

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

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Supreme Court of Kentucky **FINAL**

2005-SC-0439-MR

DATE 9-14-06 Elia G. Brown, H.D.C.

GARY V. GAMBLE

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HON. JOHN GRISE, JUDGE  
04-CR-009-001 AND 04-CR-333

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Gary Gamble, entered a plea of guilty to murder, burglary in the first degree, and being a persistent felony offender in the second degree. Following a penalty trial before a jury, Appellant was sentenced to seventy years in prison. He appeals to this Court as a matter of right, asserting the following errors: (1) that the trial court abused its discretion by requiring him to wear leg shackles during the proceedings, and (2) that the trial court erroneously admitted photographs of the victim. Finding no error, we affirm.

**I. Background**

The events underlying this appeal were set in motion by Kristie Gonzales. While living in Bowling Green, she had dated Chris Page, who sold drugs out of his apartment, according to Gonzales. When her relationship with Page soured, Gonzales relocated to Louisville where she met and began dating Charlie Morse, a childhood friend of

Appellant. Gonzales told Morse about Page's drug dealing operations and the large quantities of cash and drugs that were normally in Page's apartment. Eventually, the two hatched a plan to rob Page. Morse recruited Appellant to participate in the scheme.

Appellant, Gonzales, and Morse drove from Louisville to Bowling Green in two vehicles. The plan was for Gonzales to take one of the cars to pick up Page and drive with him to a neighboring town. Meanwhile, Appellant and Morse would use the opportunity to burglarize Page's apartment and return to Louisville in the second car. Gonzales met Page according to plan, so Appellant and Morse proceeded to the supposedly empty apartment. Unbeknownst to them, however, Page had been evicted several months before and the unit had been rented to J. Corey Webster.

Appellant and Morse approached the apartment and knocked. Hearing no response, Appellant kicked open the door. To their surprise, Webster was lying on a couch near the door. One shot was fired at Webster, though the actual gunman is unclear; both Appellant and Morse attribute the single shot to the other. The bullet passed through the bottom of Webster's foot and lodged in the back of his neck, causing his airway to swell shut. He later died in the parking lot as paramedics attempted to save him.

Following the shooting, Appellant and Morse fled the apartment complex and headed for Louisville. They reunited with Gonzales at a service station in Bullitt County. Meanwhile, Louisville police had received an anonymous tip that Morse and Gonzales were involved in the murder. Officers eventually located Gonzales and Morse, and took them into custody for questioning. Morse refused to give a statement and was released. Gonzales, however, made some incriminating statements and was held overnight. The following day, she agreed to provide the details of the crime in exchange

for complete immunity. Her statement implicated Appellant, who was thereafter arrested.

A Warren County grand jury indicted Appellant for murder, burglary in the first degree, and for being a persistent felony offender in the second degree. Though Appellant maintained that Morse had actually fired the gun that killed Webster, he nonetheless entered a guilty plea to all three charges in exchange for the Commonwealth's agreement to allow him to be sentenced by a jury. The Commonwealth also agreed not to seek aggravated sentences of life without the possibility of parole or life without the possibility of parole for twenty-five years.

Following a sentencing trial, the jury fixed Appellant's sentence at fifty years in prison for the murder charge and twenty years in prison for the burglary charge, to be served consecutively. It also recommended a forty-year sentence for the PFO charge, to be served in lieu of the burglary sentence. The trial court amended this ninety-year total sentence to seventy years, the statutory maximum. Appellant now enters this appeal as a matter of right. Ky. Const. § 110(2)(b). Further facts will be developed as necessary.

## **II. Use of Leg Shackles**

Appellant first argues that the trial court abused its discretion when it required him to wear leg shackles during his penalty phase trial. During a meeting in chambers prior to the commencement of the proceedings, the trial court informed defense counsel that Appellant would be required to wear leg shackles when he appeared in the courtroom. Defense counsel objected, but the trial court overruled the objection, citing security concerns. Appellant now argues that the trial court lacked reasonable justification for the use of leg shackles, and that he was unduly prejudiced as a

consequence. Because the trial court articulated legitimate concerns warranting the use of the restraints, we find no abuse of discretion.

Recognizing the inherent prejudice that flows from the use of physical restraints when a defendant appears before a jury, “[i]t has long been the law in Kentucky that, in the absence of special circumstances, an accused should not be forced to face the jury in chains.” Hill v. Commonwealth, 125 S.W.3d 221, 233 (Ky. 2004). The right to be free of shackles when in the presence of the jury was codified in RCr 8.28(5): “Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for his physical restraint.” This Court has explained that the use of shackles on certain defendants is necessary and permissible where the trial court has “encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials.” Tunget v. Commonwealth, 303 Ky. 834, 836, 198 S.W.2d 785, 786 (1947). Thus, when a trial court is faced with the decision to shackle a defendant, it must balance “the serious prejudice that may result from manacling a defendant in the presence of the jury” against the necessity of the restraints in light of the particular circumstances of the case. Hill, 125 S.W.3d at 233. The ultimate decision to shackle a defendant rests within the sound discretion of the trial court, and will only be overturned on appeal upon a demonstration that this discretion was abused. Commonwealth v. Conley, 959 S.W.2d 77, 79 (Ky. 1998).

Here, the trial court based its decision to shackle Appellant on concerns for courtroom security and decorum, taking into account the peculiar circumstances of the case. The trial court specifically noted in the order denying Appellant’s motion for a new trial that it had “determined that specific factors unique to the case justified the leg shackles.” Moreover, the trial court expressed its understanding that the routine

shackling of each and every defendant is not permitted. This Court, in Tunget, theorized that the use of shackles is warranted in “one murder case out of an average hundred coming to trial.” Id., 303 Ky. at 836, 198 S.W.2d at 786. Referencing this comment, the newly appointed trial judge in this matter remarked that his “one case had come early.”

The trial court also noted the exceedingly brutal and senseless nature of the crime—the unprovoked murder of a complete stranger in his own home—to which Appellant had pled guilty. The court also expected rancor among Appellant and the key witnesses. Morse, Appellant’s co-defendant, was present in the courtroom and scheduled to testify mere feet away from Appellant. As the trial court explained, “it requires little imagination to presume great animosity between admitted murderers.” Equal hostility was anticipated between Appellant and Gonzales, who had identified Appellant to police in exchange for complete immunity, despite her own critical role in the crime. The trial court also expressed its concern that courtroom decorum and integrity would be compromised due to the explosive nature of the case, especially since the victim’s family was planning to be in the courtroom and would likely be sitting near the man who had participated in this exceptionally wanton and brazen murder.

The trial court weighed these concerns against Appellant’s right to be free from shackles, and took significant measures to lessen any potential prejudice. The court limited the restraints to leg shackles and did not require more visible and restrictive handcuffs. The court also permitted Appellant to be seated at the defense table before the jurors entered the courtroom, so that they would not view him walking in shackles. Similar measures were taken when Appellant went to the witness stand. The court refrained from admonishing the jury about the leg shackles because “to do so would

draw more attention to them and do more harm than good.” The court also reasoned that there was no need to admonish the jury that the use of leg shackles could not result in an inference of guilt because Appellant had already admitted his involvement in the crime.

Upon review of the record, we conclude that the trial court acted within its discretion in requiring Appellant to wear leg shackles in the courtroom. The trial court properly balanced the potential prejudice resulting from the use of the shackles against legitimate concerns for courtroom safety and decorum. See Hill, 125 S.W.3d at 236. Moreover, the court did not base its decision on general safety concerns applicable to all criminal trials. Rather, it articulated specific factors particular to Appellant’s penalty trial. See Deck v. Missouri, 544 U.S. 622, 633, 125 S.Ct. 2007, 2015 (2005) (“[A]ny...determination must be case specific; that is to say, it should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial.”). Where, as here, a defendant has admitted his guilt, it is not improper for the trial court to consider a variety of factors, including the nature of the crimes, in determining whether a security concern exists. See United States v. Baker, 432 F.3d 1189, 1244 (11th Cir. 2005) (noting that in determining whether to shackle a defendant, the trial court’s “assessment may include consideration of, among other things, the criminal history and background of each of the defendants, including whether the defendant has a history of violent acts; the number of defendants being tried together; the nature of the charges pending against the defendant[], including whether the charged offenses include violent criminal conduct; any past history of conduct by a defendant that may have disrupted a criminal proceeding; and other circumstances, such as threatening behavior against witnesses or court personnel, that may reasonably bear upon the safety of the

courtroom and its occupants or upon the danger of escape”). The trial court’s ultimate decision to use physical restraints is permissible where, as in the present matter, the determination is justified by a legitimate interest in courtroom safety and decorum. See Peterson v. Commonwealth, 160 S.W.3d 730, 734 (Ky. 2005) (affirming use of shackles where defendant’s “belligerent conduct prior to trial...raised a serious issue of courtroom security”).

We note also that the trial court took steps to minimize any potential prejudice by allowing Appellant to enter and exit the courtroom in private, and by requiring only leg shackles. Furthermore, we agree with the trial court that Appellant’s guilty plea further minimized the chance of undue prejudice. See Hill, 125 S.W.3d at 236 (“[T]he fact that the jury already knew Appellant was a convicted criminal and a prisoner in a penitentiary mitigated the prejudice naturally attendant to such restraint.”). In light of the careful consideration given this matter, we are convinced that the trial court did not abuse its discretion. See Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994) (“A trial court abuses its discretion when its actions are arbitrary, unreasonable or unsupported by sound legal principles.”).

### **III. Admission of Crime Scene and Autopsy Photographs**

Appellant next argues that the trial court erred in admitting two crime scene photographs and one autopsy photograph. Defense counsel objected, arguing that the images are unduly graphic and gruesome and that they were rendered irrelevant due to Appellant’s guilty plea. The trial court overruled the objection, concluding that the photographs held significant probative value outweighing any prejudice created by their graphic nature. We likewise find no error.



All three challenged photographs depict the victim. The first photograph shows Webster, covered in blood, sitting up at the crime scene as paramedics treated his injuries. The second is a photograph of Webster's foot with a small metal rod inserted to recreate the trajectory of the bullet. The third photograph was taken during the autopsy, and shows the wound created by the bullet as it passed through Webster's chin.

Otherwise relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial nature. KRE 403. Accordingly, when determining whether to exclude evidence, "a trial court should consider three factors: the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth." Page v. Commonwealth, 149 S.W.3d 416, 420 (Ky. 2004). An appellate court will overturn a trial court's ruling under KRE 403 only when there has been an abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996).

Here, all three photographs were relevant. The first photograph showed the nature and extent of Webster's injuries, which assisted the jury in assessing the character of the crime. See Thompson v. Commonwealth, 147 S.W.3d 22, 36 (Ky. 2004) ("[A] sufficient amount of evidence must be presented to the jury in a penalty phase proceeding where no trial occurred, as the jury cannot be expected to make its determination without a comprehensive understanding of the serious nature of the charge."). The second and third photographs, depicting the entry wounds on Webster's foot and chin, were introduced to explain the trajectory of the bullet. Additionally, these photographs, along with the medical examiner's testimony, provided information about the position of the gunman from which the jury could conclude that the gun was fired

intentionally. We also reject Appellant's claim that the photographs were rendered irrelevant by his guilty plea: "The Commonwealth . . . has a right to prove its case to the jury with competent evidence even when the defendant pleads guilty." Thompson, 147 S.W.3d at 36.

We disagree with Appellant's claim that the photographs' probative value is outweighed by the prejudicial nature of overly graphic and heinous photographs. Generally speaking, the gruesome nature of a photograph does not automatically render it inadmissible. Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992). Rather, exclusion of graphic or gruesome photographs is warranted where the image depicted is irrelevant and only serves to inflame the jury. See Clark v. Commonwealth, 833 S.W.2d 793, 795 (Ky. 1992) (gory photographs admitted to demonstrate defendant's attempts to conceal his crime should have been excluded, where the images had "no relevance to the crime scene, but served only to arouse passion and shock at the sight of a gory event"). Here, the photographs accurately depict the nature and extent of Webster's injuries at the time he died. They are not unduly prejudicial simply because the wounds inflicted are unpleasant to view.

The trial court properly balanced the probative value of these photographs against the potential for prejudice due to their graphic nature. The photographs were necessary not only to demonstrate the character of the crime for purposes of sentencing, but also to rebut Appellant's claim that the gun fired accidentally. Having viewed the photographs, we agree with the trial court that the photographs are not so intensely gruesome as to outweigh this probative value. There was no abuse of discretion.

#### **IV. Conclusion**

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

All concur.

**COUNSEL FOR APPELLANT:**

Donna L. Boyce  
Appellate Branch Manager  
Department of Public Advocacy  
100 Fair Oaks Lane, Suite 302  
Frankfort, Kentucky 40601

**COUNSEL FOR APPELLEE:**

Gregory D. Stumbo  
Attorney General

Bryan D. Morrow  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, Kentucky 40601