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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-000383-MR
AND
2005-SC-000035-TG

GERALD WILLIAMS — APPELLANT

V.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
INDICTMENT NO. 02-CR-00046

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A Magoffin Circuit Court jury convicted Appellant, Gerald Williams, of murder, for which he was sentenced to life in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting reversible error by the trial court in: (1) improperly instructing the jury, (2) failing to strike two jurors for cause, (3) allowing the Commonwealth to improperly impeach Appellant's character for credibility, (4) failing to suppress evidence obtained by an inadequate search warrant, and (5) admitting improper hearsay evidence. We agree that the improper instructions and improper admission of impeachment evidence entitle Appellant to a new trial. We will not discuss

the jury issues, which are unlikely to recur upon retrial, or the hearsay issues, which were not preserved for appellate review. We uphold the trial court's suppression ruling.

I. FACTS.

Tammy Howard, Appellant's domestic companion, died sometime during the night of April 29-30, 2002. During the afternoon and evening of April 29, Appellant and Howard had at least five guests at their residence: Chris Lemaster and his girlfriend, Christina Hartman, and three brothers, Adam, Daniel, and Randall Minix. Although Appellant denied to the police that he struck Howard, other witnesses testified that he not only struck her on several occasions but "slung her around" inside the residence. There was also evidence that at least two other visitors struck Howard and that she fell at least once, striking the edge of the kitchen table. At one point during the afternoon and evening of April 29, Howard allegedly overdosed on drugs, resulting in a "911" emergency telephone call and the arrival of emergency medical technicians (EMTs). However, when the EMTs arrived, Howard had regained consciousness and declined treatment. The next morning, Howard's lifeless body was found on the floor of the residence that she shared with Appellant. The cause of death was determined to be closed head injuries due to blunt force trauma.

II. JURY INSTRUCTIONS.

Appellant was indicted only for intentional murder. KRS 507.020(1)(a). At the conclusion of all the evidence, the trial court permitted the Commonwealth to amend the indictment also to charge wanton murder. KRS 507.020(1)(b). The trial court used a "combination instruction" for murder that permitted the jury to find either that Appellant

killed Howard intentionally or that he killed her wantonly under circumstances manifesting extreme indifference to human life. The trial court also instructed the jury on manslaughter in the first degree, KRS 507.030(1)(a) (intent to injure but not to kill), as a lesser-included offense but refused to give Appellant's tendered instructions on the lesser-included offenses of manslaughter in the second degree ("manslaughter 2nd"), KRS 507.040, and reckless homicide, KRS 507.050. As in Johnson v. Commonwealth, 12 S.W.3d 258, 265-266 (Ky. 1999), and Hudson v. Commonwealth, 979 S.W.2d 106, 109 (Ky. 1998), the jury returned a general verdict of guilty under the combination murder instruction and did not specify under which theory guilt was premised.

The trial court relied on Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997), in refusing Appellant's tendered instructions on manslaughter 2nd and reckless homicide. Unfortunately, that reliance was misplaced. In Parker, the defendant was convicted of the intentional murder of his 22-month-old stepson. Like Appellant, he denied hitting the victim (though he admitted he was at home alone with the child when the fatal injuries occurred). *Id.* at 211. He did not claim that he injured the child unintentionally while attempting to discipline or frighten the child and offered no explanation for the child's fatal injuries. *Id.* at 211-212. Unlike the case *sub judice*, no other witnesses were available to testify to facts explaining the child's injuries. Thus, we held:

> [T]he evidence presented by the prosecution supports the singular finding that the defendant acted with the specific intent to cause the child's death. There is no reasonable suggestion that the prosecution evidence supports a finding that the defendant acted with a wanton or reckless mental state.

Id.

Here, there was substantial evidence that Appellant struck Howard in anger on several occasions and that he "slung her around" inside the house, indicating wantonness, recklessness, or intent to injure, but not necessarily intent to kill. In fact, the evidence of his lack of intent to kill was so substantial that the Commonwealth sought and obtained an amendment to the indictment to charge wanton murder to conform to the evidence; and the trial court thought the evidence of the lack of intent to kill was so substantial that it instructed the jury on two theories of unintentional homicide, *i.e.*, wanton murder and first-degree manslaughter (intent to injure but not to kill). Parker obviously has no application here. In fact, if, as the trial court believed, there was no evidence of wantonness, Appellant would be entitled to a new trial because the combination murder instruction deprived him of his right to a unanimous verdict. Hayes v. Commonwealth, 625 S.W.2d 583, 584 (Ky. 1981) (combination murder instruction denied defendant right to unanimous verdict where the only evidence indicated that the killing was intentional).

As explained by the official Commentary to KRS 507.020(1)(b) (wanton murder):

> The culpable mental state for this type of homicide is described in this section as "wantonness manifesting extreme indifference to human life." To fully understand the functional value of this language, it must be considered in the light of KRS 507.040[,] which treats homicide resulting from "wantonness" (not manifesting extreme indifference to human life) as manslaughter in the second degree.
>
> The two offenses described by these provisions, murder by KRS 507.020(1)(b) and manslaughter in the second degree by KRS 507.040, have three elements in common: the conduct in question must have involved a substantial and unjustifiable risk of death to human life; the defendant, in causing the death in question, must have

> consciously disregarded that risk[;] and his disregard must have constituted "a gross deviation from the standard of conduct that a reasonable person would [have observed] in the situation." Taken together, these three elements constitute the culpable mental state defined in KRS 501.020 as "wantonness[ ]" and[,] without more, will suffice for a conviction of manslaughter in the second degree. If accompanied by a fourth element, *i.e.*, "circumstances manifesting extreme indifference to human life," they are sufficient for a conviction of murder.

KRS 507.020(1)(b) (1974 Commentary).

Accordingly, we have held that a finding that the defendant killed wantonly "under circumstances manifesting extreme indifference to human life" elevates manslaughter in the second degree to wanton murder. Barbour v. Commonwealth, 824 S.W.2d 861, 863 (Ky. 1992), *overruled on other grounds by* Elliott v. Commonwealth, 976 S.W.2d 416, 421 (Ky. 1998). Conversely, a finding of wanton killing, not "under circumstances manifesting extreme indifference to human life," reduces wanton murder to manslaughter in the second degree. By refusing to instruct the jury on the lesser-included offenses of manslaughter 2nd and reckless homicide, the trial court effectively held as a matter of law that Appellant killed Howard "under circumstances manifesting extreme indifference to human life."

The trial court, having correctly determined that the evidence was sufficient to support a conviction of wanton murder, was required to also instruct the jury on manslaughter 2nd as a lesser-included offense in the event the jury did not find "wantonness manifesting extreme indifference to human life." And since the only distinction between wantonness and recklessness is whether the defendant was aware of and consciously disregarded a risk of death, KRS 501.020(3) (wantonness), or whether the defendant failed to perceive a risk of death that a reasonable person would

have perceived under the circumstances, KRS 501.020(4) (recklessness), the trial court should also have instructed on reckless homicide as a lesser-included offense of manslaughter 2nd. Commonwealth v. Wolford, 4 S.W.3d 534, 539 (Ky. 1999) (an instruction on a lesser included offense is required if the evidence would permit the jury to rationally find the defendant not guilty of the primary offense but guilty of the lesser offense). Since a lesser-included offense is in fact and principle a defense to the higher charge, Slaven v. Commonwealth, 962 S.W.2d 845, 856 (Ky. 1997), the failure to instruct on manslaughter 2nd and reckless homicide was prejudicial error.

III. IMPROPER IMPEACHMENT.

Appellant did not testify at trial. However, the Commonwealth played for the jury an audiotape of the statement he gave to Detective David Maynard of the Kentucky State Police after his arrest. In that statement, Appellant made no self-inculpatory statements, instead implying that Randall Minix was the probable killer. Appellant specifically denied hitting Howard, stating several times that he loved her and, on one occasion, that he intended to marry her:

> Q47 I've got several people saying they saw you all arguing Monday and saw you hitting her.
>
> A. I never hit that woman. Honest to God, I didn't.
>
> Q48 I've got several people telling me that. I've got several people telling me they saw you hit her with a broomstick.
>
> A. I never hit that woman with a broomstick. I swear to God, I didn't. I loved that woman. Honest to God, I did. Me and her was going to get married the next—that morning, sure was.
>
> Q49 You are still married to Debbie Risner, aren't you?

A. No. I had went down there and [Sheriff] Pat Montgomery gave me my divorce papers that morning. Sure did. That morning he took me to the police station. Sure did. Honest to God. Pat said, "[h]ere, I will serve them on you."

Q50 Why is everybody telling me they saw you hit her? Different people?

A. I don't know why. I don't know. Doody Lemasters or Chris Lemasters [sic] was right there, and he knows that I wouldn't.

Apparently, Appellant believed being served with a petition for dissolution of marriage was the same as being divorced. The very next witness for the Commonwealth was Sandy Gullett, a deputy circuit clerk. Over Appellant's objection, Gullett testified that Appellant's wife filed a petition for dissolution of her marriage to Appellant on April 30, 2002, the same day Sheriff Montgomery arrested Appellant for the murder of Howard, and that the divorce was not finalized until June 6, 2003. During closing argument, the prosecutor used this evidence to portray Appellant as a liar:

> I meant to go in and count how many times in that statement he said, "I loved that woman, I loved that woman, I loved that woman. I was going to marry her the next day." And that was a lie. He was still married. He didn't have the divorce papers served on him until the day after he'd beat her and she had already died. He was going to get married the next day. He told the police[,] "[w]e was going to get married the next day." He was still married. The divorce hadn't even been filed, as the clerk told you, until April 30th. He wasn't going to marry her.

Obviously, Appellant's otherwise exculpatory statement to the police was introduced by the Commonwealth for the sole purpose of laying the foundation for Gullett's testimony that allowed the prosecutor to portray Appellant to the jury as a liar in closing argument. Even though there is no provision in the Kentucky Rules of Evidence

prohibiting impeachment on a collateral fact, we have consistently recognized that prohibition as a governing principle of evidence. Purcell v. Commonwealth, 149 S.W.3d 382, 397-398 (Ky. 2004); Neal v. Commonwealth, 95 S.W.3d 843, 849 (Ky. 2003); Slaven, 962 S.W.2d at 858; Eldred v. Commonwealth, 906 S.W.2d 694, 705 (Ky. 1994), *abrogated on other grounds by* Commonwealth v. Barroso, 122 S.W.3d 554, 563-564 (Ky. 2003).[1] Furthermore:

> [A]lthough a party can impeach his own witness, KRE 607, he cannot knowingly elicit testimony from a witness as a guise or subterfuge in order to impeach the witness with otherwise inadmissible testimony.

Slaven, 962 S.W.2d at 858. Likewise, while a defendant opens the door to impeachment by introducing evidence of his own good character, the Commonwealth should not be permitted to introduce artificial evidence of a defendant's good character as a guise or subterfuge to justify introduction of evidence of his bad character.

> Federal Rule of Evidence 607 permits the government to impeach its own witness. However, the government must not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony. The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised. That is, impeachment is not permitted where it is employed as a guise for submitting to the jury substantive evidence that is otherwise unavailable.

United States v. Gomez-Gallardo, 915 F.2d 553, 555 (9th Cir. 1990) (citations and quotations omitted). *See also* United States v. Peterman, 841 F.2d 1474, 1479 (10th Cir. 1988); United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984). In

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[1] In Purcell, we noted that there is also no mention in the Rules of impeachment by bias, interest, or corruption and only limited coverage of impeachment by prior inconsistent statements (noting that KRE 612 deals only with the foundation requirements, implying that such impeachment is permissible). 149 S.W.3d at 398 n.15 (citing ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 4.05[3] at 275 (4th ed. LexisNexis 2003)).

determining the true intent of the impeaching party, the federal courts employ a "primary purpose" test, *i.e.*, was it the primary purpose of the impeaching party in introducing the impeachable evidence to place before the jury evidence that was otherwise inadmissible? United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985).

Remember, Appellant did not testify in this case. The only evidence authorizing impeachment was the introduction by the Commonwealth of Appellant's prior self-serving and arguably false unsworn statement. Absent Appellant's claimed intent to marry Howard, evidence that Appellant was still married to another person was completely irrelevant. Since nothing in Appellant's statement was inculpatory or otherwise favorable to the prosecution, the primary purpose in introducing the statement obviously was to lay a foundation for proof that Appellant arguably lied about a collateral fact in that statement. However, since Appellant did not testify, he did not place his credibility in issue. Thus, the Commonwealth's only apparent purpose for attacking his credibility was to prove that he was a person of bad moral character, *i.e.*, a person likely to commit assault and murder.

> The rules on character are based on an assumption that human personality is highly integrated with respect to moral qualities and behavior. The conduct of a given person is assumed to be generally consistent in widely varying kinds of situations: "[A] person who lies in one situation is not only likely to lie in other situations, but is also highly likely to cheat, steal, not feel guilty, and so on."

LAWSON, § 4.05[3] n.1, § 2.15[2] at 97 (quoting BURTON, GENERALITY OF HONESTY RECONSIDERED, 70 Psychol. Rev. 481, 482 (1963)).

If the evidence is the same upon retrial, *i.e.*, Appellant does not testify or otherwise introduce evidence that he intended to marry Howard the next day, the

Commonwealth shall be precluded from introducing evidence that Appellant was still married to another person.

IV. SEARCH WARRANT.

The trial court overruled Appellant's motion to suppress a broken broom handle that was found in the residence where Howard was killed and which the Commonwealth theorized was the murder weapon.

Following his interview of Appellant, Detective Maynard sought a search warrant to search the residence for possible weapons. He proceeded to the county attorney's office where a secretary helped him prepare a warrant and an affidavit for the warrant. Under the heading identifying the personal property for which the search was to be conducted, the secretary wrote on both the affidavit and the warrant: "Anything used to commit an assault or any illegal contraband." The "probable cause" portion of the affidavit was filled out as follows:

> On the 1st day of May, 2002 at approximately
> 3:35 p.m., affiant received information from/observed:

No other information was inserted because neither Maynard nor the secretary knew how to properly phrase the probable cause information. The secretary made a copy of the partially completed affidavit and gave the original and the copy, as well as the proposed warrant, to Maynard. Maynard then took all three documents to the trial commissioner, Gordon B. Long; explained to Long the facts that were known to him; and asked Long what information needed to be added to the affidavit to establish probable cause for a search. Long advised Maynard to add the following language:

> The victim, Tammy Howard, was assaulted on these premises which resulted in her death. Access to this property is needed to obtain possible evidence.

Maynard testified at the suppression hearing that he added that language in his own handwriting to the original of the affidavit, but not to the copy. He then executed the original affidavit in the presence of a notary public. Commissioner Long issued the search warrant based on that affidavit. After executing the warrant, Maynard attached both the original affidavit, which contained the added probable cause language, and the copy of the affidavit, which did not contain the added probable cause language, to the warrant and filed all three documents together. This led Appellant to believe that the probable cause language in the original affidavit was added after Maynard's notarized signature was affixed to it; thus, the probable cause language was not verified, failing to satisfy the affidavit requirement of RCr 13.10(1).

At the suppression hearing, Maynard testified under oath to the above explanation and specifically swore that the additional probable cause language was written on the original affidavit before his notarized signature was affixed to it. The trial court found Maynard's explanation to be plausible and truthful. Since that finding is supported by substantial evidence, it is conclusive. RCr 9.78.

Appellant also claims the "probable cause" statement added to the affidavit was insufficient to establish the probable cause necessary to support the issuance of the warrant. We disagree. The warrant was issued for the purpose of locating the weapon used to assault Howard. Howard's body was found in the residence sought to be searched. That was sufficient to establish probable cause to believe that the weapon would be found in the residence. But even if that were not so,

Maynard added the exact language to the affidavit that was suggested by the issuing magistrate. Obviously, Maynard executed the warrant under a "good faith" belief that the warrant was valid. United States v. Leon, 468 U.S. 897, 922, 104 S.Ct. 3405, 3420, 82 L.Ed.2d 677 (1984); Crayton v. Commonwealth, 846 S.W.2d 684, 686 (Ky. 1992). Thus, the trial court did not err in overruling the motion to suppress the fruits of the search.

Accordingly, the judgment of conviction and the sentence imposed by the Magoffin Circuit Court are reversed; and this case is remanded for a new trial in accordance with the content of this opinion.

Lambert, C.J., and McAnulty, Minton, and Roach, JJ., concur.

Wintersheimer, J., dissents by separate opinion in which Graves and Scott, JJ., join.

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2004-SC-0383-MR and

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GERALD WILLIAMS — APPELLANT

V.

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2002-CR-00046

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the instructions were correct, the jury was properly seated, impeachment testimony was correctly admitted, and the evidence was properly admitted.

I. LESSER INCLUDED INSTRUCTIONS

The trial judge instructed the jury on both wanton murder and first degree manslaughter. Williams tendered proposed instructions for second degree manslaughter and reckless homicide. The trial judge refused to submit those lesser included offense instructions to the jury.

Lesser included offense instructions are only appropriate when, considering the totality of the evidence; a jury might reasonably conclude that the defendant was guilty of the lesser included charge and not guilty of the primary charged offense. Bills v. Commonwealth, 851 S.W.2d 466 (Ky. 1993). The trial judge reviewed the evidence and found it did not support the requested instructions. We will not substitute our judgment for that of the trial judge absent a showing of an abuse of discretion. See Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999).

An instruction must have a source within the framework of the evidence. Smith v. Commonwealth, 599 S.W.2d 900 (Ky. 1980). The instruction must present the law applicable to the particular facts of the case and instructions should only present the issues from the evidence. See Patton v. Commonwealth, 199 S.W.2d 129, 303 Ky. 684 (1947). It would be simple to create a bright line rule that lesser included offense instructions should almost always be provided to the jury. A rule such as that would, however, ignore the role of the trial judge in providing the law of a particular case to the jury. The trial judge, having heard the totality of the evidence, remains in the best position to decide how best to instruct the jury. Absent an abuse of discretion we decline the opportunity to replace that judgment with our own. There is nothing in the record that supports a need for William's tendered lesser included instructions. There was no error.

II. MOTIONS TO STRIKE JURORS FOR CAUSE

Two potential jurors were a concern to Williams. One expressed having heard about the case and told how much the manner of death had upset her. She indicated that she had prayed about the situation. The trial judge denied the motion to strike for cause and Williams ultimately used a peremptory challenge to remove this potential

juror from the panel. A second juror acknowledged knowing the victim and her family. He was a teacher who had one of the victim's children in his class and had taught all of her other children. He had previously visited his own relatives when the victim's family also happened to be visiting at the same time. He acknowledged he attended the funeral. The trial judge denied the motion to strike for cause and Williams ultimately used another peremptory challenge to remove this potential juror from the panel. When questioned, both potential jurors responded that they could set aside any personal knowledge and judge the case on the merits alone.

Absent a clear abuse of discretion we will not substitute our judgment on a factual issue such as juror selection for that of the trial judge. See Adkins v. Commonwealth, 96 S.W.3d 779 (Ky. 2003). The trial judge is best suited to determine the possibility of preconceived bias or prejudice in the mind of a prospective juror. See Pennington v. Commonwealth, 316 S.W.2d 221 (Ky. 1958). It is not inconceivable that in a county with a relatively small population, many if not most of the people know one another. That they should meet, interact and take part in community events together is the norm and not unduly prejudicial. Each prospective juror was subjected to individual questioning. The trial judge was able to hear their responses and analyze their comments. Nothing in the record suggests any attempt by either of the prospective jurors to hide any feelings about the trial or the defendant. They were both very forthright in their answers.

There was no abuse of discretion after the trial judge evaluated both potential jurors and allowed them to join the panel. There was no error.

III. COLLATERAL IMPEACHMENT TESTIMONY

During police questioning, Williams repeatedly stated he loved the victim and that they were due to be married the next day. Portions of that taped interview were played for the jury. An ambulance was called to the dwelling early in the morning. On that same day, William's current wife filed for divorce. He was served the papers later in the day well after the victim had been beaten. The victim, however, was still legally married to another person at that time. A deputy clerk testified regarding the dates and content of the divorce filings and when they had been served on Williams. He now argues that this testimony was improperly admitted over objection as impeachment on a collateral matter. We do not agree.

During the closing argument, the prosecutor reminded the jury that Williams planned to marry the victim the next day. The prosecutor reminded the jury that both Williams and the victim were still married to others and that Williams could not be married to the victim the next day. He stated in the closing argument that because of these facts, Williams was a liar.

There was nothing improper in the prosecutor's explanation of the evidence. Each side is allowed to fairly comment on the evidence as it pertains to their view of the case. The credibility of a witness is always in issue before the jury. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). There was no abuse of discretion when the trial judge allowed the collateral evidence presented as it provided the jury with a measure of the credibility of the evidence. See Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999). There was no error.

IV. EVIDENCE SUPPRESSION

Williams sought to suppress the broom handle which may have been used to administer the beating. The trial judge allowed the evidence to be admitted at trial.

The police secured a search warrant prior to retrieving the object from the residence. The officer testified that he had two different copies of the affidavit. One had been partially filled in and he completed the other by adding a hand written statement in front of the magistrate before the warrant request was approved. Even if the affidavit is itself flawed, the police had an objectively reasonable good faith belief in the magistrate's probable cause determination and the sufficiency of the warrant. See Crayton v. Commonwealth, 846 S.W.2d 684 (Ky. 1992). It was not unreasonable for the trial judge to accept the uncontroverted evidence that any errors did not affect the police officer's belief in the sufficiency of the warrant. There was no error.

V. HEARSAY EVIDENCE OF LABORATORY RESULTS

The police officer testified from two different laboratory reports. Williams did not object to this testimony at trial. Trial strategy could very well have been the reason to allow this testimony. We will not generally review on appeal, those issues where the trial judge did not have the opportunity to rule on an objection. Petrey v. Commonwealth, 945 S.W.2d 417 (Ky. 1997). It is only where palpable error which affects the substantial rights of a party is created that we must act. Campbell v. Commonwealth, 564 S.W.2d 528 (Ky. 1978). A review of the record in this case shows the testimony does not rise to the level that it would have affected the outcome of the trial. See Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996). Any error was of such insignificant proportion that we affirm.

VI. INVESTIGATIVE HEARSAY

The police officer testified about his interview of Williams' then current wife. From that interview, the police officer was able to determine that Williams had spent the night with her on the evening the victim was beaten. She was never called as a witness. This testimony is a classic example of what is commonly referred to as investigative hearsay. It is not proper. See Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988).

Williams did not object to the introduction of this evidence. The trial judge must be afforded the opportunity to correct any errors or the issue is waived on appeal. Petrey, supra.

Only if the error rises to such a level that it is palpable and affects the substantial rights of a party, will we intervene. Campbell v. Commonwealth, 564 S.W.2d 528 (Ky. 1978). After a thorough review of the record in this case we determine the testimony does not rise to the level that it would have affected the outcome of the trial. See Partin v. Commonwealth, supra. Thus we affirm on this issue.

Williams received a fundamentally fair trial. He was not denied any of his due process rights under either the state or federal constitutions.

I would affirm the conviction in all respects.

Graves and Scott, JJ., join this dissenting opinion.