IMPORTANT NOTICE

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RENDERED: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0298-MR DATE 1-8-04 ElliA Grown, D.C.

BRENNAN J. ROUSE — APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
CRIMINAL NO. 01-CR-0024

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the McCracken Circuit Court convicted Appellant, Brennan Rouse, for the crime of murder in connection with the Paducah nightclub shooting of Delvecchio A. Ware. The jury fixed the sentence for this crime at life imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

At trial, the Commonwealth portrayed Appellant as a jealous and possessive individual who reacted violently when his on-again, off-again girlfriend developed relationships with other men. The victim here was one such suitor. On the night of the murder, eyewitnesses placed Appellant in the same bar as the victim, one witness testifying that she saw "fire" coming from Appellant's coat pocket just as the victim was shot. The following morning, as news of the shooting spread, Appellant spoke by phone

with his aunt, who testified that she urged her nephew to surrender to the police, to which Appellant allegedly replied: "I didn't mean to do it. I was drunk."

I. Prosecutorial Conduct

Appellant first charges that the prosecutor "cast his professional ethics aside" and "lied" during closing arguments by stating that the victim was "not doing anything wrong" and "did nothing illegal" at the time of his murder. In terms of the evidence introduced at trial, the prosecution's comments were accurate. However, when viewed in light of all of the physical evidence found at the crime scene, the statements were not technically correct. Following the shooting, a detective discovered a small baggie of marijuana and rolling papers in the victim's pocket. Although the trial court excluded this evidence on relevancy grounds, Appellant argues that the prosecutor abdicated his professional responsibilities by knowingly making "false statement[s] of fact to the jury."

When a defendant makes allegations of prosecutorial misconduct, our inquiry focuses on the overall fairness of the entire trial rather than the culpability of an individual prosecutor. Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002); Dean v. Commonwealth, Ky., 844 S.W.2d 417 (1992) cert. denied, 512 U.S. 1234, 114 S.Ct. 2737, 129 L.Ed.2d 858 (1994); Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1987) cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989). In the present matter, fairness analysis is largely unnecessary, not only because Appellant has entirely misconstrued the essence of the prosecutor's closing statements, but also since Appellant failed to preserve this issue for Appellate review.

At trial, no evidence suggested that the victim provoked Appellant prior to the shooting. In this context, the victim indeed did nothing "wrong" or "illegal" to cause this

incident. These comments, when given their most plain and ordinary meaning, fall well within the considerable leeway typically granted to prosecutors during closing arguments. See, e.g., Maxie, supra, at 866.

This is not to say counsel may play fast and loose with the facts simply because evidence has been excluded from trial. Cf., Barnes v. Commonwealth, Ky., 91 S.W.3d 564, 569 (2002) (noting that excluded evidence may not be referred to during closing arguments). Here though, the impact of any inaccuracies upon the fairness of the trial was negligible, and we find Appellant's argument on this matter specious at best. Certainly the prosecution's comments did not result in "manifest injustice" or rise to the level of "palpable error." RCr 10.26.

II. Discovery Issues

During the week prior to trial, the Commonwealth made several disclosures of evidence. Among the documents provided to Appellant shortly before trial, one finds a detective's investigative report, a listing of six statements purportedly made by Appellant, and forty-six pages of employee attendance records from Riverfront Terrace Healthcare Center. Because the detective's investigative report contained what may be considered exculpatory material, Appellant argues that a Brady violation occurred.

In criminal trials, due process considerations oblige the prosecution to disclose all exculpatory evidence prior to trial. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Nonetheless, "Brady only applies to 'the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense.'" Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 410 (2002), cert. denied __U.S. __, 123 S.Ct. 1587, 155 L.Ed.2d 327 (2003) (quoting United States v. Agurs, 427 U.S. 97,

103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349 (1976) (emphasis added)). Here, Appellant received all pertinent information *before trial*, rendering his Brady claim moot.

Appellant also complains that the Commonwealth's last-minute disclosures of evidence violated the rules of procedure as well as the Commonwealth's agreement to provide "open file" discovery in this case. The Commonwealth, for its part, concedes several disclosures were made during the week prior to trial, but counters that they forwarded all evidence to defense counsel immediately upon receipt of the same material by the prosecution.

Arguably, the disclosures by the Commonwealth conformed with all applicable Criminal Rules governing discovery. Nevertheless, the Commonwealth failed to comply with its own "open file" discovery policy by omitting from its records, at least until the week before trial, the detective's investigative report. The Commonwealth is charged with knowledge of such reports, Anderson v. Commonwealth, Ky., 864 S.W.2d 909 (1993), and the prosecutors in the present case had an affirmative duty to make this material available to defense counsel some months earlier, when the report was written. Cf. Barnett v. Commonwealth, Ky., 763 S.W.2d 119, 123 (1988).

We observe that the trial court fully considered the ramifications of this discovery violation as well as the impact of other last-minute disclosures by the Commonwealth, the judge having the option to: 1) grant a continuance; 2) exclude material not disclosed; or 3) issue "any other order as may be just under the circumstances." RCr 7.24(9); Neal v. Commonwealth, Ky., 95 S.W.3d 843, 848 (2003); Berry v. Commonwealth, Ky., 782 S.W.2d 625, 627-28 (1990). The trial judge declined to grant a continuance, discussed *infra*, but did exclude the potential testimony of two witnesses

who claimed knowledge of Appellant's allegedly incriminating statements. Because all required discovery materials were in fact provided before trial, and lacking any specific allegations of harm, we decline to disturb the trial judge's ruling in this matter. Cf. Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 905 (2000); Roach v. Commonwealth, Ky., 507 S.W.2d 154, 155 (1974).

Appellant's final discovery issue involves whether the Commonwealth has an obligation to inform defense counsel of known disparities between the written statement of a witness and her pending trial testimony. During the weekend before trial, prosecutors interviewed Shayla King, one of numerous witnesses present at the nightclub shooting. At this interview, Ms. King for the first time made the startling revelation that she saw "fire" coming from Appellant's coat as he raised his arm toward the victim, despite the fact that nearly a year earlier, she had given a written statement to police denying knowledge of who discharged the fatal shot. No new written statement was taken during this interview. Because Appellant received no notice prior to trial of Ms. King's "updated" testimony, Appellant alleges the Commonwealth violated its "open file" discovery agreement.

In Yates v. Commonwealth, Ky., 958 S.W.2d 306 (1997), we examined the Commonwealth's obligation, under another "open file" agreement, to divulge all unrecorded statements gleaned during witness interviews. Resolving this issue in Yates, we declared that under RCr 7.26(1), only written witness statements need be made available to defense counsel, notwithstanding the existence of an "open file" discovery agreement. Id. at 308. Acknowledging the reality that a witness' testimony often varies from his or her written statement, we further opined:

> It is not an infrequent occurrence during a criminal trial that a witness who has produced or signed a written statement reveals details not contained in the document. There is no authority that would require a trial judge to confine a witness's testimony to the four corners of his or her written statement. Trial lawyers scrutinize the motive or basis for such omissions or additions through the art of cross-examination.

958 S.W.2d at 308.

In the present matter, Appellant complains that Ms. King's earlier written statement to police, denying direct knowledge of how the murder occurred, lulled defense counsel into complacency. However, the defense had ample opportunity, more than a year, to interview Ms. King prior to trial. She was listed on the Commonwealth's Bill of Particulars as a potential witness, and her written statement to police was duly provided to Appellant during discovery. Furthermore, Appellant lodged no objection to the introduction of Ms. King's revised testimony during trial. In sum, we find no violation of the Commonwealth's "open file" discovery promise in this matter.

III. Prosecutor as Witness

Prior to trial, the prosecution interviewed LaDawn White, Appellant's on again, off again girlfriend. The prosecution later used statements gleaned during this interview, over defense counsel objection, to "lay a foundation" for impeaching Ms. White's trial testimony. Because no one other than Ms. White and the prosecutors attended the pre-trial interview, Appellant complains that simply by laying a foundation, i.e., by offering Ms. White an opportunity to explain any inconsistencies between her trial testimony and her earlier statements to prosecutors, the prosecutors effectively became witnesses in their own case.

There is no doubt the prosecutors referred to themselves during their questioning of Ms. White:

> Prosecution: Do you recall coming up to the office of the Commonwealth's Attorney last week?
>
> Ms. White: Yes.
>
> Prosecution: Do you recall having a conversation with both myself and [Commonwealth's Attorney] Kaltenbach?
>
> Ms. White: Yes
>
> Prosecution: Do you recall telling us that....

After a series of such questions, defense counsel interposed:

> I'm going to object to these conversations with "me and Mr. Kaltenback (sic)." It puts them in the position of testifying or being impeaching agents and adds too much credibility to the question. I think its unfair.

Undoubtedly, the questions propounded by prosecutor during the preceding colloquy reveal that the prosecutor was engaged in laying a foundation for the possible impeachment of Ms. White's trial testimony with prior inconsistent statements gleaned from her pre-trial interview. The form of the prosecutor's questions at trial closely adhered to the foundation requirements described in KRE 613(a), which provides in pertinent part:

> Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it.

This rule, and its companion, KRE 801A(a), entitled "Prior statements of witnesses," place no limits on who may provide the impeaching testimony. However, as

a general practice, prosecuting attorneys must refrain from testifying at trial. Moss v. Commonwealth, Ky., 949 S.W.2d 579 (1997); Bennett v. Commonwealth, 234 Ky. 333, 28 S.W.2d 24 (1930). For a prosecutor to take the stand "is a matter of delicacy and a practice not approved, except where the necessity of circumstances require his testimony." Bennett, supra, at 26. The Kentucky Rules of Professional Conduct are similarly restrictive, Rule 3.7(a) providing:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.

In the present matter, it is important to remember that the prosecutor never actually took the witness stand to offer impeaching testimony. Appellant claims the prosecutor's involvement was nonetheless prejudicial, and directs our attention to Roby v. State, 587 P.2d 641 (Wyo. 1978). In Roby, the Wyoming Supreme Court found improper a prosecutor's extensive examination of a defense witness regarding an earlier phone conversation between the prosecutor and that witness, the court stating that the prosecutor was "in a real and not too subtle way presenting unsworn testimony concerning his part of the telephone conversation." Id. at 646.

Although we recognize the potential for abuse, we are not inclined to reverse on this matter. Every time a foundation for prior inconsistent statements is laid, the requirements of KRE 613(a) necessarily entail the introduction of some unsworn testimony: the prosecutor must set forth the purported statement of the witness, as well as the time, place and persons present when the statement was made. Courts have

developed this method in order to avoid unfair surprise and to provide for efficient case management. IIIA Wigmore, Evidence in Trials at Common Law, §§ 1025-26 (Chadbourn rev. 1970); See also Noel v. Commonwealth, Ky., 76 S.W.3d 923, 930 (2002) (tracing the long history of this foundation requirement in Kentucky courts).

We also acknowledge that in a foundation attempt where a prosecutor claims personal knowledge of a witness' earlier inconsistent statement, the prosecutor's version may gain some added credibility in the eyes of the jury, simply due to prestige of prosecutorial office. But the difference between this and more typical foundation attempts is one of degree and not kind, for in laying a foundation, the background information regarding time, place and persons present will always affect how the jury interprets the alleged inconsistency.

The prosecutor in the present case never actually took the witness stand to impeach Ms. White's trial testimony. Nor is there any allegation that the prior statements set forth during the foundation attempts were without basis. Although the prosecutor would be well advised to have a third party present during witness interviews to obviate the need for withdrawal from the case impeachment becomes necessary, we cannot say that the prosecutor's conduct in this particular matter deprived Appellant of a fair trial.

IV. Alleged Abuse of Subpoena Power

On January 19, 2001, the McCracken County Grand Jury returned indictment 01-CR-00024, charging Appellant with the murder of Mr. Ware. This indictment lists only one witness as appearing before the grand jury, Detective Brandon Barnhill of the Paducah Police Department. Shortly before trial, the Commonwealth disclosed the

existence of additional grand jury testimony, ostensibly related to this case, taken on January 5th and February 2nd, 2001. Other than to request a continuance, Appellant made no objection to this testimony either prior to or during trial, but he now alleges the Commonwealth improperly used the grand jury subpoena power to conduct a post-indictment investigation in this case. Appellant asks this Court to review this matter for palpable error. RCr 10.26.

A grand jury has the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 686-87, 92 S.Ct. 2646, 2659, 33 L.Ed.2d 626 (1972). As such, the circuit courts charge grand juries to "inquire into every offense for which any person has been held to answer and for which an indictment or information has not been filed." RCr 5.02. Once a grand jury has inquired into an offense and filed an indictment, however, "the grand jury's function with respect to that particular indictment is concluded." Bishop v. Caudill, Ky., 87 S.W.3d 1, 3 (2002). Any further use of the investigatory powers of a grand jury, for the sole or dominating purpose of trial preparation under a pending indictment, is improper. Id. at 4; Howard v. Commonwealth, Ky., 395 S.W.2d 355, 359 (1965) cert. dismissed, 384 U.S. 995, 86 S.Ct. 1905, 16 L.Ed.2d 1012 (1966).

Our inquiry into this matter is hampered by Appellant's failure to preserve this matter for Appellate review. Nothing in the record indicates who testified before the Grand Jury or the nature of the evidence heard. Furthermore, although the Commonwealth provided Appellant with adequate notice before trial of the additional testimony under his indictment, Appellant chose not to pursue the remedies of exclusion

or suppression at the trial level. We therefore conclude the post-indictment grand jury subpoenas, although irregular, did not rise to the level of palpable error.

V. Glorification of Victim

At the time of his murder, Mr. Ware had recently completed a tour of duty with the Air Force, serving as a military policeman, and was awaiting reentry into the Armed Forces, this time with the Army. Appellant complains the prosecution impermissibly glorified the victim by mentioning these facts during closing arguments.

We have often stated that "a certain amount of background evidence regarding the victim is relevant to understand the nature of the crime." Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 113 (1994), cert. denied, 513 U.S. 1174, 115 S.Ct. 1154, 130 L.Ed.2d 1111 (1995). The prosecution need not portray the victim as a mere statistic, "as long as the victim is not glorified or enlarged." Bowling v. Commonwealth, Ky., 942 S,W.2d 293, 302-03 (1997), cert. denied, 522 U.S. 986, 118 S.Ct. 451, 139 L.Ed.2d 387 (1997). See also McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984) cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984).

Appellant compares the comments in this case to the excessive eulogizing we condemned in Morris v. Commonwealth, Ky., 766 S.W.2d 58 (1989). In Morris, the prosecution portrayed the victim as a war hero, delving into the victim's brave acts during the Korean War. Id. at 61. In contrast, the prosecution's references to Mr. Ware's service record simply served to humanize the victim in the eyes of the jury. These comments were insufficient to incite the passion of the jury, nor to transfigure the victim into an unduly sympathetic figure. We therefore find no error in the admission of these statements.

VI. Burden of Proof

In criminal trials, the prosecution bears the burden of proving beyond a reasonable doubt every element of an offense. KRS 500.07(1); In re Winship, 397 U.S. 358, 90 S. Ct. 1068; 25 L. Ed. 2d 368 (1970). Appellant claims the Commonwealth improperly shifted this burden to the defense when the prosecutor commented during closing arguments that if there were anyone with a motive to hurt the victim, the defense would have presented such testimony by using the subpoena power.

We have often stated "a prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, supra, at 412. Here, the prosecution's closing argument likely came in response to the defense strategy of insinuating that other individuals present at the nightclub shooting, but not called by the prosecution as witnesses in court, held the key to discovering the killer's "real" identity. Furthermore, because this issue is unpreserved, we cannot say the outcome of trial would have been any different had the prosecutor refrained from making this comment.

VII. Denial of Continuance

Appellant contends the trial judge erred by denying Appellant's motion for a continuance, particularly in light of the Commonwealth's eleventh-hour disclosure of discovery materials and the overall complexity of the case. Careful scrutiny of the record, however, reveals that Appellant waived reconsideration of this motion by the trial judge, rendering this claim of error unpreserved.

Prior to trial, counsel for Appellant primarily complained of the inconvenience she anticipated in locating and interviewing, over the weekend before trial, several new

witnesses revealed by the Commonwealth's late disclosures. The trial judge, after considering the practical difficulties involved, denied Appellant's motion for a continuance "for now," indicating his willingness to re-examine this ruling should the interviews prove more problematic than expected.

For a trial judge, the decision to grant or deny a continuance is not a mechanical matter, but instead depends on the "unique facts and circumstances of the case." Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 699 (1995) cert. denied, 516 U.S. 1154, 116 S.Ct. 1034, 134 L.Ed.2d 111 (1996). Here, the trial judge crafted a ruling that balanced the substantive rights of Appellant with the efficient administration of justice. Had Appellant required more time before trial to interview and investigate witnesses, a continuance still remained a viable option. By failing to renew this motion, Appellant has effectively conceded the propriety of the trial court's ruling, and we refuse to further intervene upon what we perceive as the sound discretion of the trial court in this matter. See Woodall v. Commonwealth, Ky., 63 S.W.3d 104 (2001) cert. denied, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed. 54 (2002); Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995); Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991) overruled on other grounds, Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001).

VIII. Suppression of Evidence

Appellant contends the trial court erroneously granted the prosecution's pretrial motion to exclude the small bag of marijuana found inside Mr. Ware's pocket. We find little merit in this claim. Appellant asserts that "the common knowledge that drugs are often linked to crime and to weapons, could certainly give rise to a reasonable inference that a person other than Appellant might have had a motive to harm Ware." Although

we agree that a person with a drug habit, without monetary means of support, may at times be linked to criminal activity, see Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 793 (2003), Appellant presents absolutely no evidence that the victim, in good standing with the military, had any significant involvement with drugs or crime. In fact, Appellant specifically declined to pursue this line of reasoning in his argument before the trial judge, therefore he cannot raise this matter for the first time on appellate review. Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

IX. "Other Acts" Evidence

Appellant contends that the Commonwealth did not provide adequate notice of "other acts" evidence presented at trial, namely evidence that Appellant threatened LaDawn White, his ex-girlfriend, about her relationships with other men, including decedent Ware. Appellant further argues that such evidence is irrelevant, but, if relevant, the prejudicial nature of the "other acts" evidence far outweighs its probative value.

KRE 404(c) requires the prosecution to give "reasonable pretrial notice" of its intention to introduce evidence of other crimes, wrongs or acts. "The intent of the provision is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice problems at trial." R. Lawson, The Kentucky Evidence Law Handbook, § 2.25, p. 106 (3rd ed., Michie, 1993).

Almost three weeks before trial, the Commonwealth provided notice of its intent to introduce specific instances of Appellant's threatening behavior toward Ms. White and her male acquaintances. The trial court heard Appellant's objections to the introduction

of this evidence during a pre-trial hearing, the court ruling separately on each item of evidence. Clearly, the Commonwealth fulfilled its notice obligations in this matter.

Finally, Appellant's bald assertions regarding the relevancy and prejudicial nature of "other acts" evidence in this case lack merit. The pertinent inquiry for relevance focuses on whether "other acts" evidence is introduced for a purpose other than to show the criminal tendencies of the accused. KRE 404(b); Bell v. Commonwealth, Ky., 875 S.W.2d 882, 889 (1994); Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990).

The Commonwealth argues, and we are inclined to agree, that the evidence of Appellant's volatile outbursts is probative of motive: Appellant's jealousy of his former girlfriend's suitors. A trial judge has discretion to admit such evidence, so long as the potential for prejudice does not substantially outweigh probative value. Parker v. Commonwealth, Ky., 952 S.W.2d 209, 213 (1997) cert. denied, 522 U.S. 1122, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998); Bell, supra, at 890. Evidence of domestic violence against a victim is often admissible to show state of mind or absence of mistake or accident. See Moseley v. Commonwealth, Ky., 960 S.W.2d 460, 461 (1997); Smith v. Commonwealth, Ky., 904 S.W.2d 220, 223-224 (1995); McCarthy v. Commonwealth, Ky., 867 S.W.2d 469, 470 (1993) overruled on other grounds, Lawson, supra, at 544. While we recognize the potential for prejudice from the introduction of prior instances of domestic violence, at the same time this evidence had significant probative value. We therefore find no error in the trial court's ruling to admit this evidence.

X. Jury Instructions

The grand jury indicted Appellant for committing "the offense of murder when, with intent to cause the death of Delvecchio A. Ware, he caused the death of that

person by shooting him with a handgun, against the peace and dignity of the Commonwealth of Kentucky." The trial court, over defense objection, instructed the jury on all forms of criminal homicide, and on intoxication as a defense to murder and first-degree manslaughter. Appellant claims the jury instruction on wanton murder impermissibly varied from the indictment, which by its language charged Appellant only with intentional murder.

"An indictment is sufficient if it fairly informs the accused of the nature of the charged offense and does not mislead him." Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 449 (1996). Under our current system of notice pleading, it is unnecessary for the indictment to list the exact details of the crime for which Appellant stands accused. Id. "If the guts are there the feathers are inconsequential." Johnson v. Commonwealth, 105 S.W.3d 430 (2003). Wanton murder and intentional murder, although they require proof of different forms of culpability, are nonetheless the same crime. See Evans v. Commonwealth, Ky., 45 S.W.3d 445, 447 (2001).

Typically, a variance between the instructions and the indictment will be found misleading where the variance guts a defense theory. Here, Appellant based his defense on the claim that he did not shoot the victim. Under the charge of either intentional or wanton murder, the defense would remain the same. See Yarnell v. Commonwealth, Ky., 833 S.W.2d 834, 837 (1992).

Furthermore, the wanton murder instruction was amply supported by the evidence. Wanton murder requires a mens rea of "extreme indifference to human life." KRS 507.020(b). There is no more prototypical example of such extreme indifference than shooting into a crowded room.

Because we find the wanton murder instruction justified, Appellant's claim regarding the unanimity requirement lacks merit. Although the jury received a combined instruction on murder, both theories, wanton and intentional, were supported by the evidence. See Hays v. Commonwealth, Ky., 625 S.w.2d 583 (1982). Similarly, there was sufficient evidence for submission of the intoxication instruction to the jury. In a statement attributed to Appellant, he claimed he didn't mean to do it (shoot the victim), but he was drunk.

The judgment of the McCracken Circuit Court is affirmed.

Lambert, C.J., Graves, Johnstone, Keller, Stumbo, and Wintersheimer, J.J., concur. Cooper, J., dissents without opinion.

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