

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

NO. 2005-CA-002485-MR

TIMOTHY KIRBY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, SENIOR JUDGE  
ACTION NO. 99-CR-00179

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Timothy Kirby appeals from a judgment of the Laurel Circuit Court in which the trial court determined that Kirby was not eligible for the victim of domestic violence exception, Kentucky Revised Statute (KRS) 439.3401(5), to the violent offender statute, KRS 439.3401. On appeal, Kirby argues that the alleged accidental nature of the shooting for which he was convicted does not preclude the shooting from being connected to previous domestic violence. Kirby also argues that, at the evidentiary hearing before the trial court, he presented ample evidence that the shooting was

connected to prior acts of domestic violence. Thus, the trial court erred when it determined that he was not entitled to the benefit of the domestic violence exception to the violent offender statute. Finding no error, we affirm the trial court's judgment.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

According to the record in the present case, Kirby was initially charged by indictment with murder, a Class A felony, for killing his cousin, Brian Johnson. Kirby shot Brian in the back after Brian had allegedly assaulted Miranda Kirby, Kirby's mother. After Kirby was indicted, the Commonwealth extended a plea offer to him. In exchange for Kirby's guilty plea, the Commonwealth agreed to amend the charge from murder to manslaughter in the first degree, a Class B felony, and to recommend a sentence of fourteen and one-half years in state prison. The plea offer provided that “[i]t is conceivable that a jury could determine that the reported attack on defendant's mother created an extreme emotional disturbance with justification which supports Manslaughter First Degree.” In reliance upon this plea offer, Kirby pleaded guilty to manslaughter in the first degree. The Laurel Circuit Court subsequently sentenced Kirby to fourteen and one-half years in the state penitentiary.

According to KRS 439.3401, Kirby qualifies as a violent offender, thus, requiring him to serve eighty-five percent of his sentence before being eligible for parole. *See* KRS 439.3401(3). However, pursuant to KRS 439.3401(5),<sup>1</sup> Kirby moved the trial

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<sup>1</sup> Section (5) of KRS 439.3401 reads:

This section shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the

court to be considered a victim of domestic violence, thus, exempting him from the eighty-five percent rule. Without holding an evidentiary hearing, the trial court denied this motion.

Kirby appealed the denial of his motion to this Court. In *Kirby v. Commonwealth*, 132 S.W.3d 233, 236 (Ky. 2004) (hereinafter referred to as *Kirby I*), this Court held that “KRS 439.3401(5) excepts from restricted parole eligibility those defendants who commit any of the acts listed in 439.3401(1) against an individual who has committed an act of domestic violence against a family member of the defendant.” The *Kirby I* Court determined that Kirby's kinship fell within the definition of KRS 403.720(2) potentially making him eligible for the exception to the eighty-five percent rule found in KRS 439.3401(5).

In *Kirby I*, the “reported attack” and plea agreement was characterized as follows:

**Kirby describes the shooting of [Brian] Johnson as being done to prevent [Brian] Johnson from killing his mother;** however, his plea to manslaughter forecloses the possibility that it could be a complete defense. The plea agreement by implication characterizes the attack as one that did not create an imminent risk of death or severe bodily injury but, rather, was an event that precipitated an extreme emotional disturbance which led to the shooting.

*Id.* at 234 (emphasis added).

Finally, the *Kirby I* Court held:

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death of the victim or serious physical injury to the victim. The provisions of this subsection shall not extend to rape in the first degree or sodomy in the first degree by the defendant.

[T]he Commonwealth has repeatedly described Kirby's allegations regarding the attack on his mother as “refuted by the physical evidence.” However, at this stage in the proceedings there has been no evidence introduced which, of course, precludes any factual determination. For this reason, **the circuit court must hold an evidentiary hearing to determine the truth of Kirby's allegations.**

The circuit court's order denying Kirby's motion for relief is vacated and the case remanded for an evidentiary hearing consistent with this opinion.

*Id.* (emphasis added).

Thus, the mandate of the *Kirby I* Court was to determine if the evidence supports that the shooting was a result of extreme emotional disturbance to prevent Brian from killing Kirby's mother and that the shooting was related to an act of domestic violence. On remand, pursuant to the mandate of *Kirby I*, the trial court was to hold an evidentiary hearing to determine if Kirby should receive the benefit of the KRS 439.3401(5) exception based on his alleged justification for killing Brian as articulated in *Kirby I*.

At the hearing, Kirby focused upon the alleged incident of domestic violence and presented witnesses regarding the alleged choking incident. However, before the evidence was closed, the trial court determined that the main issue was not whether the choking actually occurred, but whether, assuming it did occur, it was related to the shooting. Thus, before the Commonwealth had the opportunity to put on its evidence, the trial court made a finding that the alleged choking incident had, in fact, occurred. Despite this, the trial court went on to find:

[T]he evidence presented shows a significant amount of time elapsed between the choking and the shooting. This Court finds that the domestic violence upon Miranda Kirby was too remote in time to be directly connected to the shooting of Brian Johnson.

The Kentucky Supreme Court has held that in order to be eligible for the exception, a defendant must establish a connection or relationship between the domestic violence and the violent offense for which the defendant stands convicted. *See Commonwealth v. Vincent*, 70 S.W.2<sup>nd</sup> [sic] 422 (Ky. 2002).

The only evidence presented at the hearing was that the shooting was accidental. As such, the shooting of Johnson was not connected to the domestic violence against Kirby's mother.

(Italics added).

## II. STANDARD OF REVIEW

When a criminal defendant seeks the benefit of the victim of domestic violence exception to the eighty-five percent rule found in KRS 439.3401(5), the defendant must prove by a preponderance of the evidence that he or she was a victim domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). Not only must the defendant prove that he or she was the victim of domestic violence, but he or she must also “establish a connection or relationship between the domestic violence and the violent offense for which the defendant stands convicted.” *Commonwealth v. Vincent*, 70 S.W.3d 422, 425 (Ky. 2002). “[A] prior history of domestic violence between a violent crime victim and the criminal defendant who perpetrated the violent offense does not, in and of itself, make the defendant eligible for the parole exemption of KRS 439.3401(5).” *Id.* To resolve a defendant's request to receive the exception, the

trial court is required to conduct an evidentiary hearing and make findings. *Anderson*, 934 S.W.2d at 278. As the fact-finder, the trial court has the sole responsibility to weigh the evidence and judge the credibility of all witnesses. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (Ky. 1941). Furthermore, the trial court is free to believe all of a witness's testimony, part of a witness's testimony or none of it. *Anderson*, 934 S.W.2d at 278 (citing *Webb Transfer Lines, Inc. v. Taylor*, 439 S.W.2d 88, 95 (Ky. 1968)).

Upon review, this Court will not reverse the trial court's determination regarding the applicability of KRS 439.3401(5) unless its ruling was clearly erroneous. *Anderson*, 934 S.W.2d at 278. The Supreme Court of Kentucky has defined “clearly erroneous” in those cases where the finding was against the party with the burden of proof, like in the present case, and has held that a finding that is reasonable given the evidence is by necessity not clearly erroneous. In contrast, a finding that is unreasonable, given the evidence, is clearly erroneous. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

### III. ANALYSIS

On appeal, Kirby argues that the trial court misunderstood the holding in *Commonwealth v. Vincent*, 70 S.W.3d at 422, and erred when it decided, based on its misunderstanding, that he was not entitled to the benefit of the domestic violence exception found in KRS 439.3401(5). We disagree.

According to Kirby, in *Vincent*, the appellant shot and killed her ex-husband. *Id.* at 423. After she was convicted of murder, the trial court held a hearing to determine if the appellant had been a victim of domestic violence and, thus, entitled to the exemption set forth in KRS 439.3401(5). *Id.* The appellant presented sufficient evidence to establish that the victim had committed acts of domestic violence against the appellant. *Id.* However, noting that the appellant had claimed that the shooting was accidental, the Supreme Court held that the appellant had offered no evidence that the shooting was connected to the prior acts of domestic violence. *Id.* at 425.

According to Kirby, the trial court misunderstood the holding in *Vincent* to mean that if a shooting was accidental, then it could not possibly be connected to a prior history of domestic violence. Kirby insists otherwise and argues that the *Vincent* court held that the appellant was not entitled to the benefit of KRS 439.3401(5) because she had offered no evidence that would connect the shooting to the prior domestic violence, not because the shooting was accidental.

In the alternative, Kirby argues that the trial court erred when it found that the choking was too remote in time to be connected to the shooting. Kirby concedes that *Vincent* requires a victim of domestic violence who has been convicted of a violent crime to establish a connection between the prior domestic violence and the subsequent crime for which the person has been convicted. Furthermore, he points out that the trial court made a finding of fact that the choking occurred, but he insists that the trial court required him to show that his shooting of Brian Johnson was “directly connected” to the choking;

whereas, *Vincent* only requires that he establish a “connection” between the shooting and the choking.

According to Kirby, he presented ample evidence to the trial court to establish a connection between the shooting and the choking. In addition, he argues that the domestic violence perpetrated by Brian against Miranda, Kirby's mother, did not end with the choking. Kirby insists that the domestic violence included threats that Brian allegedly made after the choking. According to Kirby, the acts of domestic violence committed by Brian continued until Kirby accidentally shot Brian in the back. Consequently, Kirby reasons that the accidental shooting of his cousin was connected to prior acts of domestic violence committed by his cousin.

At the evidentiary hearing held on June 30, 2005, Miranda Kirby, the appellant's mother, testified on Kirby's behalf. According to Miranda, at approximately 3:00 a.m. on the morning of October 14, 1999, she was awake, and she heard the victim, her nephew Brian Johnson, knock on her back door. According to Miranda, she did not answer the door, so Brian Johnson began banging on the outside walls and windows of her trailer. Miranda testified that he did this for approximately fifteen-to-twenty minutes. During that time, she heard Brian yell at Phillip Turner Neal, Miranda's live-in boyfriend who was asleep in one of the trailer's bedrooms, and ask for a beer. Miranda testified that she heard Neal reply that he did not have a beer. Despite the fact that Brian's behavior went on for fifteen-to-twenty minutes, Miranda did not call the police. Brian then knocked on the back door again, and this time, Miranda opened the door. Miranda



testified that Brian immediately stepped into the trailer, allegedly stated, “Bitch, I’ll kill you,” and began choking her. At the evidentiary hearing, Miranda testified that the choking lasted two seconds. Later, on cross-examination, she claimed that the choking lasted a few seconds. According to Miranda, Brian let go of her when Miranda’s mother and Brian’s grandmother, Rosa Johnson, entered the kitchen. Miranda testified that Brian asked Rosa to accompany him from Miranda’s residence. Miranda testified that Neal then entered the kitchen, carrying a stick, and he intervened between Brian and Rosa. Miranda testified that Brian and Neal struggled over the stick and that Brian took the stick away from Neal. Apparently during this struggle, Miranda coaxed Rosa back into bed. Miranda testified that after doing this, she swiftly exited the back door, ran fifty-to-seventy-five feet across her backyard to Kirby’s trailer. According to Miranda’s testimony, she heard Brian behind her as she ran toward Kirby’s residence, and she heard Brian yell, “Go get Tim.” When she arrived at Kirby’s trailer, Miranda pounded on the door and yelled “Brian just tried to kill me.” According to Miranda, fifteen minutes had passed between the choking and the fatal shot.

During cross-examination, Miranda admitted that Brian had never assaulted her before. Regarding the night in question, Miranda testified that Brian was in her home approximately fifteen-to-twenty minutes. She testified that after the choking, she went into Rosa’s bedroom to calm Rosa and put her back to bed, and she admitted that she did not witness the alleged struggle between Brian and Neal over the stick. Upon cross-examination, Miranda testified that she walked, not ran, to Kirby’s trailer. She also never

called the police. She further testified that, after Kirby exited his home, he fired three shots into the air. At this point, Brian was walking back toward his father's trailer unarmed and was approximately one hundred and eighty feet from where Miranda and Kirby were. According to Miranda, Brian, who was now standing in the road, yelled, "All you sons of bitches will be dead by morning." Again, despite the fact the opportunity was available, and Brian was a good distance away, and unarmed, no one called the police.

Miranda testified that, by this time, Kirby, still armed, was escorting her back to her trailer when he tripped over something causing his rifle to accidentally discharge hitting Brian. During cross-examination, Miranda admitted that, at the time of the shooting, she was not in any danger. Indeed, by this time at least fifteen-to-twenty minutes had passed since the alleged choking, and Brian was at least one hundred and eighty feet away from Miranda walking away from her home. Other than the choking, the trial court did not find additional acts of violence against Miranda or against anyone else by Brian.

The mandate of *Kirby I* included that the trial court hold an evidentiary hearing to determine the truth of Kirby's allegations, i.e., the alleged choking was "an event that precipitated an extreme emotional disturbance which led to the shooting" because Kirby was trying to prevent Brian from killing his mother. From any vantage point, the evidentiary hearing did not verify Kirby's allegations. First, the evidence

presented by Miranda was that the shooting was accidental -- a fact not included in *Kirby I* or Kirby's plea agreement.

Second, and much more importantly, there was no evidence or testimony presented at the evidentiary hearing that Kirby was acting under extreme emotional disturbance at the time of the “accidental” shooting. Moreover, the trial court did not find that Kirby was acting under extreme emotional disturbance at the time he shot Brian. Rather, the trial court found that the domestic violence upon Miranda was too remote in time to the shooting to be connected. Miranda was the only witness who had spoken with Kirby before the shooting. She did not provide any testimony that Kirby was extremely upset; rather, Miranda's testimony was that Kirby was walking her home when he tripped and accidentally shot Brian in the back. Faced with a total lack of evidence of extreme emotional disturbance by Kirby related to an act of domestic violence, the trial court did not make any findings supporting Kirby's allegations as articulated in *Kirby I*, namely that he was acting under extreme emotional disturbance -- a factual requirement for the relief Kirby seeks.

Third, there was no evidence that the shooting occurred to prevent Brian from killing Miranda. Indeed, Brian was a good distance from Miranda by that time and unarmed.

In addition, upon cross-examination, Miranda acknowledged that when she gave her statement to police on October 14, 1999, *the day of the incident*, she did not tell

the police that Kirby tripped and accidentally shot Brian; instead, she told the police that Kirby had fired the fourth and fatal shot up in the air.

After Miranda testified, Kirby called Phillip Turner Neal to the stand. Neal testified that, at the time of the shooting, he had been living with Miranda, and, on the evening of October 13, he had been drinking whiskey and beer and that Miranda had been drinking beer. According to Neal's testimony, at about 1:00 a.m. on the morning of October 14, he went to bed and passed out. He remembered that sometime later a loud, unidentifiable noise woke him. Neal testified that he left his bedroom, walked through the living room and the kitchen and entered Rosa's bedroom. According to Neal, Brian was in Rosa's bedroom, and he was trying to convince Rosa to leave with him. At that time, Miranda was in the kitchen, and Rosa was standing in the doorway just inside her room. During this narrative, Neal did not mention being armed with a stick nor did he mention struggling with Brian. After his initial narrative, Kirby's counsel asked whether Neal had been carrying anything at the time. Neal then replied that he had been carrying a stick. In response to another leading question by defense counsel, Neal testified that Brian had jerked the stick out of Neal's hand. According to Neal, after Brian allegedly took the stick away from Neal, Neal talked to Brian and convinced Brian to step outside into Miranda's backyard. During direct examination, Neal denied witnessing the choking incident, and he testified that he had only been awake fifteen minutes before the police arrived at the scene after the shooting.

Upon cross-examination, Neal testified that he did not remember what the loud noise was that woke him. He reiterated that he had been armed with a stick, and he described it as having bark on it. Neal testified that, after Brian allegedly jerked the stick away from Neal, Neal cornered Brian against the kitchen table and told Brian to leave. According to Neal, he and Brian did not struggle, and Neal denied that Brian ever assaulted him. Instead, Neal insisted that he pinned Brian against the kitchen table, talking to Brian. Neal testified that approximately fifteen minutes elapsed from the time he awoke until the time Brian left Miranda's home, and Neal stated that Miranda left the trailer approximately five minutes before Brian did. Neal testified that, after Brian left, he did not remember hearing Brian yell anything from outside. Additionally, Neal testified that he did not hear any gunshots; however, earlier during cross-examination, Neal admitted that he was still drunk at the time of the shooting.

Kirby's last witness at the evidentiary hearing was Detective Russell Baker of the London City Police Department. Detective Baker was one of the many officers involved in the investigation regarding Brian Johnson's death. Detective Baker testified that, on the morning of October 14, 1999, he was present when Detective Phelps of the Kentucky State Police interviewed Miranda. In response to defense counsel's request, Detective Baker read part of his report into the record.

On 10/14/99 at 0530 hours I was present while Detective Johnny Phelps conducted a [sic] interview with Miranda Kirby. Miranda stated she was setting [sic] at the kitchen table when she heard a knock on the door she then heard Brian Johnson at the back bedroom asking her friend Phillip Neal for a beer. Brian then came back to the door and Miranda opened

the door. Miranda stated that Brian started choking her. Brian [sic] then went and got her son and told him what happened. Tim then got his gun and fired up in the air, she then heard Brian yell "You shot me". ... I then took several photographs of Miranda's neck [sic] their [sic] was [sic] no marks or bruises visible on her neck at the time of the photographs.

Again, Miranda gave no indication that Kirby was emotionally disturbed by the alleged domestic violence against her. Although Kirby, not the Commonwealth, had called Detective Baker to the stand, Kirby's counsel, without court permission or objection by the Commonwealth, treated the detective as a hostile witness. During cross-examination, Detective Baker testified that, while investigating the shooting, the police found a blunt instrument that Baker described as a stripped stick or club or baseball bat that appeared to have blood on it.<sup>2</sup>

After Kirby had presented his witnesses, the Commonwealth called one witness, Lonnie Owens of the Laurel County Sheriff's Department. Detective Owens testified that he was the lead officer on the case. According to Detective Owens, the police found Brian's body one hundred and eighty feet from the spent shell-casings from Kirby's rifle. Detective Owens relayed that Brian had been shot in the right upper back, and he was facing his father's house when shot. He was not armed. Detective Owens also testified that the police found the spent shell-casings laying on the ground between Kirby's trailer and Miranda's trailer.

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<sup>2</sup> There was no testimony that the substance that appeared to be blood was related to the events at hand.

In the trial court's findings of fact, conclusions of law and judgment, it noted that it had previously found, during the evidentiary hearing, that the choking incident had occurred and was an act of domestic violence.<sup>3</sup> Yet the trial court found that the shooting of Brian Johnson was not connected to the domestic violence because the evidence showed: 1) that a significant amount of time had elapsed between the choking

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<sup>3</sup> While we recognize that the issue of the choking is not before this Court because the Commonwealth inexplicably failed to cross-appeal from the trial court's finding of fact that the choking did occur, nevertheless, we wish to address the issue briefly due to the numerous inconsistencies in the testimony and the leading questions by defense counsel.

During the evidentiary hearing, the trial court found that the choking probably occurred. However, the trial court stated that it viewed the evidence in the best light favorable to Kirby before the Commonwealth had an opportunity to put on its evidence. This was the wrong standard. It is incumbent upon the movant, in this case, Kirby, to prove by a preponderance of the evidence that he was a victim of domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). By viewing the evidence in the best light favorable to Kirby, the trial court shifted the burden of proof from Kirby to the Commonwealth. We are perplexed that the Commonwealth did not object when the trial court made its finding, and we are further baffled that the Commonwealth did not cross-appeal on this issue.

Turning to the evidentiary hearing, during direct examination of Miranda Kirby, Kirby's counsel produced two sets of photographs, one set taken by the police and one set taken by one of Miranda's daughters, Tammy Kirby. During direct examination, Kirby's trial counsel handed one of the police photographs to Miranda and, pointing to a specific part of the photograph, asked, "Would you say there's some redness there?" Miranda, in response to the leading question, replied yes. Kirby's counsel then repeated this process with the remaining police photographs. At no time did the Commonwealth object to counsel's use of leading questions. After showing Miranda all of the police photographs, Kirby's counsel asked, "Is it your testimony here today that the redness that is in these pictures came about as a result of Brian Johnson's choking of you?" In reply to this leading question, Miranda answered yes. Kirby's counsel then asked Miranda if she had bruises, and, oddly enough, Miranda answered that she did not look at herself but that other, unidentified people had remarked about her being bruised. We think it is important to note that, during Kirby's direct examination of Miranda, the trial court did not have a copy of the police photographs so it was unable to contemporaneously compare Miranda's testimony about the photographs with the photographs themselves in order to ascertain whether she was testifying accurately.

After showing Miranda the photographs taken by the police, Kirby's counsel showed Miranda two photographs that had been taken by Tammy. These two grainy photographs depicted Miranda sitting at her kitchen table. Kirby's counsel showed Miranda one of the pictures,

and the shooting, and 2) the shooting was accidental. The trial court made no other findings of domestic violence, either verbal or physical. Nor did the trial court find that Kirby acted under extreme emotional disturbance when he shot Brian, and no evidence was presented on this issue.

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pointed to a specific part of the pictures and asked if Miranda saw redness and bruising. Not surprisingly, Miranda responded yes. Defense counsel showed Miranda the second photograph and asked if Miranda saw any bruising. Miranda responded affirmatively. After that, Kirby's counsel stated that she wanted the record to reflect that Miranda was pointing to the area under her chin and going down her neck. As with the police photographs, the trial court did not have copies of Tammy's photographs; thus, it was not able to contemporaneously compare Miranda's testimony to the actual photographs.

After Phillip Neal had testified, Kirby's counsel called Tammy Kirby to the stand. According to Tammy, she observed bruises on Miranda's neck on October 14, 1999. In addition, Tammy testified that, on October 15 and October 16, she had taken photographs of her mother to document the trauma to Miranda's neck. Kirby's counsel presented one of the photographs that Tammy had taken to Tammy and stated that she wished to direct Tammy's attention to the neck area. Tammy then testified that "it" showed up in the picture. Kirby's counsel then showed Tammy the second photograph and told Tammy to look at the neck. Then Kirby's counsel asked, "Is that bruised?" Tammy then pointed to her own neck just underneath her chin and replied yes. Once more, the trial court had no copies of Tammy's photographs, missing another valuable opportunity to contemporaneously compare the testimony regarding the photographs to the actual photographs.

After Tammy testified, Kirby's counsel called Detective Baker to testify. While on the stand, Detective Baker testified about the photographs and Miranda's alleged injuries. Detective Baker testified that on the morning of October 14, 1999, he observed Miranda and saw no marks or bruises on her neck. Detective Baker testified that he took photographs of Miranda's neck that morning. He then testified that he photographed Miranda's neck a second time later that day or the next day. Kirby's counsel handed Detective Baker a copy of Detective Owens's report and asked him to read part of it. Detective Baker read part of Detective Owens's report into the record, and it revealed that Detective Baker had taken another set of photographs at 2:32 p.m. The report also revealed that Detective Owens had observed no signs that Miranda had been choked or involved in a struggle. Kirby's counsel then handed the police photographs to Baker and, pointing to a specific area of one photograph asked, "Is that red or not?" Detective Baker closely scrutinized the photograph and responded that the area to which Kirby's counsel had pointed looked like a suntan, not red. Kirby's counsel handed Baker another photograph and, pointing to a specific area, demanded, "Does that look red?" Detective Baker responded that that the area indicated by Kirby's counsel looked more red than other parts of Miranda's neck. As a



Turning to the evidence adduced at the hearing, Miranda's testimony revealed that the choking lasted for an extremely brief period of time, somewhere between two seconds and a few seconds. However, using leading questions,<sup>4</sup> Kirby's counsel attempted to use Miranda's testimony to paint a picture of continuing domestic violence. Miranda testified that Brian and Neal struggled over the stick, testified that

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side note, Miranda had been working outside that day.

After Baker testified, the Commonwealth called Detective Owens, the lead detective. During cross-examination, Detective Owens testified that, on October 14, 1999, when he initially made contact with Miranda, he did not see any injuries to Miranda's neck. According to the detective, he saw no marks on Miranda to lead him to think that she had been assaulted.

It is our opinion that the evidence adduced at the hearing was not sufficient, based on the proper standard, to support a finding that Miranda had been choked. Miranda testified that she had been choked, yet two of the investigating officers who observed Miranda only a couple of hours after the alleged attack testified that they saw no marks or injuries to Miranda's neck. In fact, according to Detective Owens's report, he saw Miranda several hours after the alleged attack and he still did not see any marks or injuries.

Furthermore, at the evidentiary hearing, Kirby's counsel insisted that both the police photographs and Tammy's photographs showed injury to Miranda's neck. However, when Kirby's counsel questioned Miranda regarding the police photographs, Kirby's counsel solicited testimony from Miranda that the photographs revealed injury, in the form of redness, to the lower part of Miranda's neck. However, when Kirby's counsel questioned Detective Baker regarding this redness, he testified that it appeared to be a suntan. We have carefully examined the police photographs and note that the photographs do reveal a uniform, light redness *on the lower part of Miranda's neck and chest* that appears to be a suntan or sunburn. However, the police photographs reveal no evidence of trauma caused by choking. Furthermore, when Kirby's counsel questioned both Miranda and Tammy regarding Tammy's photographs, Kirby's counsel solicited testimony from both women that the photographs revealed bruising on the upper part of Miranda's neck underneath the chin. This is, of course, inconsistent with both Miranda's testimony and Detective Baker's testimony regarding the police photographs. We have carefully examined Tammy's photographs as well and note that they do not reveal any evidence of bruising underneath Miranda's chin.

Reviewing the record, the only evidence that we can find that supports Miranda's claim that Brian choked her is her own testimony. Neither set of photographs reveal any injury and neither did the testimony of the investigating officers. Apparently, Miranda never sought medical treatment for her alleged injuries, so there is no medical evidence to support her claim either. Given the lack of evidence and the trial court's use of the incorrect standard of evidence, it is our

Brian followed her out of the trailer as she ran across her backyard to Kirby's trailer, and testified that, while outside, Brian made threatening statements. However, despite defense counsel's use of leading questions with Neal, he contradicted Miranda's testimony. He testified that he did not struggle with Brian. In fact, he did not mention the alleged stick until prompted by Kirby's counsel. He testified that Miranda had left the trailer four-to-five minutes before Neal had convinced Brian to leave, thereby contradicting Miranda's testimony that Brian followed her from the trailer. Neal also testified that he did not hear Brian yell threats once he had left the trailer. According to Detective Baker's summary of Detective Phelps's interview with Miranda, which Kirby's counsel had Detective Baker read into the record, Miranda did not tell the police that Brian had made threats after leaving her trailer. Furthermore, during cross-examination, Miranda testified that immediately before Kirby fired the fatal shot, he was escorting her home and that she was not in any danger. In addition, Detective Owens testified that Brian was at least one hundred and eighty feet from both Miranda and Kirby when Kirby fired the fatal shot and that Brian was facing towards his father's residence with his back turned toward Kirby, unarmed.

As the finder of fact, the trial court had the sole responsibility to weigh the evidence and judge the credibility of the witnesses. *Dunn*, 151 S.W.2d at 764-765.

Additionally, it could choose to believe or disbelieve any part of a witness's testimony.

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opinion that the trial court erred when it found that the choking had occurred.

<sup>4</sup> Kirby's counsel repeatedly used leading questions while directly examining both Miranda and Neal. In essence, Kirby's counsel used both Miranda and Neal as mere props in order to testify. However, the Commonwealth never objected to defense counsel's use of leading questions.

*Anderson*, 934 S.W.2d at 278. Because of the trial court's discretion, it could believe parts of Miranda's testimony such as the choking lasted two seconds and that Brian remained in her trailer for fifteen-to-twenty minutes after the choking, and it could disbelieve her testimony regarding the alleged struggle over the stick and the threats Brian allegedly made after leaving the trailer. Discounting Miranda's inconsistent and contradicted testimony, the trial court was left with evidence showing that, after the alleged choking, the situation was relatively calm for at least fifteen minutes prior to the fatal shooting. Indeed, the trial court found no other acts of domestic violence, either verbal or physical, other than the brief choking. Furthermore, because Kirby's guilty plea regarding intent was not conclusive, the trial court could consider and believe Miranda's testimony that Kirby tripped, while escorting Miranda home, and accidentally shot Brian in the back. However, even if the shooting was intentional, the trial court's finding that the shooting was not connected to the choking was highly reasonable given the evidence. Giving the trial court the proper deference required by the case law, combined with the lack of evidence and the absence of a finding regarding extreme emotional disturbance on Kirby's behalf or a finding of continuing domestic violence, we conclude that the trial court did not err when it found that the shooting was not connected to the prior act of domestic violence.

Furthermore, in *Holland v. Commonwealth*, 192 S.W.3d 433, 437 (Ky. App. 2006), this Court stated that:

As the amicus brief aptly points out, however, defendants who are *acquitted* have no need of the probation and parole

exclusions afforded to domestic violence victims by the General Assembly. The General Assembly thus obviously intended to provide leniency to victims who could not establish **self-defense**. The class of defendants raising allegations of domestic abuse under these statutes [KRS 533.060(1) and KRS 439.3401(5)] “is provided multiple opportunities to raise the abuse in mitigation of their criminal conduct.” *See generally*, Sue McClure, Note, *The Battered Woman Syndrome and the Kentucky Criminal Justice System: Abuse Excuse or Legitimate Mitigation?* 85 Ky. L.J. 169 (1996-1997). We agree that these statutes are intended to give domestic violence victims additional opportunities to secure leniency beyond the defenses they might raise at trial. (emphasis and italics added).

Additionally, the *Holland* Court stated that:

The “battered woman syndrome” “tends to explain why a person suffering from the syndrome would not leave her mate and would be driven by fear of continuing episodes of increased aggression against herself to perceive certain conduct was necessary in her self-defense, even though another person not suffering from such a condition might believe or behave differently.” *Commonwealth v. Rose*, 725 S.W.2d 588, 590-591 (Ky. 1987). In general, the legislative enactment relating to domestic violence victims is intended to provide leniency to persons for whom the traditional notions of self-defense do not apply.

*Id.* at 438.

We agree with the *Holland* Court that the domestic violence exception set forth in KRS 439.3401(5) was meant, in part, to give leniency to those women who have suffered from “battered woman syndrome.”<sup>5</sup> This condition was initially researched by Lenore E. Walker, and she defined a battered woman as “a woman who is **repeatedly** subjected to any forceful physical or psychological behavior by a man in order to coerce

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<sup>5</sup> Obviously, this could likewise apply to men who have suffered abuse.

her to do something he wants her to do without any concern for her rights.” Sue McClure, Note, *The Battered Woman Syndrome and the Kentucky Criminal Justice System: Abuse Excuse or Legitimate Mitigation?* 85 Ky. L.J. 169, 170 (1996-1997) (quoting Lenore E. Walker, *The Battered Woman* ix, 11 (1979)) (emphasis added).

According to Miranda Kirby's own testimony, Brian Johnson had never assaulted her prior to the alleged choking, making the choking an isolated incident, *assuming* that it happened in the first place. So, according to the record, Miranda was *never* “repeatedly subjected to any forceful physical . . . behavior by” Brian nor was she in “fear of continuing episodes of increased aggression” from Brian. Kirby has already received leniency via his plea bargain with the Commonwealth. He simply does not deserve the benefit of the domestic violence exception, a leniency that is reserved for those individuals who have acted in response to having suffered abuse.

Our conclusion does no injustice to the law of the case under *Kirby I* because our Court held therein that Kirby fell within the class of individuals covered by KRS 439.3401(5) *if* his allegations were true -- that he was acting under extreme emotional disturbance when he shot Brian to prevent Brian from killing his mother. Even where domestic violence is one act like the case at hand, assuming an act of domestic violence even took place, this case fails to meet the spirit and intent of the leniency given under KRS 439.3401(5). Had Kirby walked in while Brian was allegedly choking his mother or threatening her with further imminent violence, we might conclude otherwise.

Furthermore, given the facts of this particular case, we believe that for

Brian's allegedly hostile act to be considered as domestic violence, it must have some causal connection to the family relationship between Brian and Miranda other than mere happenstance. There is no evidence that Brian intruded upon Miranda in the early morning hours of October 14 because she was his aunt. Apparently, he intruded because her home was a convenient place to possibly obtain a beer. Miranda and Brian could have easily been two unrelated neighbors. However, to apply KRS 439.3401(5) under the circumstances of this case belittles the plight of those victims who act when they believe there is no other alternative to secure their safety or their family members' safety when risk of harm is imminent from an abusive family member.

#### **IV. CONCLUSION**

Based on the reasons set forth *supra*, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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