IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2001-SC-0353-MR

DATE 11-13-03, Ella Grovitt, D.C.

GEREMY NOEL MCGOFFNEY — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VAN METER, JUDGE
00-CR-684

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Geremy N. ("Speedy") McGoffney, was convicted in the Fayette Circuit Court of murder and tampering with physical evidence and sentenced to a total of thirty-five years imprisonment. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting reversible error in the following respects: (1) he received ineffective assistance of counsel because his trial attorney had a conflict of interest; (2) a police officer was allowed to read from a police report containing hearsay; (3) the prosecutor committed prosecutorial misconduct in his closing argument; (4) there was insufficient evidence to convict him of tampering with physical evidence; and (5) KRS 439.3401(3) is unconstitutional. We affirm, but reiterate in accordance with Hughes v.

Commonwealth, Ky., 87 S.W.3d 850 (2002), that Appellant will be eligible for parole after serving twenty years of his sentence.

I. FACTS.

Appellant admitted at trial that he is a drug trafficker and that he shot and killed the victim, Andrew Webb, during a dispute over a crack cocaine transaction. He contended at trial, however, that he killed Webb in self-defense because he feared for his life. Appellant claimed that he and Webb had been long time "business associates." That is, both were involved in the local drug trade and had engaged in numerous transactions with each other.

Appellant testified that a few days before the murder, he sold a quantity of crack cocaine to Webb who intended to resell it on the street. On April 28, 2000, Webb arrived at Appellant's door and complained about the quality of the drugs. He was accompanied, according to Appellant (a fact vigorously disputed by the Commonwealth), by an unknown "Detroit drug dealer."

Appellant went to the second floor of his residence to retrieve his "scales" and, while upstairs, placed a gun in his pants pocket. He returned to the kitchen and "cooked" the cocaine in order to prove its value. Appellant testified that Webb and the "Detroit drug dealer" were satisfied by this demonstration. In fact, they were so satisfied that they allegedly implied an intent to rob him by asking, "How much you got?" Appellant claims that he then asked them to leave, and the three moved outdoors.

Once outside, Webb, who was unarmed, allegedly "charged" Appellant. Simultaneously, the "Detroit drug dealer" reached into his pocket and produced the handle of what appeared to be a gun. Appellant claims the gun got caught in the

"Detroit drug dealer's" pocket. Thus, Appellant was able to draw his own gun and shoot first. Appellant continued shooting until Webb was laying on the ground and the "Detroit drug dealer" was nowhere to be seen.

Appellant then fled the scene. He claimed at trial that, in mid-flight, he noticed that his gun was weighing down his pants, so he threw it, still loaded, near a car. Appellant claims his intent was not dispose of or hide the weapon, but only to remove the weight of the gun from his pants. Appellant eventually proceeded to his brother's residence, told him the story, and hid there and at several other locations until the police located him three days later.

The police discovered three neighbors who were eyewitnesses to the shooting. Each testified that two men were arguing outside and that one pulled out a gun and shot the other several times. None saw a third person who might have been the "Detroit drug dealer."

Appellant testified that he shot his gun "four or five times." Other witnesses generally concurred, and the largest number of gunshots reported was six. Appellant hit the victim five times, thrice in the chest, once in the armpit, and once in the back. The forensic lab estimated the firing distance at a maximum of four feet.

When questioned by the police, Appellant told, in broad strokes, the story outlined supra. A Fayette County Grand Jury indicted Appellant for murder in violation of KRS 507.020 and tampering with physical evidence in violation of KRS 524.100. Following a two-day trial, a petit jury found Appellant guilty on both counts and recommended consecutive sentences of thirty years for murder and five years for tampering with physical evidence. The trial judge entered judgment accordingly, imposing the sentences recommended by the jury. He also found that Appellant was a

violent offender for purposes of KRS 439.3401(3) and, therefore, would not be eligible for parole until he served eighty-five percent of his sentence, or twenty-nine years and nine months.

II. CONFLICT OF INTEREST.

Appellant's claim of ineffective assistance of counsel stems from the following colloquy between defense counsel and the trial judge during pre-trial conference:

> Counsel: Okay, this is a situation in which Mr. McGoffney has been maintaining for almost a year that there were two people who showed up where he lived. One, the decedent and an unknown male from Detroit. He has, he never knew a street name for him. Last week he said he had found out this guy was one of the people arrested with Jamar Richardson. There are two people arrested and are co-defendants with Jamar Richardson. One of them is my client. I asked him . . . .
>
> Court: A different client in a different case?
>
> Counsel: In an unrelated case, yes, "Mr. X." "Mr X.," Mr. McGoffney said that the fellow he was talking about, being present and pulling the gun, was maybe two or three years older than he. My client, "Mr. X," is two or three years older than Mr. McGoffney and is from Detroit. The other defendant, along with Mr. Richardson, is someone who I believe is a Lexingtonian, who is charged with allowing Detroiters to deal drugs out of his house. But, more importantly, was born in 1956 and I'm thinking an age difference like that with my background knowledge, Mr. McGoffney identified, individually, another client of mine whom I'm actively representing and whom I've got set for trial. Acting on that information, I asked Detective Chris Schoonover, who had already scheduled a photo line-up, so Mr. McGoffney could try to pick out someone from Detroit, if he wouldn't please put "Mr. X" in the line-up. He did, Mr. McGoffney did not pick him out. The line-up also took place last week and so we are talking about maybe six or seven months shy of a year after the events the trial is all about. I guess the position I am in is I don't feel I can aggressively pursue the possibility that "Mr. X" may have been the shooter because I represent him, and because both "Mr. X" and Mr. McGoffney have shared confidential information with me. On the other hand, I kind of feel like giving Mr. McGoffney the best of my efforts would require that I actively pursue the possibility that "Mr. X" is the black male from Detroit

who appeared with Mr. Webb and pulled a gun on Mr. McGoffney.

Court: But you have already said that he didn't identify him in a line-up.

Counsel: He didn't identify him in a line-up. He gave me verbal information which I . . . .

Court: And I think when we talked off the record last week that when you asked "Mr. X" about this he said "I had nothing to do with that. I don't know anything about that."

Counsel: No, that's not quite it your honor. I have not talked to "Mr. X" about this. I have not felt free to talk to "Mr. X" about this. What Mr. McGoffney told me at a much earlier date is that he thought that the man from Detroit was an associate or employee of an individual with the street name "Jay Leno" and I represent "Jay Leno." Way back when I asked "Jay Leno" if he knew anything at all about this shooting and he denied knowing it. So, it's "Jay Leno" I decided I did not have a problem with, not "Mr. X."

Court: I don't think you've got a problem. I think you need to plow ahead.

Counsel: Okay.

Defense counsel did not request an evidentiary hearing and never raised this issue again during the trial.

Preliminarily, we note that despite the exchange supra, Appellant and his counsel vigorously pursued the "Detroit drug dealer" defense at trial. Defense counsel cross-examined police officers at length about whether drug dealers from Detroit were dangerous, and whether the police used special teams to execute search warrants on suspected drug-dealers from Detroit. Appellant testified that a cousin of his had been killed by a Detroit drug dealer, and described in depth the fear that fact caused him to experience. Appellant also emphasized that a "Detroit drug dealer" accompanied Webb to Appellant's apartment on April 6, 2000, and that he only fired his weapon because the "Detroit drug dealer" reached for his weapon first. Defense counsel's summation also heavily emphasized this defense.

The "constitutional predicate" for an ineffective assistance of counsel claim based upon a conflict of interest is that the defense counsel "actively represent[] conflicting interests." Sanborn v. Commonwealth, Ky., 892 S.W.2d 542, 548-49 (1994), quoting Beets v. Collins, 986 F.2d 1478, 1486 (5th Cir. 1993) ("A theoretical or merely speculative conflict of interest will not invoke the protections of the Sixth Amendment."). That means, of course, that Appellant must show that defense counsel actually represented two clients whose interests were in conflict. Epperson v. Commonwealth, Ky., 809 S.W.2d 835, 844 (1990) ("The burden of establishing actual conflict is on [the defendant]."). Here, the trial court found that, given the vague description of the "Detroit drug dealer" and Appellant's inability to identify "Mr. X" in the line-up, there was insufficient evidence to conclude that "Mr. X" was the aforementioned "Detroit drug dealer," and, therefore, insufficient evidence to conclude that "Mr. X's" interests were in conflict with Appellant's interests.

Note that if either (1) "Mr. X" was not the alleged "Detroit drug dealer," or (2) the existence of the "Detroit drug dealer" was a fabrication, defense counsel's representation of both "Mr. X" and Appellant created no conflict of interest. Sanborn, supra, at 548. We review a trial court's determination of factual questions underlying an ineffective assistance of counsel claim for clear error. See Young v. Commonwealth, Ky., 50 S.W.3d 148, 167 (2001); Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506, 509 (1983); cf. McQueen v. Scroggy, 99 F.3d 1302, 1310 (6th Cir. 1996) ("[W]e review the district court's findings of fact pertinent to [the ineffectiveness of counsel] question for clear error."). Thus, in this case, we must affirm if the trial court's finding of fact supra was not clearly erroneous.

We find no clear error in the trial court's ruling. Appellant's inability to identify "Mr. X" at the line-up made the possibility that "Mr. X" was the "Detroit drug dealer" extremely unlikely. Appellant claims that he spent several minutes with the "Detroit drug dealer" inside his residence before the shooting, and does not allege that he had an obstructed view. Further, Appellant made use of a questionable inference in order to posit that the alleged third party was even from Detroit.

Q: Did you know the guy from Detroit by name?

A: No.

Q: Did you know him by street name?

A: No.

Q: Well how did you come to the conclusion he was from Detroit?

A: Because I know some people from Detroit affiliated in this area, and I saw him over talking with them, affiliating with them, that kind of stuff.

Of course, affiliating with people from Detroit does not make one from Detroit. Moreover, the very existence of the "Detroit drug dealer" was rendered questionable by the fact that three eyewitnesses to the shooting agreed that there was no third party present. Given this evidence, the trial court's factual determination that "Mr. X" and Appellant were not connected and, thus, had no "adverse interests" for purposes of the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution, was not clearly erroneous.

The cases cited by Appellant are inapposite because the conflict of interest in most of those cases stemmed from counsel's representation of two or more defendants standing trial for charges arising from the same course of conduct. See Cuyler v. Sullivan, 446 U.S. 335, 342, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980); Holloway v. Arkansas, 435 U.S. 475, 477, 98 S.Ct. 1173, 1175, 55 L.Ed.2d 426 (1978); Glasser v.

United States, 315 U.S. 60, 68-69, 62 S.Ct. 457, 464, 86 L.Ed. 680 (1942); see also Wood v. Georgia, 450 U.S. 261, 266, 101 S.Ct. 1097, 1100-01, 67 L.Ed.2d 220 (1981) (conflict arose when defendants' employer, for whom they were distributing obscene materials, paid for their attorney); United States v. Fulton, 5 F.3d 605, 610 (2d Cir. 1993) (attorney, himself, was accused of being involved in criminal conduct related to the charges defendant was facing). In contrast, the record does not reflect that "Mr. X" was ever prosecuted, arrested, or even questioned regarding the death of Andrew Webb. Thus, this case is even weaker than Humphrey v. Commonwealth, Ky., 836 S.W.2d 865 (1992), in which we held that the defendant was not denied effective assistance of counsel despite the fact that her attorney represented a prosecution witness on an unrelated charge. Id. at 869; see also United States v. Hernandez, 849 F.2d 1325, 1329 (10th Cir. 1988) (finding no conflict of interest despite the fact that attorney had previously represented, in an unrelated matter, the individual whom the defendant claimed had coerced him into committing the crime).

Moreover, the United States Supreme Court has held that a defendant must show that the "conflict of interest actually affected the adequacy of his representation . . . . " Mickens v. Taylor, 535 U.S. 162, _, 122 S.Ct. 1237, 1243, 152 L.Ed.2d. 291 (2002) (quotation omitted) (emphasis in original); see Sanborn v. Commonwealth, supra, at 548. Here, the "Detroit drug dealer" theory was pursued with vigor, as noted supra. Appellant did not request a post-conviction hearing, Humphrey v. Commonwealth, supra, at 872-73, and the record discloses no additional action that defense counsel would or should have taken had he not represented "Mr. X."

III. HEARSAY.

In the days between the Webb's murder and Appellant's arrest, Appellant was in hiding in the company of three friends and relatives: Nicole Bradley (the mother of Appellant's cousin's children), Jerome Owens (Appellant's brother), and Arneisha Harmon (Appellant's former girlfriend). After Appellant's arrest, Lieutenant Mark Barnard of the Lexington Police Department interviewed each of these persons and reported their statements in his official police report.

At trial, the Commonwealth called Bradley, Owens, and Harmon as witnesses and questioned them about what Appellant had told them about the murder. Each witness substantially echoed Appellant's testimony. Each testified that Appellant told him or her that (1) the shooting occurred over a drug dispute; (2) Appellant only began shooting after Webb or the other man had reached for his gun; and (3) Appellant was not sure whether his gunfire actually hit Webb.

Barnard was then called to the stand and questioned about his conversations with Bradley, Owens, and Harmon. In answer to each of these inquiries, Barnard read from his report over Appellant's objection what he had recorded as the statements each witness claimed that Appellant made to that witness. He first repeated Bradley's account of Appellant's statements to her, reading from his report in relevant part that (1) "[s]he had stated that they got into an argument, but he did not shoot him;" and that the argument concerned the fact (2) "that Speedy [Appellant] had sold some bad crack to Andrew and that Andrew had come back to [the] house to settle up, and the argument, excuse me, ensued from there."

Barnard then related what his report reflected that Owens claimed Appellant had told him. Barnard read from his report:

basically, the same gist of the argument had taken place, and that the dope he got was no good, and that he had gotten into an argument, and as they were talking, a friend came to the door with Andrew that reached behind his back, and started pulling the gun out, and he started shooting while he was backing up.

Last, Barnard testified as to what his report reflected with respect to Harmon's recount of Appellant's statements to her. Barnard read that (1) "She had stated at that time that the, an unknown, male black from Detroit had come over to [the] apartment and, at that time, he reached for his gun and started shooting, and Mr. McGoffney at that time shot back," and that Harmon reported that the argument was over (2) "a bad dope deal."

Thus, Barnard's report as to what Bradley, Owens, and Harmon told him, the testimony from Bradley, Owens, and Harmon about what Appellant had told them, and Appellant's own testimony were substantially identical with one exception. Whereas Bradley told Barnard (according to his report) that Appellant said he did not shoot the victim, she testified that Appellant told her he was not sure if he shot the victim. Bradley was asked about the discrepancy.

Q: Ms. Bradley, do you recall telling, well he's got promoted, he's Lt. Barnard now, the guy you interviewed with, do you recall telling him that Geremy told you that he did not shoot the victim in this case?

A: Yes, and like when he came to my house that day that's why, when it all happened. I was so frustrated and stuff and I had my two kids and the marshals were at my house, so I was trying to get my thoughts through . . . . But, when I said that he said he didn't shoot him is when I was explaining in such words that when I asked him if he knew that he actually contacted his bullets. He said that he didn't know. All he knew is that he was shooting and they were both running. And he said that he did see Andrew fall or whatever, but he wasn't really sure if he had shot him. And, then I proceeded to ask him, well, do you think he may have died, or if he is dead, and he was like he didn't know. He didn't know anything, he was just scared.

Thus, Bradley claimed she was confused at the time of the Barnard interview but could remember the conversation clearly at the time of trial.

Appellant now claims (1) it was error to allow Barnard to read from his police report; (2) Barnard's testimony as he read from his report constituted inadmissible hearsay; (3) the Commonwealth failed to show the police report to Bradley, Owens, and Harmon as required by KRE 613(a); and (4) the Commonwealth only called these witnesses for the purpose of impeaching them. Only the first objection is preserved. However, because that error is not easily separated from the hearsay issues, we address both on the merits, finding all errors to be harmless beyond a reasonable doubt. We find no palpable error on the last two issues.

A witness, including a police officer, may not read from a document under the guise of "refreshing his recollection" pursuant to KRE 612. Charles Alan Wright & Victor James Gold, Federal Practice & Procedure: § 6184, at 463-64 (1993) ("[C]ourts will not permit a witness to retain the writing during testimony where the circumstances suggest that the writing is merely a script that is being read into evidence under the guise of refreshed recollection."). While Barnard purported to be merely refreshing his recollection with his police report, he was clearly reading the text word-for-word. He retorted to defense counsel at one point, "if I can read exactly a piece of that [report] instead of trying to remember and I can give you exact information . . . ."

The trial court characterized the KRE 612 issue as a problem of "form over substance," but that ignores the hearsay implications of reading from a report prepared out of court. Barnard's testimony while reading from his report was hearsay within hearsay within hearsay, or "triple hearsay." Each item of testimony involved an out-of-court statement made by Appellant to the witness which was repeated out of court by

the witness to Barnard, and written by Barnard out of court in his report, and then read by Barnard in court. Therefore, the statements were admissible only if "each part of the combined statements conforms with an exception to the hearsay rule provided in [the Kentucky Rules of Evidence]." KRE 805. See Rogers. v. Commonwealth, Ky., 60 S.W.3d 555, 557-58 (2001); Prater v. Cabinet for Human Res., Ky., 954 S.W.2d 954, 958-59 (1997). If Barnard had not read from his report in violation of KRE 612, the problem would have been one of only "double hearsay."

We analyze each layer of the triple hearsay in turn. The first layer (Appellant's statements to the witnesses) is unproblematic. Pursuant to KRE 801A(b)(1), a "party's own statement" which "is offered against a party" is not excluded by the hearsay rule. E.g., Thurman v. Commonwealth, Ky., 975 S.W.2d 888, 893 (1998).

In contrast, most of the mid-level statements (the witnesses' statements to Barnard) do not conform to any hearsay exception. The only exception is Bradley's statement to Barnard that Appellant said that his gunfire did not hit Webb. That declaration was admissible pursuant to KRE 801A(a)(1) as a prior inconsistent statement. Miller v. Commonwealth, Ky., 77 S.W.3d 566, 570 (2002) ("a prior hearsay statement of a witness is admissible as substantive evidence at trial . . . when the prior statement is inconsistent with the witness's present testimony . . . ."). Bradley testified at trial that Appellant told her he was not sure if he hit the victim when he fired; that statement was inconsistent with Bradley's report to Barnard that Appellant said he did not hit Webb. Thurman, supra, at 893. That statement alone survives the first two layers of hearsay. Note that all of the other statements related prior consistent statements of Appellant and would not have been admissible even if offered by Appellant. KRE 801A(a)(1).

However, the final layer of hearsay renders all of the statements, including Bradley's statement to Barnard, inadmissible. Barnard's reading from his own report might have been permissible pursuant to KRE 803(5) ("recorded recollection"), but a witness may not utilize KRE 803(5) unless a proper foundation has been laid establishing that the witness "once had knowledge" of the matter in question "but now has insufficient recollection to enable the witness to testify fully and accurately." KRE 803(5). A KRE 803(5) document must also be "shown to have been made . . . when the matter was fresh in the witness' memory and to reflect that knowledge correctly." Id. Here, Barnard did not claim that he had an "insufficient recollection to testify fully and accurately." Indeed, he claimed that his memory was sufficient to recall the basics of the interview and he read from the report only to "give you exactly as much information exactly as I can without trying to refer to it just on memory."

> Q: Lieutenant Barnard, I noticed that when [the prosecutor] was going over the statements that Mr. Owens and Ms. Harmon made to you, you were looking down at your notes, is that because you didn't of your own recollection recall exactly what they said all this time later?
>
> A: No sir.

Thus, the statements were inadmissible under KRE 803(5) without further foundation. See Berrier v. Bizer, Ky., 57 S.W.3d 271, 277 (2001) ("KRE 803(5) applies when the witness is unable to testify from present memory even after being exposed to the recorded recollection."); Fields v. Commonwealth, Ky., 12 S.W.3d 275, 280 (2000) ("It was not within the recorded recollection exception, KRE 803(5), because [the witness] did not claim to have insufficient recollection of the facts as to be unable to testify without reference to the videotape.").

In any case, it is clear that, at trial, the Commonwealth attempted to justify Barnard's use of his report through KRE 612, not KRE 803(5). The prosecutor asked

Barnard, "the documents to which you are referring, are you using them to refresh your recollection of this interview which took place almost a year ago?" Barnard answered "yes," and later explained to defense counsel, "We have them make documented notes so that when we do go to court . . . we can refresh our memory from those notes to give you exactly the best recollection that we can."

Nevertheless, the admission of this hearsay was harmless. We have long held that the admission of hearsay evidence that is merely cumulative of other properly admitted evidence is harmless. E.g., White v. Commonwealth, Ky., 5 S.W.3d 140, 142 (1999); Collins v. Commonwealth, Ky., 951 S.W.2d 569, 576 (1997); Allgeier v. Commonwealth, Ky., 915 S.W.2d 745, 747 (1996). Here, the evidence was not only cumulative, it corroborated Appellant's testimony. Each witness told Barnard the same story that they told on the stand and that Appellant, himself, told: that the shooting occurred over a drug dispute and that Appellant drew and fired his weapon only after Webb or the "Detroit drug dealer" attempted to draw his gun. The only material inconsistency in all of the testimony – that Appellant allegedly told Bradley that he did not hit the victim – was more favorable to Appellant than the statement it contradicted. Thus, the trial court's error in admitting these hearsay statements was harmless. RCr 9.24. Since the KRE 613(a) argument was not preserved, and any error was harmless, we do not address it separately.

Finally, we reject Appellant's complaint that "manifest injustice" resulted when Bradley, Owens, and Harmon were called to the stand only so that their testimony could be impeached. The argument is completely without foundation regarding Owens and Harmon; their testimony simply was not impeached. And, as in Thurman, supra, we highly doubt that the "primary purpose" of calling Bradley to the stand was to show the

jury that Bradley once said that Appellant told her he did not shoot the victim. Id. at 893. As noted supra, that testimony was contrary to the prosecutorial purpose of showing that Appellant intentionally killed the victim. It is more likely that the Commonwealth called Bradley, Owens, and Harmon because they were the only people, besides the police, who heard Appellant's story before trial. We find no palpable error. RCr 10.26.

IV. ALLEGED PROSECUTORIAL MISCONDUCT.

Appellant asserts that two statements made by the Commonwealth during its closing argument constituted prosecutorial misconduct. The first complaint, related to the prosecutor's use of the word "gangster," is best understood in context. The "gangster" reference originally arose during Appellant's direct testimony.

> Q: You said you knew something of the reputation of Detroit drug dealers. Did you believe the reputation you heard?
>
> A: Yes.
>
> Q: And what was that reputation that you believed?
>
> A: They was gangsters.
>
> Q: And when you say they were "gangsters," what do you mean by that?
>
> A: They're all on drugs, in gangs, they shoot. All the above I guess.

Defense counsel mentioned "gangsters" again in his closing argument.

> He was afraid of Detroit drug dealers. And he had a good reason to be afraid of them too. He had heard the rumors that they were "gangsters." He had heard the rumors that some of them were armed.

After this argument, the prosecutor suggested that Appellant's fear of "gangsters" was ironic.

> Speedy told you that a couple of years ago a friend of his got killed and that's why he fears drug dealers from Detroit. He fears them because they deal dope and shoot people. Well, the evidence is pretty clear that Speedy, who is already a felon at the young age of nineteen, dealt dope

and he shot somebody. Ladies and gentlemen, he is every bit the gangster he claims to fear.[1]

The United States Supreme Court instructs us that statements claimed to be prosecutorial misconduct should be considered in context. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985). Here, the context makes it clear that the prosecutor did not label Appellant a "gangster" in order to inflame the jury or to suggest that Appellant should be convicted because he is a "gangster." Instead, his argument was an invited response to Appellant's defense that he only fired because he was afraid of the "gangster" from Detroit. See Foley v. Commonwealth, Ky., 953 S.W.2d 924, 940 (1997) (affirming when prosecutor's comments were responsive to defense argument).

We upheld the prosecutor's characterization of the defense theory as "stupid," in Stopher v. Commonwealth, Ky., 57 S.W.3d 787 (2001), noting that in closing argument the prosecutor "may comment as to the falsity of the defense position." Id. at 806 (quoting Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1987)). A prosecutor has "wide latitude" in closing argument, id. at 806, and may comment on and draw fair inferences from the evidence. E.g., Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 866 (2002); Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 854 (2000); Davis v. Commonwealth, Ky., 967 S.W.2d 574, 580 (1998). Indeed, given Appellant's own definition of "gangster" during his testimony, the prosecutor's comment that Appellant, himself, was a "gangster" was fair. We previously have upheld many similar references as fair comments on the evidence. See Slaughter, supra, at 412 (referring to defendant

[1]Appellant does not object to the reference to his being a felon in this argument. We note that the trial judge properly admonished the jury when Appellant's status as a felon was initially raised that that fact was to be considered only for credibility purposes.

as "a bit of evil"); Ferguson v. Commonwealth, Ky., 401 S.W.2d 225, 228 (1965) ("beast"); Holbrook v. Commonwealth, 249 Ky. 795, 61 S.W.2d 644, 645 (1933) ("desperado"). "The jury surely understood the comment for what it was," Young, supra, at 19, 105 S.Ct. at 1048; the name was used merely to cast doubt on Appellant's professed fear by showing that Appellant was fearsome in his own right.

Second, Appellant complains that the prosecutor improperly attempted to elicit sympathy for the victim during the closing argument. Immediately following the argument transcribed supra, the prosecutor made the following argument.

> Com: You may be sympathetic toward Geremy McGoffney because of his young age. I suggest two things ladies and gentlemen. Save your sympathy for Andrew Webb's family who will never again see their son, their brother . . .
>
> Counsel: Objection.
>
> Court: Overruled.
>
> Com: their cousin. If you have any sympathy for this defendant exercise it upon sentencing. But hold him accountable for ending Andrew Webb's life. . . .

Again, this was responsive to defense counsel's summation, viz:

> Geremy was an eighteen-year-old kid from the East side with an eleventh grade education.
>
> . . .
>
> Remember, you've got an eighteen-year-old here . . . . You've got an eighteen-year-old who's scared, and sad, and confused. . . .
>
> . . .
>
> It's not the job of an eighteen-year-old with an eleventh grade education to go out and [investigate the "Detroit drug dealer"].
>
> . . .
>
> He's not a professional. He's a scared kid.

It was proper for the prosecutor to admonish the jury not to be swayed by sympathy. Cf. Hodge, supra, at 853 (prosecutor's penalty phase argument that "the fact that Appellant had been disciplined as a child did not mitigate his commission of two brutal

murders as an adult" was proper). As fact-finders, the jury's sole task was to determine whether the Commonwealth had proved beyond a reasonable doubt each of the elements of KRS 507.020 and KRS 524.100. The jury could be reminded, then, to focus on the elements of the offense rather than Appellant's tender age. Cf. Victor v. Nebraska, 511 U.S. 1, 13, 114 S.Ct. 1239, 1246-47, 127 L.Ed.2d 583 (1994) (holding that a sentencing instruction not to be swayed by mere sympathy correctly pointed the jurors' attention to the evidence before them).

It was also permissible briefly to remind the jury that the victim would be missed by his family. Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 303 (1997) ("the prosecutor's reference to the victims' families briefly during the guilt phase closing argument did not deprive the appellant of a fair trial."); Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 707 (1994) ("If, in the future, someone should cry a tear, cry one for [the victim]."). Because we find no error in the Commonwealth's summation, we need not address whether the alleged errors would require reversal. See, e.g., Barnes v. Commonwealth, Ky., 91 S.W.3d 564, 568 (2002).

V. SUFFICIENCY OF THE EVIDENCE.

Appellant does not challenge the sufficiency of the evidence supporting his murder conviction. However, he claims that the trial court should have granted his motion for a directed verdict of acquittal on the charge of tampering with physical evidence. KRS 524.100(1)(a) provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in

> the official proceeding with intent to impair its verity or availability in the official proceeding;

Appellant concedes that there was sufficient evidence for the jury to have found that he "concealed" the murder weapon by throwing it near a car. However, he contends that no reasonable jury could have found that he did so "believing that an official proceeding . . . may be instituted" during which the gun would be "used," and "with intent to impair [the gun's] . . . availability in the official proceeding." KRS 524.100(1)(a).

While Appellant's argument on this score is less than clear, it fails under any light. Under one interpretation, Appellant may be read to suggest that a conviction under KRS 524.100(1)(a) is impossible if an official proceeding has not yet begun at the time of tampering. However, as Appellant concedes, we rejected that argument in Phillips v. Commonwealth, Ky., 17 S.W.3d 870, 876 (2000), and Burdell v. Commonwealth, Ky., 990 S.W.2d 628, 633 (1999). We decline his invitation to overrule those decisions today.

Under the other interpretation, Appellant may be understood to claim that there was insufficient evidence that he subjectively believed that either (1) an official proceeding would begin in response to the murder; or (2) that the gun would be used during that proceeding. However, "we have long held that mens rea, specifically intent, can be inferred from circumstances." Commonwealth v. Wolford, Ky., 4 S.W.3d 534, 539 (1999). Here, the circumstances weighed overwhelmingly against Appellant.

The jury could have reasonably believed that Appellant should have known that few incidents are as likely to trigger an "official proceeding" as a public murder. And, in a murder investigation, the murder weapon will invariably be "used." The jury did not need to stretch its collective imagination to conclude that Appellant was aware that

killing Andrew Webb would trigger an official proceeding that in turn would be very interested in the murder weapon. Burdell, supra, at 633 ("one who has committed a criminal act and then conceals or removes the evidence of his crime does so in contemplation that the evidence would be used in an official proceeding which might be instituted against him."). While Appellant was entitled to argue that he discarded the murder weapon only because it was weighing down his pants, "the jury was free to disbelieve [him]." United States v. Hamilton, 263 F.3d 645, 652 (6th Cir. 2001) (quotation omitted).

VI. PAROLE ELIGIBILITY.

Finally, Appellant asserts that KRS 439.3401(3), which facially makes him eligible for parole only after serving twenty-nine years and nine months in prison, is unconstitutional as a denial of Equal Protection. As Appellant notes, KRS 439.3401(2) renders a defendant sentenced to life imprisonment eligible for parole after twenty years imprisonment. There is no rational basis, he argues, for making a defendant sentenced to life imprisonment parole-eligible before a defendant serving a lesser sentence. In the alternative, Appellant claims that he should be eligible for parole after serving twenty years imprisonment, the same term under which a defendant serving a life sentence would become eligible. As it turns out, this argument was prescient, if not entirely correct.

Five months after Appellant filed his brief, we held in Hughes v. Commonwealth, Ky., 87 S.W.3d 850 (2002), that KRS 439.3401(3) was not unconstitutional. Id. at 855 ("'[T]here is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency.'") (quoting Land v. Commonwealth, Ky., 986 S.W.2d 440,

442 (1999)). However, we did agree that KRS 439.3401(3) should be read, as a matter of statutory interpretation, to require that a defendant in Appellant's situation becomes eligible for parole after serving either eighty-five percent of his sentence or twenty years, whichever is less. Id. at 855-56. We established this construction in Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992), and the legislature adopted the Sanders interpretation when it amended KRS 439.3401(3) in 1998. Hughes, supra, at 855-56. We adhere to that view today. Thus, Appellant will be eligible for parole after serving twenty years imprisonment.

Accordingly, the judgment of convictions and the sentences imposed by the Fayette Circuit Court are affirmed with the proviso that Appellant will be eligible for parole after serving twenty years of his sentence.

All concur.

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