directed verdict of acquittal on the tampering with physical evidence

charge. Appellant's first two claims contain a number of subparts, which the Court will address accordingly.

A. Character Evidence

1. Taped Interview with Appellant

a. Portions of Interview Concerning Officer Johnson

After Appellant was detained for fleeing from the police after running a stop sign, he was interviewed by Louisville police. During the course of the interview, he made a number of inflammatory comments about an "Officer Johnson," a Louisville police officer who was not part of the investigation into the shootings, with whom Appellant had apparently had a number of prior run-ins in the neighborhood. Appellant was videotaped calling Officer Johnson derogatory names such as "d—head" and "p—yhead." He also stated that if he "had a licensed gun, [he] would have blew his motha f—in' noggin off," he would stab Johnson if he had the chance, he would spit on him if he could, and he would urinate on Johnson if he died, among many other inciting statements. Appellant also stated he had a cousin who was getting out of jail in Mexico a month later and that he hoped that the cousin would come to Louisville and kill Officer Johnson.

The detective's reason for engaging in this line of questioning is that he had learned that Appellant and Dominique had an altercation a few weeks prior that involved Officer Johnson in some fashion. There was also a report that Gonzalez had visited Dominique's home a few weeks prior to the shooting looking for him. Thus, police suspected that Appellant had a problem with Dominique. The comments about Officer Johnson were apparently Appellant's

attempt to say that he did not have a problem with Dominique, but did have one with Johnson.

Prior to trial, Appellant moved to suppress various portions of the videotaped interview, including the statements about Officer Johnson, on the grounds that they were irrelevant and unduly prejudicial. While the trial court sustained portions of Appellant's motion, it specifically overruled the motion pertaining to the statements about Officer Johnson and about the guns, discussed below, on the grounds that they tended to show Appellant's mental state.

At trial, a redacted, eighty-minute version of the videotaped interview was played for the jury, including the aforementioned comments about Johnson and guns. Appellant now claims that the introduction of these portions of the interview was error because the statements were irrelevant and unduly prejudicial, were improper character evidence, and violated KRE 404(b)'s prohibition of evidence of prior bad acts.

The Commonwealth claims that the testimony was relevant to show that Appellant would commit violent acts, including murder, against someone he had problems with, which went directly to the factual issue before the jury. Moreover, the Commonwealth argues that if this evidence were considered KRE 404(b) evidence, it should nevertheless be admissible because it is "so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2).

Appellate review of a trial court's ruling on an evidentiary issue is for an abuse of discretion. *See Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (citing *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004)). A trial court abuses its discretion if its decision is arbitrary, unreasonable, or unsupported by sound legal principles. *Miller v. Eldridge*, 146 S.W.3d 909, 914-15 (Ky. 2004).

It is true that the beginning of the interview concerned possible reasons why Appellant was at the Hale Avenue home in the early morning hours, including an attempt to reconcile a disagreement between Appellant and Dominique. This line of questioning first prompted the discussion of Officer Johnson, namely that Appellant had no problems with Dominique, and that his only problem was with Johnson. This went primarily to Appellant's motive or lack of motive for wanting to harm Dominique and was likely inextricably intertwined with other evidence so as to prevent its redaction.

But after this preliminary discussion, the interview quickly devolved into a twenty-minute profanity-laced, maniacal diatribe by the Appellant that was unprompted by the detective and not in response to any questions posed by the interrogating detective. Appellant described repeatedly his hatred for Officer Johnson, including stories about how Johnson had harassed him in the past, and how Appellant wished he could exact revenge on him. After allowing the Appellant to rant about Officer Johnson for nearly twenty minutes, the detective brought the interview back around to the topic of the shooting. Soon thereafter, Appellant ended the interview and invoked his right to counsel.

The portion of the interview solely concerning Officer Johnson is inadmissible, for a number of reasons. First, it was not relevant because Officer Johnson was not involved whatsoever in the case. Once it was established that Appellant's story was that he had no problem with Dominique, and that whatever the police heard otherwise was a misperception because his actual problem was with Johnson, any further discussion about Johnson was not relevant as the officer played no part in the case.

Second, this portion of the interview is impermissible "propensity" character evidence under KRE 404(a), which states that "[e]vidence 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." It is apparent that the real purpose of showing this portion of the interview was merely to demonstrate that Appellant was a violent person who would resort to killing someone he had a problem with. The Commonwealth has essentially stated this was why it was offering it. In fact, its brief argues that the purpose of the testimony was to show that Appellant tended to react violently when he had a "beef" with someone else, so he must have acted violently with regard to Dominique. But this is the precise type of evidence that KRE 404(a) is intended to prevent: evidence of Appellant's violent character to prove that the Appellant acted in conformity therewith.

The Court has previously condemned the admission of prior threats made against third-parties, i.e., not the victim. In *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004), the Court noted that "evidence of prior threats or violence against an unrelated third-party is generally regarded as inadmissible

character evidence." *Id.* at 722 (citing *Fugate v. Commonwealth*, 202 Ky. 509, 260 S.W. 338, 341 (1924)). While it is clear that Appellant did not make these threats directly to Johnson, the principle of inadmissibility of these types of statements nevertheless applies.

In *Fugate*, a witness testified that some time before the homicide the appellant approached him, said that he owed him $50 and: "If you don't get that up for me, I am going to kill you." *Fugate*, 260 S.W. at 341. This witness was not the ultimate victim. The Court held:

> [T]he threat was not a general threat to kill some one [sic]. It was a threat against a particular person other than the accused, growing out of a particular transaction, and conditioned on the failure of that person to do a particular thing. It did not show appellant's state of mind towards the deceased, or towards a class of which the deceased was a member, or towards mankind in general. It did not serve to establish general malice, but tended only to show special malice towards a particular individual concerning a transaction with which the deceased had no connection, and its admission was prejudicial error.

Id. The Court's holding in that case is applicable here. Appellant's feelings about Officer Johnson did not show Appellant's state of mind toward any of the victims, and merely tended to show "special malice" toward Officer Johnson.

To compound the issue, it is clear by the Commonwealth's own words in its closing argument that its only purpose for introducing this evidence was to allow the jury to draw the conclusion that Appellant was a violent person who committed the violent acts. In its closing, the Commonwealth stated:

> You also get to consider how he behaved in that video. And I submit to you, ladies and gentlemen, that you saw *his natural self.* You saw *his temper.* You saw *his violent nature.*

(Emphasis added.)

This is as clear an example as this Court has seen of the Commonwealth using character evidence to prove a defendant's propensity to commit the crime alleged, and it undermines the Commonwealth's credibility when it claims that the evidence was used for purposes other than propensity. Further, emphasizing the evidence in closing compounds the error that occurred in admitting those portions of the interview.

Third, the Court rejects the Commonwealth's claim that the portions of the testimony concerning Officer Johnson, specifically Appellant's inflammatory violent comments, were admissible "other bad acts" under KRE 404(b) because they were so "inextricably intertwined" with the rest of the evidence so that they could not have been redacted. KRE 404(b)(2). Even if the Court determined that such inflammatory testimony were properly characterized as an "other bad act"—that is, as a threat to another person—the fact that the exceptionally inflammatory statements stood alone and could have easily been redacted, as much of the interview had already been, leads the Court to the conclusion that the testimony was not "inextricably intertwined" with the other proof. Thus, it does not fall under the exception in KRE 404(b)(2) and is instead subject to the general prohibition against evidence of other bad acts.

For the foregoing reasons, the Court holds that admitting portions of the videotaped interview with Appellant concerned solely with Officer Johnson was error. While some of this proof, such as when Appellant was explaining that his problem was not with the victims but with Officer Johnson, was admissible,

anything after that concerning Officer Johnson was not. The trial court abused its discretion in admitting this evidence.

The Commonwealth urges the Court to nevertheless find any error regarding the admission of those portions to be harmless under RCr 9.24. An error is harmless when the Court can say "with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). "The inquiry is not simply whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 689 (quoting *Kotteakos v. United States*, 328 U.S. at 765) (internal quotation marks omitted).

While the Court feels strongly that admitting those portions of the interview was certainly error, the Court cannot say that the evidence substantially swayed the jury. While the question under *Winstead* is never just whether there was *sufficient* evidence, absent the erroneously admitted evidence, to support a conviction, the quality and quantity of the other evidence against the accused is nevertheless a proper consideration in deciding whether the error swayed the jury.

Here, the evidence against Appellant was strong. He had been to the scene of the crime earlier that night, was armed with a gun, and demanded to speak to one of the inhabitants in a threatening tone. Ciera Kinnard testified that Appellant begged her to borrow her car and, after she relented, saw him

get into a car with an assault rifle and return fifteen minutes later with an assault rifle. A car matching the description of Ciera's car was seen leaving the scene of the shooting. The same rifle was eventually discovered in the trunk of the Chrysler Concord that Ciera saw Appellant driving that night. Ballistic tests confirmed that the shots fired into the Hale Avenue home came from that rifle.

In *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011), the Court held that the trial court erred in admitting appellant's statement to an undercover officer that if the police sent marshals after him he would "send back bodies." The Court held that the statements were not "relevant for some purpose other than to prove the criminal disposition of the accused." *Id.* at 665. The Court found the error harmless, however, because of the weight of the evidence against the appellant, including his own confession and testimony from his co-defendant. *Id.* at 666.

Following the rationale used in *Meece*, this Court likewise holds that the error was harmless because we can say with fair assurance that the judgment was not substantially swayed by the error.

b. Portion of Interview Concerning Glock Handguns

Appellant also claims that the trial court erred in playing a portion of the interview where he discussed firearms, specifically Glock handguns, and different types of ammunition. He claims that the evidence was not relevant and was unduly prejudicial because it tended to show that he had a violent and angry character, despite the fact that a Glock handgun was not used in the shootings whatsoever.

While Appellant's discussion with the detective contained some arguably relevant information (i.e., that he was knowledgeable about how certain types of ammunition would pierce armor while others would not), this portion of the interview was mostly irrelevant because it merely demonstrated that he knew a little about guns, and had a strong preference for Glock handguns, which were not used in the crime. In fact, when baited by the detective to express an interest for assault rifles in certain circumstances, Appellant continued to insist that he prefers Glocks. Thus, the discussion was not relevant and was therefore error.

In *Meece*, the Court also considered the introduction of a human silhouette target owned by the appellant that had twenty-six bullet holes in an "upper body spray pattern." *Id.* at 663. The appellant objected on relevance grounds, but the Court held that the "evidence was clearly relevant to establish [appellant's] ability, knowledge, and competency with pistols and their shooting," and that "there is nothing inherently wrong, or unduly prejudicial, with respect to this evidence—even the bragging about, or holding, the pistol with which he professed to have shot the target." *Id.*

Meece, however, is distinguishable because Meece actually used a handgun in the commission of the crimes and shot the victims in a similar manner to how he shot the target, and the proof tended to show he was a good shot. Thus, Meece's ability to accurately shoot handguns was more relevant and probative in his case than Appellant's mere knowledge of how guns and ammunition work were in this case.

Despite the trial court's error in admitting this irrelevant testimony, this Court again cannot say that the judgment was "substantially swayed" by the error, *Winstead*, 283 S.W.3d at 688-89, given the weight of the other evidence of Appellant's guilt. Therefore, the Court holds that the error was harmless.

2. Incidents Three Weeks Prior to Shooting

Prior to trial, the Commonwealth provided notice that it intended to introduce KRE 404(b) evidence concerning incidents that took place prior to the shooting and involving the Appellant. The first incident occurred two or three weeks prior to the shooting where Dominique saw Appellant armed with an assault rifle at the time, and he looked directly at Dominique. The second incident occurred approximately three weeks prior when the Appellant and another man confronted Dominique and Delorean on the street while armed with handguns. The trial court allowed the evidence and Appellant now claims that decision was error because it was irrelevant and unduly prejudicial.

At trial, Dominique testified that he did not recall either of these events occurring, but Delorian testified that she recalled telling police about the incident involving the handguns and Demetria testified about the confrontation as well.

"Generally, evidence of prior threats and animosity of the defendant against the victim is admissible as evidence of motive, intent, or identity." *Davis v. Commonwealth*, 147 S.W.3d 709, 722 (Ky. 2004) (citing *Goodman v. Commonwealth*, 285 S.W. 2d 146, 149 (Ky. 1955)). Because Appellant was charged with intentional murder, his prior recent conduct relating to the

victims was relevant to prove motive and intent, and was properly admitted by the trial court.

Appellant also claims that because a number of eyewitnesses placed an angry Appellant at the home a few hours before the shooting, further testimony of prior incidents demonstrating that he was upset with Dominique were cumulative and thus unduly prejudicial. The Court rejects that argument, however, because Appellant's primary defense, evidenced by his interview with the detective, is that he had no problems whatsoever with Dominique. This Court cannot say that the additional evidence was unduly prejudicial, and it was highly probative of Appellant's motive and intent to shoot at Dominique, and of his identity as the shooter. Thus, this additional evidence was properly admissible.

3. Incident Two or Three Days Prior to Shooting

Gail Smith testified that two or three days before the shooting, Appellant's brother Oscar and another man came to her house looking for her nephew, Anthony Parker. She testified that the two men had pistols and that they told her that they were going to kill Parker. Demetria testified that Parker had been involved in a fight with the other man, who was Appellant's next-door-neighbor. Dominique testified that Parker had been in a fight with the other man, but that Oscar did not have a gun when he went to the Hale Avenue house.

Appellant now claims that this was irrelevant and unduly prejudicial prior bad act testimony under KRE 404(b). Evidence of this prior bad act, however, was not introduced to demonstrate Appellant's action in conformity

therewith because the "bad act" was *Oscar*'s bad act. Regardless, even if it were introduced to show action in conformity therewith, such evidence was admissible under KRE 404(b)(1) because it was relevant to prove Appellant's motive for revenge. Appellant's previous confrontations with Dominique, many of which stemmed from Dominique's interactions with Appellant's brother, combined with the fact that another member of the family had also had problems with Appellant's brother tended to show that Appellant not only had a motive to harm just Dominique but also other members of the family. In fact, the nature of the shootings demonstrated that Appellant had a problem with the family in general, because Appellant's conduct—firing blindly into an occupied house—showed that he was not just targeting one specific person.

4. Traffic Stops

At trial, the Commonwealth elicited testimony about four prior traffic stops involving Appellant. An officer testified that four days prior to the shooting he pulled over Appellant driving the gold Ford Taurus registered to Ciera Kinnard's mother. Three other officers testified that they had pulled over Appellant on three separate occasions while he was driving the black Chrysler Concord. The Commonwealth did not elicit testimony about the reasons for the traffic stops, and any mention of those stops was elicited by Appellant's counsel on cross-examination. Appellant claims that such testimony violated KRE 404(b) because it was irrelevant and unduly prejudicial, and was entirely unrelated to the crimes for which Appellant was convicted.

The officers' testimony was relevant in that each of the stops involved an automobile that was used the night of the shooting, including the gold Ford

Taurus that eyewitnesses saw leaving the scene and the black Chrysler in which the assault rifle was found. Because none of these automobiles were registered to Appellant, the Commonwealth introduced testimony that Appellant was known to drive these automobiles regularly and close in time to the incident. And such evidence tended to prove identity under KRE 404(b)(1).

Because the reasons for the traffic stops were not elicited by the Commonwealth, the prejudice to Appellant was minimal, especially in light of the probative value. Therefore, the Court finds that the trial court did not err in allowing this testimony.

B. Hearsay

1. Investigative Hearsay

At trial, Detective Cohn was called by the Commonwealth to testify about how Appellant became the primary suspect in the shooting. An eyewitness had told Detective Cohn that he had seen a gold Ford Taurus leaving the scene immediately after the shooting. When the prosecutor asked about the gold Ford Taurus, Appellant objected on hearsay grounds, specifically to the portion of the Commonwealth's question regarding the car "fleeing the scene." Appellant argued that the Commonwealth was introducing the evidence to prove the truth of the matter asserted, namely that the Ford was leaving the scene.

The Commonwealth argued that it was not being offered for the truth of the matter asserted, but was being used to explain the next steps in Detective Cohn's investigation. The trial court held that the statement was admissible insofar as it was used only to prove what the police did after learning that a gold Taurus had left the area. The detective answered the question and stated

that he was told that a gold Ford Taurus was seen *leaving* the scene. The eyewitness interviewed by the officer did not testify at trial. Appellant now claims that the trial court erred in admitting the officer's testimony.

Appellant argues that such testimony violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, as discussed in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* concerned the prosecution's attempt to introduce recorded statements made by Crawford's wife during the course of a police investigation into her husband. The wife did not testify at trial pursuant to Washington's marital privilege. The Supreme Court held that the use of her statements violated the Confrontation Clause because, as to "testimonial evidence,"[1] "the Sixth Amendment demands what the common law required: unavailability [of the declarant] and a prior opportunity for cross-examination," *id.* at 68, and "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

Since *Crawford*, however, the Supreme Court has clarified that it only applies to the right to confront witnesses when their statements are being used to prove the truth of the matter asserted. *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) ("*Crawford*, while departing from prior Confrontation Clause precedent in other respects, took pains to reaffirm the proposition that the Confrontation Clause 'does not bar the use of testimonial statements for

[1] The Court left the task of defining a "testimonial statement" for later decisions.

purposes other than establishing the truth of the matter asserted.'" (quoting *Crawford*, 541 U.S. at 59-60, n.9)).

This Court has held that statements used to explain why a police officer took the actions he took are not hearsay because they are not used to prove the truth of the matter asserted, noting that "[t]he rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 294 (Ky. 2008) (quoting *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988)).

The Court clarified what such testimony may be used for: "Such testimony is then admissible not for proving the truth of the matter asserted, but to explain why a police officer took certain actions." *Id.* The Court then noted that the testimony is limited

> to circumstances where the taking of action by the police is an issue in the case and where it tends to explain the action that was taken as a result of the hearsay information. In such circumstances, hearsay may be admissible to prove why the police acted in a certain manner, but not to prove the facts given to the officer.

Id. (quoting *Gordon v. Commonwealth*, 916 S.W.2d 176, 179 (Ky. 1995)).

Finally, the *Chestnut* Court held that the officers' testimony did not violate *Crawford* because it "concerned only what they did on the night in question," and did not repeat the out-of-court statements of the witness. *Id.* at 295.

Detective Cohn's testimony explained why he took the investigative steps that he did. At trial, an issue arose as to why he would pursue those actions because there was otherwise no connection between the gold Ford Taurus and Appellant, who was the primary suspect almost immediately. The statement was given, in part, to explain why the officer investigated the owner of a gold Ford Taurus in Danville. Thus, there was at least some non-hearsay use of the testimony, as allowed under *Chestnut*.

But unlike in *Chestnut*, where the police officer did not actually testify to the content of the out-of-court statements (that the victim had identified the appellant in a lineup), here the officer did testify that the eyewitness told him that he identified a gold Ford Taurus leaving the scene. While the detective's testimony partly had a nonhearsay use as described above, it also had a substantive purpose in that it established the presence of a gold Ford Taurus at the scene. In that sense, it was used to prove the truth of the matter asserted. Thus, the admission of the testimony was error under *Crawford's* framework, which allows admission of out-of-court testimonial statements only when not offered for the truth of the matter asserted.

The question becomes, then, whether the error was reversible or whether, because it was an error of a constitutional magnitude, it was harmless beyond a reasonable doubt. The standard for determining whether a federal constitutional error was harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *McGuire v. Commonwealth*, 368 S.W.3d 100, 107 (Ky. 2012) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The error here concerned a single line of testimony from the officer. And while that testimony was one evidentiary link that placed Appellant at the scene of the crime, it was not the only one, nor was it even a particularly important one. The Commonwealth's other proof established conclusively that Appellant had gone to the house earlier in the day, had borrowed a car from a friend in the middle of the night, had taken an assault rifle, had gone to great pains to hide that gun upon his return, and had a positive reaction upon seeing news coverage of the shooting.

Perhaps most importantly, the gun in question was recovered from a car that Appellant frequently drove and, upon ballistic testing, was found to match the gun used in the shooting. The officer's single line of testimony was but a small link in the evidentiary chain and its admission was really only a technical error. It is beyond a reasonable doubt that it did not contribute to the verdict. Thus, this Court holds that any error regarding Detective Cohn's testimony was harmless.

2. Dominique Heard Threats that Appellant Wanted to Kill Him.

Appellant argues that impermissible hearsay was admitted at trial when he was asked about statements he made to police officers about his not going out to encounter Appellant on the porch the night of the shooting. At trial, Dominique was asked if he had not gone out on the porch to speak with Appellant because he had a bad feeling. He replied that he did not remember. To impeach this response, the Commonwealth asked him about a prior statement to police in which he said that he had a "bad feeling" because he had heard that Appellant wanted to kill him. Appellant objected on hearsay

grounds. The Commonwealth responded that the statement was not for the truth of the matter asserted and was instead used to show Dominique's mental state. The trial court overruled Appellant's objection. The Commonwealth then asked the question again, and Dominique said that he did not recall making the statement to the police.

First, it must be pointed out that Dominique did not testify to the content of his previous statement, so the statement was not entered as evidence. Instead, the Commonwealth repeated the alleged statement in its impeachment question. (The Appellant has not cited where the police officer in question was called to testify on this point.) While the statement would clearly be hearsay, we need not analyze whether it would be subject to any exceptions. Even if it was inadmissible hearsay, it was harmless because it did not substantially affect the verdict.

C. Failure to Instruct on Lesser-Included Offenses of First-Degree Manslaughter and Reckless Homicide

The trial court instructed the jury on intentional and wanton murder, with second-degree manslaughter as a possible lesser-included offense. The trial court rejected Appellant's proposed first-degree manslaughter and reckless homicide instructions on the grounds that it would be unreasonable for the jury to find either under the facts in this case. The trial court's ruling was not erroneous.

While it is the trial court's duty to instruct on the whole law of the case, RCr 9.54(1), this duty only extends to instructions "deducible from or supported to any extent by the testimony," *Thomas v. Commonwealth*, 170

S.W.3d 343, 348-49 (Ky. 2005), and those "supported by the evidence." *Gabow v. Commonwealth*, 34 S.W.3d 63, 72 (Ky. 2001). The Court has stated more clearly that "the lesser included offense instruction is given 'only when the state of the evidence is such that a juror might entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.'" *Crain v. Commonwealth*, 257 S.W.3d 924, 928 (Ky. 2008) (quoting *Jacobs v. Commonwealth*, 58 S.W.3d 435, 446 (Ky. 2001)). This Court reviews a trial court's ruling on lesser-included instructions for an abuse of discretion. *See Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006).

Under KRS 507.030, a person is guilty of first-degree manslaughter if "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person," KRS 507.030(1)(a), or "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance," KRS 507.030(1)(b). The trial court ruled, and the Appellant concedes, that there was no evidence of an extreme emotional disturbance. Likewise, the trial court held that there was no evidence to suggest that a reasonable jury could believe that Appellant merely intended to harm someone in the house, but did not intend to kill anyone nor act in a wanton manner with respect to causing death. The Court agrees.

The problem with Appellant's contention is that his conduct "so clearly posed a grave risk" of killing someone in the house "and so clearly manifested

[Appellant's] extreme indifference to that possibility that a reasonable juror could not find that [Appellant] engaged in that conduct without also finding that he was guilty of the sort of aggravated wantonness punishable as murder." *Allen v. Commonwealth*, 338 S.W.3d 252, 257 (Ky. 2011) (rejecting first-degree manslaughter instruction in wanton murder case where appellant had shaken an infant so violently that it broke several bones, caused the child's eyes to roll back in his head, and caused it to stop breathing).

Admittedly, this case differs somewhat from *Allen* because Appellant, unlike Allen, was charged alternatively with having committed the murder intentionally. But that difference does not matter under these facts. Just as a jury could not have had a reasonable doubt about Appellant's aggravated wantonness yet still find a mere intent to cause serious physical injury, so too a jury could not have had a reasonable doubt about Appellant's intent to cause death yet believe beyond a reasonable doubt that he only intended to cause a serious physical injury.

Appellant was not simply unlucky enough to cause a death in the course of intending to commit only an assault. He fired more than a dozen 7.62 x 39 mm jacketed rounds capable of penetrating a house from a semi-automatic assault weapon. He intentionally fired the rounds into the house and specifically targeted the front bedroom at night. There is no evidence whatsoever that Appellant merely intended to injure someone in the house. Again, no rational jury would acquit Appellant of murder but believe he intended only to cause an injury. The trial court therefore did not abuse its

discretion by denying Appellant's proposed first-degree manslaughter instruction.

Similarly, there was no evidence to support a lesser-included offense instruction for reckless homicide. As the instructions in this case worked, reckless homicide would have been a lesser-included offense of second-degree manslaughter, which requires a wanton mental state. Wantonness is where a person "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(3). Reckless homicide occurs when a person "with recklessness ... causes the death of another person." KRS 507.050(1). Recklessness is when a person "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(4).

To get a lesser-included offense instruction on reckless homicide, a jury would have to be able to find beyond a reasonable doubt that Appellant was aware of and consciously disregarded the risk that he would cause a death by firing his assault rifle into a house, yet believe beyond a reasonable doubt that Appellant instead simply failed to perceive this risk. The trial court noted that there is no evidence that the Appellant simply failed to perceive a substantial or unjustifiable risk that someone would die. This Court agrees. No jury would have acquitted Appellant on the higher degrees of homicide and found that he only committed reckless homicide.

Appellant suggests that he was entitled to the instruction because any intent he may have had went to someone other than the homicide victim, Lujuan Smith. To support this claim, he notes there is no evidence to suggest

that he even knew Smith was at the house. Thus, he suggests, he at most failed to perceive the specific risk that Smith would die instead of his intended victim, meaning he could have been convicted of reckless homicide instead.

This approach does not work because Kentucky has adopted the doctrine of transferred intent, which states that

> if one by mistake kills one person when he intended to kill another, he is guilty or innocent exactly as though the fatal act had caused the death of the person against whom it was directed, and the homicide is murder or manslaughter or excusable homicide according to the attendant circumstances.

Bolen v. Commonwealth, 265 Ky. 456, 97 S.W.2d 1, 2 (1936). Appellant is not entitled to a reckless homicide instruction on the grounds that he did not specifically intend that Lujuan Smith would die or acted wantonly with respect to him. Indeed, the proof in this case, which established a shooting into a crowded home, is one of the quintessential examples of wanton murder. *See* KRS 507.020 LRC/Crime Comm'n Cmt. (1974). Thus, the trial court did not abuse its discretion in denying Appellant's proposed reckless homicide instruction.

D. Directed Verdict for Tampering with Evidence

Appellant's final claim is that the trial court erred in denying his motion for a directed verdict of acquittal on the tampering with physical evidence count.

KRS 524.100 provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
>
> (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

It is the Commonwealth's theory that Appellant "removed" the rifle from the scene and "concealed" it in the trunk of the Chrysler Concord parked in the parking lot of an apartment complex on the other side of Louisville. Appellant claims that the act of placing the rifle in the trunk of the car was not concealing it because he did not place it in an "unconventional place."

Appellant cites *Mullins v. Commonwealth*, 350 S.W.3d 434 (Ky. 2011), in which this Court recently held that Mullins was entitled to a directed verdict of acquittal on a tampering charge because he did not "remove" or "conceal" a murder weapon that police never located by merely taking it with him from the scene of the crime. *Id.* at 444. The Court in *Mullins* focused on whether the person intends to conceal or remove the evidence in an attempt to impair its availability.

One factor the Court recognizes in making the determination of intent to conceal is whether the item was placed in a conventional or unconventional place. *Id.* at 443 (citing *Commonwealth v. Henderson*, 85 S.W.3d 618, 620 (Ky. 2002)). Items placed in a conventional place suggest less of an intent to conceal than items placed in an unconventional place, such as placing money in one's shoe as opposed to one's pocket.

Appellant contends that he placed the rifle in a conventional place when he placed it in the trunk where it was not placed under the spare tire or even under a blanket. Moreover, the car itself was not hidden because it was parked in the same parking lot to which Ciera Kinnard said that they went.

But the conventional-unconventional inquiry is merely one factor in determining whether there was an intent to conceal evidence, and such a determination should be made by considering the totality of the circumstances. *See Mullins*, 350 S.W.3d at 443 (noting that the location of the evidence is important in determining whether there is evidence of tampering, but suggesting that the court may consider other factors, such as pursuit by police).

Here, for example, the trunk of the Chrysler was not a "conventional" place to put the rifle considering the circumstances. When Appellant left the scene of the crime, he drove across town in one car and placed the rifle in the trunk of a third car, the Chrysler, that was not involved in the crime, in a parking lot across town. This conduct suggests that Appellant knew that even if the first two vehicles were implicated in the crime, eyewitnesses could not place the Chrysler at or near the scene. Also, Appellant had Ciera wait at the front of the parking lot while he placed the gun in the trunk of the Chrysler and she did not see the rifle from that point forward. From this, a jury could infer that Appellant was trying to hide the weapon's location from a collateral witness. That Ciera later was able to tell police where the parking lot was, and thus allow police to find the Chrysler and the gun, is of no consequence

because Appellant's intent to conceal the rifle is judged at the time of the concealment.

Under the standard for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187–88 (Ky. 1991). The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; but if more evidence is produced and it would be reasonable for the jury to return a verdict of guilty, then the motions should be denied. *Id.* On appellate review, the standard is slightly more deferential; the trial court will be reversed only if "it would be *clearly unreasonable* for a jury to find guilt." *Id.* (emphasis added).

The Court holds that it would not be clearly unreasonable for a jury to find guilt as to tampering with physical evidence. Thus, the trial court did not err by denying Appellant's motion for a directed verdict on the tampering charge.

III. Conclusion

For the foregoing reasons, the Appellant's convictions and sentence are affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur.

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