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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL DATE 9-15-05 ELIA Grau:tt, D.C.

2003-SC-0132-MR

JERRY DON BATTOE — APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
01-CR-103

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On the evening of March 16, 2001, Appellant, Jerry Don Battoe, was driving in McCracken County in the direction of Paducah when his automobile left the road and struck a tree, killing one of his passengers and injuring each of his four other passengers. Appellant was subsequently convicted by a McCracken Circuit Court jury of one count of manslaughter in the second degree, KRS 507.040, three counts of assault in the second degree, KRS 508.020, one count of wanton endangerment in the second degree, KRS 508.070, and one count of owning/operating a motor vehicle without insurance, KRS 304.39-080, and sentenced to a total of twenty years in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting six claims of reversible error, viz: (1) overruling his motion for directed verdict of acquittal; (2) overruling his motion for a mistrial after the prosecutor failed to introduce evidence

supporting a portion of his penalty phase opening statement; (3) improperly restricting the voir dire questions asked by defense counsel; (4) permitting the prosecutor to ask a witness a question regarding Appellant's prior marijuana use without having provided pretrial notice; (5) rendering prejudicial guilt phase instructions; and (6) permitting the prosecutor to urge the jury to recommend a sentence greater than the statutory maximum. Finding no error, we affirm.

I. SUFFICIENCY OF THE EVIDENCE.

Appellant claims that the evidence adduced at his trial was insufficient to establish that he acted wantonly, and thus that the trial court erred in overruling his motion for a directed verdict of acquittal on each of the manslaughter, assault, and wanton endangerment charges. On a motion for a directed verdict of acquittal, all fair and reasonable inferences must be drawn in the Commonwealth's favor. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, we determine whether, under the evidence viewed as a whole, it would be clearly unreasonable for a jury to find the defendant guilty. Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (Ky. 1983).

Appellant departed his residence in McCracken County at approximately 9:00 p.m. on the evening in question. At the time, Appellant had five passengers in his automobile: William Lofty, Kayla Battoe, Cara Bartholomew, Natasha Lofty, and Ted Purvis. According to each of the four surviving passengers, Appellant began to exceed the 55 miles per hour speed limit soon after the trip began. Purvis testified that Appellant began driving at 60 to 65 miles per hour and then increased his speed. Natasha Lofty estimated Appellant's ultimate speed at a rate between 85 and 90 miles per hour. Kayla Battoe, Appellant's daughter, testified that she looked at the

automobile's speedometer and noticed that Appellant was driving between 75 and 80 miles per hour. Bartholomew stated that when she looked at the speedometer, the automobile was traveling at approximately 65 miles per hour. In addition to speeding, Appellant drove erratically, swerving back and forth. At one point, the wheels of Appellant's automobile veered off the right side of the road, into the gravel alongside the road. Because of his manner of driving, each of Appellant's passengers asked him to slow down. Further, Bartholomew and Natasha Lofty asked Appellant to stop the car so that one of the two could drive in his place. Appellant responded by telling his passengers to "shut up," that they were "getting on [his] nerves," and that he had the situation "under control."

Appellant continued to drive along Oaks Road, a two-lane highway in McCracken County, for approximately four miles, when he approached another vehicle, driven by Janet Goodman. Goodman and her son testified that Appellant's automobile stayed behind her vehicle for a short period of time before crossing the center line to pass them. Appellant was also exceeding the speed limit at this time. As Appellant passed the Goodmans, they observed that he swerved suddenly to his right, toward their vehicle, and then veered back to his left. Appellant's left two tires then fell off the road into the adjacent grassy ditch. Janet Goodman testified that she saw no indication that Appellant attempted to apply his brakes or reduce his automobile's speed in any other way. Wanda Cates, who was in a position to observe Appellant's vehicle from her living room, also testified that Appellant failed to slow his automobile. Appellant's automobile proceeded forward at the same excessive rate of speed, ran across a side road that crossed the ditch, and collided head-on with a tree. Based on the consistencies between the damage to Appellant's vehicle and the statements given to the police by

the above witnesses, an accident reconstructionist concluded that Appellant's automobile was traveling between 50 and 60 miles per hour at the moment it collided with the tree. William Lofty died as a result of the collision, and Appellant and each of his other passengers sustained injuries.

Investigating officers from the McCracken County Sheriff's Department discovered a pipe containing burnt marijuana residue inside Appellant's vehicle. After Appellant and the surviving passengers were taken to the emergency room, hospital staff and the investigating officers discovered a package of papers used to roll marijuana cigarettes in Appellant's wallet and two Valium tablets in Appellant's clothing. Appellant subsequently told the police that he had smoked three or four marijuana cigarettes on the day of the collision, the final one being at approximately 6:30 or 7:00 p.m. Appellant also informed the police that he had taken a Lortab tablet at approximately 4:00 or 5:00 p.m. on the same day. An analysis of Appellant's blood and urine revealed levels of cannabinoids and hydrocodone (the active ingredient in Lortab) consistent with this statement, as well as large levels of benzodiazepines consistent with chronic use of Valium.[1] Dr. Edward Barbeaire, who testified as an expert witness for the Commonwealth, concluded that these drugs cumulatively affected Appellant's alertness, judgment, perception, coordination, response time, and sense of care and caution, to an extent that rendered him unfit to safely operate a motor vehicle.

Following a three-day trial, the jury convicted Appellant of one count of second-degree manslaughter for the death of William Lofty, three counts of second-degree

[1] Evidence at trial showed that Appellant had prescriptions for both Lortab and Valium, thus tending to refute the possibility that Appellant's high levels of benzodiazepines resulted from an acute dose of Valium.

assault for the injuries suffered by Kayla Battoe, Cara Bartholomew, and Natasha Lofty, and one count of second-degree wanton endangerment with regard to Ted Purvis.

> A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's:
>
> (a) Operation of a motor vehicle; . . .

KRS 507.040(1) (emphasis added).

> A person is guilty of assault in the second degree when:
> . . .
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

KRS 508.020(1) (emphasis added).

> A person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person.

KRS 508.070(1) (emphasis added). Thus, for the jury to convict Appellant of any of these three offenses, it was required to find that Appellant acted wantonly.[2] Appellant's only argument is based upon an assumption that in order to prove him guilty of a wanton offense on the basis of intoxication, the Commonwealth must prove that Appellant was unaware of the risks created by his conduct and that his voluntary intoxication was the sole reason for this unawareness. Appellant argues that the Commonwealth failed to prove that intoxication was the sole reason for his unawareness of such risks.[3] After viewing the evidence as a whole, however, we hold

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[2] The Commonwealth neither asserted at trial nor argues here that Appellant acted "intentionally," as is used in KRS 508.020(1)(a) and (b).

[3] As an initial matter, the Commonwealth's contention that Appellant failed to preserve this issue is unfounded. During his motion for directed verdict at the close of the Commonwealth's case, Appellant's counsel claimed that the evidence was insufficient to support an inference that Appellant acted wantonly. He incorporated this argument into his motion for directed verdict at the close of all evidence. Appellant's objections were sufficiently specific to apprise the trial court of the precise nature of his objection and to

that it was not clearly unreasonable for the jury to conclude that Appellant's actions were wanton. Sawhill, 660 S.W.2d at 5.

As the statutory definition of "wantonness" demonstrates, Appellant's argument is based upon a flawed premise.

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

KRS 501.020(3) (emphasis added). In this case, the results and circumstances described by the pertinent statutes are death, KRS 507.040(1), serious physical injury, KRS 508.020(1)(c), and substantial danger of physical injury, KRS 508.070(1). Thus, the Commonwealth could prove the mental state of wantonness by evidence showing that Appellant either: 1) was aware of and consciously disregarded the risks of death, serious physical injury, and substantial danger of physical injury; or 2) created such risks but was unaware of them solely by reason of voluntary intoxication. The evidence presented at Appellant's trial was sufficient to establish both theories.

From the moment Appellant began driving after he added marijuana to his prescription drug regimen, his conduct created a substantial, unjustifiable risk of causing death or serious physical injury. This risk was evident not only from Appellant's impairment, but also from his high rate of speed and erratic manner of driving. The evidence presented as to Appellant's awareness of this risk was equivocal; thus,

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preserve this assignment of error. RCr. 9.54(2); Commonwealth v. Wolford, 4 S.W.3d 534, 535 (Ky. 1999); Seay v. Commonwealth, 609 S.W.2d 128, 130 (Ky. 1980).

whether the jury concluded that Appellant was aware of the risk or that he was not, it was justified in reaching such conclusion. If the jury concluded that Appellant was aware of the risk created by his conduct, then it was certainly reasonable for the jury to determine that Appellant consciously disregarded the risk, given his responses to his passengers' pleas for him to slow down and stop his automobile. The fact that Appellant made no attempt to reduce his speed or stop his vehicle upon veering into the ditch alongside Oaks Road further strengthens the reasonableness of this conclusion. Conversely, if the jury reached the alternative conclusion that Appellant was unaware of the risk created by his driving, there was no evidence to suggest that anything except Appellant's intoxication caused this unawareness. In this event, the jury's finding of wantonness would have been further supported by Dr. Barbeaire's conclusions as to the effects of the drugs on Appellant's judgment and perception.

Finally, we note that our prior decisions are replete with affirmances of convictions for wanton murder under circumstances similar to the case sub judice. See Cook v. Commonwealth, 129 S.W.3d 351, 363 (Ky. 2004) (defendant was intoxicated, admitted his awareness of the risk of driving while intoxicated, and drove at a high rate of speed); Love v. Commonwealth, 55 S.W.3d 816, 827 (Ky. 2001) (defendant was intoxicated, drove at a high rate of speed, and failed to slow or attempt to stop upon seeing a police officer blocking the road); Estep v. Commonwealth, 957 S.W.2d 191, 193 (Ky. 1997) (defendant was impaired by several prescription drugs, drove at a high rate of speed, crossed center line to pass another vehicle, and failed to return to the proper lane); Walden v. Commonwealth, 805 S.W.2d 102, 105 (Ky. 1991) (defendant was intoxicated, drove at high rate of speed, lost control of his vehicle, and crossed center line), overruled on other grounds by Commonwealth v. Burge, 947 S.W.2d 805,

811 (Ky. 1996); Hamilton v. Commonwealth, 560 S.W.2d 539, 543 (Ky. 1977) (defendant was intoxicated, drove at high rate of speed, and failed to stop at a red light). See also Ramsey v. Commonwealth, 157 S.W.3d 194, 196-98 (Ky. 2005) (driving while intoxicated, in an "irregular and unreasonable manner," and with a ten-year-old child as passenger was sufficient to support conviction of first-degree wanton endangerment). If the evidence in these prior cases was sufficient to support a finding of wantonness "under circumstances manifesting extreme indifference to human life" (the requisite mental state for wanton murder, KRS 507.020(1)(b), and first-degree wanton endangerment, KRS 508.060), then a fortiori, Appellant's intoxication, high rate of speed, erratic manner of driving, and failure to slow or stop his vehicle upon driving halfway into a ditch were sufficient to support the jury's finding of simple wantonness. We hold that Appellant was not entitled to a directed verdict of acquittal.

II. REQUEST FOR MISTRIAL DURING THE PENALTY PHASE.

Appellant's next claim of error is predicated upon the following statement made by the prosecutor during his penalty phase opening statement:

> What you're going to find out is that in 1996, this defendant, Mr. Battoe, was convicted of DUI, Third Offense, driving under the influence of pain medication. . . . That tells you that within five years of when he was convicted of that offense, he'd also been convicted two other times of DUI. . . . And I'm going to introduce all of those convictions for you in this case. Two of the DUIs, I've got certified copies of two of the DUIs.

Appellant's trial attorney presented no opening statement, and the prosecutor immediately moved to introduce into evidence two certified records of Appellant's prior convictions for driving under the influence (DUI): one dated September 12, 1994, and one dated March 4, 1997, which recited that it was Appellant's third DUI offense. The prosecutor did not introduce any evidence of a second DUI conviction before March 4,

1997. At this point, Appellant's trial counsel objected to the introduction of the March 4, 1997, conviction, based upon the fact that the Commonwealth was not introducing both of Appellant's prior DUI convictions. He also moved for a mistrial based upon the prosecutor's reference to "DUI, Third Offense," during his opening statement. The trial court overruled the objection and the motion for mistrial.

On appeal, Appellant claims only that the trial court erred in overruling his motion for mistrial; he does not assign as error the admission of the March 4, 1997, conviction. The Commonwealth argues that Appellant's objection to the prosecutor's opening statement was untimely and is thus unpreserved. We disagree. To be considered timely, "an objection must be made 'as soon as the opponent knows, or should know, that the objection is applicable.'" Robert G. Lawson, The Kentucky Evidence Law Handbook, § 1.10[3][f], at 36 (4th ed. LexisNexis 2003) (quoting 1 McLaughlin, Weinstein's Federal Evidence § 103.11[1] (2d ed. 2003)).

> Sometimes it happens that in an opening statement by counsel a jury is given damaging information that apparently would be admissible but which in fact is not thereafter produced during the trial, and of course in that instance opposing counsel is not in a position to raise the question until the party in whose behalf the statement was made completes his case in chief without having introduced evidence in support of the facts as previously represented. In that instance, assuming the unproved information is considered prejudicial, the appropriate procedural remedy is by motion for a mistrial.

Williams v. Commonwealth, 602 S.W.2d 148, 149 (Ky. 1980). Until the prosecutor moved to introduce the Commonwealth's penalty phase evidence, defense counsel was not in a position to know that only two of Appellant's prior DUI convictions would be introduced. The prosecutor acknowledged during his opening statement that he had only two certified copies of the convictions, but it was conceivable that he would later introduce evidence of the third conviction by means of, e.g., a certified Kentucky State

Police computer printout. See generally Hall v. Commonwealth, 817 S.W.2d 228, 229-30 (Ky. 1991), overruled on other grounds by Commonwealth v. Ramsey, 920 S.W.2d 526, 527 (Ky. 1996). Defense counsel moved for a mistrial as soon as he was shown the Commonwealth's penalty phase evidence. Accordingly, this issue is preserved. Nevertheless, the refusal to grant a mistrial did not constitute reversible error.

A trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion. Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002). Declaration of a mistrial is an extraordinary remedy, which should only be granted when the record demonstrates "manifest necessity." Maxie, 82 S.W.3d at 863; Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985), habeas corpus granted on other grounds by Skaggs v. Parker, 235 F.3d 261, 275 (6th Cir. 2000). In other words, "[t]he occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). Appellant argues that prejudice of this magnitude occurred because the prosecutor misstated the law under which Appellant was previously convicted by referring to the prior conviction as a "DUI, Third Offense," rather than simply a "DUI." While Appellant is correct that KRS 189A.010 establishes only one DUI offense, and not multiple kinds of offenses based on the accused's number of prior convictions, Ramsey, 920 S.W.2d at 529; Div. of Driver Licensing, Dep't of Vehicle Regulation, Transp. Cabinet v. Bergmann, 740 S.W.2d 948, 950 (Ky. 1987), his argument fails to take the characteristics of the penalty phase into account. Under our "Truth-In-Sentencing" statute, the Commonwealth may introduce evidence of prior convictions of the defendant and evidence of the nature of these prior

offenses. KRS 532.055(2)(a). The prosecutor's reference to "DUI, Third Offense," was a proper statement of the nature of Appellant's prior convictions.

Similarly, the prosecutor's subsequent failure to introduce certified copies of each of Appellant's three prior DUI convictions did not constitute grounds for a mistrial. The record of the March 4, 1997, conviction recited that it was Appellant's third DUI offense within five years, and thus the evidence presented did not vary from the prosecutor's opening statement. We have previously approved the admission of testimony from a certified Kentucky State Police computer printout that listed a defendant's prior convictions, where the testimony occurred during the penalty phase, and where there was no dispute as to the defendant's prior convictions. Hall, 817 S.W.2d at 229-30. There is no analytical difference between the certified computer printout in Hall and the certified copy of Appellant's March 4, 1997, conviction. Appellant neither disputed at trial nor disputes here the fact that he had three prior DUI convictions. In fact, in the signed guilty plea attached to the March 4, 1997, conviction, Appellant admitted his guilt to "3rd degree" DUI. Because the prosecutor's opening statement referenced undisputed facts and did not vary with the proof subsequently offered, there was no "manifest necessity" to declare a mistrial. We hold that the trial court did not abuse its discretion.

III. UNPRESERVED ISSUES.

Appellant failed to preserve the remainder of his claims of error. Therefore, reversal is only warranted if palpable error occurred, i.e., if the error affected Appellant's substantial rights and resulted in manifest injustice. RCr 10.26; KRE 103(e). A palpable error is one that is obvious. Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005); Lawson, supra, § 1.10[8][b], at 54. A palpable error must also be serious, in

that it would seriously affect the fairness, integrity, and public reputation of the judicial proceeding were it not corrected. Ernst, 160 S.W.3d at 758; Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). See also Lawson, supra, § 1.10[8][b], at 54; 1 McLaughlin, Weinstein's Federal Evidence, § 103.42[3] (2d ed. 2003). Thus, palpable error necessarily involves prejudice more egregious than that occurring with mere reversible error. Ernst, 160 S.W.3d at 758; Lawson, supra, § 1.10[8][b], at 54 n.146.

A. Voir Dire on Lesser Included Offenses.

Appellant argues that he was deprived of his right to a fair and impartial jury, based on the following exchange, which occurred during voir dire:

> Defense: [to the venire panel] You've heard the charges both from Judge Hines and from the prosecutor in this case. At the end of the case, you may, it's up to the judge, but you may be given other options other than the charges you have heard. If you are given other options, meaning that in addition to murder, maybe there will be a manslaughter--
>
> Commonwealth: Judge, I'm going to object to this question. I think the most recent case this year says that you do not voir dire on lesser included offenses, only on the underlying.
>
> Court: I agree; I'm going to sustain it.
>
> Defense: Okay.
>
> Defense: [to the panel] When it comes time for you to reach a verdict in this case, will you all assure me that you will reach a verdict only on the crimes that you feel the Commonwealth has proven beyond a reasonable doubt? . . . Because he's charged with many crimes, even if you find him guilty of one crime, you will consider all of the other ones as well.

Defense counsel then moved on to address a new line of questioning.

Appellant now claims that his trial attorney sought only to pose a general question regarding the potential jurors' abilities to follow the trial court's instructions on lesser included offenses, and that the trial court erred in disallowing this inquiry. This appeal marks the first time that Appellant has presented this theory. If Appellant's trial

attorney indeed intended to examine the potential jurors on their abilities to follow the law, he did not proffer such a question to the trial court. This assignment of error is therefore unpreserved. Compare Lawson v. Commonwealth, 53 S.W.3d 534, 541 (Ky. 2001) (issue unpreserved where, after Commonwealth's objection to voir dire question was sustained, defense counsel failed to proffer the question she would have asked), with Varble v. Commonwealth, 125 S.W.3d 246, 252 (Ky. 2004) (issue preserved where defendant filed motion in limine seeking to examine prospective jurors as to whether they could consider the full range of penalties for each charged offense).

Appellant correctly points out that the test for determining whether a prospective juror should be disqualified is whether, "after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Wheeler v. Commonwealth, 121 S.W.3d 173, 179 (Ky. 2003); Tamme v. Commonwealth, 973 S.W.2d 13, 26 (Ky. 1998); Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994). He argues that the trial court prevented him from ensuring that the prospective jurors would conform their views to the requirements of the law regarding lesser included offenses, thus depriving him of his right to an impartial jury. We disagree. It is clear that the Commonwealth's objection and the trial court's subsequent ruling were based on Lawson v. Commonwealth, which was decided eleven months prior to Appellant's trial and which limited penalty range voir dire to the penalty ranges for the indicted offenses. Lawson, 53 S.W.3d at 544. Therefore, the trial court's ruling properly restricted Appellant from conducting voir dire regarding the penalty ranges for lesser included offenses; it did not prevent Appellant from ensuring that the prospective jurors would conform their views to the requirements of the law with regard to lesser included offenses. In fact, the next question posed to the panel by Appellant's

trial attorney was the substantial equivalent of the question Appellant now claims he was denied the opportunity to ask. Appellant was thus given the opportunity to seek assurance that the prospective jurors would "reach a verdict only on the crimes that [they felt] the Commonwealth [had] proven beyond a reasonable doubt." Appellant neither was deprived of a substantial right nor suffered manifest injustice; thus, no palpable error occurred. RCr 10.26.

B. Redirect Examination of Kayla Battoe.

Appellant claims that the trial court erred in permitting the Commonwealth to ask one of its witnesses a question referencing Appellant's prior marijuana use without having filed pre-trial notice of its intent to do so, pursuant to KRE 404(c). Appellant also argues that the question should not have been allowed because its subject was not relevant to a proper purpose under KRE 404(b). During the cross-examination of Kayla Battoe, defense counsel questioned her at length about the manner in which Appellant typically drove along Oaks Road, where the fatal crash took place. Through this series of questions, Battoe testified that she had ridden with Appellant many times on Oaks Road, that he usually drove at speeds well above the speed limit, that he did so safely, and that he seemed to be driving normally in all respects on the night in question. During the Commonwealth's subsequent redirect examination, the following exchange occurred:

> Commonwealth: Mr. Preston asked you some questions about, really, about your dad's driving habits, how he normally drove, was it unusual if he did this, was it unusual if he did that. Was it a common or an uncommon occurrence for you to see your dad after he'd been smoking pot?
>
> Kayla Battoe: Um, I'm not really sure.

(Emphasis added.)

The comment now complained of was in the form of a question, which yielded no response affirming or denying its subject matter. Because the exchange produced no evidence at all, KRE 404(b) and (c) are inapposite, and Appellant's claim of error is more properly characterized as one of prosecutorial misconduct. Moreover, our review is further limited to determining whether palpable error occurred, as Appellant lodged no contemporaneous objection to the prosecutor's question. KRE 103(e). We review a claim of prosecutorial misconduct to determine whether the misconduct was so egregious as to deny the accused his constitutional right to due process of law. Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987). This analysis focuses on the overall fairness of the trial, not the culpability of the prosecutor. Thompson v. Commonwealth, 147 S.W.3d 22, 45 (Ky. 2004); Maxie, 82 S.W.3d at 866; Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996); Slaughter, 744 S.W.2d at 411-12.

Thus, the "substantial right" involved in palpable error review of alleged prosecutorial misconduct is the right to an overall fair trial. The prosecutor's inquiry did not jeopardize this right, as he clearly sought impeachment evidence and not, as Appellant claims, KRE 404(b) evidence subject to the notice provisions of KRE 404(c). "Although a witness in a criminal case may be impeached by contradictory evidence, '[s]uch evidence is not admissible for that purpose unless it pertains to a material matter.'" Chumbler v. Commonwealth, 905 S.W.2d 488, 495-96 (Ky. 1995) (quoting Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982)). A material issue in the case sub judice was the extent to which the intoxicants ingested by Appellant impaired his driving abilities, and so the prosecutor's question was at least arguably permissible to impeach Kayla Battoe's testimony that Appellant's driving was normal on the night of the fatal crash. Accordingly, without an objection by Appellant, there was no obvious

error in permitting the question. Appellant was not deprived of his substantial right to a fair trial.

Further, the question did not result in manifest injustice to Appellant. It is inconceivable that the prosecutor's fleeting inquiry had any effect on the overall outcome of the trial. Even if the jury had inferred from the question that Appellant had previously smoked marijuana, the evidence that Appellant was impaired at the time of the fatal collision was overwhelming. Appellant did not dispute that, in addition to ingesting Lortab, he had smoked three to four marijuana cigarettes on the day of the collision. Dr. Barbeaire testified that the drugs Appellant had ingested rendered him unfit to drive, and Appellant offered little in the way of medical evidence to refute that conclusion. Finally, although Appellant presented evidence tending to establish that driving at a high rate of speed was a normal practice for him, there was also substantial eyewitness testimony describing his erratic manner of driving during the time leading up to the collision. Thus, it is unlikely that Appellant suffered prejudice from the prosecutor's inquiry, much less manifest injustice. As the reference did not deprive Appellant of a substantial right or result in manifest injustice, no palpable error occurred.

C. Guilt Phase Instructions.

According to Appellant, the guilt phase instructions given to the jury "virtually directed" a finding that Appellant had a wanton mental state. Although Appellant did not object to these instructions at trial, he now complains of the following definitions of "wantonly" and "recklessly":

> (a) "Wantonly" – A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of

> conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.
>
> . . .
>
> (d) "Recklessly" – A person acts recklessly with respect to a result or to a circumstance when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(Emphasis added.) Because only the definition of "wantonly" contained a reference to intoxication, Appellant claims that these instructions led the jurors to believe that a finding of any level of intoxication necessitated a finding of wantonness. Appellant concedes that these instructions reflected the statutory definitions of "wantonly," KRS 501.020(3), and "recklessly," KRS 501.020(4), yet contends that they violated his constitutional right to a jury trial.

In fact, the instructions given by the trial court are identical to the statutory definitions of "wantonly" and "recklessly" in all material respects. As such, Appellant is essentially asking this Court to rule on the constitutionality of KRS 501.020(3) and (4). A party challenging the constitutionality of a statute is required to serve a copy of the document first raising the challenge upon the Attorney General before judgment is entered. KRS 418.075(1); CR 24.03. This notice requirement is mandatory and will be strictly enforced. Maney v. Mary Chiles Hosp., 785 S.W.2d 480, 482 (Ky. 1990). It applies with equal force in civil and criminal cases. Jacobs v. Commonwealth, 947 S.W.2d 416, 419 (Ky. App. 1997). Because Appellant did not comply with the notice requirement in this case, we decline to address this issue.[4]

[4] Even if Appellant had not procedurally defaulted this claim, his arguments are utterly meritless. The instruction defining wantonness was clear: for the jury to find that Appellant was unaware of a risk that he created and that this unawareness rose to the level of wantonness, then his unawareness must have been "solely by reason of

D. Penalty Phase Opening Statement and Closing Argument.

Appellant's final claim of error arises out of the Commonwealth's penalty phase opening statement and closing argument. During his opening statement, the prosecutor made the following assertion to the jury:

> I'm going to ask you to give him ten years on each [conviction], and I'm going to ask you to run those consecutively for forty years, so that the judge knows that's what you recommend. When it comes to sentencing, the judge will have to reduce that sentence to twenty years by operation of law. [Appellant] can't be required to serve more than twenty years because he's been convicted of C felonies. . . . But I want the judge to do that. I want you to recommend the maximum.

(Emphasis added.) During his closing argument, defense counsel also told the jury, "any number over twenty will be reduced to twenty." The prosecutor then stated the following during the Commonwealth's penalty phase closing argument:

> I'm going to ask that you send the message that you don't want him getting out in four years, you don't want him driving the streets in four years, and the way to do that is to give him the maximum and to run them consecutively. The judge will lower it, but that's not your job. I'm asking you to give him the maximum and ask that they run consecutively, so that when he does go up to the parole board, and Mr. Preston is right, I've got a sneaking suspicion that Mr. Lofty is going to show up at the parole board when they meet, and he ought to, and I'm not so sure that I'm not going to be there standing beside him. But you can bet your bottom dollar that Mr. Battoe's family will be there too, and somebody like Mr. Preston will be standing up there saying "let him out, let him out." Again, I only ask that you return those sentences because I don't think that he is entitled to a minimum sentence on any of those charges, and I don't think that he should get a free shot at anybody, especially given his past. He knew, based upon these convictions, what happens when he takes pain medication. He knew that it impairs his ability to drive a vehicle. Those records tell you that, and there's no question about it.

(Emphasis added.)

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voluntary intoxication." If the jury found that Appellant was intoxicated but that other factors contributed to his unawareness of the risk, the definition of recklessness was unmistakable in its application.

At the close of the penalty phase, the jury fixed the punishment for Appellant's second-degree manslaughter conviction at ten years of imprisonment and the punishments for his three second-degree assault convictions at ten years of imprisonment each. The jury recommended that these four sentences be run consecutively, for a total of forty years. The trial court subsequently ordered that each sentence for Appellant's second-degree assault convictions be run concurrently with each other and consecutively with the sentence for Appellant's second-degree manslaughter conviction, for a total of twenty years of imprisonment. Appellant now argues that the prosecutor's foregoing statements constituted an improper argument urging the jury to disregard the law. Because Appellant failed to object to either of these statements, we review this claim for palpable error. RCr 10.26.

Indeed, in Medley v. Commonwealth, 704 S.W.2d 190 (Ky. 1985), we stated that "[c]ounsel has the right to argue that the jury may disbelieve the evidence and find the defendant not guilty, but no right to argue that it may disregard the law because it believes the minimum penalty set by the legislature is too severe." Id. at 191. The converse of this principle is true: it is improper for counsel to argue that a jury should disregard a statutory maximum for any reason. Because the most severe crime Appellant stood convicted of was manslaughter in the second degree, a Class C felony, KRS 507.040(2), he could be sentenced to no more than twenty years of imprisonment. KRS 532.110(1)(c); 532.080(6)(b). By insisting that the jury recommend a sentence outside of this prescribed statutory range, the prosecutor essentially urged the jury to take an action that was "unauthorized and unlawful." Neace v. Commonwealth, 978 S.W.2d 319, 321 (Ky. 1998).

Nevertheless, as previously stated supra, an analysis of prosecutorial misconduct must focus not on the culpability of the prosecutor, but on the overall fairness of the trial. Thompson, 147 S.W.3d at 45; Maxie, 82 S.W.3d at 866; Partin, 918 S.W.2d at 224; Slaughter, 744 S.W.2d at 411-12. After a review of the record as a whole, we are persuaded that Appellant received basic safeguards of fairness and that no manifest injustice occurred. "While KRS 532.060 does not insulate all sentencing phase errors from palpable error review, we believe Kentucky's sentencing procedures provide an additional layer of protection from prejudice which we should consider in the context of RCr 10.26 review in this case." Young v. Commonwealth, 25 S.W.3d 66, 75 (Ky. 2000). See KRS 532.070 (trial court may modify jury's recommendation when it is of the opinion that recommended sentence would be "unduly harsh"); Murphy v. Commonwealth, 50 S.W.3d 173, 178 (Ky. 2001) (trial court not bound by jury's recommendation as to whether sentences should run concurrently or consecutively); Dotson v. Commonwealth, 740 S.W.2d 930, 932 (Ky. 1987) (same). In fact, where, as here, a jury recommends an unlawful sentence, the trial court is required to modify the sentence "to conform to the law." Neace, 978 S.W.2d at 322. Because the trial court properly corrected Appellant's sentence, we are unable to conclude that Appellant suffered manifest injustice.

It also bears emphasis that both the prosecutor and Appellant's trial counsel informed the jury that twenty years of imprisonment was the statutory maximum penalty that Appellant could face, and that in spite of this knowledge, the jury recommended that Appellant be sentenced to a total of forty years of imprisonment. For this reason, our holding that palpable error did not occur is entirely consistent with the principle that "a jury's recommendation as to concurrent or consecutive sentencing is far from

meaningless or pro forma, and that the jury's recommendation in this regard has significance, meaning, and importance." Lawson v. Commonwealth, 85 S.W.3d 571, 581 (Ky. 2002) (internal quotation omitted). See also Stoker v. Commonwealth, 828 S.W.2d 619, 627 (Ky. 1992); Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984). In Lawson, we found it necessary to remand for a new sentencing hearing where an evidentiary error "distort[ed] the jury's conception of the available sentencing range," and where the jury recommended a sentence at the midpoint of what it perceived to be the correct sentencing range. Lawson, 85 S.W.3d at 580-82. Because of these two factors, it was impossible in Lawson to determine what the jury would have recommended had it possessed the correct information. In contrast, the jury in the case sub judice was informed of the correct statutory minimum and maximum. Moreover, unlike the Lawson jury, this jury's recommendation was not at the midpoint of its perceived sentencing range. Instead, this jury recommended that Appellant be sentenced to a total of forty years, which, if it intended to disregard the statutory limits set forth in KRS 532.110(1)(c) and KRS 532.080(6)(b), would be the maximum possible penalty for four Class C felony convictions. Thus, in contrast to the situation that occurred in Lawson, there is no doubt as to this jury's intent that Appellant be sentenced to the statutory maximum of twenty years of imprisonment. Because the trial court imposed a lawful twenty-year sentence that gave effect to the jury's intent and did not detract from the "significance, meaning, and importance" of the jury's recommendation, Appellant was not denied his right to a fair sentencing hearing. No palpable error occurred.

Accordingly, the judgment of convictions and the sentences imposed by the McCracken Circuit Court are AFFIRMED.

All concur.

COUNSEL FOR APPELLANT:

John Palombi
Assistant Public Advocate
Department of Public Advocacy
Suite 302
100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General
Room 118
State Capitol
Frankfort, KY 40601

Michael Harned
James Havey
Assistant Attorneys General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204