

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: MAY 20, 2004  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky** **FINAL**

2002-SC-1021-MR

DATE 6-10-04 Ena Grant, H, DC

MARY COOK

APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE T. STEVEN BLAND, JUDGE  
2000-CR-0287

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Cook of complicity to commit murder. She was sentenced to life in prison without the possibility of probation or parole for twenty-five years.

The questions presented are whether information about the victim was properly admitted during the guilt phase; whether improper opinion evidence by the police was introduced through the videotaped statement of Cook; whether the admission of a prior consistent statement of a prosecution witness was palpable error; whether the introduction of incorrect minimum parole eligibility guidelines resulted in manifest injustice; and whether Cook was entitled to an instruction on criminal facilitation to commit murder.

Cook was indicted for complicity to commit murder after her “lover,” England, killed her husband. After England pled guilty to murder and was sentenced to life without the possibility of probation or parole for twenty-five years, he testified against Cook at her trial. According to England, Cook asked him if he would kill her husband in exchange for being with her as well as for \$4,000 and a Mustang automobile. The money apparently was to come from the \$15,000 life insurance policy Cook had on her husband as part of her employment benefit package and the automobile was recently purchased by the couple. England initially rejected the deal, but Cook brought up the subject again and he finally agreed to do it. The plan at that time was for England to murder the victim at work when he took out the trash at night.

England testified that Cook cashed a check and gave him the money to buy the murder weapon, a knife. She also advised him that she had some gloves for him to wear. The original murder plan changed at some point because Cook informed England that the victim was no longer taking out the trash at work. She told him that her husband had to be killed as soon as possible and he again agreed to do it.

On the night in question, Cook went to England’s home, where he lived with his “common law wife,” supposedly to play cards. Cook and the “common law wife” were apparently friends since grade school and the two couples socialized with each other. Meanwhile, England went to Cook’s home, a place where he was a frequent visitor, and waited for the victim to get home from work. He drank approximately eight beers while he was there. Cook called him at one point and asked “if it was done yet,” and England told her no, that the victim was asleep. Cook stated that was “even better,” and hung up the telephone. Shortly thereafter, England entered the victim’s bedroom and stabbed him to death with a knife.

When questioned by police that morning, England first claimed that he and the victim were attacked by an intruder. However, after police recovered the murder weapon and the gloves and presented that information to England, he confessed to the killing and the plot.

Cook testified in her own defense and admitted a sexual relationship with England. She also admitted telling the police she had discussed killing her husband with England, but at trial she stated the discussion had been "hypothetical." Cook acknowledged that after her husband was killed, the insurance company paid off their trailer. She otherwise denied involvement.

After a six day jury trial, the jury convicted Cook of complicity to commit murder and sentenced her to life in prison without the possibility of probation or parole for twenty-five years. This appeal followed.

Initially, we must observe that most of the issues raised by Cook are not properly preserved for appellate review. In those instances, she seeks review pursuant to the palpable error rule in RCr 10.26. That rule, however, is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. RCr 9.22. The general rule is that a party must make a proper objection to the trial judge and request a ruling on that objection, or the issue is waived. See Commonwealth v. Pace, Ky., 82 S.W.3d 894 (2002). See also Bell v. Commonwealth, Ky., 473 S.W.2d 820 (1971). An appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one which affected the defendant's "substantial rights" and resulted in "manifest injustice." RCr 10.26.

## I. Testimony about Victim

Cook argues she was substantially prejudiced and denied due process of law by the introduction of irrelevant information concerning the victim during the guilt phase of trial. We disagree.

During the guilt phase, the father of the victim testified about certain background information concerning his son, namely, his age, early life, education and work history. The father also described the circumstances under which his son met Cook and described their family situation. To a more limited extent, the mother of the victim also testified about certain background information concerning her son. She identified a picture of him while he was still living as well as his two children.

We have held many times that it is not an abuse of discretion to admit evidence that "humanizes," as opposed to "glorifies," the victim. See McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 523 (1984) ("It would, of course, behoove the appellant to be tried for the murder of a statistic, but we find no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community."). See also Campbell v. Commonwealth, Ky., 788 S.W.2d 260, 263 (1990). A certain amount of background information regarding the victim is relevant to understanding the nature of the crime. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 542 (1988).

Cook's attempt to distinguish McQueen, supra, because it was decided before bifurcated trials were the norm, before truth-in-sentencing was enacted and before the rules of evidence were adopted is not persuasive. Equally unpersuasive is her reliance on Payne v. Tennessee, 501 U.S. 808, 112 S.Ct. 28, 115 L.Ed.2d 720 (1991) and Clark v. Commonwealth, Ky., 833 S.W.2d 793 (1991) because the testimony of the parents in

this case did not amount to improper victim impact evidence. We decline the invitation by Cook to overrule McQueen.

Here, the prosecution did not introduce any evidence that inflamed the passions of the jury. The evidence presented brought to life a simple outline of the victim. This evidence was completely relevant as background to the crime. The trial judge did not abuse his discretion in permitting the testimony of the parents concerning background information of their son.

## II. Opinion Evidence

Cook contends that the trial judge erred to her substantial prejudice when he allowed the prosecution to introduce opinions by police officers concerning the relative credibility of the main prosecution witness as well as herself. She admits that this issue was unpreserved, but seeks review pursuant to RCr 10.26.

During the testimony of a police sergeant, the prosecution played the videotaped statement Cook gave on the morning of her arrest. On that tape, the police, as part of their interview technique, urge Cook not to lie and to tell the truth. They also indicate to her that England has already been truthful about the plan to murder her husband.

Before the tape was played, however, the trial judge asked defense counsel if there was an objection, and she responded, "No, sir, no objection." Thus, Cook affirmatively waived any challenge to this testimony. In any event, the officers' statements did not constitute impermissible opinion testimony. The statements by the police during the interview were solely designed to see whether the defendant would change her story. Their statements merely provided the necessary context that enabled the jury to assess the reasonableness of the defendant's responses. There was no error of any kind.

### III. Prior Consistent Statement of Witness

Cook asserts that the introduction of England's prior consistent statements was palpable error and there is a reasonable probability that this error affected the outcome of her trial. We disagree.

In general, "a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony." Eubank v. Commonwealth, 210 Ky. 150, 275 S.W. 630, 633 (1925). Several exceptions to this rule allow the introduction of prior consistent statements, such as when they are "offered to rebut an express or implied charge ... of recent fabrication or improper influence or motive," KRE 801A(a)(2), or when the statements have "some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." Noel v. Commonwealth, Ky., 76 S.W.3d 923, 929 (2002), *quoting* United States v. Ellis, 121 F.3d 908, 920 (4th Cir.1997).

Here, England testified extensively about the plot and the brutal murder of the victim. On cross-examination, the defense implicitly charged England with testifying falsely in order to get a more lenient sentence. Consequently, the subsequent testimony of the detective concerning England's statement given on the morning of the murder was admissible to rebut an "implied charge . . . of recent fabrication or improper influence or motive." KRE 801A(a)(2). There was neither error in rebutting the charge nor in the comments during the closing argument and there certainly was no palpable error.

### IV. Incorrect Minimum Parole Eligibility Requirements

Cook claims that the prosecution introduced materially false testimony concerning the minimum parole eligibility requirements, which was repeated by defense

counsel in her sentencing phase argument, resulting in manifest injustice. We disagree.

A probation and parole officer testified that Cook was a violent offender and if she were to receive a numerical term of years, she would be eligible to meet the parole board after serving 85% of her sentence. As an example, the officer told the jury that if Cook were sentenced to 50 years, she would be eligible to meet the parole board in 42 years and 6 months. He concluded that 50 years could provide a longer term of imprisonment than a life sentence, where the minimum parole eligibility was 20 years.

In actuality, a violent offender must only serve eighty-five percent (85%) of the sentence imposed, or twenty (20) years, whichever is less. Hughes v. Commonwealth, Ky., 87 S.W.3d 850, 854-856 (2002). Using the example above, if Cook received a 50 year sentence, she would be eligible to meet the parole board after 20 years, not 42 years and 6 months. Here, the jury considered sentences ranging from a term of twenty years to fifty years; life; life without probation or parole for twenty-five years; and life without the possibility of probation or parole. Cook was sentenced to life without probation or parole for twenty-five years. Despite the erroneous information on the other sentences, the jury clearly knew that she would not be eligible to meet the parole board for twenty-five years on the sentence it imposed. Considering the lack of ambiguity with this sentence, we find no manifest injustice here.

#### V. Lesser Included Instruction on Facilitation to Commit Murder

Cook complains that the trial judge erred to her substantial prejudice and denied her due process of law when he failed to instruct the jury on the lesser-included offense of criminal facilitation to commit murder. She concedes that she did not request the



instruction, but asserts that the trial judge has a duty to instruct on the whole law of the case.

Facilitation reflects the mental state of one who is "wholly indifferent" to the actual completion of the crime. KRS 506.080(1). Complicity, on the other hand, may be accomplished without physical aid or involvement in the crime, so long as the defendant's actions involve participating with others to carry out a planned crime. Perdue v. Commonwealth, Ky., 916 S.W.2d 148 (1995). Here, the evidence clearly demonstrated that, far from being a detached observer, Cook's intention was to receive monetary benefits from causing the victim's death.

Cook did not seek an instruction on facilitation and affirmatively stated that the defense was not going to seek any lesser included offenses because this was an "all or nothing case." Clearly, her failure to request a facilitation instruction was trial strategy. To reverse in such a circumstance would be to disregard the role of the trial judge and relegate him to a point of irrelevancy. See Perdue, supra.

Cook received a fair trial. She was not deprived of any due process right under the federal or state constitutions.

The judgment of conviction is affirmed.

All concur, except Stumbo, J., who concurs in result only.

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