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RENDERED: SEPTEMBER 30, 2021
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2020-SC-0089-MR

MICHAEL R. HAMBLEN, JR. — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
NO. 18-CR-000281

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

A Jefferson County jury convicted Michael Hamblen of murder, tampering with physical evidence, and possession of a handgun by a convicted felon for events related to the death of Jasmine Newsome on January 6, 2018. Consistent with the jury's recommendation, the trial court sentenced Hamblen to twenty-seven years' imprisonment for murder, one year's imprisonment for tampering, and five years' imprisonment for possession of a handgun by a convicted felon with all of the sentences running concurrently. Hamblen appeals as a matter of right,[1] asserting the trial court committed five errors: (1) the trial court erred by admitting Facebook messages and photos concerning the sale of guns unrelated to the murder; (2) Hamblen was entitled to a directed verdict on the tampering with physical evidence charge; (3) the trial

[1] KY. CONST. § 110.

court erred by failing to give a separate jury instruction on the presumption of innocence and right to remain silent; (4) the trial court committed palpable error in permitting the Commonwealth's only eyewitness to repeatedly state she was terrified; and (5) it was palpable error to allow a detective to testify to hearsay that bolstered the eyewitness testimony. For the following reasons, we affirm the judgment of the Jefferson Circuit Court.

## I. BACKGROUND

Testimony at trial established the following facts. Jasmine Newsome and Tina Minor lived at 2309 West Ormsby Avenue in Louisville. Michael Hamblen was the boyfriend of Alysha "Nikki" Hendricks, who lived with her five children at 2320 West Ormsby. Just before 3:30 P.M. on January 6, 2018, Minor called police reporting that her roommate, Newsome, had been shot. When asked by 911 dispatchers if she knew who shot Newsome, Minor stated she did not know the shooter but described him as a thin, light-skinned Black man wearing a mask who fled the home and headed toward the backyard.

The first officers arrived on the scene within two minutes of the call, and Minor directed them into the home. Inside, officers found Newsome lying unresponsive on a mattress on the floor. Newsome's friend, Marshon Goldsmith, stood beside her. Officers attempted to resuscitate Newsome until paramedics arrived. Despite these attempts, Newsome succumbed to her injuries at the hospital.

Detectives and forensics technicians searched the scene and collected multiple spent shell casings in and around the house, most of which were .40

caliber. They also discovered a spent bullet and found a discarded pot of cooked eggs on the front porch. Hendricks later identified the pot as her own. Louisville homicide Detective Yolanda Baker took the lead in the investigation of Newsome's murder. Detective Baker interviewed Minor and Goldsmith at the scene. She interviewed Goldsmith a second time at the police station. Goldsmith stated he was in his mother's house nearby when he heard the shooting and ran over to Newsome's home. When called to testify at trial, Goldsmith maintained that he did not know who shot Newsome, that he arrived after the events, and that he did not know Hamblen at all.

Minor's initial statement to Detective Baker was that she did not know who shot Newsome. She said that it was a light-skinned Black man wearing a mask and a Carhart jacket. Detective Baker stayed in contact with Minor via text message. Subsequently, Minor texted Detective Baker that the shooter was Hendricks's boyfriend, Hamblen. Minor sent a photo of Hamblen from Hendricks's Facebook page. On January 7, 2018, after receiving the new information from Minor, Detective Baker put out "wanteds" for both Hamblen and Hendricks. She sought Hamblen for the murder charge and Hendricks for questioning only.

Detective Baker testified that over the following days, detectives from the homicide unit attempted to locate Hendricks and Hamblen. On January 9, 2018, Detective Baker saw lights on in Hendricks's home and a car leaving. She followed the car, which went around the block and stopped again in front of the house. Detective Baker approached the driver, who identified herself as

Hendricks's sister. The sister told Detective Baker that Hendricks was in the house. Detective Baker knocked on the door, and Hendricks answered. Hendricks confirmed that Hamblen was in the area on the day of the murder. When Detective Baker could not locate Hamblen, she obtained an arrest warrant for him. On January 16, 2018, members of a joint task force comprised of U.S. Marshals and Louisville Metro Police Department personnel located Hamblen at his grandmother's house and arrested him. Hamblen was transported to the homicide unit for questioning.

Detective Baker interviewed Hamblen on January 17, 2018. During the interview, Hamblen denied any knowledge of the incident. He claimed he was not in the West Ormsby neighborhood on the day of the murder. Detectives took a black jacket Hamblen was wearing at the time of his arrest and sent it off for forensics testing. Technicians from the Kentucky State Police Crime Laboratory testified that tests on the jacket revealed trace gunshot residue but no trace of blood or DNA. Special Agent Cosenza from the Federal Bureau of Investigations Cellular Analysis Survey Team testified to his technical review of Hamblen's cell phone location data. The agent testified that based on a historical cell site analysis, Hamblen's phone was in a relatively small area that included both Hendricks's home and the murder scene on the day of the murder.

At 12:20 A.M. on February 15, 2018, police arrested Anthony Brown in Louisville's west end. Although Brown's arrest was unrelated to Newsome's murder, police confiscated a .40 caliber handgun from Brown during the

arrest. A Kentucky State Police ballistics technician testified that the weapon confiscated from Brown fired the intact bullets removed from Newsome's body as well as the .40 caliber shell casings recovered from the scene. Investigators found no connection between Brown and Newsome nor between Brown and anyone else associated with Newsome's murder. Brown testified that he bought the handgun from a white male named "Jeffrey" in a gas station parking lot for $180.

At trial, the Commonwealth presented multiple law enforcement, forensics, and medical witnesses (as well as Marshon Goldsmith and Anthony Brown) to establish the facts outlined above. Despite this, the only Commonwealth witness to directly name Hamblen as the shooter was Tina Minor. In her testimony, Minor recounted the events leading up to the murder. Minor stated that while she knew Hendricks, she had only met Hamblen once before the day of the murder. At the time of Newsome's murder, Minor said she did not know Hamblen's name, only that he was Hendricks's boyfriend. Minor said that Newsome was at Hendricks's house earlier before returning home and lying down on a mattress on the floor. Shortly after Newsome's return, there was a knock at the door. When Minor answered, Hamblen was at the door holding a pot of eggs. Hamblen was angry because Newsome had cooked eggs at Hendricks's home and refused to clean up the mess. Minor said that Hamblen dumped the eggs on the porch and left. After a short time, Hamblen returned with Hendricks, and Hamblen and Newsome began arguing. Minor testified she asked everyone to move outside.

According to Minor, Hendricks left the house and went down the front steps first. Minor followed. Newsome and Hamblen continued arguing in the house. As Minor reached the bottom of the steps, she heard Hamblen say, "shut up before I blow your head off." Minor testified that at this point, she looked back, saw Hamblen pull out a gun, and heard shots. Then, Hamblen ran out of the house and past her. Minor said she heard Newsome say, "he killed me." Minor testified that she yelled to Hendricks to call 911, but Hendricks ignored her. At this point, Goldsmith arrived, and Minor went back into the house to call 911.

The Commonwealth asked why she told the 911 dispatcher that she did not know who the shooter was. Minor answered,

> I was terrified. I was so terrified. For a person to just shoot someone over a pot of eggs in front of you. You don't know what that person is capable of. I was so terrified. Where I am from snitches get stitches or are found in ditches. I was really terrified, so terrified. So I lied to 911 and went to my mother's home for two weeks before she kicked me out.

Similarly, when asked why she did not initially tell Detective Baker that Hamblen was the shooter and why the Commonwealth had to subpoena her to get her to return from out of state to testify, she stated that the event had terrified her and that she had been threatened.

On cross-examination, defense counsel asked Minor about Newsome's initial difficulties with her neighbors and detailed the vandalism of Minor's house that resulted. He then began a series of questions, approximately fourteen in total, detailing Minor's prior statements to 911, her prior statements to Detective Baker, and the fact that Minor was testifying under

subpoena. In response to each of these questions, Minor asserted that the terror Hamblen's actions generated was the basis of her earlier inconsistent statement and her reluctance to testify. Defense counsel never objected to Minor's use of the word "terror". He never asked the court to instruct Minor to limit her answers to "yes" or "no" on these issues, and he never requested an admonition by the court regarding the answers.

After Minor's testimony, the Commonwealth called Hendricks to testify. Hendricks was uncertain of many facts, which necessitated frequent refreshing of her memory with her prior statements. Hendricks testified that she and Hamblen had been in an "on-again, off-again" relationship for three or four years. Hendricks stated that on the day of the murder, Hamblen, Goldsmith, Minor, and Newsome were at her house. Hendricks asserted that she did not know Newsome well. Newsome's presence at her home was a result of Newsome's friendship with Goldsmith. Hendricks testified that Newsome cooked eggs at her house. When asked if Newsome and Hamblen were arguing over the eggs, Hendricks denied knowing for certain. She testified, "people were arguing, but they were outside," and she did not know who was arguing. She stated she was in the street when she heard the shots and continued walking to her home without looking back. Hendricks asserted that she had no other knowledge of the shooting.

Alcohol, Tobacco and Firearms ("ATF") Agent Dan Volk testified to explain how the internet and social media are used to buy and sell weapons. Agent Volk testified that it was not necessarily illegal to conduct such transactions,

even if it made tracking firearms more difficult or impossible. He stated that while social media was often used to circumvent firearms restrictions, so long as neither party to the transaction was subject to regulation as a Federal Firearms Licensee or prohibited from owning or possessing a firearm, such transactions were entirely legal.

The Commonwealth's final witness was Detective Baker. Her testimony summarized the investigative process from the time of Newsome's murder until trial. The court first addressed the admissibility of the Facebook account information during a pretrial conference on the morning of the first day of trial. Defense counsel objected to its introduction, arguing that the records were either not relevant or involved uncharged "bad acts" under KRE[2] 404(b) without proper notice as required by KRE 404(c). The Commonwealth countered by arguing that the messages and photographs were proof of motive or means. Therefore, the Commonwealth argued the Facebook data was not evidence of prior bad acts under KRE 404(b) but was proof directly related to the charge of tampering with physical evidence. The trial court found that the records specifically related to Hamblen's buying and selling of a firearm and the messages indicating Hamblen possessed a firearm were relevant to the current charge.

At trial, Hamblen's counsel renewed his objection to the introduction of the Facebook data. He emphasized that none of the weapons referenced in the messages or shown in the photographs were the handgun used in this murder.

[2] Kentucky Rules of Evidence.

He argued that they were not probative to any issue before the court. The Commonwealth countered that the Facebook data was not being used to prove that Hamblen committed the murder, but that it was probative of Hamblen's means and opportunity to dispose of a weapon. The Commonwealth also argued that the evidence explained how the murder weapon ended up in Brown's hands. The trial court permitted the admission of the data, finding that it was probative of the Commonwealth's theory regarding the tampering with physical evidence charge. The trial court offered to draft an admonition for the jury outlining the purposes for which the evidence could be considered. Defense counsel maintained that an admonition would not "cure or remove the objection," but accepted the admonition without waiving the objection.

Detective Baker then testified to the content of the Facebook data. The messages indicated Hamblen sought to buy a gun in December 2017, approximately three weeks before the murder. There were also messages in mid to late December 2017 from senders seeking to purchase guns from Hamblen. Additionally, the Commonwealth introduced three photographs of guns from the messages, although none of these weapons were the murder weapon. After Detective Baker's testimony regarding the photographs and messages, the trial court admonished the jury. The trial court explained that the evidence could not be used to infer anything about Hamblen's character. The court informed

the jury that while the parties may argue about what the importance of the evidence was, it was the jury's job to determine its value.[3]

On cross-examination of Detective Baker, Hamblen focused on three issues. First, Hamblen emphasized that Minor initially failed to identify Hamblen, and no other witnesses identified Hamblen as the shooter. Defense counsel asked Detective Baker if she had recorded her entire interview with Minor; Detective Baker responded that she had. Defense counsel then asked Detective Baker to read a section from her investigative report. Her investigative notes stated that at the conclusion of Minor's interview, and after she had turned the recorder off, "Tina then told me the light-skinned, male suspect is a friend of Nick. [sic] Tina stated he is an ex-boyfriend of Nick, [sic] recently released from jail. Tina was very hesitant but stated that the male was wearing a black Carhart jacket."

The second issue Hamblen raised was the admission of Facebook photographs and messages. Defense counsel repeatedly emphasized in his questioning of Detective Baker that none of the photographs showed the murder weapon, and Hamblen himself was not the source of the photographs. Detective Baker acknowledged that Hamblen was the recipient of the

[3] We did not include a verbatim recitation of the admonition. When read in isolation, the admonition's informal structure may be challenging to follow. After a full review of the video record, we find the admonition to be entirely consistent with the conversational tone and relationship the trial court had established with the jury. The admonition identified the key issues and directed the jury not to use the evidence for an improper purpose, and based on the prior interactions, we believe the jury understood the admonition.

photographs and not the sender. She also admitted that none of the messages indicated the completion of a firearms sale.

Third, Defense counsel also asked Detective Baker whether police followed up on a witness statement that indicated a Black male with dreadlocks was seen in the alley shortly after the shots were heard. Detective Baker stated that people are always seen running after shots are fired, and they canvassed the entire block. She also stated that when she first arrived on the scene, she walked through the crowd and heard comments to the effect "that girl's ex-boyfriend didn't have to shoot her like that."

At the conclusion of Detective Baker's testimony, the Commonwealth rested its case. Hamblen moved for a directed verdict on all charges. Regarding the tampering charge, Hamblen asserted the Commonwealth offered no proof that he tampered with physical evidence, only generalities of how guns are bought and sold on Facebook. He argued that the only basis for the charge was that he did not possess the gun when police arrested him. The Commonwealth argued that the Facebook messages, the testimony of Agent Volk, and the testimony of Brown provided sufficient evidence for a reasonable juror to find that Hamblen sold the weapon in an attempt to prevent its use in his prosecution. The trial court denied the motion for a directed verdict.

Hamblen declined to present any affirmative evidence. The trial court tendered instructions to the parties. The court said it had received the parties' proposed instructions. The court also stated that where the proposed instructions differed from the court's tendered instructions, the submission of

proposed instructions preserved any objection. Hamblen then made one specific objection to the court's instructions: he requested that Instruction Number One, Murder, be separated into two instructions—one for intentional murder and one for wanton murder—rather than being combined. The trial court declined to make the change.

Following closing arguments, the jury returned guilty verdicts on the charges of murder and tampering with physical evidence. The trial court conducted a separate proceeding for Hamblen's felon in possession of a handgun charge. The jury also returned a guilty verdict on this charge. The jury fixed Hamblen's sentences at twenty-seven years' imprisonment for murder, one year's imprisonment for tampering with physical evidence, and five years' imprisonment for being a felon in possession of a handgun. All the sentences were to run concurrently. This appeal followed as a matter of right.

## II. ANALYSIS

### A. The trial court did not abuse its discretion in permitting the introduction of Facebook messages and images. The evidence was neither prior bad acts under KRE 404(b) nor habit evidence under KRE 406.

Hamblen argues that the trial court committed reversible error by admitting Facebook messages and photos concerning his attempts to buy and sell firearms. The issue was preserved by pretrial motion and by contemporaneous objection to the presentation of the evidence. The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "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 & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *English*, 993 S.W.2d at 945).

Hamblen makes multiple arguments for the exclusion of the Facebook evidence. Hamblen argues that the introduction of the Facebook messages and photographs was barred as either prior bad acts under KRE 404(b) or as habit evidence under KRE 406. Hamblen also argues that the evidence was irrelevant under KRE 401. Alternatively, Hamblen argues that even if the evidence is proper under KRE 401, 404(b), and 406, it is nonetheless substantially more prejudicial than it is probative and should therefore have been barred. We address Hamblen's arguments in turn.

KRE 404(b) bars the admission of other crimes, wrongs, or acts used to "prove the character of a person to show action in conformity therewith." "Acts" for purposes of KRE 404(b) include any acts "other than the ones formally charged." Robert G. Lawson, KENTUCKY EVIDENCE LAW HANDBOOK § 2.30(1)(a) (2020 ed.). While prior acts do not have to be criminal to justify exclusion, they must amount to some misconduct or "bad act." *Meece v. Commonwealth*, 348 S.W.3d 627, 661–62 (Ky. 2011).

Under KRE 404(b), the evidence offered was not proof of prior bad acts because it did not necessarily constitute misconduct. As part of its case-in-chief, the Commonwealth offered testimony from Agent Volk. He testified that there was nothing intrinsically illegal about buying or selling a gun from another individual on the internet. As far as the jury knew, there was nothing

"bad" in Hamblen's interest in purchasing or selling a firearm on Facebook. Because Hamblen was a convicted felon, being in possession of a firearm would have been a crime. However, the jury was unaware that Hamblen was a convicted felon at the time it decided Hamblen's guilt on the murder and tampering with evidence charges.[4] Therefore, Hamblen's actions were not bad acts for the purposes of KRE 404(b).

Hamblen further argues that even if the evidence was not prior bad acts under KRE 404(b), it was offered as impermissible habit evidence under KRE 406. KRE 406 states, "[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." In *Harris v. Commonwealth*, 384 S.W.3d 117 (Ky. 2012), the trial court admitted two handguns of the caliber used in the murder even though the Commonwealth stipulated neither weapon was used to commit the murder. *Id.* at 122. Harris objected. *Id.* The trial court based its decision to admit the weapons on the grounds that they "tended to show Harris preferred and was familiar with this type of weapon." *Id.* We held that insufficient evidence was admitted at trial to permit a finding that Harris's use of these weapons rose to the level of a habit. *Id.* at 124. Instead, we held that the evidence simply proved ownership of unrelated weapons and nothing more. *Id.*

[4] Hamblen's criminal charge as a felon in possession of a firearm was trifurcated from the principal charges specifically to avoid informing the jury of Hamblen's status as a felon.

In the instant case, a thorough review of the record does not support an inference that the evidence was introduced as proof of a habit. Unlike the evidence in *Harris*, the evidence herein was not offered to prove Hamblen's preference for buying and selling weapons online. Rather, the evidence was offered to show that Hamblen had both the means and knowledge to dispose of a weapon online. We find nothing in the record that can be reasonably read to support that the Commonwealth argued Hamblen's use of the internet for such transactions rose to the level of a habit.

We now turn to Hamblen's principal argument at trial: that the Facebook evidence was not relevant to the events in question, and that even if it were relevant, the danger of undue prejudice from the evidence substantially outweighed its probative value. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 402 provides that irrelevant evidence is inadmissible, while KRE 403 provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice." Hamblen argues under *Harris* and *Major v. Commonwealth*, 177 S.W.3d 700 (Ky. 2005), that the introduction of the messages and photographs was prohibited.

In *Harris,* we held that proof of ownership of weapons unrelated to the crime is generally inadmissible. 384 S.W.3d at 124 (citations omitted). There,

however, the error was harmless because the jury was repeatedly informed that neither weapon was the murder weapon. *Id.* at 125.

Similarly, in *Major*, we held that the trial court erred in admitting three weapons unrelated to the underlying crime. 177 S.W.3d at 710–11 (citing *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 756 (Ky. 2005)). However, unlike in *Harris*, we reversed and remanded for a new trial because the evidentiary error was one of multiple errors amounting to cumulative error. 177 S.W.3d at 712. The lower court in *Major* did not warn the jury to the extent that the lower court in *Harris* did, and so the error was unmitigated.

In both *Major* and *Harris*, the Commonwealth introduced actual weapons that were not the murder weapon. The weapons' purpose in those cases was to show the defendants' access to firearms. Neither *Major* nor *Harris* dealt with the recovery of a murder weapon by an unrelated third party.

In deciding to admit the evidence in the instant case, the trial court found that the evidence was relevant to the Commonwealth's theory regarding Hamblen's tampering with physical evidence charge. We agree. The photographs themselves were minimally relevant, but they were equally minimally prejudicial. The weapons in the photographs were unrelated to the crime, posted by parties other than Hamblen, and did not include a weapon of the same type or caliber as the murder weapon. Like in *Harris*, however, these facts were made abundantly clear to the jury, and therefore the prejudice to Hamblen was mitigated.

The messages, on the other hand, were highly relevant. Unlike the photographs, the messages included statements from Hamblen regarding his desire to obtain a weapon or to Hamblen from senders seeking to purchase a gun from him. They were therefore significantly more probative and significantly more prejudicial than the photographs themselves. To require exclusion, however, the danger of undue prejudice caused by the messages would have to substantially outweigh their probative value. *See* KRE 403. We disagree that the messages only proved that Hamblen knew people who bought and sold guns on Facebook. In fact, the messages could make it more probable that Hamblen sold the gun after the shooting, but the messages were unlikely to support an inference that Hamblen shot Newsome. As the Commonwealth asserted, the messages were a means of explaining how the murder weapon ended up in Anthony Brown's hands. Therefore, the messages were highly relevant.

To mitigate the possibility the jury would consider the properly admitted evidence for an improper purpose (such as using the Facebook messages as proof that Hamblen murdered Newsome, rather than as proof that Hamblen knew how to discretely sell a gun), the trial court gave an admonition. "Jurors are presumed to have followed an admonition." *Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998) (citations omitted). Hamblen argues the admonition was insufficient because there was an overwhelming probability that the jury would be unable to follow the admonition. *Cf. Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009). The trial court's admonition correctly outlined that

the Facebook information was not evidence of the defendant's general character and that the parties would address the appropriate use of the evidence. Based on a review of the video record, we see no overwhelming probability that the jury would be unable to follow the trial court's specific admonition regarding the evidence's proper use. For these reasons, the trial court did not abuse its discretion in admitting the Facebook messages and photographs as relevant to the tampering with physical evidence charge.

**B. The trial court did not err in denying Hamblen's motion for a directed verdict on the tampering charge.**

A person tampers with physical evidence under KRS 524.100(1)(a) when: (1) believing an official proceeding is pending or may be instituted; (2) he conceals or removes physical evidence he believes to be relevant to the proceeding; and (3) does so with the intent to impair the availability of the evidence at the proceeding. Hamblen argues that the trial court erred in denying his motion for a directed verdict on the tampering with physical evidence charge because the Commonwealth failed to introduce evidence that Hamblen had taken any action to conceal or remove the gun after the murder. Without conceding that he was Newsome's murderer, Hamblen argues that no reasonable juror should have convicted him on the charge without testimony identifying a specific post-crime act.

We review the denial of a motion for directed verdict using the rule set out in *Commonwealth v. Benham*:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable

> juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

816 S.W.2d 186, 187 (Ky. 1991) (citation omitted). Hamblen cites *Mullins v. Commonwealth*, 350 S.W.3d 434, 443 (Ky. 2011), for the proposition that merely carrying a weapon away from the crime scene, without more, does not constitute tampering with physical evidence. In *Mullins*, the defendant was arrested based largely on eyewitness identification. *Id.* at 436–37. The defendant was seen in possession of what appeared to be a weapon immediately after the murder, but the weapon itself was never actually recovered. *Id.* at 442. We stated that while the jury could infer the defendant carried the gun away, merely getting in a car and telling the driver to drive away from the scene did not constitute an additional act demonstrating an intent to conceal the weapon. *Id.* Instead, a court must determine the veracity of a tampering charge based on where the evidence "was ultimately found or based on evidence of an additional act." *Id.* at 443. We held the police's inability to find the gun did not "mean it was placed in an unconventional location" in an attempt to prevent its recovery. *Id.* at 444.

Unlike in *Mullins*, here, the location and manner in which the murder weapon was recovered supported the veracity of Hamblen's tampering charge.

On review, we view the facts in the light most favorable to the Commonwealth. As such, we assume that Minor's eyewitness testimony identified Hamblen as the shooter. If Hamblen murdered Newsome, then he possessed the weapon at the time of the murder. Police recovered the murder weapon from Anthony Brown approximately five weeks after the murder. Assuming Hamblen had the weapon at the murder and did not have the weapon when it was recovered, we must conclude that something happened to the weapon between the murder and the weapon's recovery. It is possible that Hamblen took some affirmative act to dispose of the weapon because Hamblen knew how to transfer a weapon and avoid law enforcement by selling it on Facebook.

Given these facts, it would not be clearly unreasonable for a jury to believe that Hamblen took some affirmative act resulting in the handgun being transferred from Hamblen's possession to Brown's. Based on all fair and reasonable inferences from these facts, a juror could believe beyond a reasonable doubt that: (1) Hamblen believed an official proceeding may be instituted against him; (2) he concealed or removed the handgun because he believed it to be physical evidence that may be produced or used in that proceeding; and (3) he did so with the intent to impair the ability of police to produce the handgun at the proceeding. Therefore, the trial court did not err in denying Hamblen's motion for a directed verdict.

### C. The trial court's jury instructions included a full explanation of the relevant law.

Hamblen next argues that the trial court erred in giving jury instructions that consolidated the language regarding Hamblen's presumption of innocence

and his right to remain silent in an introductory instruction rather than in separately numbered instructions.[5] We review the substantive content of jury instructions de novo. *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015), *overruled on other grounds by Univ. Med. Ctr., Inc. v. Shwab*, 2019-SC-0641-DG, 2021 WL 3828487 (Ky. Aug. 26, 2021). The Commonwealth contends that the issue was not adequately preserved because Hamblen failed to voice a specific objection to the instructions regarding this issue. Kentucky Rule of Criminal Procedure ("RCr") 9.54(2) states as follows:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge **by an offered instruction** or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

(emphasis added). Defense counsel tendered separately numbered instructions regarding the presumption of innocence and the right to remain silent.[6] Furthermore, the trial court specifically informed counsel twice that any objections to the final instructions were preserved on the record by the parties' tendered instructions. We therefore hold that under these facts the issue was preserved by Hamblen's tendering of requested jury instructions.

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[5] The jury instruction introduction states, in relevant part:

> "The law presumes Mr. Hamblen to be innocent of the crimes charged and the Indictment shall not be considered as evidence or as having any weight against him. Mr. Hamblen is not compelled to testify, and the fact that he did not cannot be used as an inference of guilt and shall not prejudice him in any way."

[6] *See Exantus v. Commonwealth*, 612 S.W.3d 871, 890 (Ky. 2020) (holding defendant preserved the issue of whether the trial court erred by failing to instruct the jury on the definition of "dangerous instrument" by properly tendered instructions that included a definition of "dangerous instrument").

A trial court should instruct the jury on the defendant's presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478, 491 (1978) (Brennan, J., concurring), and the right to remain silent in all cases where the instructions are requested. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). Hamblen does not assert that the trial court failed to give the instructions at issue; rather, he argues that the "amalgamation of these principles presented to the jury on the first page of the jury instructions confused the jury such that Mr. Hamblen did not receive the benefits of these rights." We examine jury instructions in their entirety. *See Fields v. Commonwealth*, 274 S.W.3d 375, 415 (Ky. 2008) (citing *Bills v. Commonwealth*, 851 S.W.2d 466, 471 (Ky. 1993)), *overruled on other grounds by Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010).

Hamblen fails to support his confusion argument with any precedent, but cites *Herp v. Commonwealth,* 491 S.W.3d 507, 513 (Ky. 2016), in which this Court rejected a similar argument. In *Herp*, the defendant critiqued the trial court's placement of a separate instruction on the presumption of innocence at the end of the jury instructions rather than at the beginning. *Id.* at 514. Herp argued that this placement would confuse the jury. *Id.* However, in *Herp* we found no reason to conclude that the placement of the relevant instruction made the jury unaware or confused regarding the presumption of innocence. *Id.*

To support his argument that the jury was confused, Hamblen relies on a LinkedIn message sent to trial counsel shortly after the trial. In the message, a juror indicated his appreciation for trial counsel's advocacy on behalf of

Hamblen and indicated that if there was some evidence to counter the Commonwealth's case, the result might have been different. To Hamblen, this illustrated that the jury was confused about who bore the burden of persuasion. First, RCr 10.04 states, "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot."[7] Accordingly, we will not consider the message. Second, even if we could consider the message, the trial court succinctly and accurately addressed it during Hamblen's motion for a new trial. As the trial court stated, an equally reasonable reading of the juror's message was that because the Commonwealth met its burden, the defense should have offered its own affirmative evidence.

On review, Hamblen's tendered instructions were fully articulated within the trial court's instructions. Our review of the trial court's instruction does not reveal any probability that the burden on the Commonwealth was minimized in the mind of a reasonable juror. Nothing in United States Supreme Court precedent compels the use of a separately numbered, stand-alone instruction to inform the jury of the defendant's rights where the record clearly shows the trial court's adherence to *Taylor* and *Carter*. Were we to hold otherwise, we would elevate form over substance. In sum, the trial court did not err in its instructions regarding Hamblen's presumption of innocence or right to remain silent.

[7] There are limited exceptions, irrelevant here, permitting a juror to testify regarding outside influences that may have played an inappropriate role in deliberations. *See Warger v. Shauers*, 574 U.S. 40, 51 (2014); *Commonwealth v. Abnee*, 375 S.W.3d 49, 54 (Ky. 2012).

### D. Minor's testimony that her earlier inconsistent statements were a result of her being terrified at the time of the murder was admissible.

Hamblen's fourth basis of appeal is that undue prejudice resulted from Minor's repeated testimony that she was terrified. The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "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 & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *English*, 993 S.W.2d at 945.

Hamblen acknowledges the issue was not properly preserved by contemporaneous objection and requests palpable error review pursuant to RCr 10.26. "For an error to rise to the level of palpable, 'it must be easily perceptible, plain, obvious and readily noticeable.'" *Doneghy v. Commonwealth*, 410 S.W.3d 95, 106 (Ky. 2013) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). When we "engage in palpable error review," our "focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

Immediately after the murder and in a statement to Detective Baker later that day, Minor claimed not to know the shooter. Later, however, she came forward with Hamblen's name. When asked by the Commonwealth why she did not initially identify Hamblen to 911, Minor stated she was terrified, "that in

her neighborhood, 'snitches get stitches and end up in ditches.'" Similarly, when asked about her original statement to Detective Baker, she likewise attributed her refusal to provide truthful statements to being terrified. Minor repeated that she was terrified multiple times in response to the Defense's cross-examination in which the Defense attempted to impeach her credibility with her prior inconsistent statements.

"Ordinarily, a witness's statement that he or she fears retaliation for testifying is improper." *McDaniel v. Commonwealth*, 415 S.W.3d 643, 650 (citing *Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009)). However, we narrowed this prohibition in cases where a witness's fear is offered to explain the witness's prior inconsistent statement and not for purposes of proving the defendant's character. *McDaniel* 415 S.W.3d at 651.[8]

In *McDaniel*, the witness acknowledged that he did not initially identify the defendant as the person who shot him during a lineup because he feared retaliation if he testified. *Id.* at 650. The witness's fear stemmed from his own "experiences and time spent in prison." *Id.* at 651. Because the evidence was not offered to "prov[e] a vengeful propensity," but rather to "aid the jury in resolving a witness credibility issue," we held that it was relevant. *Id.* Turning to its probativeness, we determined that because of the general nature of the witness's fear based on his past experiences, "the possibility of prejudice . . . was negligible." *Id.* We therefore did not find palpable error.

[8] This exception "comports with KRE 404(b)(1), which allows evidence of other crimes 'if offered for some other purpose' other than to prove propensity." *McDaniel*, 415 S.W.3d at 651 n.3.

Like the witness in *McDaniel*, Minor did not identify Hamblen as the shooter initially, despite knowing who it was the entire time. Minor's testimony regarding her mental state immediately after Newsome's shooting explained her reluctance to initially tell the truth and her prior inconsistent statements to 911 and Detective Baker. Unlike *McDaniel*'s single statement, a review of the record indicates Minor made some type of reference to being afraid at least twenty-two times in response to seventeen separate questions.[9] Furthermore, in answer to the Commonwealth's question of why it had to subpoena her to compel her to return to testify, she indicated that she had received at least one threat as a result of her being a witness. Interestingly, however, more than fifteen of the statements were made in response to fourteen separate questions during the defense counsel's cross-examination. We acknowledge that as the number of times the statement is made increases, the resulting prejudice may increase as well. However, we do not read *McDaniel* to include a strict limitation on how often a witness may cite fear as a justification for prior inconsistent statements.

The Commonwealth asked Minor only once each about her statement to the 911 dispatcher, her statement to Detective Baker, and the Commonwealth's need to subpoena her from out of state to testify. In response to each of these questions, Minor indicated that her prior inconsistent statement or reluctance

[9] Hamblen, in his brief, states a version or synonym of the word "terrified" was used twenty-five times. Given the free-flowing nature of Ms. Minor's testimony, it is possible the actual number is twenty-five, but the absolute number is largely irrelevant to our underlying analysis.

to testify stemmed from her fear. During cross-examination, however, the defense asked her fourteen separate questions addressing her prior inconsistent statements or the fact she was under subpoena to be in court. Defense intended for Minor to answer these questions in a "yes" or "no" manner. Minor, however, justified each answer by explaining her fear. In spite of this, Defense counsel never asked the court to instruct Minor to limit her answers. Instead, he continued to attempt to impeach Minor. Even if defense counsel had moved to limit Minor's answers in response to his questions, on redirect, the Commonwealth would have been entitled to have Minor explain the discrepancy again. Because Minor's fear was offered to "aid the jury in resolving a witness credibility issue" and because the Defense itself elicited and failed to correct her testimony, we hold that Minor's testimony about her fear was relevant.

We now turn to the question of undue prejudice. The potential prejudice from statements that a witness fears retaliation from the defendant "may be great". *McDaniel*, 415 S.W.3d at 651; *see also Parker*, 291 S.W.3d at 658. Such prejudice may be particularly high when the statements are repeated several times, as Minor's were. However, most of Minor's statements dealt with her general fear of testifying or of Hamblen as a result of the act she witnessed. Only once did she specifically mention being threatened against testifying. Her testimony never specified the source of the threat or threats. Most importantly, the number of times her fear was repeated was directly invited by the defense by its repeated attempts to impeach her. While the possibility of prejudice from

Minor's testimony was real, it does not substantially outweigh the probative value of the testimony as to her credibility. Therefore, its admission was not an error, let alone a palpable error.

### E. The admission of Detective Baker's statements on direct examination and cross-examination was not palpable error.

As noted above, the standard of review on evidentiary issues is abuse of discretion. *Clark*, 223 S.W.3d at 95; *English*, 993 S.W.2d at 945. "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 *English*, 993 S.W.2d at 945).

Admitting that the issue was not preserved for review by objection at trial, Hamblen argues the trial court committed palpable error in permitting Detective Baker to bolster the testimony of Tina Minor, Marshon Goldsmith, and Alysha Hendricks with hearsay. As with the questions of Minor's testimony, we will only reverse under the palpable error standard when a "manifest injustice has resulted from the error." RCr 10.26.

Hamblen claims that the trial court erred when, on direct examination, it permitted Detective Baker to recount: portions of her conversation with Goldsmith, Minor's description of Newsome and Goldsmith's relationship, Minor's recounting of her call to 911, Minor's text messages to Detective Baker first identifying Hamblen as the shooter, Detective Baker's brief conversation with Hendricks's sister, and Hendricks's confirmation that Hamblen was in the West Ormsby area on the day of the murder. Additionally, Hamblen asserts the trial court erred when it failed to sua sponte exclude Detective Baker's

statements on cross-examination regarding what Minor disclosed to her on the day of the murder after she shut off her recording device. Hamblen argues the trial court also erred by failing to exclude Detective Baker's statement on cross-examination about comments she heard at the scene, such as "that girl's ex-boyfriend didn't have to shoot her like that."

The Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution were designed to prevent conviction based on anonymous statements lacking any showing of reliability and failing to provide the defendant an opportunity to cross-examine the declarant. *Hughes v. Commonwealth*, 730 S.W.2d 934, 934–35 (Ky. 1987) (citing *Stewart v. Cowan*, 528 F.2d 79, 80–81 (6th Cir. 1976)). Generally, a police officer "may testify about the information furnished to [her] only where it tends to explain the action that was taken by the police officer as a result [of the information]," and those actions "are [at] issue in the case." *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006). Why police officers took the actions they did and how the defendant became a suspect are clearly at issue where the defendant asserts his absolute innocence of the crime. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 352 (Ky. 2006) (stating that where defendant does not raise the issue of the propriety of the steps taken by police, use of integrative hearsay to explain police actions is a harmless error). Generally, even if a court errs in admitting testimony that goes beyond explaining the officer's actions, the error will be harmless if the source of the out-of-court

statements testifies and is subject to cross-examination. *See* RCr 9.24; *see also Brewer*, 206 S.W.3d at 352 (holding any error harmless because the sources of the alleged hearsay statements testified and were subject to thorough cross-examination).

On direct examination, Detective Baker's statements were not offered as proof of the matter asserted. Rather, they were offered to explain how the police investigation progressed to focus on Hamblen. Detective Baker's summary of her conversation with Goldsmith, as well as Minor's characterization of Goldsmith and Newsome's relationship, bore directly on why Goldsmith was not an initial suspect. Minor's text message to Detective Baker identifying Hamblen as the shooter and stating that he was Hendricks's boyfriend explained why Detective Baker immediately began a search for Hamblen and Hendricks in order to question them. Detective Baker's comment on Hendricks's sister's statement explained why Detective Baker didn't continue to question her and instead went to knock on Hendricks's door. Finally, Detective Baker's statement that Hendricks confirmed Hamblen was in the area on the day of the murder explained why she obtained an arrest warrant for Hamblen after the conversation. Detective Baker never testified on any particular statement for the purpose of proving that statement's truth. Under these facts, the admission of Detective Baker's statements was not an error.

On cross-examination, Detective Baker's statements were direct responses to defense counsel's questioning. A party is estopped from asserting an invited error on appeal. *Gray v. Commonwealth*, 203 S.W.3d 679, 686 (Ky.

2006) (citations omitted). An appellate court will not review actions that "reflect the party's knowing relinquishment of a right." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011) (citing *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)). Because it was invited, Detective Baker's recitation of Minor's statement on cross-examination did not amount to palpable error. Defense counsel specifically requested Detective Baker read Minor's unrecorded statement and thereby waived any objection to its admission. Following Detective Baker's recitation of Minor's unrecorded statement, it was the Commonwealth who objected. The Commonwealth said, "we were getting into hearsay," but defense counsel argued successfully for the admission.

The second statement on cross-examination that Hamblen argues was admitted in error was Detective Baker's answer that she heard comments implicating Hamblen while circulating through the crowd. Hamblen's principal line of defense was his absolute innocence. Hamblen's cross-examination focused on the stranger in a mask first identified in Minor's call to 911 and her original statement to Detective Baker. The implication that Louisville detectives failed to fully investigate other leads was key to Hamblen's defense. Detective Baker's statement directly answered defense counsel's question of why officers did not pursue a lead regarding a Black man with dreadlocks being in the alley behind Minor's house immediately after the shooting. Like the complained-of statements on direct examination, Detective Baker's answer was an explanation of how the investigation proceeded, specifically addressing defense counsel's insinuation that police had not followed up on what appeared to be a

viable alternative suspect. As such, the trial court did not err by failing to sua sponte exclude the comment. We agree that this statement was more questionable than those elicited on direct examination. Had defense counsel requested it, the statement likely would have warranted an admonition from the trial court that it could only be considered to explain the detective's actions and not as proof of the truth of the statement itself. However, Hamblen requested no such admonition.

In short, the complained-of statements in Detective Baker's testimony were permissible either to explain the course of the police investigation or were directly solicited by defense counsel. As such, the trial court's admission of these statements was not error.

## III. CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's judgment and sentence of Michael R. Hamblen, Jr.

All sitting. All concur.

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