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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001352-MR

IAN MILLER — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 14-CR-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON[1] AND KRAMER, JUDGES.

KRAMER, JUDGE: Ian Miller appeals the Wayne Circuit Court's judgment convicting him of reckless homicide and sentencing him to five years of imprisonment. Following a careful review of the record, we affirm.

[1] Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office on November 20, 2018. Release of this opinion was delayed by administrative handling.

Ian and his then-wife, Brianna,[2] moved into a trailer at 685 Highway 1275 on or about April 19, 2014. Near midnight on April 20, 2014, Ian was sitting on his front porch when his new neighbor, Gavin Thompson, approached and greeted him. Brianna later joined them; Shana Cummings[3] (Gavin's live-in girlfriend) did so as well; and the four of them conversed. During that time, the men consumed alcohol, and Ian repeatedly pulled a gun that he carried with him out of his pocket to show Gavin and Shana. At approximately 3 a.m., the women were relaxing in the Millers' trailer while the men were in Gavin's and Shana's trailer next door. Shana heard gunshots, so she ran home. When she opened the door, Gavin was lying on the floor, and a large, serrated kitchen knife was underneath one of his arms. Ian was standing at Gavin's feet and pointing the gun at Gavin's head. Shana called 911. The authorities arrived shortly thereafter, and Ian disarmed and surrendered himself.

During the investigation that ensued, only Ian and Shana offered direct accounts of the circumstances surrounding Gavin's death, and much of the focus was upon the discrepancies between their versions. Ian, for his part, did not

[2] Brianna has since changed her last name, but for purposes of this opinion we refer to Ian and Brianna in the collective as "the Millers."

[3] Throughout his brief, Ian refers to Gavin's live-in girlfriend as "Shanna Cummins." However, throughout the circuit court's written record, the several exhibits presented, and the Commonwealth's brief, her name is spelled "Shana Cummings." For purposes of this opinion, we will use the latter spelling of her name.

contest that he shot Gavin three times – once in the left lower quadrant of his abdomen, once in his left upper back, and again in his right mid back. But, he claimed to have done so in self defense. He told investigators that after meeting on his porch, the four of them had initially gone over to Gavin and Shana's trailer to socialize. Once there, Gavin had become increasingly aggressive toward him and the women; that he had intentionally suggested the women relax at the trailer he shared with Brianna in an effort to separate them from Gavin; and that shortly after the women left, and immediately before he shot Gavin, Gavin had charged at him with a kitchen knife. Aside from that, Ian had no specific memories of the shooting, what had led to it, or of what transpired immediately afterward.

Ian's version of events differed significantly from Shana's more detailed account. To summarize, Shana indicated that Ian, not Gavin, had acted irrationally and aggressively. She told investigators and later testified that while she and Brianna were with Gavin and Ian, the two men never appeared angry with one another, always appeared to be getting along, and had mostly debated about music. However, she felt something about Ian was "off," and it frightened her that Ian repeatedly displayed his gun. She recalled Ian making a statement to the effect that he had never gotten the opportunity to kill anyone while he was in the military, that he sounded disappointed when he had said it, and that he had also said that he had had dreams of killing people. She also recalled that at one point she attempted

to remove herself from Ian's presence by locking herself in the bathroom of the trailer she shared with Gavin. She stated Ian broke into the bathroom and tried to grab her and that she immediately rushed out and back to where Gavin and Brianna were (the kitchen and living room area of the trailer she and Gavin shared). But, she did not tell anyone what had occurred.

Shana stated that Ian had suggested she and Brianna go to the Miller trailer and relax over there because she was feeling sick, and because the men wanted to continue talking, listening to music, and cooking in Gavin's and Shana's trailer. She stated that she whispered to Gavin that she thought they should just ask the Millers to leave because she did not feel comfortable having someone with a gun in their home. But, she went to the Miller trailer with Brianna after Gavin assured her everything would be fine.

According to Shana, she heard the gunshots ten or twenty minutes later, ran home, opened the door, and discovered Gavin bleeding and laying face-down on the floor. Ian was standing at Gavin's feet, pointing a gun at Gavin's head. She tried pushing Ian away, but Ian continued to point his gun at Gavin and proceeded to point the gun at her face. Ultimately, she either succeeded in pushing Ian outside or he left on his own. Then, as she held the door shut and called 911, Ian tried to pull the door open from the outside but abandoned the effort shortly before the first police officer arrived on the scene.

Following an investigation, Ian was indicted on the charge of capital murder. The primary issue at trial was whether Ian had shot Gavin believing, reasonably or otherwise, that doing so was necessary for self protection. Following a jury trial, Ian was convicted of reckless homicide and sentenced to five years of imprisonment.

On appeal, Ian argues the trial court erred in either limiting his ability to conduct cross examinations, or by excluding what he believes was relevant, exculpatory evidence. As to the nature of the evidence that the trial court excluded, it generally falls into two categories: (1) impeachment evidence against Shana; and (2) impeachment evidence against Detective Billy Correll, the lead investigator who ultimately arrested Ian.

The limitations that are placed upon cross examination are within the circuit court's discretion. *See Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005) (explaining "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (internal quotation marks and citation omitted; alteration in original)). We review the trial court's decisions with respect to the admission or exclusion of evidence under the abuse of discretion standard. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With that in mind, we proceed with our analysis.

I. Impeachment and cross examination of Shana Cummings

Ian asserts, without citing any specific evidentiary rule, that he should have been permitted to impeach Shana during cross examination by demonstrating that during the time of his trial she was on pretrial diversion for a felony conviction and that two bench warrants were pending against her. We disagree.

We begin with what Ian argues was the trial court's erroneous refusal to allow him to impeach Shana with her "felony conviction," and qualify his argument by noting he was able to imply during his trial that Shana had been *charged* with a felony. On cross examination, the following exchange between his counsel and Shana took place:

> IAN'S COUNSEL: Miss Cummings, as you sit here today testifying, you are a convicted felon, aren't you?
>
> SHANA: No, not convicted.

That aside, evidence of a witness's felony conviction is an accepted form of impeachment. *See* Kentucky Rule of Evidence (KRE) 609(a). This is so – as Ian notes – even if a witness is participating in pretrial diversion[4] that could ultimately negate the felony conviction.[5] *See Futrell v. Commonwealth*, 471

[4] *See* KRS 533.258.

[5] In *Rine v. Commonwealth*, 2002-SC-1079-MR; 2003-SC-0012-MR, 2005 WL 1185205, at *4-5 (Ky. May 19, 2005) (unpublished), the Kentucky Supreme Court explained why participation in pretrial diversion of a felony charge pursuant to KRS 533.258 qualifies as a conviction of a felony within the meaning of KRE 609(a). We cite *Rine* only for purposes of illustration.

S.W.3d 258, 286-87 (Ky. 2015); *cf. Holt v. Commonwealth*, 250 S.W.3d 647, 653 (Ky. 2008) (explaining a witness's "mere participation in a pretrial diversion program, absent any further showing upon which to infer bias, is an insufficient basis for impeachment"); *Farmer v. Commonwealth*, 309 S.W.3d 266, 272-73 (Ky. App. 2009) (explaining that upon the *completion* of a felony diversion program, a witness is no longer considered convicted of a felony for purposes of KRE 609(a)).

However, according to the appellate record, Shana was *not* convicted of a felony nor has she ever been on pretrial diversion for any felony charge. Rather, the avowal exhibits Ian tendered merely demonstrate the following: (1) on July 2, 2013, Shana filed a motion in a criminal proceeding in Anderson Circuit Court *requesting* to be placed on pretrial diversion for a felony charge; (2) she offered a plea of guilty to the felony charge, but her plea was *conditioned* upon the Anderson Circuit Court granting her motion;[6] and (3) the Anderson Circuit Court entered no order granting her motion. Indeed, Shana herself testified through avowal that she has never participated in a pretrial diversion program relating to her felony charge.

[6] In relevant part, Shana's motion for pretrial diversion set forth the following provision:

> 6. I understand that if the Court rejects the plea agreement, it must so inform me. If this occurs, I may either persist in my guilty plea and possibly receive harsher treatment than I bargained for or *I may withdraw my guilty plea* and proceed to trial.

(Emphasis added.)

Courts speak only through written orders entered upon the official record. *Kindred Nursing Ctr. Ltd. P'ship v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010). Here, while Ian demonstrated Shana had been *charged* with a felony, he offered no proof, much less a written court order, indicating she had been *convicted* of one or otherwise indicating how her criminal matter had been resolved, if at all. As the trial court correctly explained below, that was insufficient for impeachment purposes under KRE 609(a).

As for the trial court's exclusion of the two bench warrants pending against Shana at the time of Ian's trial, we likewise find no error. Ian's argument in this vein implicates KRE 608(b), which allows *inquiry* into a witness's specific instances of past conduct for purposes of impeachment, not *extrinsic evidence*. Thus, to the extent Ian is arguing the jury should have been permitted to consider the several court records he provided the trial court through avowal, relating to Shana's warrants and apparently pending felony charge, he is mistaken. Nor, for that matter, does Ian argue the probative value of that extrinsic evidence was so compelling or so crucial to his defense that the trial court should have exempted those records from the ordinary rules of evidence.

Alternatively, if Ian's argument is focused upon the scope of *inquiry* he was permitted by the trial court regarding Shana's specific instances of conduct, we reject the notion that any reversible error occurred. KRE 608(b) only allows

for inquiry into a witness's specific instances of conduct if the conduct in question is "probative of truthfulness or untruthfulness[.]" A witness's failure to appear in court is not probative of a witness's truthfulness. *See, e.g., Slone v. Commonwealth*, 382 S.W.3d 851, 857 (Ky. 2012). And of the two warrants, the first relates to Shana's failure to appear in Anderson Circuit Court for sentencing in her felony matter. The second was issued due to Shana's failure to appear in Anderson District Court for monitoring that related to her probation for misdemeanor theft by unlawful taking.[7]

Ian also insinuates the outstanding warrants could have given Shana an incentive to lie to curry favor with the prosecution. He specifically draws attention to the fact that the prosecution was made aware of Shana's outstanding warrants approximately three months prior to his trial (after his counsel informed the prosecution about her warrants).

However, as the Kentucky Supreme Court explained in *Davenport*, 177 S.W.3d at 769,

> [R]eviewing courts have found reversible error when the facts clearly support an inference that the witness was biased, and when the potential for bias exceeds mere speculation. In [*Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)], the Confrontation Clause violation occurred when the trial

[7] As a side note, Ian was permitted to ask Shana during cross examination if she was on probation for a conviction of misdemeanor theft by unlawful taking. Shana answered in the affirmative.

court excluded evidence that a key prosecution witness's criminal charge had been dismissed after he agreed to talk with investigators about the murder, an agreement which the witness readily acknowledged. 475 U.S. at 676, 106 S.Ct. at 1432. In [*Spears v. Commonwealth*, 558 S.W.2d 641, 642 (Ky. App. 1977)], error occurred when the trial court excluded evidence that the principal prosecution witness had an indictment pending at the time of trial in the same county. *Id.* In *Williams v. Commonwealth*, this Court determined that the trial court should have permitted defense counsel to question a key witness about the possibility of a "deal" with the Commonwealth. 569 S.W.2d 139 (Ky. 1978). In *Williams*, though, evidence supporting the Inference of bias was strong: the key witness refused to testify at the defendant's first trial unless he was released from jail, he was in fact thereafter released, the conviction was later vacated, and he admittedly refused to incriminate the defendant until after he had spoken with a government agent. *Cf. Nunn v. Commonwealth*, 896 S.W.2d 911 (Ky. 1995) (finding no violation of appellant's confrontation rights where the trial court prohibited cross-examination of a key witness regarding pending charges against him, particularly in light of the extensive cross-examination that was permitted and the potential for juror confusion).

The trial court does not err in limiting evidence of potential bias when there is a lack of credible evidence supporting the inference. In *Bowling v. Commonwealth*, a factually analogous case, we concluded that the mere fact of a witness's pending indictments in an adjacent county were insufficient to infer that the witness was motivated to testify in an effort to curry favor with the Commonwealth's Attorney. 80 S.W.3d 405, 411 (Ky. 2002). The Court in *Bowling* was persuaded by the fact that the prosecuting attorney, in reality, had no jurisdiction to grant any leniency to the witness with respect to charges in another county. "Since there was no connection between [the prosecuting attorney] and the case against [the witness] in Fayette County, the pending

> Fayette County indictments were not admissible." *Id*. The Court also took note that Bowling offered no evidence that supported his claim that the witness had been offered leniency to testify.

Here, the circumstances surrounding Shana's outstanding bench warrants were analogous to the circumstances surrounding the witness's indictments in *Bowling*. Shana's warrants originated in a different county (Anderson). The Commonwealth's Attorney prosecuting this matter had no jurisdiction to grant Shana anything with respect to those warrants, much less leniency in relation to those proceedings. Shana was offered nothing from the Commonwealth's Attorney in exchange for her testimony – a point the Commonwealth's Attorney verified to the trial court; Ian's counsel conceded while taking Shana's avowal testimony; and which Ian produced nothing aside from his own speculation to refute. Indeed, during her avowal testimony Shana stated she was unaware of the warrants. Accordingly, the trial court acted well within its purview in excluding this evidence. *See Bowling*, 80 S.W.3d at 411. We find no error.

II. Impeachment and cross examination of Detective Billy Correll

The second category of evidence Ian asserts the trial court wrongfully excluded is what he characterizes as impeachment evidence against Kentucky State Police Detective Billy Correll, the lead investigator who ultimately arrested him. Ian takes issue with the scope of inquiry he was allowed or believes he was

allowed during cross examination to demonstrate, in the words of his brief, that "Correll didn't do the work necessary to make a decision as to whether Gavin was a good neighbor or a crazy neighbor." However, it is unclear from his argument and the context of what occurred at trial if Ian is focusing upon his ability to ask: (1) whether Correll *received* Gavin's criminal or psychological records prior to arresting him; (2) whether Correll *reviewed* any of Gavin's criminal or psychological records prior to arresting him; or (3) for Correll's *opinion*, based upon those records, of Gavin's likely mental condition before Gavin was shot – in other words whether, if he had reviewed those records, Correll would have found Ian's version of events (*i.e.*, that Gavin was the first aggressor) more credible or believable.

To explain, portions of Correll's pre-arrest interview with Ian were introduced as evidence at trial and at one point during the interview, while discussing Ian's claim that Gavin had charged at him with a knife, the following exchange occurred:

> CORRELL: What about the other possibility, Ian?
>
> IAN: What other possibility?
>
> CORRELL: The other possibility being that he pulled the knife trying to defend himself from you, who pulled the gun on him?
>
> IAN: Why in the hell would I pull a gun on him?

CORRELL: Why in the hell would he pull a knife on somebody that's got a gun?

IAN: Because he's fucking crazy?

CORRELL: Well, I mean, that's a quick, that is a quick explanation for something.

IAN: It is a quick explanation and it's --

CORRELL: You know what I'm saying? You know?

IAN: -- really easy to believe as well, but –

CORRELL: I asked you a question, and you answered me with a question that, that has the same answer. You know what I'm saying?

IAN: I understand.

CORRELL: I mean, I don't know you, I don't know him. And, and I, that's what I'm trying to figure out, is, okay --

IAN: Listen, I got, I got an answer.

CORRELL: Okay.

IAN: He was a drug user. If you test his blood, I'm sure you'll find drugs.

Correll was later questioned by the Commonwealth about Ian's suggestion that Gavin was "crazy," and Correll reiterated what he had stated to Ian during their interview:

COMMONWEALTH: Is that something that you, when you've got two people that are at odds with one another,

> is that something that you put a lot of faith or stock in, when one person calls somebody else "crazy"?
>
> CORRELL: No, sir.
>
> COMMONWEALTH: Why not?
>
> CORRELL: Well, um, it, it's just a term that's used very loosely by a lot of people, and obviously it has a lot of different meanings to whoever is talking, who's using that term. Um, unless they're, unless they have a specialty in that particular field, I wouldn't deem that as a credible term to categorize somebody.

Correll also noted during his testimony that Ian's knowledge of Gavin, prior to Gavin's death, had been limited to what Ian had learned in the approximately three hours Ian and Gavin had socialized.

During cross examination, Ian then asked Correll whether, prior to arresting him, Correll had gotten "to know the real Gavin Thompson" by investigating the criminal backgrounds of Gavin and Shana; questioning any of Gavin's neighbors, co-workers, or relatives about whether Gavin had a tendency to "act crazy;" checking whether Gavin had undergone treatment for drug abuse or mental health issues; and ascertaining whether and to what extent Gavin had a history of drug abuse. Correll responded in the negative, admitting he still knew nothing about the histories or backgrounds of Gavin, Ian, or Shana, and that he had made no attempt to learn more about them. Ian's counsel then asked: "But if you

had, you would've learned something, wouldn't you?" Whereupon, the Commonwealth objected.

At an ensuing bench conference, the extent of the Commonwealth's objection dealt with a concern that Ian was intending to describe and then ask Correll to opine about specific instances of when Gavin had previously been hospitalized for psychiatric treatment. The Commonwealth argued if that was the case, Ian was effectively asking the detective to render an opinion about Gavin's probable mental state at the time of his death based upon inadmissible hearsay. The colloquy between the Commonwealth's Attorney, Ian's counsel, and the trial court was as follows:

> COMMONWEALTH: Before we get into the issue of the psychiatrics, the only way [Correll] would know anything about that is through hearsay. And so, my initial objection would be, is that if she is going to ask him whether or not he would have learned that Gavin had mental health issues, there is no way he knows anything about that except through somebody else telling him, so it calls for a hearsay answer. And, I don't know how much we need to address it here with Detective Correll, but the psychiatric records are absolutely privileged under the criminal rules. In fact, I know this court has had experience with dealing with this issue under the standards set forth in *Barroso*.[8] As so far as I'm aware, there has been no request to have those records reviewed in camera to even make an initial determination about their admissibility. Without that, those records are not admissible. I think primarily as to this witness, the objection is, is that he has no personal knowledge, it can

[8] This is a reference to *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003).

only come through hearsay, and so it would be inadmissible to ask him about learning about Gavin's mental health history.

IAN'S COUNSEL: Judge, my response is two-fold. I believe that Detective Correll made this an issue during the interview of Ian Miller. His quote was "I don't know him, I don't know you." But then, he keeps on questioning Ian as to why he would do this. Alright? So, then I ask him, did you get anything about his psychiatric records? He says no. Then, on redirect, [the Commonwealth] opened the door about the "crazy". He said, you know, "Did you take that to mean anything? Crazy?" You know. So, I think he has. We have a due process right to present a defense, and in this case the hearsay objection should fall by the wayside because he opened the door, making it an issue, and so did the prosecutor in saying, you know, "What about crazy?" I've got some notes written down that on redirect, he didn't have to do that, but he did, as far as [Correll] is concerned about the term "crazy." And I'll, he's got the records now. He's got them. So, you know, if he had done a records check based upon the interview with Mr. Miller, again, he would have found out that this man has several psychiatrics, even more than the ones I was able to provide, or to get. So with that, I think that we are being deprived of our due process right to defend ourself because they're trying to say that we can't go into Gavin Thompson's psychiatric issues.

COMMONWEALTH: Judge, if you will recall, number one, the psychiatric records were provided to Detective Correll by the defendant. The defense cannot provide records, and then ask him to opine on records, or to state the contents of records that have been provided by them.

IAN'S COUNSEL: No, I'm not asking that –

COMMONWEALTH: You can't, so the initial objection, I was asking Mrs. Cummings about Gavin's

physical condition, she was starting to talk about surgeries he had, about that kind of thing. The objection was, from [Ian's counsel], that there was no way she could know that other than by hearsay. This is exactly the same issue. This is not prohibiting them from putting on a defense. This is just following the rules. This is, if those records are otherwise admissible, then they can bring, and I don't agree that they are, but for argument purposes, they can bring a witness in and put those records in, and we can deal with the admissibility issue there. But this is exactly like Mrs. Cummings' testimony, when you sustained that objection. That is based entirely on hearsay.

IAN'S COUNSEL: He said, "I don't put a lot of faith or stock in that term. My impression was there was no crazy." Well yes, Mr. Gavin Thompson has been in several psychiatrics. And some of the records even talk about that he was contemplating suicide. Okay? So, with that, if he had learned that, again, he's put it at issue when he interviews him that night. He keeps on saying, "Why would this guy bring a knife to a gunfight? Why would he do that?" Well there's information out there that he could have found. And I'm not going to ask him about, is he, is the diagnosis in the records, da da da da da. I'm asking him, he was provided with certain records about Mr. Thompson. And so, did he follow up on it? No, he didn't. And I think that I'm allowed to ask that.

COURT: But –

IAN'S COUNSEL: He didn't follow up on, on any of those psychic –

COURT: It's too late to follow up on it. It's too late.

IAN'S COUNSEL: Well, but this, this has been –

COURT: This has already been done.

> IAN'S COUNSEL: But I'm saying three years --
>
> COURT: He's been arrested, and he's been charged. It's too late later on. You're not going to do any good here. That's your job after that.
>
> IAN'S COUNSEL: Again, I think he –
>
> COURT: When he said "crazy," that's just a common thing that happens regularly, they'd say "well he's crazy," that's basically what he was saying. I'm going to sustain the objection, I'm not letting you get into that.

Thereafter and through avowal, Ian was permitted to ask Correll the questions he had intended to ask prior to the Commonwealth's objection. There, Ian presented Correll with documentation relating to Gavin's medical history that indicated Gavin had been an inpatient in a West Virginia psychiatric facility between July 30, 2005, and August 29, 2005. Ian asked Correll if those records had been reviewed prior to his arrest. As before, Correll answered he was unaware of Gavin's medical history. Ian then presented Correll with a number of Gavin's criminal records that indicated Gavin had been convicted several times for public intoxication. He asked Correll if those records had been reviewed prior to his arrest. As before, Correll answered he was unaware of Gavin's criminal history.

Ian's counsel then asked Correll, "If you had done that, and gotten his records, his psychiatric records, gotten Gavin Thompson's psychiatric records, it might've shed a little bit of light on why he was acting the way Ian said he was

acting that night, is that right?" To which Correll responded, "Well, it depends on those records. Yes, ma'am, it could potentially."

Upon concluding these questions, Ian's counsel then explained to the Court during avowal *why* Correll's answers to these questions were relevant and necessary to his defense:

> IAN'S COUNSEL: Again, Judge, not asking him as to whether or not, I, I'm not asking his impression. I understand he cannot tell what such-and-such said. But at least I was going to question him out there on the record as to whether or not he had received these records. Because a lot of information that is provided in these records is given to the doctors by Pam Workman, Mr. Thompson's mother, who is here, and who we have subpoenaed to testify in this case. So again, my questioning out there, I wasn't gonna ask Detective Correll what, you know, he's got all these, uh, psychiatric issues, is he paranoid schizophrenic or anything like that. Not conclusions, not that. Only that whether or not he had even attempted to, and then not had received these records. Um, again I've got –
>
> COMMONWEALTH ATTORNEY #1: I thought you already did that. Had he checked all of his psychiatric records.
>
> IAN'S COUNSEL: *Maybe. I guess I may have asked him if he got all his psychiatric records, but I think before he answered, was the objection from the Commonwealth.*
>
> COMMONWEALTH ATTORNEY #1: *No. That the,* [Ian's Counsel] *asked, I think a couple times, whether he had checked into, checked into the psychiatrics and, and he said "no."*

> COMMONWEALTH ATTORNEY #2: That's what I think.
>
> COMMONWEALTH ATTORNEY #1: And then –
>
> COMMONWEALTH ATTORNEY #2: He was asked two or three times.
>
> COMMONWEALTH ATTORNEY #1: It was. And then the line of questioning was asking about the specific records, and that's why I wasn't gonna let her do that.

(Emphasis added.)

With the above in mind, we now return to Ian's argument on appeal. If it takes issue with his ability to ask whether Correll *received* any of Gavin's criminal or psychological records prior to arresting him, Ian cites no authority favoring the proposition that Correll had any duty to obtain or review these types of records prior to arresting him. Indeed,

> [c]ourts are in no position to say as a matter of law that an officer must break off an investigation at any particular point in time or that he must move in and effect an arrest at any particular time. These are matters that do and must remain in the reasonable discretion of the officer in the field conducting the investigation.

Phillips v. Commonwealth, 473 S.W.2d 135, 137 (Ky. 1971).

It is also a moot point. As Ian's counsel apparently conceded during avowal, Correll was asked that question during trial – along with whether Correll had reviewed those records – and Correll answered he had not.

Conversely, we find no error if Ian's argument takes umbrage with the trial court's decision to preclude him from asking, based upon those records, for Correll's *opinion* of Gavin's likely mental condition at the time of the shooting. To begin, there was nothing for Ian to impeach in this vein. When Ian's counsel represented during the above-discussed bench conference that Correll had testified his "impression was there was no crazy," insinuating Correll had expressed an opinion regarding Gavin's mental state, Ian's counsel misremembered. Correll gave no such testimony; nor, as the trial court pointed out, did he open the door to providing it. Rather, he stated that a layperson's use of the word "crazy," in his experience, is unhelpful to an investigation because "it has a lot of different meanings to whoever is talking."

Ian also asserts in his brief that eliciting such an opinion from Correll was necessary because, at some point earlier on in the trial, Correll had given an "improper opinion that Ian had not acted in self-defense" and had "opined that two wounds to the back was inconsistent with a claim of self-defense." But this too is a misrepresentation of Correll's testimony. Correll offered no such opinion during the several hours he was questioned at trial. Indeed, the point in the video record where Ian identifies Correll's "opinion" in this respect (cited in his brief as located at "VR; 6/6/2017; 9:45:20") actually identifies testimony given by another investigating officer, Detective Christopher Lyon; and there, Lyon merely testified

that when he observed Gavin's condition, he noticed a fact that is not in dispute – that Gavin had been shot twice in the back and once in the abdomen.

In any event, Correll was unqualified to provide such an opinion based upon the hearsay evidence of Gavin's records. As a lay witness, any opinion he could have given regarding Gavin's probable mental state could only have been based upon his own factual observations or perceptions of Gavin – of which, Correll had none. *See* KRE 701; *Gabbard v. Commonwealth*, 297 S.W.3d 844, 855 (Ky. 2009).

Lastly, and in a somewhat related vein, Ian asserts that Gavin's psychiatric records "were not absolutely barred." The records he is referencing relate to the documentation he produced in avowal illustrating that for a period of approximately one month in 2005, Gavin was an inpatient at a treatment facility in West Virginia due to chronic and acute depression, suicidal thoughts, and other issues stemming from abuse of prescription pain medication and alcohol. Ian's contention that they "were not absolutely barred" takes issue with the statement the trial court made during its colloquy with his counsel that it was "too late to follow up on it. It's too late." From that statement, Ian believes the trial court signified it was unwilling to admit Gavin's psychological records under any circumstances. And, Ian argues the trial court erred in this respect.

But, that is not what the trial court ruled when it stated, "It's too late." That much is illustrated by the trial court's follow-up statement that "[Ian has] been arrested, and he's been charged. It's too late later on. You're not going to do any good here. That's your job after that." Taken at face value, the trial court was only indicating that asking Correll to deliberate further upon whether he should have arrested Ian was a moot point because the decision to arrest and charge him had already been made. To the extent the trial court sustained any objection from the Commonwealth relating to the admissibility of those records during the bench conference, the Commonwealth's objection was limited to introducing those records through *Correll*, who had no personal knowledge of the records and was unqualified to form any opinions of Gavin's mental state based upon them.

And, while Ian broadly refers to this evidence as "exculpatory," he fails to explain how the introduction of those records could have affected the outcome of his trial. Much of what the records stated was cumulative of the testimony that was given. Shana, for example, testified that she first became acquainted with Gavin after 2005, at a time when he was living in a drug rehabilitation group home in Wayne County. Gavin's mother, Pamela Workman, testified that Gavin was in pain and continuously poor health due to prior extensive treatments for bone cancer; he had continuously struggled with chronic and severe depression; he had been prescribed antidepressants; and that in July of 2005, his

depression had gotten to a point that "scared" her,[9] and she had signed a petition for Gavin to be admitted into a hospital. It was also uncontested that that at the time of his death Gavin was intoxicated with a blood-alcohol level of at least 0.211%.

Furthermore, what the records stated regarding Gavin's prior drug abuse was irrelevant – according to Gavin's autopsy report and the testimony presented at trial, the only substance that could have actively affected Gavin at the time of his death was alcohol.[10]

CONCLUSION

In light of the foregoing, Ian has failed to demonstrate that the trial court abused its discretion or otherwise committed any form of reversible error. We therefore AFFIRM.

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[9] To illustrate, upon questioning from Ian's counsel about Gavin's treatment in 2005, Workman testified:

> IAN'S COUNSEL: We understand. You're his mother. You are seeing him, and everything you've said up to this point is you want to do what's best to get [Gavin] help. So, can you explain if I'm misinterpreting it?
>
> WORKMAN: Yes. Um, he was severely depressed. He was so family-based, the cancer took away his possibility of having children. And, . . . he had severe depression and chronic depression from things like not being able to have children. Um, people wouldn't want to marry him if he couldn't give them children. So, he got to a point where I was very scared about his depression.

[10] This was the testimony of Kevin Shenks, the toxicologist who interpreted and verified the toxicology findings in Gavin's autopsy report.

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