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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 24, 2006
AS CORRECTED: SEPTEMBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000947-MR

DATE 9-19-06 ELA Grayson DC

JEFFREY CRAIG DUDGEON — APPELLANT

V.

ON APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
NO. 03-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jeffrey Craig Dudgeon, was convicted of assault in the first degree[1] and burglary in the first degree.[2] He was sentenced to twenty (20) years for the assault and fifteen (15) years for the burglary, to be served consecutively for a total of thirty-five (35) years. Appellant appeals his conviction to this Court as a matter of right.[3]

In the early morning hours of April 26, 2003, Gail Dowell was awakened by a pounding on her back door. Mrs. Dowell's daughter, Jennifer, had gone out drinking the night before, and Mrs. Dowell went to the door apparently concerned that something had happened to her. Unbeknownst to Mrs. Dowell, Appellant had been out that night with Jennifer. Jennifer drove Appellant to a liquor store to pick up beer, and

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[1] KRS 508.010.
[2] KRS 511.020.
[3] Ky. Const. § 110(2)(b).

then the pair went to a bar. After the bar quit serving drinks, Jennifer went outside to get a beer from her car. While outside, Jennifer saw some people she knew, and left with them. Appellant was forced to get a ride home from the bar with someone else, and after arriving home, he proceeded to the Dowell residence.

Mrs. Dowell opened the door and Appellant started screaming at her, "Pat Mann f****d me over."[4] Mrs. Dowell knew what Appellant was referring to, because two weeks earlier Appellant had called and told her that Pat had given him two cold checks. Mrs. Dowell told Appellant that she was sorry, but she could not help that. Mrs. Dowell then told Appellant, "[d]o you hear my grandbaby? She is crying. I have to go." Appellant then replied, "[o]h, am I bothering you?" Before Mrs. Dowell could close the door, Appellant asked, "[i]s your husband at home?" Mrs. Dowell replied in the affirmative, and Appellant then asked, "[h]ave you ever heard of the chainsaw massacre movie?" Mrs. Dowell responded that she did not know anything about movies and that she had to go. Mrs. Dowell then shut and locked the door.

Mrs. Dowell then began preparing a bottle for her grandchild who was still crying. While standing at the kitchen sink she heard a sound, and looked outside and saw Appellant attempting to start a chainsaw. Mrs. Dowell threw the bottle down and ran to the bedroom to get her husband, Jimmy Dowell, who had not awakened when Appellant previously knocked on the back door. Mrs. Dowell told her husband that Appellant had a chainsaw and was trying to gain entry to the residence. As Mr. and Mrs. Dowell were coming toward the kitchen, they could hear Appellant trying to cut through the metal on the back door. Just as the two got into the kitchen, Appellant

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[4] Pat Mann was Mrs. Dowell's son-in-law, who had secretly married Jennifer six months earlier.

struck a large pane of glass in the door with the chainsaw causing it to shatter. Appellant then began to push his way through the hole in the door.

While Mr. Dowell confronted Appellant, Mrs. Dowell ran to the bedroom where her granddaughter was sleeping. She put a pacifier in the child's mouth, and pushed the child as far back under the bed as she could in an attempt to muffle her cries from Appellant. In the kitchen, Mr. Dowell yelled over the sound of the chainsaw, "[w]hat have I done to you?" Appellant replied, "nothing," and lunged at Mr. Dowell, cutting him and causing blood to splatter on the floor and walls. Mr. Dowell ran out the back door into the yard because he thought Appellant was going to cut off his head and kill everyone in the house. Mr. Dowell remembered that there was a spade leaning up against the fence and ran to get it to defend himself. He slipped and fell on the grass, and Appellant attacked his right shoulder with the chainsaw. Mr. Dowell turned over and grabbed a bar on the chainsaw with his hand, and during the struggle he was severely cut on his hand, arm, left shoulder, and stomach. He also sustained severe cuts on his chest and face, and one ear lobe was sliced off. Mr. Dowell got up and ran to the end of the yard to the driveway and noticed that his hand was dangling down. Appellant then stopped, looked at Mr. Dowell and said, "[n]ow go call the law," and then left the premises.

While Mrs. Dowell was still hiding under the bed with her granddaughter she began to hear Mr. Dowell whispering, "Gail, Gail." Mrs. Dowell got out from underneath the bed with the child, and went to check on Mr. Dowell. He was standing in the kitchen holding his arm, which was attached to his body by only an inch of skin. Both bones in the arm had been cut in two, and both of Mr. Dowell's shoulders were cut

wide open. On the left side of his back he had a large wound that extended through the muscles of the back, down to the bone of the clavicle. Mrs. Dowell, a licensed practical nurse, used shoestrings from her grandson's shoes to make a tourniquet for Mr. Dowell's left arm, put his arm "meat to meat" so the wound could get blood, and pushed the cut muscles back down on his shoulders before she called 911.

An ambulance arrived and transported Mr. and Mrs. Dowell to the Taylor County hospital. Due to the extensive nature of the injuries, the hospital transported Mr. Dowell to the University of Louisville Hospital where he was treated. While at UofL Hospital, Mr. Dowell had four surgeries on his left arm.

After Appellant fled from the house, Kentucky State Police troopers and sheriff's deputies were informed that Appellant was traveling on a four-wheeler. Appellant drove to a friend's house and hid his vehicle behind a barn. Police officers arrested Appellant later that afternoon.

A Green County grand jury indicted Appellant for first degree burglary and first degree assault. Prior to trial, Appellant was twice evaluated for competency, and both times he was found competent to stand trial. While incarcerated, Appellant made a phone call that was recorded by police, and later played for the jury. During the call, Appellant stated that he cut his opposition in two, that he got mad at the wrong people, and that he was going to have to pay for it. Appellant also stated that he cut Mr. Dowell with a chainsaw because they slammed a door in his face like it was nothing.

A jury trial was held on September 22, 2004, and September 23, 2004. Appellant did not deny guilt, but relied on the defenses of intoxication and extreme emotional disturbance. The jury found Appellant guilty of assault in the first degree and

first degree burglary. The jury recommended twenty years on the assault charge and fifteen years on the burglary charge, to be served consecutively. Following the trial, Appellant filed a motion for a new trial, which was overruled. The trial court sentenced Appellant in accordance with the jury's recommendation. This appeal followed.

Appellant first argues that it was error for the trial court to allow Jimmy Dowell, the victim, to sit at the prosecution table during the trial. Appellant concedes that this issue is unpreserved, however this Court will review the issue under the palpable error standard as Appellant has requested.[5]

The trial court excluded all witnesses from the courtroom during trial, but the Commonwealth elected to have Mr. Dowell remain in the courtroom and sit at counsel table in order to assist in the prosecution of Appellant. The Commonwealth acknowledged in its opening statement that "the Commonwealth has selected Mr. Dowell to sit at counsel table. Only one person can remain in with the Commonwealth to be of some assistance in the trial." Appellant now claims that "[t]he presence of Jimmy Dowell at the prosecutor's table throughout the trial was a violation of Kentucky law [KRE 615]." Appellant further contends Mr. Dowell was seated at counsel table in an effort to refresh or enhance his memory of the crime, and was used by the Commonwealth as a "live exhibit—a constant reminder to the jury of the nature and impact of the 'horrific injuries' he received[.]" We note that the trial court did not rule on this matter as Appellant raised no objection at trial.

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[5] RCr 10.26.

Victims who are also witnesses may be excluded from the courtroom during trial by the trial court or on motion of a party.[6] Kentucky Rule of Evidence 615 states as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
> (1) A party who is a natural person;
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

Under the language of this rule, upon the request of a party the trial court must exclude all witnesses from the courtroom unless one of the three exceptions is deemed applicable. Prior to January 1, 2005, the Kentucky Rules of Criminal Procedure contained the complimentary provision of Rule 9.48. That rule allowed the trial court discretion in whether to allow witnesses to remain in the courtroom after the request of a party.[7] However, by order of this Court that rule was deleted, and now we have only KRE 615.

In Brewster v. Commonwealth[8] we dealt with this issue, but in the context of RCr 9.48. However, as RCr 9.48 is the predecessor to KRE 615, the reasoning in Brewster is applicable to the case at bar. In Brewster, the Commonwealth elected to have a victim of an assault and robbery sit at counsel table during the trial. The trial court overruled the defendant's objection and allowed the victim to sit at the table. In

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[6] KRE 615.
[7] See Brewster v. Commonwealth, 568 S.W.2d 232, 236 (Ky. 1978).
[8] 568 S.W.2d 232 (Ky. 1978).

reviewing the issue of whether a witness may sit at counsel table, this Court stated as follows:

> This practice is neither new nor unusual. It is so well established that there is no need for a citation of authority and, as a matter of fact, it has been the law of this Commonwealth for so long that the mind of man runneth not to the contrary that in a criminal case the trial judge, in his discretion, may allow one witness to remain in the courtroom to aid the Commonwealth's Attorney. The court did not err in permitting . . . [the victim] to sit at the table with the Commonwealth's Attorney.[9]

In Mills v. Commonwealth[10] we dealt with facts similar to those presented here. In that case, a victim of a robbery was permitted to sit at counsel table during the entire trial, over the objection of defense counsel. The victim was able to hear the testimony of the lead investigator, the owner of the business that was robbed, and a police informant. This Court noted that "[c]ontrary to the language of RCr 9.48, the use of the word 'shall' in KRE 615 makes exclusion mandatory and removes the separation of witnesses from the trial judge's discretion in the absence of one of the enumerated exceptions."[11] We went on to hold that the trial court erred when it allowed the victim to sit at counsel table, because the victim did not qualify under exception (3) in KRE 615. Specifically, this Court stated that "[s]ince. . . [the victim] was the only witness to the robbery that testified at trial, his overall credibility was crucial to the Commonwealth's case. As such, he should not have been permitted to hear the testimony of the Commonwealth's other witnesses."[12]

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[9] Id. at 236.
[10] 95 S.W.3d 838 (Ky. 2003).
[11] Mills v. Commonwealth, 95 S.W.3d 838, 841 (Ky. 2003).
[12] Id.

We have held that KRE 615 "was adopted to prevent witnesses who have not yet testified from altering their testimony in light of evidence adduced at trial."[13] Appellant has not argued on appeal that Mr. Dowell changed his testimony to conform to other witnesses, but rather he argues that Mr. Dowell's memory was refreshed by other witness testimony, and that he was seated at counsel table in order to serve as a "live exhibit." Additionally, there is nothing in the record that shows Mr. Dowell changed or adapted his testimony when he testified at trial, which application of the sequestration rules is designed to prohibit.[14] Furthermore, unlike Mills, there was no doubt as to the identity of the perpetrator of the crime, as Appellant admitted his involvement.

Appellant's lack of a request to sequester the victim at trial, coupled with his failure to argue that Mr. Dowell adapted his testimony in light of other witnesses, is fatal to this claim. KRE 615 makes the separation of witnesses mandatory only if a *party* requests the separation. The language of the rule is clear, and we refuse to find error of any sort when no request was made to the trial court to invoke KRE 615.

Appellant next argues that the Commonwealth introduced inadmissible victim impact evidence during the guilt phase of the trial. At the outset, we note that none of this testimony was disputed at trial, because Appellant raised no objection. Appellant concedes that this error is not preserved, however we will review it for palpable error as Appellant has requested. Appellant asserts that on three separate occasions during trial, inadmissible victim impact evidence was either elicited or offered

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[13] Justice v. Commonwealth, 987 S.W.2d 306, 315 (Ky. 1998) (citing Reams v. Stutler, 642 S.W.2d 586 (Ky. 1992)).
[14] See Mills, 95 S.W.3d at 840-41; Jacobs v. Commonwealth, 551 S.W.2d 223, 225 (Ky. 1977).

by the Commonwealth. Each of those three instances will be examined and reprinted below.

Gail Dowell was the second guilt phase witness for the prosecution. She testified about her family, her contact with Craig Dudgeon on April 26, 2003, and the injuries her husband received that day. Mrs. Dowell also testified about the seven surgeries her husband had on the arm that was nearly severed by the chainsaw. Mrs. Dowell and the Commonwealth then engaged in an exchange for which Appellant now claims error, and that disputed testimony is reprinted below.

> **Commonwealth**: Now that's been, of course, almost 19 months now, if I calculated it right. Let's see –16 months or whatever. What is he able to do now?
> **Mrs. Dowell**: He lost job. He had the best job he has ever had in his life at TG Kentucky. He, of course, got terminated, because he couldn't do his job. He got to stay off for a short period of time on what they call, you know, temporary disability or whatever. But he eventually lost his job, and it just changed his – he can't do a public job, because there's not very many jobs you can do with one hand, that you could make the money he was making. Sure, you could flip burgers at McDonald's maybe, but he was our sole provider for our family. And we had excellent insurance at TG Kentucky – thank God – but now, in order to keep our insurance, we pay $836 a month to keep insurance. You know, we have to have it – because we – Jimmy may have to have more surgeries. And you know, who wants to take you – what insurance company wants to take you?
> **Commonwealth**: Has he been declared disabled?
> **Mrs. Dowell**: Yes, he has.
> **Commonwealth**: What's his disability income?
> **Mrs. Dowell**: He draws $1200 and turns around and pays $836 to the insurance company, so he's bringing home less that $400 a month.
> **Commonwealth**: Do his prospects in the future look any better?
> **Mrs. Dowell**: As far as him being able to go back to work?
> **Commonwealth**: Yes.
> **Mrs. Dowell**: No sir – he's – he's completed therapy –as much as the insurance would pay. So I wanted him to keep

on going to therapy, and now, we are in the hole $15,000 at – for the therapist at Taylor County Hospital, but that's okay. I mean, I wanted him to go, and now, we are doing the therapy at home. And you know, he hasn't – I think he's – he's just about gained all he is going to gain. So he – you know, he can't make a fist. He can't rotate. He just barely can grab – so now, he is able to button his shoes – I mean, button his pants, and tie his shoes, which he couldn't do for a long period of time. But he has got his – this back – but he can't do this – he can't rotate. So you know, it's – he will – you know, again, I don't like to speak negative. And yes, we are trusting in the Lord, that he's going to get complete restoration of this hand – and praise God – I hope he does – I hope he does. But for now, he sure doesn't – he doesn't have that.

Appellant also asserts that during the guilt phase testimony of Jimmy Dowell, the Commonwealth elicited similarly improper and highly prejudicial victim impact testimony. The disputed testimony is reproduced below.

Commonwealth: Now, of course, you heard your wife's testimony, so I don't want to, you know, just go over the same ground, but did you – did you ever attempt to go back to work at your old job?
Mr. Dowell: No, no, I have not.
Commonwealth: But you know you couldn't do it, or was that...
Mr. Dowell: Well, I mean, yeah. I knew I couldn't do the job that I done – no. I mean, I was lucky. I mean it took all I could do to do my job with both hands, and I worked at TG Kentucky. And they were a Japanese company and they had different guidelines than most companies do. They have got a – they have got a work sheet and you have to do your job just exactly like the sheet shows. I mean, they are QS qualified for automobile parts, and you have got a – they got a step-by-step deal. And you have got to take you right hand and do exactly what it says, and your left hand – each job you have got has got a step-by-step process. So you – I mean, you would have to use your right hand for the things they tell you to do, and your left hand for the things that it says do there.
Commonwealth: So that job is over then?
Mr. Dowell: Yeah, I mean, it – and we didn't only do the same job. We worked in a team, and we rotated. We done

– everybody in the same team done every job. That way, when somebody wasn't there – that you – you could do their job.
Commonwealth: I mean, how – have you been declared totally disabled?
Mr. Dowell: Yes
Commonwealth: And your – of course—so your wife testified, but that testimony is – I mean, I am not – is there anything that needs to be added to that – I mean, as far as the – did she cover it as far as what your disability and so forth?
Mr. Dowell: Not that I know of.
Commonwealth: Are you able to help with the children – with these grandchildren?
Mr. Dowell: Yes, I do help with them – yes.
Commonwealth: Is she working full-time now?
Mr. Dowell: Yes.
Commonwealth: Other than this schooling that she testified about?
Mr. Dowell: She does that on the side – yeah. She works full-time.

Appellant also asserts that the prejudice of the impermissible victim impact testimony was compounded when the Commonwealth reiterated the impact of the crime on the family during its closing argument. During summation, the Commonwealth stated as follows:

> I believe they – Gail stated there had been 7 surgeries, and there are more to come. Their nightmare has continued. Currently, they indicated that he earns $1200 a month in disability; however he has to pay $836 a month in health insurance, because of the pre-existing condition and having to maintain health insurance. She stated though that she is still not convinced that the rehab is at its fullest point and that she continued to go on – they have $15,000 owed to Taylor County Rehab itself. She told you what he is now able to do, and Mr. Dowell told you what he is now able to do. He can just now close his hand enough to reach down and tie his own shoes, button his pants, maybe ties the shoe of the grandchildren he has custody of, maybe help them get dressed. He is just now – maybe help them get a drink of water, anything at all using that hand – he is just now able to do it.

Appellant was charged and convicted of assault in the first degree, for violating KRS 508.010. KRS 508.010 states as follows:

> (1) A person is guilty of assault in the first degree when:
> (a) He intentionally causes *serious physical injury* to another person by means of a deadly weapon or a dangerous instrument; or
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.
> (2) Assault in the first degree is a Class B felony. (emphasis added).

The Commonwealth argues that the disputed testimony was not victim impact evidence, but rather was elicited to prove an essential element of the crime charged. Specifically, the Commonwealth contends that the disputed testimony was adduced in order to prove Mr. Dowell suffered serious physical injury, as required by KRS 508.010(1)(a). Serious physical injury is defined as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ."[15] Since the Commonwealth is required to prove every element of the crime beyond a reasonable doubt,[16] our inquiry must be whether the relevant testimony was used to prove an element of the crime, or whether it was elicited to arouse sympathy from the jury.

"[A] certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime."[17] Evidence of this sort does not

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[15] KRS 500.010(1)(a).
[16] KRS 500.070.
[17] Bussell v. Commonwealth, 882 S.W.2d 111, 113 (Ky. 1994).

unduly prejudice a defendant, "as long as the victim is not glorified or enlarged."[18] Generally speaking, victim impact evidence is inadmissible during the guilt phase of a trial,[19] but permitted during the penalty phase.[20] "[S]uch evidence is generally intended to arouse sympathy for the families of the victims, which, although relevant to the issue of penalty, is largely irrelevant to the issue of guilt or innocence."[21] "This Court has disapproved sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant's culpability."[22] However, "the . . . [Commonwealth] is allowed reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly."[23]

In this case, the disputed testimony was not only permissible, but required in order to prove an essential element of the crime charged. The Commonwealth had the responsibility to show that Mr. Dowell did in fact suffer serious physical injury. Medical and/or non-medical testimony can be used to establish that a victim suffered a serious physical injury.[24] While medical testimony as to the gravity and degree of injuries is the preferred method for establishing their seriousness, nearly as important is testimony regarding the permanent and irreparable effects of the injuries on the victim by laypersons who have close contact with him. When one thinks of serious injury, not

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[18] Bowling v. Commonwealth, 942 S.W.2d 293, 302-03 (Ky. 1997).
[19] Ernst v. Commonwealth, 60 S.W.3d 744 (Ky. 2005); Bennett v. Commonwealth, 978 S.W.2d 322 (Ky. 1998); Clark v. Commonwealth, 833 S.W.2d 793 (Ky. 1991); Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984).
[20] KRS 532.055(2)(a)(7).
[21] Bennett, 978 S.W.2d at 325.
[22] Clark v. Commonwealth, 833 S.W.2d 793, 797 (Ky.1991) (citing Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989)).
[23] Lynem v. Commonwealth, 565 S.W.2d 141, 145 (Ky. 1978) (citing Harness v. Commonwealth, 475 S.W.2d 485 (Ky. 1972); Richards v. Commonwealth, 517 S.W.2d 237 (Ky. 1974)).
[24] Prince v. Commonwealth, 576 S.W.2d 244, 246 (Ky. App. 1979).

only does the notion of immediate bodily pain and disfigurement come to mind, but so do the long-term effects of the injury on the victim's home and professional life. As serious as an injury may seem when immediately inflicted, the seriousness of that injury is compounded when its effects are felt over the course of many years, and in many areas of life.

As required by KRS 500.070, the Commonwealth could prove serious physical injury by showing Mr. Dowell suffered an injury; (1) which created a substantial risk of death, (2) which caused serious and prolonged disfigurement, (3) which caused prolonged impairment of health, or (4) which caused prolonged loss or impairment of the function of any bodily organ. Prong (1) was proven at trial by the testimony of a treating physician, who testified that Mr. Dowell would have died, or at least lost his arm, had his injuries not been treated quickly. However the Commonwealth had the prerogative to prove the other three prongs of KRS 500.070, and it attempted to do so largely by layperson testimony. Mr. Dowell's inability to return to work or regain employment was indeed relevant to prove that his health had suffered a prolonged impairment, or that he had prolonged loss or impairment of the function of a bodily organ.[25]

Testimony regarding medical bills, physical therapy, and insurance payments further illustrated the severity of his injury, and while this testimony would obviously illicit sympathy from the jury, we can hardly imagine a situation in which a jury would not be sympathetic to a man who had his arm nearly severed by a chainsaw

[25] See Clift v. Commonwealth, 105 S.W.3d 467 (Ky. App. 2003) (where the Court of Appeals found an injury to an infant's arm constituted "prolonged loss or impairment of the function of [a] bodily organ").

wielding assailant. Even the Commonwealth's statements regarding Mr. Dowell's inability to assist his grandchildren with even the simplest tasks went to show that the injury permanently impaired the functioning of his arm. "A prosecutor can remind the jury of victim background evidence during closing argument, without overly expounding on it."[26] The jury may very well have found that there was serious physical injury based solely on the medical testimony, but we cannot fault the Commonwealth for its attempts to ensure that the jury knew the extent of Mr. Dowell's injuries through the testimony presented.

Furthermore, our review of cases involving impermissible victim impact testimony does not show that the disputed testimony in this case rises to the level deemed impermissible in those cases.[27] Since this issue was not preserved, we find no palpable error.

Appellant's third and final claim of error involves the closing argument made by the Commonwealth during the penalty phase of the trial. The disputed argument made by the Commonwealth is reprinted below:

> **Commonwealth**: But of course, there was an assault. Well, when the – when the legislature sets up the limits – and if the limit had been fifty – so for this one I'd have no trouble, you know, saying fifty years.

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[26] Ernst v. Commonwealth, 160 S.W.3d 744, 764 (Ky. 2005) (internal citations omitted).
[27] See Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ky. 1992) (prosecutor asked the jury to imagine a hypothetical scenario where the family of the victim was at the scene of the crime, pleading "please don't pull the trigger" and offering money to spare the victim's life); Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989) (during closing argument the prosecutor glorified the victim, informed jury that they had an obligation to impose the death penalty, and made an improper "Golden Rule" argument), overruled on other grounds by Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003); Sanborn v. Commonwealth, 754 S.W.2d 534, 542-43 (Ky. 1988) (several cumulative errors requiring reversal included an impassioned closing argument calling attention to the devastating impact on the family, for which proper objection was made).

> **Appellant's Counsel**: Objection, Your Honor.
> **Commonwealth**: But that's not the ten to twenty. That's not the – I mean, I – ten to twenty. I'm not – I certainly recognize that. But, possibly you know my – my gist – what I'm coming from. What we're asking for is twenty years on the assault – the maximum. Well, standing back a minute, I'm asking for twenty years on that.

Appellant contends that the Commonwealth's personal opinion as to the proper punishment was improper and prejudicial, and that this Court should reverse for new sentencing. However, we will not address the merits of this argument, because the issue is unpreserved and Appellant does not seek a palpable error analysis.

As illustrated above, when Appellant made his objection the trial judge did not issue a ruling on the matter, nor did Appellant request a ruling. "[I]f an objection is made, the party making the objection must insist that the trial court rule on the objection, or else it is waived."[28] "Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived."[29] Since Appellant failed to insist that the trial court rule on the objection, it is waived.

Appellant also argues, in his reply brief, that the motion for a new trial was sufficient to preserve this error. However we disagree. Raising an issue for the first time in a post-judgment motion for a new trial is insufficient to preserve an error for appellate review.[30] "Errors are waived if presented for the first time in a motion for a

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[28] Bell v. Commonwealth, 473 S.W.2d 820, 821 (Ky. 1971); see also Bratcher v. Commonwealth, 151 S.W.3d 332, 350 (Ky. 2004).
[29] Thompson v. Commonwealth, 147 S.W.3d 22, 40 (Ky. 2004) (citing Bell, 473 S.W.2d at 821).
[30] See Gabow v. Commonwealth, 34 S.W.3d 63, 73 (Ky. 2000); Vaughn v. Commonwealth, 255 S.W.2d 613, 615 (Ky. 1953).

new trial."[31] Because Appellant failed to preserve this issue for review and failed to argue palpable error, we decline to address the issue here.

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

Lambert, C.J., and Graves, McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ., concur.

[31] Davenport v. Commonwealth, 285 Ky. 628, 148 S.W.2d 1054, 1062 (Ky. 1941).

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Supreme Court of Kentucky

2004-SC-000947-MR

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V.

ON APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
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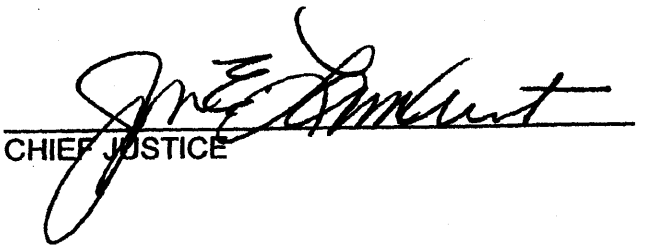
COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER OF CORRECTION

The Opinion of the Court entered August 24, 2006, is hereby corrected on its face by substitution of the attached Opinion in lieu of the original Opinion. The purpose of this Order of Correction is to correct a typographical error and does not affect the holding of the Opinion.

ENTERED: September 19, 2006.



CHIEF JUSTICE