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RENDERED: DECEMBER 19, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000374-MR

MICHAEL HANDLE — APPELLANT

V.

ON APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 11-CR-00060

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Breckenridge County jury found Appellant, Michael Handle, guilty of kidnapping and second-degree assault. Appellant was sentenced to twenty years' imprisonment for kidnapping and ten years' imprisonment for second-degree assault, to run consecutively for the maximum sentence. He now appeals as a matter of right, Ky. Const. §110(2)(b), alleging that: 1) the Commonwealth should be bound by the terms of the plea agreement, 2) he was entitled to a directed verdict for the kidnapping charge, 3) he was entitled to an instruction on the lesser-included offense of second-degree unlawful imprisonment, 4) he suffered undue prejudice when the jury instructions listed elements not included in the indictment, 5) he was denied his right to present a complete defense when the court denied his motion to compel social media evidence, 6) the trial court erred in admitting improper penalty phase evidence,

and 7) he suffered undue prejudice when the Commonwealth made speculative comments regarding his parole eligibility. For the reasons that follow, we affirm.

I. BACKGROUND

Appellant shared a home with his girlfriend, Tia Hager,[1] and their three-month-old son, Patrick. According to Hager, on February 11, 2011, Appellant became enraged because there were dirty dishes in the sink, and began yelling "stupid bitch, do the dishes," and calling her a "piece of shit." Hager further testified that at this point Appellant tied her up in various positions, shot her at point-blank range with a paintball gun, and smacked her across the face with a machete.

Hager said that Appellant would untie her to feed their baby, and that he threatened to harm her entire family if she tried to escape. This continued for three days, and when Appellant finally left the house, Hager called her uncle to come and get her. Hager and her mother went to the office of the Hardin County Attorney. There, Trooper Brad Riley photographed Hager's injuries, including numerous circular bruises, several flat bruises, and ligature marks around her wrists.

Trooper Riley went to Appellant's residence, where Appellant admitted to repeatedly shooting Hager with a paint ball gun. Appellant was taken to the

[1] Throughout the record Hager's name is alternatively spelled with an "ar" instead of an "er." However, the parties agreed that the correct spelling was "er."

Breckenridge County Detention Center, and while there he had over seventy incident reports logged against him.

A Breckenridge Grand Jury indicted Appellant for kidnapping, second-degree assault, and first-degree wanton endangerment. The Commonwealth offered Appellant a plea bargain, to which he eventually responded with a counteroffer. The Commonwealth rejected Appellant's counteroffer, withdrew the original offer, and proceeded to trial.

At trial, following the presentation of all the evidence, Appellant made a motion for directed verdict, which the trial judge denied. The jury eventually returned a verdict finding Appellant guilty of kidnapping and second-degree assault, but not guilty of first-degree wanton endangerment. For these crimes, Appellant received the maximum sentence of thirty years' imprisonment.

II. ANALYSIS

A. Commonwealth Not Bound By Plea Agreement

Appellant's first argument is that the Commonwealth should have been bound by the terms of the offered plea agreement. Specifically, Appellant alleges that because his counteroffer did not alter the material terms of the plea agreement, the Commonwealth should be bound by it. It is within the discretion of the trial court to accept or reject a guilty plea. RCr 8.08. Therefore, we will review the trial court's denial of Appellant's motion to enforce the alleged plea agreement for an abuse of discretion. If a trial court determines not to accept a defendant's guilty plea, this Court will not disturb such, unless it is clear that there has been an abuse of discretion. *Skinner v.*

Commonwealth, Ky., 864 S.W.2d 290, 294 (1993). "The test of 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). Here there is no evidence that the trial court abused its discretion in rejecting the alleged plea agreement.

Prior to trial, the Commonwealth offered Appellant eight years' imprisonment on the second-degree assault charge and five years' imprisonment on the first-degree wanton endangerment charge, to be served concurrently, in exchange for his guilty plea. As part of the agreement, the Commonwealth agreed to drop the kidnapping charge altogether. However, Appellant also had to agree to transfer title of the truck he and Hager shared solely to her.

After several hours of consultation with counsel, Appellant sent the Commonwealth a response requesting that the terms of the plea agreement be altered to avoid forfeiture of his truck and allow for his release pending final sentencing. However, the Commonwealth rejected Appellant's response, claiming that it was a counteroffer.

On the morning of trial, Appellant sought to enforce the plea agreement, noting that he was now willing to agree to all the terms proposed by the Commonwealth. The Commonwealth, however, argued that the plea was a "limited time offer" and that Appellant had voided that offer by replying with counter terms. Appellant stated that he had always agreed to the *material*

terms of the contract and asked that the plea be enforced, but his request was denied.

"Plea agreements are often bargained-for exchanges, and are governed by basic contract law." *Commonwealth v. Morseman*, 379 S.W.3d 144, 149 (Ky. 2012). Under basic contract law, "[a]n acceptance must be unequivocal in order to create a contract." *Venters v. Stewart*, 261 S.W.2d 444, 446 (Ky. 1953). An acceptance which includes additional terms, or alters the terms of the original offer, constitutes a counteroffer, and not an acceptance. *Gen. Motors Corp. v. Herald*, 833 S.W.2d 804, 807 (Ky. 1992) (Leibson,J., dissenting).

In the present case, the Commonwealth did make Appellant an offer, but Appellant never accepted it. Instead, Appellant said that he would agree to the original plea only if the Commonwealth would remove the term requiring him to relinquish title to his truck. By stating that he would agree to the original plea if and only if material terms were removed, Appellant was making a counteroffer and not an acceptance. Given that Appellant never actually accepted the terms of the plea agreement, but instead made a counteroffer which the Commonwealth rejected, we cannot say that the trial court abused its discretion in denying his motion.

B. Directed Verdict

Appellant next argues that he was entitled to a directed verdict for the charge of kidnapping. Specifically, Appellant alleges that he was entitled to a directed verdict because the kidnapping charge merged with that of assault.

Appellant concedes that this issue is unpreserved, but asks that it be reviewed for palpable error. RCr 10.26; KRE 103.

"A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, . . . and the error must have resulted in 'manifest injustice.'" *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005) (*citing Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997)). "[P]alpable error . . . [is] composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding." *Id.* (internal citations and quotation marks omitted).

Appellant claims that he suffered a manifest injustice when the Commonwealth overcharged him by adding the kidnapping charge on top of the assault charge, which already includes the elements of restraint and/or movement of the victim. In support of his claim, Appellant relies upon the Kidnapping Exemption Statute as set forth in KRS 509.050:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape.

Appellant further points this Court to the Kentucky Crime Commission's Commentary to KRS 509.050, which explains that Kentucky's kidnapping

exemption statute "seeks to express a policy against the use of kidnapping to impose sanctions upon conduct which involved a movement or confinement (of another person) that has no criminological significance to the evil toward which kidnapping is directed."

In order for the exemption to apply: (1) "the criminal purpose must be the commission of an offense defined outside Chapter 509;" (2) "the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense; and" (3) "the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense." *Murphy v. Commonwealth*, 50 S.W.3d 173, 180 (Ky. 2001); *see also Hatfield v. Commonwealth*, 250 S.W.3d 590, 599 (Ky. 2009).

Because the first prong is clearly met, the question becomes whether the interference with Hager's liberty was incidental to the commission of the assault and of a type normally associated with such an offense. In *Timmons v. Commonwealth*, this Court held that "if the victim of the crime is going to be restrained of his liberty in order to facilitate its commission, the restraint will have to be close in distance and brief in time in order for the exemption to apply." 555 S.W.2d 234, 241 (Ky. 1977). In the present case, Hager testified that Appellant bound her multiple times over the course of several days, and thus, Appellant fails to demonstrate that the restraint was "brief in time."

More importantly, Appellant failed to demonstrate that restraint was ordinarily incidental to an assault. In *Stinnett v. Commonwealth*, this Court

held that the exemption was inapplicable where the defendant bound the victim before murdering her. 364 S.W.3d 70, 78 (Ky. 2011). According to this Court, "Appellant could have killed her without taking an extended time to terrorize her." *Id.* at 78. In the present case, Appellant could have committed assault by simply smacking Hager across the face with the machete or shooting her with the paintball gun, the extended period of restraint was not necessary for the commission of the assault.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham,* 816 S.W.25d 186, 187 (Ky. 1991) (citation omitted). In the present case, we simply find no error, palpable or otherwise, on the part of the trial court as there was evidence presented that would allow a jury to find Appellant guilty of both kidnapping and assault independently of one another.

C. Lesser-Included Offense

Appellant next argues that he was entitled to an instruction on a lesser-included offense. Specifically, Appellant alleges that he should have received a jury instruction on the lesser-included offense of second-degree unlawful imprisonment. We review the refusal to give a jury instruction of a lesser-included offense by the 'reasonable juror' standard established in *Allen v. Commonwealth*:

> As noted, we review a trial court's decision not to give a criminal offense jury instruction under the same "reasonable juror"

> standard we apply to the review of its decision to give such an instruction. *See Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991). Construing the evidence favorably to the proponent of the instruction, we ask whether the evidence would permit a reasonable juror to make the finding the instruction authorizes. We typically do not characterize our review under this standard as either *de novo* or for abuse of discretion, but in some recent cases we have and it may appear that we have done so inconsistently. *See Hunt v. Commonwealth,* 304 S.W.3d 15, 31 (Ky. 2009) ("The trial court's decision not to give a jury instruction is reviewed for abuse of discretion."); *Cecil v. Commonwealth,* 297 S.W.3d 12, 18 (Ky.2009) ("We review the trial court's rulings with respect to jury instructions for abuse of discretion."); *Morrow v. Commonwealth,* 286 S.W.3d 206, 209 (Ky. 2009) ("Because this matter turns on the trial court's determination as to whether to tender a jury instruction, we will engage in a *de novo* review."). In this context, the characterization makes little difference and so the inconsistency is more apparent than real. On the one hand, if the evidence supports an instruction that is otherwise appropriate, the proponent is entitled to the instruction as a matter of law, and to emphasize that entitlement, as we did in *Morrow,* our review can be characterized as *de novo.* On the other hand, to emphasize that the sufficiency of the evidence is measured against a reasonableness standard—the reasonable juror—as we did in *Cecil,* our review can be characterized as for abuse of discretion. Regardless of the characterization, however, the "reasonable juror" is the operative standard, in the appellate court as well as in the trial court.

338 S.W.3d 252, 255 (Ky. 2011). Therefore, in evaluating the refusal to give an instruction we must ask ourselves, construing the evidence most favorably to the proponent of the instruction, whether the evidence would permit a reasonable juror to make the finding the instruction authorizes.

The jury was instructed on kidnapping and first-degree unlawful imprisonment. The kidnapping instruction required the jury to find that:

> A. [I]n this county on or about February 17, 2011, and before the finding of the indictment herein, he restrained Tia Hager by constraining her with a rope;
> B. That the restraint was without Tia Hager's consent; AND

C. That in so restraining Tia Hager it was the defendant's intention to inflict bodily injury or to terrorize Tia Hager.

The first-degree unlawful imprisonment instruction also required the jury to find a "risk of serious physical injury":

A. [I]n this county on or about February 17, 2011, and before the finding of the indictment herein, he restrained Tia Hager by constraining her with a rope;
B. That the restraint was without Tia Hager's consent; AND
C. That the restraint occurred under circumstances which exposed Tia Hager to risk of serious physical injury.

However, following the presentation of the evidence, Appellant requested a lesser-included jury instruction on, *inter alia*, second-degree unlawful imprisonment. According to Appellant, the jury could have believed that Hager's injuries were inflicted separate from the imprisonment. The trial judge agreed to give the two previously stated instructions, but denied Appellant's request for a second-degree unlawful imprisonment instruction. The judge reasoned that only if Hager had been released unharmed, would Appellant be entitled to such an instruction.

"An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt of the greater charge, but believed beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Thompkins v. Commonwealth*, 54 S.W.3d 147, 151 (Ky. 2001) (*quoting Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993)).

A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person—no risk of bodily harm

is required. KRS 509.030.[2] But, if he does so under circumstances which expose the victim to a *risk of serious physical injury*, then he is guilty of unlawful imprisonment in the first degree. KRS 509.020.[3]

In the present case, there was no indication that Appellant released Hager unharmed. Appellant argues that the jury could have found that he restrained Hager, but that he did not expose her "to a risk of serious physical injury," which would have entitled him to an instruction of unlawful imprisonment in the second degree. However, Appellant bound and smacked Hager with a machete and shot her at point-blank range with a paintball gun. Therefore, the trial court correctly concluded that the evidence simply would not support a theory that Appellant restrained Hager, but released her unharmed, and thus an instruction on second-degree unlawful imprisonment was unnecessary.

D. Elements Not in Indictment

Appellant next argues that he suffered undue prejudice when the jury was given erroneous instructions on the second-degree assault charge.

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[2] KRS 509.030, Second-Degree Unlawful Imprisonment, reads:

(1) A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person.

(2) Unlawful imprisonment in the second degree is a Class A misdemeanor.

[3] KRS 509.020, First-Degree Unlawful Imprisonment, reads:

(1) A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury.

(2) Unlawful imprisonment in the first degree is a Class D felony.

Specifically, Appellant alleges that the instructions listed elements of the crime that were not included in the indictment. We review a trial court's decision to allow an amendment to an indictment for an abuse of discretion. *See Riley v. Commonwealth,* 120 S.W.3d 622, 631–32 (Ky. 2003). "The test of abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d at 945.

The original indictment charged Appellant with assault in the second degree in violation of KRS 508.020, and read as follows:

> COUNT II: That on or about February 17, 2011, in Breckenridge County, Kentucky, the Defendant, Michael Handle, committed the offense of Assault in the Second Degree, when he, acting alone or in complicity with others, caused serious physical injury to Tia Hager.

However, as the evidence unfolded and prior testimony was reviewed, it became apparent that Appellant had used a machete and a paintball gun in order to inflict bodily harm upon Hager.

During its opening statement, the Commonwealth read from the indictment regarding the second-degree assault charge, but also noted that Appellant hit Hager with a machete and shot her with a paintball gun. Based upon the evidence presented at trial, the Commonwealth moved to amend the indictment to include that Appellant intentionally caused a physical injury to Hager by striking her with a dangerous instrument.

This Court's precedent establishes "that an indictment may be amended at any time to conform to the proof providing the substantial rights of the defendant are not prejudiced and no additional evidence is required to amend

the offense." *Wolbrecht v. Commonwealth*, 955 S.W.2d 533, 536-37 (Ky. 1997). In the present case, we cannot say that the substantial rights of Appellant were prejudiced as he was aware from the outset of the case that the Commonwealth was going to pursue the fact that he had caused bodily harm to Hager through the use of dangerous instruments. The Commonwealth discussed the injuries, and the methods of injury, in its opening statement, the proof offered at trial indicated that this was a theory the Commonwealth was pursuing, and the evidence was brought forth in the district court proceedings below. Appellant was on notice from the very outset of the trial as to what theories the Commonwealth was going to pursue, thus, we find no error.

For the aforementioned reasons, we find that the trial court did not abuse its discretion in allowing the indictment to be amended.

E. Social Media Evidence

Appellant next argues that the court erred by interfering with his right to present a defense. Specifically, Appellant alleges that the trial court interfered with his right to present a defense when it denied his motion to compel social media evidence. The standard of review regarding admission of evidence is whether the trial court abused its discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

During trial, Appellant's counsel made written and oral motions asking the trial court to reveal Hager's usernames and passwords for her Facebook and MySpace accounts. The motion noted that "the victim in this case has

demonstrated large amounts of activity on the two above named social media sites and is done in real time with IP addresses that can confirm the origin cites of her activity." Counsel argued that Hager said she was restrained for this certain period of time, but that he thought there might be evidence that would demonstrate that she had logged into various social media sites during that time period. The Commonwealth protested arguing that this was "the electronic version of searching [Hager's] underwear drawer," and opined that she was "semi-literate" and thus her ability to use these sites was questionable.

The trial judge conducted a hearing and found it disturbing to think that a victim's privacy could be invaded simply so that Appellant could investigate to see if she was "keeping her story straight." The trial court denied Appellant's motion.

"The extent to which either party to a criminal proceeding may require information of the other is set forth in RCr 7.24."[4] *Porter v. Commonwealth,*

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[4] RCr 7.24 states in pertinent part:

> (1) Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth . . .
> (2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable . . .
> (3)(a) If the defendant requests disclosure under RCr 7.24(1)(b), upon compliance to such request by the Commonwealth, and upon written request of the Commonwealth, the defendant, subject to objection for cause, shall permit the Commonwealth to inspect, copy, or photograph any results or reports of

394 S.W.3d 382, 387 (Ky. 2011). There is nothing in the language of RCr 7.24 that would compel the discovery requested by Appellant, and he concedes that there is no case law mandating this type of disclosure. Furthermore, there is no indication that Appellant was even certain such evidence existed, he simply thought that it may exist. For these reasons, we cannot conclude that the trial court abused its discretion in not compelling the production of the evidence.

"[A] discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence were disclosed the result would have been different." *Chestnut v. Commonwealth,* 250 S.W.3d 288, 297 (Ky. 2008). We simply cannot say that Appellant's speculation that Hager's Facebook or MySpace accounts may have indicated that she was not keeping her story straight is sufficient to establish a reasonable probability that the outcome would have been different if the information had been disclosed.

Furthermore, the trial judge stated that he would consider the motion if it related to or in any way impeded the presentation of Appellant's defense. An exclusion of evidence will only "be declared unconstitutional when it

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physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony. If the defendant requests disclosure of the Commonwealth's experts under RCr 7.24(1)(c), then upon written request by the attorney for the Commonwealth, the defense shall furnish to the attorney for the Commonwealth a written summary of any expert testimony that the defense intends to introduce at trial. This summary must identify the witness and describe that witness's opinions, the bases and reasons for those opinions, and the witness's qualifications . . . .

significantly undermine[s] fundamental elements of the defendant's defense." *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003).

In the present case, Appellant stated that the social media evidence was necessary because Hager talked about getting a paintball gun on some of her Facebook postings. The trial judge stated that he could cross-examine Hager about these postings. Therefore, Appellant had the opportunity to question her about her social media activity during cross-examination but chose not to do so. Accordingly, the trial court judge's ruling did not interfere with or undermine fundamental elements of Appellant's defense. Furthermore, whether or not Hager purchased a paintball gun is irrelevant to the issues in the present case. It is obvious that the paintball gun existed, and the purchaser of the gun is not in controversy. Therefore, the trial court did not abuse its discretion in denying Appellant's motion to compel the production of the evidence.

F. Improper Penalty Phase Evidence

1. Prior Charges

Appellant next argues that the trial court erred in admitting improper penalty phase evidence. Appellant first alleges that an error occurred when charges for which he was never convicted were presented to the jury. Specifically, the jury was presented with Commonwealth's Exhibit #4 which stated: "merge KRS 508.030 assault in the fourth degree and KRS 525.080 harassing communications into KRS 508.080 terroristic threatening which is

being pled to." Given that this evidence was introduced against Appellant's objection, this issue is preserved.

Notably, KRS 532.055 warns against the presentation of crimes for which Appellant was never convicted, and KRS 532.055(2)(a) permits the jury to hear only of a defendant's prior *convictions*. "[I]t is . . . well settled that the Commonwealth cannot introduce evidence of charges that have been dismissed or set aside." *Cook v. Commonwealth*, 129 S.W.3d 351, 365 (Ky. 2004); *see also Chavies v. Commonwealth*, 354 S.W.3d 103, 115 (Ky. 2011) (holding that the introduction of charges that were later dismissed or amended was erroneous). Given such, we find that error occurred in allowing the presentation of the charges in question. *Id.*

However, we must now determine whether the said error was harmless. RCr 9.24. Under our standards "[a] non-constitutional evidentiary error may be deemed harmless, . . . , if the reviewing 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 (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.'" *Id.* Here, we do not believe it did, given the weight of evidence of other prior convictions presented to the jury.

During the penalty phase, the Commonwealth introduced evidence of eight prior convictions of: threats of violence, ten counts of possession of a

forged instrument, complicity to commit second-degree burglary, criminal possession of a forged instrument, terroristic threatening in Larue County, theft by deception in two different counties, DUI, and harassment and terroristic threatening in Breckenridge County. Following the presentation of the evidence, the jury retired to deliberate Appellant's sentence. They returned in less than twenty minutes with the maximum sentence of thirty years.

While we agree that it is erroneous to present evidence of charges that have been dismissed or set aside, we find that in the present case the error is harmless. Given the weight of the eight prior convictions, and the fact that the jury returned with the maximum sentence so quickly, we come to the conclusion that the presentation of the merged misdemeanor charges did not substantially sway the decision of the jury. *Winstead*, 283 S.W. 3d at 289.

Appellant also argues that the trial court erred in allowing the presentation of impermissible evidence during the penalty phase of his trial. Specifically, Appellant alleges that he suffered undue prejudice when the jury was presented with the identity of the victims of his prior charges. This issue is admittedly unpreserved, and thus we will review for palpable error. RCr 10.26; KRE 103.

According to KRE 103, "A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, . . . and the error must have resulted in 'manifest injustice.' " *Ernst*, 160 S.W.3d at 758 (*citing Brock*, 947 S.W.2d at 28). "[P]alpable error . . . [is] composed of two elements: obviousness and seriousness, the latter of which is present when a failure to

notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding." *Id.* (citations and internal quotation marks omitted).

In the present case, Appellant alleges that the jury was given identifying information regarding prior victims - unduly prejudicial evidence beyond the "nature of prior offenses." For example, Commonwealth's Exhibit #4, with which the jury was provided a copy, identified the victims, as a name can be seen written underneath each charge. In addition, during the cross-examination of Appellant's character witness during sentencing, the Commonwealth asked the witness if he would be surprised to learn that Appellant had a prior conviction for assaulting the witness' mother, whose name had also been revealed.

KRS 532.055(2)(a) provides, in relevant part, that in the sentencing stage, "[e]vidence may be offered by the Commonwealth relevant to sentencing including: 1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; [and] 2. The nature of prior offenses for which he was convicted . . . ." *Webb v. Commonwealth*, 387 S.W.3d, 319, 330 (Ky. 2012); *see also Newman v. Commonwealth*, 366 S.W.3d 435, 445–46 (Ky. 2012); *Mullikan v. Commonwealth*, 341 S.W.3d 99, 107–08 (Ky. 2011).

In defining what evidence is permissible in describing the "nature of prior offenses" we recently held that:

> [E]vidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed. We suggest this

> be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself. Said recitation for the jury's benefit, we feel, is best left to the judge. The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling. *The trial court should avoid identifiers, such as naming of victims,* which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes.

Webb, 387 S.W.3d at 330 (emphasis added) (*citing Mullikan*, 341 S.W.3d at 109).

In *Webb*, this Court held that the Commonwealth went far beyond "conveying to the jury the elements of the crimes previously committed," by introducing highly prejudicial information including the names of victims. *Id.* We found the resulting prejudice of this practice in *Webb* to be so egregious as to have resulted in manifest injustice, in that the failure to correct the error "would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *Id.* (*quoting Mullikan*, 341 S.W.3d at 109).

However, in the present case the identifying information involved victims who were not from the area in which the case was being tried and were not in any way similar or related to the victims of the present crime, and thus, we find it to be distinguishable from *Webb* in which the victims were local police officers, and likely known by the jurors.[5] *Id.* For this reason, we find that the

[5] In *Webb*, one of Appellant's previous convictions was for assaulting a police officer in the same rural area as the current crime for which he was being tried. Furthermore in *Webb*, Appellant was on trial for hitting Bourbon County Detention Center guards with his vehicle, and thus introducing evidence of assault on a police officer was in fact too prejudicial. Here, the prior crimes were not so similar in nature as the one for which Appellant was standing trial, and the victims were not from the immediately surrounding areas.

introduction of such evidence in the present case did not result in 'manifest injustice.' *Ernst*, 160 S.W.3d at 758 (*citing Brock*, 947 S.W.2d at 28). Thus, we find no palpable error.

III. CONCLUSION

For the aforementioned reasons, we affirm Appellant's conviction and sentence.

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

NOBLE, J., CONCURRING IN PART AND DISSENTING IN PART: I agree with most of the well-written majority opinion, but I depart in regard to the penalty phase evidence.

KRS 532.055(2)(a) states that in the penalty phase, only a defendant's prior *convictions* may be introduced as evidence for the jury to consider in setting a penalty. As the majority points out, this Court has previously stated that "the Commonwealth cannot introduce evidence of charges that have been dismissed or set aside." *Cook v. Commonwealth,* 129 S.W.3d 351, 365 (Ky. 2004). We have made similar statements in other cases. *See Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996); *Scrivener v. Commonwealth*, 539 S.W.2d 291, 293 (Ky. 1976); *see also Dial v. Commonwealth*, 142 Ky. 32, 133 S.W. 976, 977 (1911) ("When, therefore, the judgment of conviction has been set aside by the court rendering it, when it had jurisdiction to do so, the verdict stands as if judgment had not been rendered."). And in those cases, we found the error to be prejudicial and vacated the sentences on that ground.

Here, the Commonwealth was allowed to present Exhibit #4 to the jury, which contained the following language: "merge KRS 508.030 assault in the fourth degree and KRS 525.080 harassing communications into KRS 508.080 terroristic threatening which is being pled to." Clearly, this document named three distinct crimes for the jury, although Handle was only *convicted* of one of these crimes.

The purpose behind the statute and our case applying it is to prevent listing multiple crimes that may have been merged or dismissed because there is clearly prejudice in "piling on" a laundry list of charges for which a defendant was never found to be guilty. There is no doubt that when jurors hear the names of unconvicted crimes, they will cumulate those crimes in their thinking about the defendant and will, with all probability, rely on that full listing of crimes in fixing a penalty. There is a strong possibility the jury will speculate that the defendant actually committed all those crimes, and that he "got a deal," or that the jury will not have the knowledge of what a named crime is and assume it is worse than it actually is.

That is likely what happened in this case. While a lawyer may know that fourth-degree assault is a misdemeanor, an unsophisticated juror will only hear the word they are likely to understand: *assault*. This leads to the assumption that the defendant is violent, even though he has not been convicted of that offense. Similarly, *harassing* communications sounds like someone who unreasonably interferes with another's life, even though again the defendant has not been convicted of that offense.

Nonetheless, the majority concludes that this evidence, which they agree was error, was harmless. The majority's rationale is that the jury heard proof of eight other crimes of which the Appellant was actually convicted. This, however, cannot undo the prejudice from also listing the crimes that the Appellant was not convicted of, especially given the names of those crimes.

I fail to see why this Court must bend over backwards to save a conviction or, in this case, a sentence when the rules relating to the evidence in question are clear. Prosecutors should have no problem understanding the language of the statute and our previous cases. Indeed, the rule at play has been "well settled" since at least 2004. *See Cook,* 129 S.W.3d at 365. It is not this Court's job to save a conviction or a sentence by watering down clear, concise evidentiary rules by declaring their violation to be harmless when we have previously stated that such violations are prejudicial. This applies the rules in an inconsistent manner, and makes practice by attorneys and rulings by the trial court much more difficult and subjective, and promotes continued bad practice. Why should a prosecutor follow the statute and our cases when we have just established that we will call such an error harmless? In effect, we are saying it is not really error.

There is no doubt a proper place for harmless error analysis, such as when an evidentiary error can clearly be said to have no weight on the jury's decision. But I don't believe that is the case here. In my experience, the more crimes attached to a defendant's name, the more punitive the sentence is. An error is not harmless when the error had a "substantial influence" on the jury

or if the court is "left in grave doubt" about the influence. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009). Handle was tagged with two additional crimes. That simply cannot fail to influence the thinking of the average juror, and at the very least we should be left in grave doubt that the added crimes had no effect on the jury's consideration. Therefore, I don't believe this error could be harmless.

If the rule prohibits conduct because it is harmful, then it should take careful analysis to say that it creates no harm under the circumstances in a given case. Harmless error should be rare, not a savings clause for bad prosecutions. Otherwise, our rules of evidence and procedure are so riddled with subjectivity and inconsistency that it is hard to say what the rules are.

I would reverse for this error which I do not find to be harmless.

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