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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000002-MR

DANIEL LEE FORTNER — APPELLANT

V.

ON APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
NO. 03-CR-00073-004

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2006-SC-000020-MR

JOSHUA CYRUS FORTNER — APPELLANT

V.

ON APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
NO. 03-CR-00073-003

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Daniel Fortner and Joshua Fortner appeal as a matter of right[1] from judgments convicting each of second-degree manslaughter, first-degree robbery, and first-degree

[1] KY. CONST. § 110(2)(b).

burglary and sentencing each to thirty years' imprisonment. Because the Fortners were tried together and their appeals involve common facts and issues, we elect to issue a single opinion resolving both cases. Although the Fortners raise several issues on appeal, we find no reversible error and affirm both judgments.

I. FACTUAL BACKGROUND.

Joshua and Daniel Fortner, who are brothers, engaged in a fateful meeting with several other men in a Carter County barn in July 2003. The other men present included Shane Phillips, the owner of the barn; brothers Tommy and David Fritz, Carter County residents acquainted with the Fortners; and Derek Lemon[2] and Randall Miller, South Carolina residents traveling through Kentucky to visit Miller's relatives. Joshua had recently bought a bag of marijuana from Brian Keith Waugh and became angry when he found that the marijuana was wet. According to others present, Joshua vowed to get his money back "no matter what it took." The men then hatched a plan for some of them to go to Waugh's trailer to take money or marijuana. They later denied any intent to kill Waugh.

Waugh died of brain injury caused by blunt force trauma to the head after the group invaded his home and beat him while stealing money and marijuana. The grand jury returned an indictment charging Joshua and Daniel Fortner, Tommy Fritz, and Derek Lemon with capital murder, first-degree robbery, and first degree burglary and charging David Fritz with complicity to commit capital murder, first-degree robbery, and

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[2] Lemon is sometimes referred to as "David Lemon" or "Derrick Lemon" in the parties' briefs; however, the indictment refers to him as "Derek Lemon."

first-degree burglary. Apparently, no one disputes that David Fritz participated in planning the attack; but he was not present for the attack.

As the Commonwealth's cases against Joshua and Daniel proceeded to trial, the Fritz brothers entered pleas to lesser crimes and received reduced sentences in exchange for testifying against the Fortners. Miller, who had been seventeen years old at the time of the crime, was treated as a juvenile in exchange for testifying against the Fortners. Phillips and Lemon, whose indictments were pending, did not testify at the Fortners' trial. Neither Joshua nor Daniel testified.

Police officers testified concerning their investigation and the content of each Fortner's statements to police during the investigation. In his statement to police, Joshua admitted to buying marijuana from Waugh and to confronting Waugh on the evening in question about the condition of the marijuana. Joshua admitted to being present when the men planned to enter Waugh's house, but he denied being present at or participating in the attack. Daniel also denied participating in the attack when interviewed by police, stating that he had returned home early after going to Shane Phillips's house earlier in the evening.

Others present at the planning session and attack told a different story. They identified Joshua and Daniel as active participants in the attack. Miller testified that Daniel was the first one to hit Waugh and that Daniel hit Waugh the most. Miller further testified that Joshua ran back and put his full body weight into a "leverage" hit against Waugh. He also testified that the group took Waugh's money and marijuana and later divided both among themselves.

Shortly before the close of the Commonwealth's case, the trial judge was called away on a family emergency, and a substitute judge came in to preside over the remainder of the trial. The parties did not object to the substitute judge presiding; although, the Fortners expressed concern about the substitute judge's ruling on key issues such as the admissibility of the posed photographs without reviewing the record. When both Joshua and Daniel moved for directed verdicts on all charges, the substitute judge admitted that he had not been able to review the record; and Joshua and Daniel objected to his ruling on their directed verdict motions without doing so. The judge then asked the parties to summarize the evidence. Finding "no big disagreement" in their summaries, he then denied the directed verdict motion without reviewing the record, stating the evidence was sufficient for a reasonable jury to find guilt.

Following deliberations, the jury acquitted the Fortners of murder but found both guilty of second-degree manslaughter, first-degree robbery, and first-degree burglary. The trial court sentenced both in accordance with the jury's recommended sentence of ten years for second-degree manslaughter, to run consecutively with 20 years for first-degree robbery, to run concurrently with twenty years for first-degree burglary, for a total of thirty years' imprisonment for each. Further facts will be developed as necessary in the opinion.

II. ANALYSIS.

A. Substitute Judge's Ruling on Directed Verdict Motion Without Reviewing Record Was Harmless Error.

Both Fortners claim that their convictions must be reversed as a result of the mid-trial substitution of judges, particularly the substitute judge's ruling on the directed verdict motions without reviewing the evidence. They contend that this constitutes a

"structural error," which mandates retrial and is not subject to harmless error analysis. But they notably fail to cite any authority stating that the mid-trial substitution of a judge by itself or the substitute judge's ruling on key issues without reviewing the record constitutes a structural error. In fact, many courts have arguably implicitly found any errors relating to substitution of judges not to be structural in subjecting these issues to harmless error analysis.[3]

The United States Supreme Court has defined "structural errors" rather narrowly as errors that affect "[t]he entire conduct of the trial from beginning to end" such as "absence of counsel for a criminal defendant" or "presence on the bench of a judge who is not impartial."[4] It has excluded from this definition errors which do not "transcend[] the criminal process[,]" such as the admission of involuntary confessions.[5] In light of the lack of authority to indicate that such substitution issues constitute structural error, we decline to expand the definition of "structural error" to include such issues.

We recognize that ideally, "the judge who hears the testimony as to the facts also applies the law thereto."[6] But courts have generally not found reversible error where the

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[3] *See, e.g.*, United States v. Lane, 708 F.2d 1394, 1396-97 (9th Cir. 1983) (finding harmless error in substitute judge's failure to certify familiarity with record as required by FED. R. CRIM. P. 25(a)); McIntyre v. State, 463 S.E.2d 476, 479 (Ga. 1995) (stating that substitution of judges over defendant's objection did not entitle him to retrial unless he could show actual prejudice). *See also* Hood v. State, 637 A.2d 1208, 1213 (Md. 1994) (holding that due to substitute judge's failure to become thoroughly familiar with record, as required by Maryland state rule, "prejudice to the defendant must be presumed and a new trial awarded unless the State can rebut the presumption of prejudice or demonstrate beyond a reasonable doubt that the error was harmless.").

[4] Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

[5] *Id.* at 311.

[6] Tracey A. Bateman, Annotation, *Substitution of Judge in State Criminal Trial*, 45 A.L.R.5th 591 § 2(a) (1997) (explaining premise of early case law against substitution, as well as general rule that substitution before introduction of evidence does not constitute reversible error).

defendant, as here, consented or failed to object to the substitution of judges during the presentation of proof.[7] This general rule is premised on a "finding that any right the defendant might have to a trial with the same judge was not so fundamental that it could not be waived."[8] So we clearly find no reversible error in the mid-trial substitution of the judge in the instant cases because of the defendants' failure to object to substitution or request a mistrial.

The Fortners did object to the substitute judge's ruling on their directed verdict motions without reviewing the evidence. This is an issue we find more troubling, although, ultimately, not a reversible error under the facts of this case. We note that the federal courts and some state courts have adopted rules governing the mid-trial substitution of judges. And these rules generally require that the substitute judge certify that he/she has reviewed the record of the case.[9] Kentucky has no court rule governing the mid-trial substitution of judges.[10]

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7 *Id.* at §§ 2 and 4.

8 *Id.* at § 2(a). *See also* Randel v. State, 219 S.W.2d 689, 693-95 (Tex. Crim. App. 1949) (holding that as defendant could waive trial by jury under Texas statutes, any right to have the same judge throughout trial was not so fundamental that it could not be waived; and, thus, mid-trial substitution of judges with defendant's consent was not reversible error).

9 *See* Fed.R.Crim.P. 25(a) ("Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and (2) the judge completing the trial certifies familiarity with the trial record."); Hood, 637 A.2d at 1211 (*citing* Maryland Rule 4-361(b)); State v. Young, 196 S.W.3d 85, 103-05 (Tenn. 2006) (discussing Tennessee Rules of Criminal Procedure 25, which mimics FED.R.CRIM.P. 25, and holding that a death in the original trial judge's family qualified as an "other disability" under Rule 25(a) such that a mid-trial substitution of judges for that reason was proper so long as the substitute judge certified familiarity with the record as required by the rule).

10 RCr 11.32 governs only *post-verdict* substitution of judges:

"If by reason of death, sickness, or other disability, a judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty, any successor or special judge sitting in or assigned to the court in which the case was tried may perform those duties; but if such other judge is satisfied that he or

After hearing the parties argue their summaries of the evidence, the trial court attempted to recapitulate their summaries in ruling on the directed verdict motion, stating that

> Somebody went in, took the money, took the marijuana, and this gentleman's dead. It sounds to me that there's been sufficient evidence shown where a reasonable jury could reach a reasonable conclusion as to whether these two individuals committed the offense of burglary, robbery[,] or murder. Motions are overruled.

Since we affirm based on the harmlessness of the error due to the sufficiency of the evidence of record to withstand the directed verdict motions and not based on any alleged similarity in the summaries, we decline to describe in detail how the parties summarized the evidence. And we do not evaluate whether the trial court was correct in stating that there was "no big disagreement in their summaries" because we cannot approve of resolving a directed verdict motion on summaries rather than evidence.

Apparently due to the lack of an explicit requirement that a substitute judge certify familiarity with the record, the Commonwealth argues that:

> the rule of law in Kentucky should be that a substitute judge may lawfully consider the parties' respective summaries of the evidence and then rule upon a motion for directed verdict of acquittal based upon these summaries, unless there is a substantial difference in the parties' summaries, in which case the substitute judge should review the videotapes of the trial conducted prior to his appearance as judge.

We decline to embrace this as the proper procedure on substitution of judges. Despite the lack of court rule explicitly requiring certification of familiarity with the record when a mid-trial substitution of judges takes place, our case law has consistently required that a trial court review the *evidence* when ruling upon a motion for a directed

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she cannot perform those duties because he or she did not preside at the trial or for any other reason, such judge may in his or her discretion grant a new trial."

verdict of acquittal.[11] The parties' summaries of the evidence are simply not evidence. So a substitute judge cannot simply review summaries of the evidence but must review the evidence in the record to the extent necessary to determine whether the evidence is sufficient that a reasonable juror could find guilt beyond a reasonable doubt to rule properly upon a motion for a directed verdict of acquittal. While a substitute judge may not necessarily need to review the whole record or watch all of the videotapes, the substitute judge must review enough evidence to make sure that it is sufficient for a reasonable finding of guilt beyond a reasonable doubt, including satisfaction of all required elements of the crime, before denying a motion for directed verdict.

In the instant cases, we find the substitute judge's error in ruling upon the directed verdict motions without reviewing the evidence was harmless. Our review of the record indicates that the evidence was sufficient to withstand the Fortners' motions for directed verdicts of acquittal. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."[12] Furthermore, RCr 9.24 constrains us to deem harmless any "error or defect in any ruling" unless that error affected the "substantial rights of the parties." Given the evidence presented by the Commonwealth in this case, it was not clearly unreasonable for the jury to find

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[11] *See, e.g.*, Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

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

[12] *Id.* (*citing* Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)).

Joshua and Daniel guilty of the crimes for which they were convicted, meaning that the trial judge's failure to review the record before ruling on the Fortners' motions for directed verdicts was a harmless error.[13]

B. Proof Was Sufficient to Deny Directed Verdict on Second-Degree Manslaughter Charges.

KRS 507.040(1) states that: "A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person[.]" KRS 501.020(3) states that:

> A person acts wantonly with respect to a result or circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

David Fritz and Randall Miller testified to the Fortners' involvement in the plan to break into Waugh's residence for money and marijuana. As the Fortners point out, there was apparently no testimony stating explicitly that those who met in the barn intended to "beat up" or "attack" Waugh. But a jury could reasonably infer that the participants intended such based on the testimony that they would obtain money or marijuana "no matter what it took" and from the fact that Waugh was, in fact, beaten up, in the course of the participants taking his money and marijuana.

Miller testified to seeing both Fortners beat Waugh. Although Miller and Lemon also took part in the beating, Miller testified that Daniel was the first to strike Waugh and that Daniel threw the most punches. Miller also testified that Joshua hit Waugh the

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[13] We note that, apparently, there was no DNA evidence linking Joshua to the crimes; but, apparently, Daniel's DNA was found on some camouflage clothing that was allegedly worn during the commissions of the crimes. But our resolution of this case does not turn on the DNA evidence.

hardest with a single, running blow —a "leverage hit" that he put his weight into. Dr. Roth, Deputy Chief Medical Examiner, testified that Waugh suffered multiple blows to the head and died as a result of brain injury caused by blunt impact head injuries. Given this evidence, it was not clearly unreasonable for the jury to find both Fortners guilty of wantonly causing Waugh's death by beating him in the head and clearly disregarding a generally known risk that their blows to Waugh's head could cause serious injury or even death. Furthermore, despite the Fortners' arguments to the trial court that there was no proof that either inflicted the fatal blow, Dr. Roth testified to Waugh's dying as a result of multiple blows to the head. Since the jury could reasonably have found that the blows inflicted by Joshua and Daniel both contributed to the victim's death,[14] or that the blows inflicted by both were each sufficient to cause death, we find no error in the trial court's denial of their motions for directed verdict of acquittal on homicide charges.

As for the Fortners' arguments that Fritz's and Miller's testimony was suspect due to discrepancies in their statements and their making deals with the Commonwealth, questions regarding these witnesses' creditability and the weight to be given to their testimony were reserved to the jury.[15] Given the evidence supporting guilt, the trial court's denial of their directed verdict motion was not in error.

C. Proof Was Sufficient to Deny Directed Verdict on First-Degree Robbery Charges.

KRS 515.020(1) provides, in pertinent part, that:

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[14] Bennett v. Commonwealth, 150 Ky. 604, 150 S.W. 806 (1912) (holding that if two people both caused injuries which contributed to the victim's death, then both are liable for homicide).

[15] Benham, 816 S.W.2d at 187.

A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

(a) Causes physical injury to any person who is not a participant in the crime[.]

Obviously, Miller's and Fritz's testimony that Joshua and Daniel acted with others in taking Waugh's property and beating him, coupled with the medical examiner's testimony that Waugh had suffered head injuries resulting in brain injury and death, is sufficient evidence that the jury's finding of guilt is not unreasonable. Again, any conflicts in testimony and any issues regarding the creditability of witnesses or the weight to be accorded their testimony were properly left to the jury. Neither Fortner was entitled to a directed verdict of acquittal on first-degree robbery charges.

D. Proof Was Sufficient to Deny Directed Verdict on First-Degree Burglary Charges.

KRS 511.020(1) provides, in pertinent part, that:

A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:

. . . .

(b) Causes physical injury to any person who is not a participant in the crime[.]

The jury's finding both Fortners guilty of this offense was clearly not unreasonable in light of the evidence presented. Miller and Fritz testified that the Fortners were involved in planning the unauthorized entry into Waugh's home for the purpose of taking marijuana and money. Miller also testified that the Fortners beat the victim, and the medical examiner testified to the injuries suffered by the victim due to the

beating. Again, any conflicts in testimony and questions regarding creditability of witnesses and the weight accorded to their testimony were left to the jury. Neither Fortner was entitled to a directed verdict of acquittal for the offense of first-degree burglary.

E. Trial Court Did Not Abuse its Discretion in Allowing the Commonwealth to Display Enlarged Photographs of the Victim and the Crime Scene.

The Fortners claim that reversible error resulted from the original trial judge's decision to allow the Commonwealth to display enlarged photographs of the victim and the crime scene in the courtroom. Although they hyperbolically characterize the enlargements as being the size of "billboards," they also state that the enlargements were approximately four feet by four feet in size. More accurately, these enlargements were poster-sized. We note that the trial court did not allow these poster-sized enlargements to go back to the jury room but permitted them to be displayed to the jury in the courtroom on easels.

The Fortners claim that due to the enlargement of these somewhat gruesome photos, the photos should have been excluded under KRE 403 because undue prejudice outweighed the photo's probative effects. But these photographs of the victim's body were relevant to show the extent of his injuries and to refute the defense that the Fortners had no intention to kill or seriously injure the victim in beating him. Generally, photographs that show the nature and extent of the victim's injuries are admissible even though they may be gruesome.[16] Kentucky courts have generally found error in admitting such photographs only where the photograph has not been a

[16] Adkins v. Commonwealth, 96 S.W.3d 779, 794 (Ky. 2003).

fair and accurate depiction of the injuries received from the perpetrator, such as where lighting or angle was manipulated to make injuries appear more prominent[17] or where a victim's body has decomposed or been mutilated by animals after the commission of the crime.[18]

We are not aware of any authority that prohibits the enlargement of these photographs, which are otherwise fair and accurate depictions of relevant matters. The Fortners have not alleged that the photographs were not fair and accurate. In fact, defense counsel specifically objected only to the enlargements and not to the photographs themselves. Since the photographs were fair and accurate depictions of the victim's injuries and the crime scene, we find no fault in the display of the photographs enlarged to a size that permitted easier viewing by the jury.

Furthermore, the fact that the medical examiner's testimony and other witness testimony may have independently established the fact of the victim's head injuries, does not preclude the display of a photograph fairly and accurately depicting the injuries. We have recognized the probative effectiveness of photographic evidence and approved its admission where the photographs fairly and accurately depict the matter

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[17] Haddad v. Kuriger, 437 S.W.2d 524, 525 (Ky. 1968) (finding abuse of discretion in admission of photograph of child's automobile accident injuries in civil case based on photograph not being fair and accurate depiction of injuries): "The photograph is an extreme close-up, so much so as to present a distorted perspective. It appears to have been designed purposely to depict the child's injuries in the worst possible light; to emphasize them by presenting a view such as would be had only by a person putting his face within a few inches of the child's. Thus the gruesome appearance is enhanced. The lighting and coloring do not appear normal. After examining and re-examining, considering and reconsidering this photograph, we are constrained to conclude that it has such a gruesome appearance that its inflammatory and prejudicial effect on the jury would far outweigh its evidentiary or probative value and therefore the trial court should have excluded it."

[18] *See, e.g.,* Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992); Holland v. Commonwealth, 703 S.W.2d 876, 879-80 (Ky. 1985); Clark v. Commonwealth, 833 S.W.2d 793, 794-95 (Ky. 1991).

portrayed even where other evidence might independently establish the same relevant matter:

> Photographs of a victim of a homicide or the scene of a crime constitute demonstrative evidence which is often an aid to the jury in the trial of a case. It is true that "one picture is worth more than 10,000 words." A famous author phrased it in this fashion, "[a] picture shows me at a glance what it takes dozens of pages of a book to expound."[19]

We find no error in displaying this demonstrative evidence even though other evidence also established the fact of the victim's injuries. As for the Fortners' contention that this display lasted too long, we find no indication on the record that they requested earlier removal of the display; and, thus, this sub-issue is un-preserved for our review.

F. Any Error in Admitting Posed Photographs of Joshua and Daniel Was Harmless.

Joshua contends that the substitute judge violated his due process rights by allowing the Commonwealth to exhibit posed photographs of Daniel and himself. He contends that the trial court's lack of familiarity with the record left it at a loss to evaluate the admissibility of this evidence in the context of the trial as a whole and argues that these photographs were not provided in advance to the defense in violation of the trial court's discovery order, which he contends mandated discovery of all photographs.[20]

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[19] Brown v. Commonwealth, 558 S.W.2d 599, 604 (Ky. 1977) (footnotes omitted).

[20] Although the trial court's discovery order does not specifically mention providing all photographs, the Commonwealth's answer to the discovery order stated that the defense could inspect all photographs by contacting the investigating agency. Apparently, defense counsel went to Kentucky State Police headquarters to inspect all photographs taken in the case. The Commonwealth then directed Sergeant Taylor to send copies of "all photographs" to defense counsel. Sergeant Taylor apparently sent the photographs which he had taken to defense counsel but, for whatever reason, did not send photographs taken by Detective Garnes—including the posed photographs of the defendants taken by Detective Garnes.

The substitute judge allowed these posed photographs to be displayed poster-size on easels but stated that such reproductions were not to be admitted as exhibits.

The prosecutor stated that these photographs were listed on a log of those provided for defense inspection when visiting the state police post; however, these particular photographs taken by Detective Garnes must have been omitted from the file of photographs sent to the defense by Sergeant Taylor, who apparently only sent the photographs that he took himself. Defense counsel acknowledged being aware that "mug shots" were generally taken upon arrest; although, they stated that they did not know that such "mug shot" photographs had been properly developed in this case. The substitute judge permitted display of the posed photographs, stating that they showed the defendants at the time of their arrest, that there was at least a jury issue as to whether the photographs showed injuries, and that the defense had notice that "mug shots" would be taken and should have made inquiries to obtain them.

Although Joshua correctly notes that posed photographs have at least sometimes been viewed with some suspicion, a trial court's ruling on the admissibility of such posed photographs, nonetheless, must not be disturbed absent an abuse of discretion.[21] Under the facts and circumstances of this case, we find no such abuse of discretion in the trial court's allowing these photographs to be displayed.

Furthermore, even if a discovery violation had occurred and the posed pictures were of little probative value, we find any error in their display harmless. Although Joshua complains that his photo provided the most damning proof that he had an injury

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[21] *See* Gorman v. Hunt, 19 S.W.3d 662, 665-69 (Ky. 2000) (ultimately upholding trial court's admission of posed photograph to show location of parties at time of accident at issue in civil case as not abuse of discretion, after noting that posed photographs had often been criticized or excluded as incompetent or self-serving).

to his hand, the copy of this photograph provided to us from the record does not obviously show any injuries. Although the photograph does show him holding onto one arm, which Joshua argues definitively shows his injury, the effect is doubtful at best—in fact, the picture seems to spotlight his tattoo rather than accomplishing any other significant purpose.

Furthermore, Joshua admits that other evidence of his hand being injured was provided in Miller's testimony and the testimony of Detective Garnes—both of whom recalled observing that Joshua's hand was injured. Since two witnesses independently testified to the injury and to the dubious evidence of injury in the copy of the photo provided to us, the display of this photograph almost certainly had no effect on the jury's verdict. As for Joshua's argument that he might have investigated further to obtain evidence that his hand was, in fact, injured while fixing a vehicle, as he now contends, we do not see how he was prevented from doing so by not being provided with this photograph. He was surely aware of his own injury.

Joshua contends that he was also prejudiced by association due to the display of his brother Daniel's posed photograph depicting Daniel's allegedly frightening appearance wearing a "wife-beater" tank top inexplicably lifted to reveal his ribs. Apparently the Commonwealth contends that Daniel's photograph was admitted to show injuries as well. As with Joshua's own photograph, however, the copy of Daniel's photograph provided to us in the record does not show an obvious injury. Again, although this photograph may be of dubious probative value, we cannot see how it could have had much prejudicial effect either. The brothers' allegedly dangerous or scary appearance in these photographs would seem to have little prejudicial effect in

light of the testimony indicating their participation in the frightening attack on the victim. Furthermore, Joshua did not explicitly argue to the trial court that the photographs should be excluded based upon them making the brothers look scary or dangerous.

Since the display of these posed photographs did not affect substantial rights and there is no substantial possibility that any error in their admission had an impact on the outcome of the trial, we find any error in the admission of such evidence to be harmless.[22]

III. CONCLUSION.

For the foregoing reasons, the judgments of the circuit court are hereby AFFIRMED.

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, Schroder, and Scott, JJ., concur.

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[22] RCr 9.24; Thacker v. Commonwealth, 194 S.W.3d 287, 291 (Ky. 2006) ("The test for harmless error is whether there is any substantial possibility that the outcome of the case would have been different without the presence of that error.").

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