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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE Jan 25, 07 E.L.A. Grawmyer D.C.

2005-SC-000290-MR

RICHARD ROCK — APPELLANT

V.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
03-CR-00149

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Richard Rock appeals from his jury conviction on charges of wanton murder and tampering with physical evidence in the homicide of his mother, Elaine Rock. Appellant was sentenced to a total of thirty years imprisonment. He argues on appeal that 1) the instructions in this case were deficient; 2) he should have been permitted to call an expert as to his medical condition on the night of the crime; 3) the Commonwealth engaged in a line of irrelevant and prejudicial questioning regarding a mental disorder which appellant did not have; 4) appellant was compelled to curtail his defense based on the Commonwealth's deception regarding its ability to bring forth rebuttal evidence; 5) the court improperly limited his questioning of a Commonwealth's witness; 6) the Commonwealth did not give notice regarding prior bad acts evidence; and 7) victim impact evidence was improper. Having reviewed these claims of error, we

affirm appellant's conviction.

Appellant confessed to causing the death of his mother, Elaine Rock. He stated that he and his mother had been fighting about money, which they did frequently, when he "snapped." He indicated that he strangled her by holding her in a headlock. He admitted that afterward, he moved her body from the garage into the house and changed the clothes she had been wearing. He asserted that he took a bottle of sleeping pills and blood pressure pills and lay down beside his mother's body. When he awoke, he called his uncle, Terry Rock. Terry was the brother of appellant's deceased father and the brother-in-law of Elaine. He asked his Uncle Terry to come over, but would not give him a reason why. When his uncle arrived at about 3:15 a.m., appellant first gave him titles to his vehicles and some other personal documents, and then showed his uncle his mother's body, covered by a sheet.

A plan was formulated for appellant to go to Las Vegas and stay with a cousin; both appellant and his uncle claimed it was the other's idea. Terry moved a beer can, retrieved the clothing that had been removed from Elaine from the garage, placed it in a hamper, and left.[1] Appellant called one of his mother's co-workers to say that she was ill and would not need a ride to work. Then appellant caught a flight to Las Vegas at 7:30 a.m. Terry told his wife and a friend later that morning that appellant had killed his mother. They convinced Terry to notify law enforcement. Appellant was arrested in Las Vegas, where he gave a statement admitting that he had committed the offense. He asserted that he was bipolar and that he had been off his medication for some time, and when he did not take his medication he had violent and suicidal tendencies.

---

1 Terry Rock pled guilty to Tampering with Physical Evidence.

I. Instructions

Appellant's first claim of error is that the trial court erred in failing to instruct the jury on manslaughter in the first degree. As to the homicide, the jury was instructed on intentional murder, wanton murder, manslaughter in the second degree, and reckless homicide. Appellant was found guilty of wanton murder. He argues that an instruction on manslaughter in the first degree was appropriate because the jury could have believed he did not intend to kill his mother, but could have believed instead that he intended only serious physical injury. He asserts the evidence at trial which supported this instruction was the remorse he expressed after her death and his claim in his statement to Detective Tapp of the Kentucky State Police that he attempted to perform CPR after his mother became non-responsive.

Lesser-included offense instructions are proper if the jury could consider a doubt as to the greater offense and also find guilt beyond a reasonable doubt on the lesser offense. Skinner v. Commonwealth, 864 S.W.2d 290 (Ky. 1993). Manslaughter in the first degree is committed when a person acts with intent to cause serious physical injury to another person, but causes the death of that person. KRS 507.030(1)(a). Proof of intent in a homicide case may be inferred from the character and extent of the victim's injuries. Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky.1997). Intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense. Id. Appellant cites Hudson v. Commonwealth, 979 S.W.2d 106, 110 (Ky. 1998), a case in which strangulation was the means of death, for the following language: "To say that the method and means of [the victim's] death only support an instruction on intentional murder is to make the

inference of intent mandatory."

It was not error to refuse to give an instruction on manslaughter in the first degree. Appellant told Detective Tapp in his statement that he knew his mother was really hurt when she had no response when he let her go. We have no indication from his statement that he meant to stop before he caused her the ultimate harm. The testimony from the medical examiner was that a person would lose consciousness within a minute or less of a person holding them in a headlock, and that brain death occurs after three to five minutes of asphyxiation. The evidence as a whole did not support a belief that appellant intended only serious physical injury.

We conclude that the other cases appellant cites are distinguishable factually. In Bartrug v. Commonwealth, 568 S.W.2d 925 (Ky. 1978), overruled on other grounds, Wellman v. Commonwealth, 694 S.W.2d 696 (Ky. 1985), a manslaughter in the first degree instruction was given even though the defendant shot the victim numerous times. The instruction was held to be required, however, due to the fact that the defendant testified that he intended only to scare her. Id. at 925. Thus there was an evidentiary basis, unlikely as it may have been, for the jury to infer the defendant intended serious physical injury. Hudson, cited by appellant is also distinguishable since the jury in the case at bar was instructed on a number of lesser-included offenses that were applicable to the facts of the case. In addition, the court notably in Hudson did not include an instruction on manslaughter in the first degree as an alternative to an intentional murder charge.

In this case, there was no evidence from which to infer that appellant intended his actions to only seriously injure his mother. There was no evidence that he expressed that he only intended to scare or intimidate her. Furthermore, we do not

believe that appellant's alleged attempt to resuscitate his mother, occurring after the death, establishes his state of mind when committing the act. It is consistent with regret of his actions, but does not show intent only to injure. We affirm the denial of an instruction for manslaughter in the first degree. We further note that the jury had the opportunity to convict on a number of lesser-included offense instructions which were applicable to the facts of the case.

2. Exclusion of Expert Testimony

Appellant next believes that it was error for the trial court to exclude the testimony of a physician who would have testified to appellant's condition at the time of the offense. In his statement to Detective Tapp, appellant said on the evening of the offense his mother confronted him in the garage after he got home. He told Detective Tapp that just before that, while driving home, he "lost control of [his] bladder." He asserted that was what happened when his blood sugar level was high. He stated, "And that happens when blood sugar gets high, I can't see, you lose control of your bladder, so I pissed all over myself." The defense's medical witness was to testify about what happens to a diabetic when blood sugar is elevated. The trial court initially agreed to allow the evidence, then ruled that the testimony was not relevant upon learning that it had not been verified that appellant had diabetes.

Appellant argues that the trial court erred in excluding the testimony. He claims there was an adequate foundation to show that appellant suffers from diabetes from the circumstances that night and the fact that appellant's father had diabetes. He argues the evidence was relevant to explain his physical state just prior to the confrontation with Elaine Rock. The Commonwealth argues the claimed error is unpreserved for appellate review because appellant failed to make an avowal of the proposed

testimony.

KRE 103(a) provides that error cannot be predicated upon a ruling which admits or excludes evidence unless it affects a substantial right of the party. KRE 103(a)(2) provides:

> Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.[2]

An alleged error in the trial court's exclusion of evidence is not preserved for appellate review "unless the words of the witness are available to the reviewing court" by way of an avowal. Commonwealth v. Ferrell, 17 S.W.3d 520, 524 (Ky. 2000). The purpose of an avowal is to make the substance of evidence known for the information of the trial and also to allow a reviewing court to determine whether the exclusion was erroneous and whether it affected a substantial right. Robert G. Lawson, The Kentucky Evidence Law Handbook, § 1.10(3) at 31 (4th Ed. 2003).

In this case, the record contains only counsel's assertion that the physician would have testified with regard to the physical condition of a diabetic experiencing a high blood sugar level. This Court has nothing to indicate the substance of what that testimony would have been. Without the doctor's testimony, we cannot know if he could have indicated the likelihood that appellant had a diabetic condition based on the limited facts he related. We have no indication whether a hyperglycemic condition could impact a person's state of mind. We agree with the Commonwealth that appellant's failure to present this testimony by avowal renders the allegation of error incapable of being reviewed.

---

[2] RCr 9.54, which formerly governed avowals in addition to KRE 103, was deleted by Order of the Supreme Court, effective January 1, 2005.

Appellant further alleges that the trial court erred in not conducting a hearing on the admissibility of the expert testimony pursuant to KRE 702. We disagree, however, in that the evidence was not ruled inadmissible as being scientifically unsound, but was excluded on the basis of relevance. Thus, it was not incumbent on the court to conduct a hearing under KRE 702.

3. Questioning on Antisocial Personality Disorder

Next, appellant alleges that the Commonwealth engaged in a line of questioning regarding mental disorders that was designed to confuse the jury. Appellant had asserted in his statements to the investigating officers that he was bipolar and had not been taking his medication. The defense called Dr. Michael Harris, a forensic psychiatrist, to testify about what Bipolar Disorder is, how it is treated, and whether it is common for those with the disorder to stop taking their medication. On cross-examination, the Commonwealth elicited from the witness that he had not diagnosed appellant with having Bipolar Disorder and could not say that appellant had the disorder. Dr. Harris further testified that he did not observe any instance in his review of appellant's hospital and outpatient records where appellant had been diagnosed with having Bipolar Disorder. He stated that he found that appellant had some of the criteria of the disorder, but not all. He testified that appellant's records showed he had been diagnosed with major depression and possibly with a panic disorder.

The Commonwealth's Attorney asked, "Now, did you ever see an occasion where the defendant was diagnosed with an Antisocial Personality Disorder?" The doctor responded, "I don't believe I saw that." The Commonwealth's Attorney asked the doctor about irritability as a psychiatric symptom. Then the Commonwealth's attorney returned to the subject of Antisocial Personality Disorder. Dr. Harris described it as a

condition caused by repeated antisocial acts and attitudes. The Commonwealth Attorney asked Dr. Harris a series of questions about the symptoms of Antisocial Personality Disorder – whether they included irritability, a tendency to get involved in physical altercations, a failure to consistently work, and a tendency to rationalize one's actions. For each, the doctor agreed that it could be a characteristic of Antisocial Personality Disorder. At last, defense counsel objected to "any other line of questioning on Antisocial Personality Disorder."

At the bench, defense counsel argued that the questioning implied that appellant had the disorder, though he did not. The Commonwealth asserted that appellant presented information that he had Bipolar Disorder, so the Commonwealth was trying to show that it was just as likely that appellant could be categorized as having Antisocial Personality Disorder. The trial court questioned the relevance, and furthermore noted that the Commonwealth already had established that appellant did not have Bipolar Disorder. Still expressing reservations about relevance, the court decided to allow the Commonwealth to continue based on the fact that appellant had opened the door to the questions on direct examination.

The Commonwealth then elicited from the psychiatrist that appellant did not neatly fit into the category for a disorder, and had some characteristics of Antisocial Personality Disorder. The Commonwealth asked, "He could go either way, now, couldn't he?" The psychiatrist replied that it would also depend on the history obtained, and acknowledged that diagnoses are sometimes inexact. Finally, the Commonwealth's Attorney asked, "Is it true that as far as the Antisocial Personality Disorder that a lot of those – a lot of people that you can diagnose with that are people you see in jail or prison. Is that right?" The psychiatrist responded,

> I think it depends on which end you are looking for. If you go to a jail or prison probably a lot of the people there have Antisocial Personality Disorder. But I don't know how many people on the outside who have the disorder are going to end up in jail. Correct.

Appellant alleges that he was prejudiced when the Commonwealth's Attorney brought up the subject again in closing argument. The prosecutor asserted that Dr. Harris's testimony had not informed the jury of anything of any assistance to them. He asserted that the witness' testimony was intended to have the jury believe that appellant was bipolar, even though the doctor agreed that he did not meet some of the criteria of Bipolar Disorder. The Commonwealth's Attorney stated that appellant did fit some of the criteria for Antisocial Personality Disorder according to Dr. Harris.

He noted that Dr. Harris had stated that research tended to show that Bipolar Disorder has an organic cause, but that no organic basis had been discovered for Antisocial Personality Disorder. He continued:

> There is no such organic reason or excuse for Antisocial Personality Disorder. What causes that? He told us that, well, it is more nearly your personality and what you have been brought up to see and what you have done as a kid, and those kinds of things.
>
> And I asked him, you know, does that kind of personality describe people you a lot of times see in prisons and he said yes. I can't tell you how many; there's probably a lot of them outside of prison, too.
>
> So we get this picture of what is going on. This is thrown out for you that there is this Bipolar Disorder. That is what caused him to snap. That's not what caused him to snap. What caused him to snap is, that is his personality. That's how he functioned.
>
> Dr. Harris, the defendant has never been diagnosed as having a Bipolar Disorder. And there was no testimony at all that he suffered from any type of disorder on June 12th/June 13th.

There was no objection during the Commonwealth's closing argument. Appellant contends that the argument regarding this testimony which was not relevant permitted

the prosecutor to portray appellant as suffering from a disorder without an organic "excuse" and which is shared by the general jail and prison population. He argues that even if it had been relevant, its probative value was substantially outweighed by its tendency to mislead the jury. KRE 403.

We agree with appellant that this entire line of questioning as to Antisocial Personality Disorder should not have been pursued. It had no relevance. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. KRE 401. This evidence did not tend to prove or disprove any fact of consequence to the determination of the action. The fact that appellant had some criteria of a disorder, but not the disorder itself, did not tend to prove anything about Bipolar Disorder or the facts of the case, and did tend to mislead. It was misleading for the prosecutor to pursue an inference that if appellant had enough of the criteria he may have the disorder, and prejudicial to infer that he may share it with much of the prison population. The Commonwealth's asserted premise – that appellant merely exhibited some characteristics of a disorder – could have been addressed without injecting into the minds of the jury an additional disorder appellant did not have.

Furthermore, the trial court erred in ruling that the defense's questioning "opened the door" to allow the Commonwealth to question the psychiatrist about disorders not raised by the defense case and which appellant did not have. "Opening the door," sometimes referred to as "curative admissibility," occurs when one party introduces an inadmissible fact that opens the door for the opponent to offer similar facts whose only claim to admission is that they negate, explain, or counterbalance the prior inadmissible fact. Blair v. Commonwealth, 144 S.W.3d 801, 806 (Ky. 2004). We agree appellant

opened the door for the Commonwealth to refute appellant's evidence regarding bipolar disorder. But the Commonwealth could do this without reference to another disorder, and without the additional implications made in this case. Where the probative value of rebuttal evidence is substantially outweighed by its prejudicial effect under KRE 403, the trial court should exclude it, even when presented with the argument that the door was opened to the evidence. Purcell v. Commonwealth, 149 S.W.3d 382, 400-401 (Ky. 2004).

Having determined that the line of questioning was error, we must determine whether it affected appellant's substantial rights. We consider whether there is a reasonable possibility that the error might have affected the jury's decision. Crane v. Commonwealth, 726 S.W.2d 302, 307 (Ky. 1987). We conclude that what saves this error from inviting reversal is the fact that the psychiatrist clearly reported to the jury that appellant had not been diagnosed with either Bipolar or Antisocial Personality Disorder. He also defused the question about Antisocial Personality Disorder in the prison population with his assessment that essentially it is not effective as a predictor of who will wind up in prison. Thus, we believe the jury was effectively informed by the expert testimony despite the improper questioning. In addition, although the prosecutor returned to the prejudicial aspects of this line of questioning in his closing argument, which incurred no objection, he did reiterate to the jury that appellant was not diagnosed with any disorder.

We do not believe the jury's ultimate determination of appellant's mental state at the time of the killing would have been affected by this improper questioning. The psychiatrist expressed no opinion as to appellant's mental state at the time of the killing. The prosecutor did not use the disorder evidence to argue for any particular result in

this case. From our review of the record as a whole, we find that appellant's substantial rights were not affected and the error was harmless in this case.

4. Commonwealth's Contentions Regarding Rebuttal Evidence

Appellant filed a motion for new trial in which he argued that the Commonwealth misled appellant and the court by claiming to have rebuttal evidence which did not exist. In appellant's and Terry Rock's transcribed statements, they referred to an alleged earlier incident when appellant once beat Elaine Rock so badly during a fight that she was hospitalized. The Commonwealth elected not to pursue the matter of prior bad acts in its case-in-chief. Appellant alleges that the Commonwealth, in discussions with defense counsel, asserted that he had witnesses he could call in rebuttal who would testify about the alleged beating. Appellant argues that the threat of calling these witnesses curtailed his defense and caused him to advise appellant not to take the witness stand in his own defense. He states that he only learned during the sentencing phase of trial that the Commonwealth did not have witnesses prepared to testify to the prior bad acts. Appellant alleges that the Commonwealth's Attorney's threats of introducing evidence of a prior bad act, made with the knowledge that it did not have competent evidence to establish such proof, constituted prosecutorial misconduct.

This Court can only review this issue as to what is in the trial record. In the trial transcript, the Commonwealth asserted that if appellant introduced only a portion of his statement at trial, the Commonwealth was entitled to put in the remainder of the statement. The trial court ruled that the parties would be free to admit the portions of the tape they wanted, subject to a determination of relevance. Defense counsel stated that he needed a recess to decide what he wanted to do. Following the recess, the defense announced its case was closed.

The required analysis by a reviewing court in considering an allegation of prosecutorial misconduct must focus on the overall fairness of the trial, and not the culpability of the prosecutor. Slaughter v. Commonwealth, 744 S.W.2d 407, 411-412 (Ky. 1987). We believe the record shows that the Commonwealth elected to forgo any attempt to prove the prior bad act, which was potentially admissible in its case-in-chief, out of caution. However, the Commonwealth maintained that if appellant played a portion of the tape the Commonwealth could introduce the remainder of the tape. The Commonwealth acknowledged to the court that it had not prepared witnesses to prove that what was said on the tape had occurred. We do not regard this as a "bluff" by the Commonwealth as to what its evidence would be. The record shows that the defense was concerned about the playing of the tape and potential to open the door to evidence of prior bad acts, and decided to end its case in chief without using the tape or appellant's testimony. That was a strategic decision by defense counsel, based on the evidence, actual and potential, known to the defense. We perceive no instance of prosecutorial misconduct, and believe that the overall trial was fair.

5. Limitation of Cross-Examination

Next, appellant argues that the trial court improperly limited its questioning of the investigating detective. Detective Tapp testified that Jeremy Rock's answers to his questions regarding how he caused his mother's death "were elusive." Defense counsel asked about this on cross-examination and the detective responded that appellant omitted the details. Defense counsel asked,

> You say when you look at Jeremy's demeanor in his statement, "The only thing I know is somebody I cared about was gone." Do you think his reluctance to tell you the actual blow-by-blow, the moment-by-moment, every single detail, do you think that was motivated by an effort to deceive you or do you think it may have had something to do with just pure

shame?

The court sustained Commonwealth's objection to the question on the basis that it was not relevant, the officer would have to speculate as to whether appellant was trying to hide something or felt shame, and such determinations were for the jury.

Appellant argues that the response should have been allowed because evidence of the accused's demeanor, appearance and behavior during the time period in which the crime was committed and shortly thereafter is considered relevant evidence in the determination of guilt. Garland v. Commonwealth, 127 S.W.3d 529, 542 (Ky. 2003), overruled on other grounds, Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005). Appellant further argues that the Commonwealth opened the door to this evidence. We agree with the trial court's ruling. The question purely called for speculation on the part of the detective. The question, moreover, had to do with appellant's demeanor at the time of police questioning, not at the time of the crime nor shortly thereafter.

6. Statement of Co-Worker

Next, appellant argues that the Commonwealth failed to comply with the requirement in KRE 404(c) that the prosecution give "reasonable pretrial notice" of its intention to use evidence of the defendant's prior acts. However, the evidence at issue was a statement, not any acts committed by appellant. Appellant argued the Commonwealth could not call as a witness a former co-worker of appellant's who gave a statement that appellant told him while they were at work that sometimes his mother made him so mad he wanted to beat her with a bat or a two-by-four. KRE 404(b), by its terms, is concerned with "other crimes, wrongs or acts," but not with statements of a person. For that reason, the KRE 404 notice requirement is inapplicable to the statement the Commonwealth sought to introduce in this case. Moreover, the

statement was provided in the Commonwealth's discovery. The trial court correctly concluded that the statement was relevant and admissible.

7. Victim Impact Evidence

Appellant admits that this claim of error was not preserved by contemporaneous objection, but argues that it should be reviewed as a palpable error pursuant to RCr 10.26. In the sentencing phase of appellant's trial, the Commonwealth called two witnesses, a sister and sister-in-law of Elaine Rock, to testify to the impact on her family following her death. Appellant urges us to find palpable error since this Court has previously held that only one witness is permitted to present victim impact evidence pursuant to KRS 532.055(2)(a)(7) and KRS 421.500, citing Terry v. Commonwealth, 153 S.W.3d 794, 805 (Ky. 2005). Appellant also argues that there is no provision in the definition of victim in KRS 421.500 for a sister-in-law of the victim to offer victim impact evidence, and in actual fact, the witness only married Elaine Rock's brother after Elaine's death.

While appellant argues that the additional testimony provided by the future sister-in-law of the victim was emotional, he fails to show that it was palpable error. The evidence was basically cumulative of other evidence tending to show how Elaine was going to be missed by her close-knit family. We perceive no manifest injustice to appellant in having a second, even improper, witness testify to the impact of her death. This was not palpable error under RCr 10.26.

For all the foregoing reasons, we affirm the conviction of appellant for wanton murder and tampering with physical evidence.

All concur.

ATTORNEY FOR APPELLANT

Christopher N. Lasch
Michael L. Goodwin
Goodwin & Lasch, PSC
6008 Brownsboro Park Blvd
Louisville Ky 40207

ATTORNEY FOR APPELLEE

Gregory D. Stumbo
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky 40601