

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-1026-MR

DATE 3-16-06 ELLA G. GONN+P.C.

JIMMY BROWNING

APPELLANT

V.

APPEAL FROM PERRY CIRCUIT COURT
HON. SAMUEL T. WRIGHT, III, SPECIAL JUDGE
INDICTMENT NO. 03-CR-64-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Jimmy Browning, was convicted in Perry Circuit Court on one count of murder and tampering with physical evidence. He appeals to this court as a matter of right, Ky. Const §110(2)(b), asserting several claims of reversible error.

The Appellant argues he should be granted a new trial because the trial court erred by: 1) limiting the Appellant's cross-examination of witness Billie Jean Smith (Ms. Smith); 2) allowing hearsay testimony to be admitted into evidence during Ms. Smith's testimony; 3) not instructing the jury on second degree manslaughter and lesser included offenses; 4) not allowing the taped interview of the co-conspirator, Ance Neace, to be played in its entirety; 5) rejecting the Commonwealth's sentence recommendation in the plea agreement;

6) allowing the trial to continue with a special judge, after the jury had been sworn and opening arguments delivered; 7) allowing the Commonwealth to play video clips of trial testimony in its closing arguments; and 8) overruling the Appellant's motion for directed verdict.

On November 20, 2003, the trial court sentenced the Appellant in conformity with the jury's recommendations, fifty (50) years on the murder charge and five (5) years on the tampering charge. After review of the record, we affirm the Appellant's conviction and sentence.

FACTUAL BACKGROUND

The Appellant, Jimmy Browning, and Ance Neace had been friends for years. Both men dated the victim, Tamara Beverly, at different times. Neace had been living with Tamara and their child until social services removed the child from their custody, placing him with Neace's mother and father. During the custody dispute, Neace and Tamara became hostile towards each other, and in February of 2001, Tamara obtained a domestic violence order against Neace.

On April 5, 2001, Neace and Tamara argued on the phone about the custody of their son. Allegedly, Tamara told Neace that she was going to take full custody of the child and bring charges against the Appellant for molesting her youngest daughter. That night, Neace made a three-way phone call to Ms. Smith and the Appellant. During the conversation, Neace discussed the argument he and Tamara had earlier that day. The Appellant and Neace also then planned to get Tamara to go somewhere with them, do drugs, and have sex. Because Neace did not have a car, the Appellant agreed to pick him up and then they would go get Tamara.

On April 5, 2001, somewhere between the hours of 7:00 p.m., and 9:00 p.m., the Appellant and Neace picked Tamara up at her home. They went to a surface mine strip-job on top of a mountain to “snort” and “eat” some pills and drink some whiskey. Once on top of the mountain, the men took turns having sex with Tamara.

The Appellant claims he had sex with Tamara first and then got out of the truck so Neace could have his turn. Supposedly, after Neace and Tamara had sex, they got out of the car and went to the back of the truck. At that time, the Appellant claims he got back in the truck and fell asleep and remained asleep until he was awakened by Neace. The Appellant claims that Neace was then in a panic and told him that he had “done it” and wanted to “get the hell out of there.” Neace told the Appellant that he and Tamara had gotten into an argument over their son; she claimed he was not the father, and he got so angry he “put her in the pond.” Then they drove back to the Appellant’s house. His mother, Joan Morton, and his wife, Christy, were there. Neace told them the story and threatened to say they were accomplices if they told anyone.

Sometime around 1:00 a.m., Neace allegedly called Ms. Smith and told her he “did it” and that the Appellant had helped. During this phone call, Neace told her about the murder and then the Appellant told her not to say anything about it or she would “be laying up there right where [Tamara] is.”

The next couple of days following Tamara’s disappearance, the police visited Neace and the Appellant several times. Both denied having seen Tamara. Then, Appellant’s mother finally convinced him to tell the police what he knew about the murder. He contacted Detective John Sizemore and gave a

complete statement. He then led police to the site. The police recovered the body and placed the Appellant under arrest for Tamara's murder.

PROCEDURAL FACTS

Both the Appellant and Neace were indicted on May 15, 2001, in the Perry Circuit Court on one count of murder, one count of tampering with physical evidence, and one count of rape in the first degree.

Thereafter, the Appellant and the Commonwealth entered into a plea agreement for a recommendation of a twenty year sentence in exchange for a plea of guilty to murder and his truthful testimony in the case against Neace. The rape charge was thereafter dismissed on motion of the Commonwealth in June of 2002. Subsequently, on August 23, 2002, a new Commonwealth's Attorney was appointed to proceed with the case. On December 18, 2002, after several delays, Judge Combs accepted the Appellant's plea and set the matter for final sentencing on January 22, 2003.

However, at the hearing for final sentencing on January 22, 2003, Judge Combs announced his rejection of the recommended sentence and suggested a harsher punishment. The Appellant argued, without avail, that Judge Combs was bound by the plea and that the Appellant detrimentally relied upon the Court's words and actions in allowing his trial to be continued. The trial court then allowed the Appellant to withdraw his guilty plea and the matter was set for trial.

Consequently, on March 7, 2003, the new Commonwealth's Attorney sought and obtained a superseding indictment from the Perry County Grand

Jury, charging the Appellant with one count of complicity to murder, and one count of complicity to tampering with physical evidence.

After several continuances, the trial started on August 5, 2003, with Judge Combs presiding. On the first day of trial, the jury was sworn in and opening statements were delivered. On the second day of trial, Judge Combs had a family emergency. He gave notice of the emergency to counsel for both sides and discussed options on how to proceed with the trial. Ultimately, Judge Combs contacted the Chief Regional Judge to request appointment of a special judge. Judge Samuel Wright, the Circuit Court Judge of Letcher County, was appointed as special judge. The Appellant then objected stating that Judge Combs was more familiar with the case and that it would be prejudicial to have a new judge enter the case. However, on the following day, Judge Wright took the case as ordered by the Chief Regional judge. The Appellant again objected to the case going forward, but Judge Wright proceeded with the trial.

During trial, the Commonwealth called several witnesses, including Ms. Smith. She was 19 years old at the time of trial and due to some mental health issues, the Commonwealth made a *motion in limine* as to the use of her mental health records. The court conducted an in chambers hearing to discuss the admissibility of portions of the mental health records. In chambers, Ms. Smith stated that she had previously suffered from visual and auditory hallucinations, such as people calling her name. She also disclosed to the court that she was under the care of a mental health professional before and after the events surrounding the murder, but could not remember specifically if she was on any medication on April 5, 2001.

The Appellant argued that the mental health records went to the credibility of Ms. Smith's testimony and therefore, he should be able to question her about them. The court ruled that the Appellant could not question her about the mental records except to ask her about what medications she was taking at the time of the incident.

Ms. Smith testified the Appellant and Neace were very angry during the phone conversation before the murder took place. She stated the Appellant said, "Hazard would be a hell of a lot better place if the bitch was dead." She also testified that Neace called her back around 1 a.m. on April 6, 2001, stating, "I did it. I killed her. Jimmy helped me." During the second conversation, the Appellant threatened that if she told anyone she would "be up there where she is." All of the statements were admitted into evidence over the Appellant's hearsay objections.

The Appellant cross-examined Ms. Smith about her medication and what she was taking during the time around the murder. She stated that she had been taking anti-depressants prior to, and after, the murder, but could not remember if she was taking medication during the time of this incident. However, she did admit to snorting pills such as Xanax, Lorcets, and Percocets during this time.

Neace also testified for the Commonwealth. Several times during direct and cross examination, Neace failed to remember what he had told Detective Duff during his confession interview. In an attempt to refresh his recollection, the Appellant wanted to play Neace's entire taped interview with the detective. The Appellant argued that even after Neace read the transcript, he could not remember certain statements that he had made during that interview and playing

the entire tape would help. The trial court did not allow the tape to be played in its entirety. Instead, the trial court ruled that the Appellant could play portions of the tape that were inconsistent or contradictory with the testimony that Neace provided while on the stand.

At the close of the evidence, the court overruled the Appellant's motion for a directed verdict based on insufficiency of the evidence. The Appellant also objected to the Commonwealth's use of the videotaped testimony during their closing arguments. The court overruled the objections.

While discussing jury instructions, the Appellant asked for an instruction on complicity to second degree manslaughter due to intoxication. The motion was overruled.

The jury returned its verdict finding the Appellant guilty on both counts and recommended fifty (50) years on the murder charge and five(5) years on the tampering charge to run consecutively for a total of fifty-five (55) years. He was sentenced accordingly.

The Appellant's arguments follow.

ISSUES

I. Cross-examination of Ms. Smith.

The Appellant argues he was denied the right to a fair trial when the trial court limited the scope of his cross-examination of Ms. Smith. During an in chambers hearing, Ms. Smith stated she had been, and still is being, treated for mental health problems, mostly anxiety and depression. The Appellant moved to have Ms. Smith's medical records admitted into evidence to impeach the credibility of her testimony by questioning her about her medical diagnosis and

doctor evaluations. The trial court ruled the Appellant could introduce parts of the medical record that were inconsistent with her testimony and could ask about any medications that she was taking during the events surrounding the murder.

“Psychiatric problems are not a proper subject for impeachment unless it can be shown that such problems relate to the credibility of the witness.”

Stanford v. Commonwealth, 793 S.W.2d 112, 116 (Ky. 1990). Such problems relate to credibility when it “can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about.” Commonwealth v. Huber, 711 S.W.2d 490, 491 (Ky. 1986).

“The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination.” Commonwealth v. Barroso, 122 S.W.3d 554, 560 (Ky. 2003). Therefore, “if the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's [inability] to recall, comprehend, and accurately relate the subject matter of the testimony, the defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege.” Id. at 563. “Factors a court should consider in allowing such evidence are the nature of the psychological problem, the temporal recency or remoteness of the condition, and whether the witness suffered from the condition at the time of the events to which she is to testify.” Id. at 562-3.

In this case, the Commonwealth and the Appellant discussed this matter with the court in chambers. The Appellant was allowed to review the medical records of the witness and show the court any impeachable, or exculpatory, evidence contained therein. The trial court ruled that the Appellant could ask Ms.

Smith about her drug use and anything that the Appellant could find to attack Ms. Smith's credibility, such as inconsistent testimony. The court suggested that expert medical testimony that the drugs inhibited her perception, or diminished her ability to recall, would also be appropriate. However, the Appellant was not permitted to ask about specific medical issues, namely her hallucinations.

Although "the Confrontation Clause guarantees an *opportunity* for effective cross-examination [it does not allow] cross-examination that is effective in whatever way, and to whatever extent the defense might wish." Barroso 122 S.W.3d at 559; (citing Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (emphasis in original)).

The Appellant argued that Ms. Smith's prior hallucinations would be an issue that could affect her credibility. The trial court decided, however, that the hallucinations were too remote in time to the event (approximately six months before the incident) and were very infrequent, factors considered in Barroso. The trial court ruled that the type of hallucinations Ms. Smith experienced were not the type that would have prevented her from being able to comprehend or recall conversations that she had with the Appellant and Neace. "A person's credibility is not in question merely because he or she is receiving treatment for a mental health problem." Barroso 122 S.W.3d at 563.

There is nothing in the record that could prove her past hallucinations caused her not to be able to recall the incidents that occurred on April 5, 2001. However, the Appellant was given the opportunity to question Ms. Smith about any medications she was taking before, during, and after the night in question, notwithstanding that there was no expert testimony that the medications were of

the type that would have diminished Ms. Smith's capacity to recall or recollect the events surrounding the murder.

Additionally, Ms. Smith testified consistently on the stand with what she had told the officers directly after the incident. When asked on the stand about her medications, she admitted she had been on medication before, during, and after the night in question. She also admitted to snorting pills.

Thus, the trial court acted properly in limiting the scope of Ms. Smith's cross-examination and we find no abuse of discretion.

II. The out of context statements testified to by Ms. Smith were admissible.

The Commonwealth introduced statements made by the Appellant and Neace through the testimony of Ms. Smith. Ms. Smith testified as to what was said during phone conversations she had with the Appellant and Neace. The Appellant objected to this testimony as inadmissible hearsay. The court overruled the Appellant's objection, ruling the testimony was admissible under KRE 801A(b)(1), (2), and (5) and KRE 803(2).

There are several hearsay exceptions under 801A(b). Under KRE 801A(b)(1), a party's own statement, or an adoption of a statement, is admissible. Also, KRE 801A(b)(2) provides that incriminating statements may be admissible, if they are "made in the presence of an accused under circumstances that would normally call for his denial of the statements, and it is clear that the accused understood the statements, yet did not contradict them and the statements are admissible as tacit, or adoptive, admissions." Marshall v. Commonwealth, 60 S.W.3d 513, 521 (Ky. 2001). Furthermore, under KRE 801A(b)(5), statements made by a co-conspirator are allowed if it can be shown

that 1) there was a conspiracy, 2) the defendant was a part of that conspiracy, and 3) the statement was made in furtherance of the conspiracy. Moreover, a statement by a declarant is admissible if the statement was an excited utterance made while under the stress of excitement caused by a startling event or condition. KRE 803(2).

According to testimony in the record, there were several ongoing conversations between the Appellant, Neace and Ms. Smith about killing Tamara to help Neace keep his child. Ms. Smith testified that the Appellant and Neace had spoken with her about killing Tamara prior to the night in question. Neace admitted during his testimony that he and the Appellant had discussed killing Tamara.

Ms. Smith testified that the Appellant and Neace had spoken with her twice on the night of the murder. During the first call, the Appellant claimed that, "Hazard would be a whole lot better place if that bitch were dead." Both Ms. Smith and Neace testified that the Appellant and Neace had a plan to get Tamara out, do drugs, and have sex with her.

The second call came after the murder. Ms. Smith testified that Neace called her and stated he "did it" and "Jimmy [Appellant] helped me." Jimmy responded to Neace's statement by threatening Ms. Smith that she better not tell anyone or "she would be laying up there right where [Tamara] is."

Looking at the testimony in its entirety, there is sufficient evidence that the Appellant and Neace were co-conspirators in the murder of Tamara. The men had talked to Ms. Smith about killing Tamara prior to the night of the murder. On the night in question, they told Ms. Smith how they planned to get her to go with

them and do drugs. The testimony of Ms. Smith concerning these statements on the phone before the murder was that of statements by co-conspirators and therefore admissible under KRE 801A(b)(5). The facts in the record are sufficient to prove there was a conspiracy between the Appellant and Neace to harm Tamara. The statements were made during the course and in furtherance of that conspiracy.

The testimony concerning the telephone call to Ms. Smith after the murder was also properly admitted. Ms. Smith testified Neace told her he “did it” and the Appellant threatened her if she told she would be “up there where [Tamara] was.” The murder had just occurred and, as Neace and the Appellant were fleeing the scene, they called Ms. Smith and told her that it was completed. These statements were made while the men were under the stress of excitement caused by the murder and thus, pursuant to KRE 803, are admissible as excited utterances.

Ms. Smith also testified that Neace said “Jimmy [Appellant] helped him.” This statement is admissible under 801A(b)(2) as an adoption because under circumstances such as this, a person would normally deny the statement. The Appellant instead threatened Ms. Smith that if she told anyone, she would be harmed too.

Thus, the trial court did not err in admitting this testimony.

III. The trial court did not err in refusing instructions without evidentiary support.

The Appellant argues that he was denied a fair trial and due process when the trial court did not instruct the jury on the lesser included offenses of manslaughter based on intoxication as a defense to murder.

A trial court may instruct on a lesser included offense when the evidence presented “justif[ies] a doubt based on the theory that the crime committed was of a lower degree or lesser culpability.” Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977). Under KRS 501.080(1), voluntary intoxication is a defense to a criminal charge if it negates the existence of an element of the offense. “The defense is justified only where there is evidence reasonably sufficient to prove that the defendant was so intoxicated that he did not know what he was doing.” Rogers v. Commonwealth, 86 S.W.3d 29, 44 (Ky. 2002). “[W]hen there is evidence that the defendant was so drunk that he did not know what he was doing, or when the intoxication [negates] the existence of an element of the offense,” a voluntary intoxication instruction is proper. Nichols v. Commonwealth, 142 S.W.3d 683, 688 (Ky. 2004). In other words, “[w]henver a defendant adduces sufficient evidence of voluntary intoxication, the defendant is entitled to an instruction on the defense of intoxication.” Id.

Therefore, if “the jury reasonably could have concluded that Appellant was intoxicated and that because of his intoxication, he could not have formed the requisite mens rea for the offenses,” a voluntary intoxication defense is warranted. Nichols 142 S.W.3d at 689. However, evidence of mere drunkenness is not sufficient to warrant an instruction. Jewell v. Commonwealth, 549 S.W.2d 807, 812 (Ky. 1977)(overruled on other grounds). “There must be something in the evidence reasonably sufficient to support a doubt that the defendant knew what he was doing.” Id.

Based on the record, the Appellant did not prove he was out of control or so intoxicated, thus negating the element of intent to cause the death of

Tamara. There was testimony that the Appellant admitted to killing Tamara, and he remembered enough to describe how she was “laying on the ground shaking” and although “Ance told him to stop,” he knew “she was going to die anyway,” so he “held her under until she drowned.”

An expert for the Appellant testified that a mixture of drugs and sex would cause someone to fall asleep. However, the Appellant did not prove that he was so “out of control” that he did not know what was going on around him.

“Intoxication, whether voluntary or involuntary, is a defense to an intentional crime if the effect of the intoxication is to completely negate the element of intent; it causes the defendant's mental state to equate with insanity.” McGuire v. Commonwealth, 885 S.W.2d 931, 934 (Ky. 1994).

The Appellant admitted to snorting pills and drinking whiskey on the night in question, but he did not prove that this was out of his normal routine or that drugs caused him to be so intoxicated that he did not know what he was doing. Simply stated, the Appellant was aware enough to drive to Tamara’s, find his way up the mountain to the strip job site at night, have sex with Tamara, remember getting out of the car, and most of the details that happened thereafter. Even after the murder, he demonstrated knowledge that what he did was wrong by threatening Ms. Smith not to tell anyone or she would be killed too.

Under the evidence adduced, a second degree manslaughter instruction based on intoxication as a defense was not warranted. Thus, the court did not err in its instructions.

IV. The court properly denied Neace’s video-taped confession to be played in its entirety

The Appellant also argues he was denied a fair trial and due process by not being permitted to play the videotaped confession of Neace in its entirety. During Neace's testimony at trial, he did not remember certain statements he had made during his videotaped interview. However, the trial court allowed the Appellant to refresh Neace's recollection by having him read the transcript of the interview. Also, the Appellant was allowed to impeach him by reading portions of the transcript into the record or by playing portions of the videotaped confession, but the Appellant was not allowed to play the videotape in its entirety.

A trial court "may abuse its discretion when otherwise inadmissible evidence is introduced to the jury through the guise of refreshing a witness's recollection." Rush v. Illinois Central Railroad Company, 399 F.3d 705, 717 (6th Cir. 2005). "Caution must be exercised to insure that the document is not used to put words into the mouth of the witness." Id. at 718; (citing United States v. Falkner, 538 F.2d 724 (6th Cir. 1976)). "It is the witness's present refreshed recollection--as opposed to the contents of the writing used to refresh memory--that is the substantive evidence of the matter at issue." Id.

The Appellant wanted to refresh Neace's recollection by playing his videotaped interview with Detective Duff in its entirety. While Neace was on the stand, he answered that he did not know or could not remember certain things that he said during that interview. The record indicates that the trial court gave the Appellant permission to use portions of Neace's tape-recorded interview that were inconsistent with his trial testimony, but because the transcript and the tape were the same, the court only allowed Neace to read the transcript to refresh his memory or set up his impeachment. The trial court warned the Appellant not to

put words in Neace's mouth or to use his own interpretation of what was said in the transcript. See Faulkner 538 F.2d at 727 (holding that the trial court did not abuse its discretion in permitting a government witness' recollection to be refreshed by the use of a transcript of tape recordings which had been refused admission into evidence.)

Supporting his position, the Appellant cites Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997), wherein a witness was asked about whether the defendant told her he was going to the victim's home to kill him. The witness replied, "No, he didn't." That testimony was in direct contradiction to what she had stated in her previous interview and defense counsel announced his intention to confront the witness with her prior inconsistent statement by playing the tape recorded conversation for her. There, the witness was contradicting statements that she had made in her previous testimony, not merely claiming that she did not know or could not remember. Id. at 28. This Court held in Brock that the admittance of the tape recorded interview was limited to the contradictory testimony and could not be played in its entirety.

Because the trial court permitted the Appellant to use the transcript of the tape recording to impeach Neace, the trial court acted appropriately. It did not err in overruling the Appellant's motion to play the videotape to the jury in its entirety. There was no abuse its discretion.

V. The rejection of Appellant's plea agreement was proper.

The Appellant argues that he was denied due process when Judge Combs rejected the Commonwealth's sentence recommendation in his plea agreement. Judge Combs did accept the plea. However, he made it clear during

the hearing that he was not bound by the sentencing recommendation and that he could impose a much harsher punishment on the Appellant at sentencing. Ultimately, Judge Combs ruled he would impose a greater sentence than recommended in the agreement, but then allowed the Appellant to withdraw his plea.

The plea bargaining process is an essential component of the administration of justice, and “if the court has reasonable grounds for believing that acceptance of the plea would be contrary to the sound administration of justice, it may reject the plea.” Hoskins v. Maricle, 150 S.W.3d 1, 25 (Ky. 2004). “A ‘sentence bargain’ is an agreement in which the prosecutor agrees to recommend or not to oppose a particular sentence in exchange for a guilty plea to the original charge.” Id. at 22. “Since sentencing is a function of the judiciary, a judge's discretion to accept or reject a sentence bargain is unfettered.” Id.

Although the trial court accepted the plea, it expressly stated on the record that it did not have to accept the sentence proposed in the plea agreement. The trial court unambiguously stated the sentence could include a minimum sentence of 20 years and a maximum of life in prison. On the record, the Appellant stated that he understood that the court could impose a harsher penalty than the sentence recommended.

When the trial court rejected the sentence recommendation, it gave several reasons for its decision. The trial court justified its rejection by expressing concerns it had about how the original prosecutor handled the case. Also, the court was concerned that Browning’s agreement to testify truthfully against Neace was never in writing and included in the plea.

After rejecting the sentence recommendation, the trial court gave the Appellant the opportunity to withdraw his plea and proceed to trial. The Appellant did so and a trial was set. There was no error.

VI. The appointment of Special Judge Wright to proceed with trial was proper.

The Appellant argues that he was denied a fair trial and due process when the trial court improperly sought and obtained a Special Judge to step in and finish the trial when he was unfamiliar with pre-trial materials and previous hearings.

When the family emergency arose, Judge Combs discussed several alternatives with the Appellant and the Commonwealth on how to proceed with trial. At that time, no witnesses had given testimony. Judge Combs also considered the amount of time the Appellant had been in jail awaiting trial. He thought that prolonging the trial, or declaring a mistrial, would be to the Appellant's disadvantage. Thus, Judge Wright was appointed, and the trial proceeded.

Nowhere in the record does the Appellant state specifically what issues were previously litigated or unknown to Judge Wright that would have prejudiced the Appellant. Of course, most pre-trial hearing would be reflected in the court record or, at least, counsel could apprise the new judge of the previous proceedings. The Appellant simply does not establish that the Special Judge was unable to give the Appellant a fair trial and due process of law. Thus we find no merit in this argument.

VII. Commonwealth was properly allowed to play select video clips of trial testimony during closing arguments.

The Appellant argues that he was denied a fair trial and due process when the trial court allowed the Commonwealth to play video clips of trial testimony in its closing argument.

“It is a well settled principle that matters pertaining to closing arguments lie within the discretion of the trial court.” Hawkins v. Rosenbloom, 17 S.W.3d 116, 120 (Ky. App. 1999). In closing arguments, “[b]road latitude is given to counsel so they can recite and interpret the evidence for the jury.” Owensboro Mercy Health System v. Payne, 24 S.W.3d 675, 678 (Ky. App. 2000). Closing arguments are allowed “[g]reat leeway [because] [i]t is just that-an argument.” Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987).

The Appellant argues that he was denied a fair trial when the Commonwealth played video clips of witnesses’ trial testimony during its closing argument. However, counsel is allowed, during closing arguments, to brief or summarize the testimony or evidence that has been accepted during the trial in a way that strengthens their case, and helps refresh the jury of the testimony that it has heard throughout the trial. The trial court recognized that the purpose of closing arguments is to draw the jury’s attention to what each side considered the most important testimony. It also recognized that using the video of the witnesses’ trial testimony was like pointing out certain portions of an exhibit to the jury to get the point across.

This Court held in Fields v. Commonwealth, 12 S.W.3d 275 (Ky. 2000), that “[a]s for closing argument, attorneys are generally allowed to replay excerpts from recorded testimony which is analogous to reading excerpts from the record.”

Id. at 281; (citing Hodges v. State, 194 Ga.App. 837, 392 S.E.2d 262 (1990); People v. Gross, 265 Ill.App.3d 74, 202 Ill.Dec. 250, 637 N.E.2d 789 (1994)).

Thus, there was no error.

VIII. Insufficient evidence to support conviction.

The Appellant argues that he was denied his right to a fair trial under the requirement of proof beyond a reasonable doubt as the evidence was blatantly insufficient to prove the charges of which he was convicted. However, based on the record, there plainly was sufficient evidence to support the jury's verdict.

This court unambiguously established the standard for a directed verdict in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Furthermore, "[t]he jury is certainly empowered to draw reasonable inferences from the circumstances." Commonwealth v. Brindley, 724 S.W.2d 214, 216 (Ky. 1986). "It is the duty of the jury to affix criminal responsibility." Id. "If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Trowel v. Commonwealth, 550 S.W.2d 530, 533 (Ky. 1977). Applying that criterion, the evidence was clearly sufficient.

The Appellant was charged with violating KRS 507.020 and KRS 524.100. Based on the record, the evidence was sufficient to find that a reasonable jury could find the Appellant guilty. He concealed evidence of the murder for several

days before giving a complete statement, satisfying the element of KRS 524.100. Also, there was enough evidence that a reasonable jury could find that the Appellant intended to cause the death of Tamara and caused her death, elements of KRS 507.020. Again, we do not find any merit to this argument.

CONCLUSION

For the foregoing reasons, the judgment of the Perry County Circuit Court is affirmed.

All concur.

COUNSEL FOR APPELLANT

David A. Johnson
479 Main Street
2nd Floor First Federal Building
Hazard, Kentucky 41701

COUNSEL FOR APPELLEE

Gregory D. Stumbo
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601