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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 22, 2008
NOT TO BE PUBLISHED

FINAL
DATE 9-18-08 E.A. Grant P.C.

Supreme Court of Kentucky

2006-SC-000380-MR

BEVERLY CLAY — APPELLANT

V.

ON APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
NO. 05-CR-000006

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Beverly Clay, was convicted of attempted murder by a Greenup Circuit Court jury. She now appeals as a matter of right pursuant to Ky. Const. § 110(2)(b).

On appeal, Appellant raises seven issues: (1) that the trial court improperly admitted evidence of other crimes and bad acts; (2) that the jury instructions were improper; (3) that the trial court erred in its final judgment; (4) that it was error to refuse to require a witness to disclose the name of the drug dealer who received stolen goods from a burglary of the victim's home; (5) that it was error to admit the victim's statements to two police officers as impeachment testimony; (6) that it was error to allow certain testimony pertaining to her eligibility for parole; and (7) that the victim did not suffer serious physical injury for purposes of sentencing under the violent offender statute. For the reasons set forth herein, we affirm Appellant's conviction.

I. Facts

Appellant and Donald Clay ("Don"), the victim, married in 1996. They separated in May 2004. After their separation, Appellant began a relationship with Cynthia Rusk ("Cynthia") and they started living together. She gave Appellant a ring and had the phrase "Sin of Bev" tattooed on her forearm.

Both however were abusing OxyContin and Cynthia stole items from Don's home on November 12, 2004, to support their habit. The stolen property was traded for more OxyContin.

Despite her separation from Don, Appellant remained the beneficiary on his $200,000 life insurance policy. Then, in need of more money for drugs, Appellant hatched a plan to collect on the policy. The plan was that Appellant would help Cynthia gain access to Don's home, and once inside, Cynthia would push him down the stairs, making his death look like an accident. Cynthia agreed to the plan and in preparation, borrowed a baseball bat to hit him with and acquired a gun by trading some OxyContin.

The attempted murder occurred on November 20, 2004. Don came home from work and Cynthia, who had been waiting for him in the bathroom with the bat, instead shot him in the chest and face. A struggle ensued and Don managed to wrestle the gun away from Cynthia and call 911. Cynthia fled on foot.

When police arrived, Don gave them the direction Cynthia had fled and she was apprehended shortly thereafter. When arrested, Cynthia admitted the shooting, but did not implicate Appellant.

During an interview with the police a few days later, however, Cynthia claimed Appellant had been involved. According to Cynthia, Appellant came up with the plan to kill Don to collect his life insurance and drove her to his house that day. Appellant however denied any involvement.

Appellant was later indicted for attempted murder and pled not guilty. She was found guilty by a jury of attempted murder and sentenced to twenty (20) years imprisonment.

II. Analysis

A. Other Crimes, Wrongs, and Bad Acts

Appellant argues that the trial court erred on four occasions in admitting evidence of other crimes, wrongs, and bad acts. Specifically, Appellant takes issue with evidence of the following: the burglary of Don's home, the alleged filing of a false insurance claim, the solicitation of Cynthia's brother to kill Don, as well as the romantic relationship between Appellant and Cynthia. In addition, Appellant argues cumulative error.

The standard of review for the admission of evidence is whether the trial court abused its discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id.

KRE 404(b) prohibits the use of evidence of other crimes, wrongs, or acts solely to prove a propensity to commit a specific act. Such evidence, however, may be admissible if offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident, or if it is so interwoven with other essential evidence that the two cannot be separated. KRE 404(b). In addition, KRE 404(c) requires that the prosecution give notice to the defendant of its intention to present evidence of other crimes, wrongs, or acts. In determining the admissibility of other crimes and bad acts evidence, the evidence is analyzed using a three-tier inquiry addressing: (1) relevance, (2) probativeness, and (3) prejudice. Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005).

1. Burglary of Don's Home

Appellant contends that it was error to admit evidence of the burglary of Don's home on November 12, 2004, a week before the shooting.[1]

Prior to trial, the Commonwealth gave notice it intended to introduce the evidence. In response to Appellant's motion in limine, the trial court held a hearing on the motion. Although the court initially sustained Appellant's motion, it reconsidered the matter, at trial when, during the Commonwealth's direct examination of Don, and over Appellant's further objection, it changed its ruling and allowed the evidence to be admitted.

Appellant argues that evidence of the burglary was inadmissible under KRE 404(b) and KRE 403. The Commonwealth, however, contends that the evidence was properly admitted, as such was offered for purposes other than to prove Appellant's propensity.

Motive was pertinent to the issue in this matter, as there was evidence that Appellant was the beneficiary on Don's life insurance policy despite their separation. See White v. Commonwealth, 178 S.W.3d 470, 478 (Ky. 2005) ("We

[1] Appellant was not charged with burglary.

have long held that while motive is rarely an actual element of a crime, it is often relevant to show criminal intent."). Moreover, evidence of the burglary supports a motive to commit the charged offense, i.e., both the burglary and the shooting were carried out for money. Cynthia testified that she and Appellant burglarized Don's house for the purpose of obtaining money for drugs. They traded the stolen property for OxyContin. It also supports an inference that they had a *need* for money for drugs and directly connects both of them to each other as well as to Don and his premises as a source for funds. Yet, when the burglary did not solve their drug and money problems, Appellant decided to have Don killed, with Cynthia's help, to get his insurance.[2]

Moreover, the burglary evinces a plan that includes the attempt to kill Don. The crimes share common characteristics, in that they both involved the same participants (Appellant and Cynthia), the same location (Don's home), and the same victim (Don). Evidence of the burglary shows that, a week before the shooting, Appellant stole a number of items from Don for drug money.

Appellant argues that the burglary and the shooting were not part of a common plan because Cynthia testified she did not learn that Appellant was the beneficiary on Don's life insurance policy until after the burglary. However, Cynthia's ignorance of this fact is immaterial in our KRE 404(b) analysis, as it was Appellant who came up with the plan, and she was clearly aware of her status as the beneficiary. Further, the potential for undue prejudice from the use of this evidence does not substantially outweigh its probative value. Thus, the

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[2] According to Cynthia's testimony, the plan was to make Don's death look accidental, by hitting him with a baseball bat and shoving him down the basement stairs. Cynthia, of course, brought a gun for backup. Apparently becoming frightened, she shot Don, instead of using the bat.

evidence was clearly admissible as evidence of motive, opportunity, preparation, plan and knowledge, all of which relate to her objective of obtaining money. See Gilbert v. Commonwealth, 838 S.W.2d 376, 378 (Ky. 1991).

2. Filing a False Insurance Claim

In addition, Appellant asserts error in regards to the prosecutor's comment during closing argument, when he accused Appellant of helping Don file a false insurance claim for the items stolen. Appellant argues this comment violated KRE 404(b) and that she was entitled to pretrial notice pursuant to KRE 404(c). The issue was properly preserved.

The facts relevant to this issue are as follows. The victim, Don, was a hostile witness for the Commonwealth, as Don apparently believed that Appellant was not involved in the shooting. According to Don, he and Appellant had separated amicably. Thus, the Commonwealth sought to explain Don's desire to protect Appellant against criminal liability.

The Commonwealth suspected that Appellant had helped Don file a false insurance claim with respect to the theft and thus that he wanted to protect her. Don, in fact, had filed and collected on a $12,000 claim regarding the theft, yet he also lost a $30,000 coin collection in the theft, uncovered under the policy, but did not report it as stolen to the police. In his closing argument, the prosecutor tried to explain to the jury why Don would want to protect Appellant, to wit:

> And I think that insurance business is [a key piece of the puzzle]. And I think it's an indication that [Appellant] knew well about the burglary because she participated in it. Why wouldn't a man report to the police a $30,000 coin collection? Especially if it hadn't even been insured, as he said. "It wasn't insured," he said. Why wouldn't he do that? Man, I'd be trying to find that. I'd be telling the police about it, in case it popped up, they'd know it was mine. Maybe I wouldn't care if I got it back from my wife, who burglarized

> my house with my knowledge and information. *And helped me make this false insurance claim as well.*

(Emphasis added).

In this respect, we note that a closing argument is just that — *an argument.* Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). Because a closing argument is *not evidence*, the prosecutor's comment is outside the scope of KRE 404(b), which by its plain terms prohibits the use of *evidence* of other crimes, wrongs, or acts to prove a propensity to commit some specific act. Moreover, "[i]t is unquestionably the rule in Kentucky that counsel has wide latitude while making opening or closing statements." Brewer v. Commonwealth, 206 S.W.3d 343, 350 (Ky. 2006). "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter, 744 S.W.2d at 412. In fact, he may state what he believes from the evidence.

Moreover, when the court overruled Appellant's objection, it admonished the jury that the prosecutor's remark was merely speculation. Given that a prosecutor is allowed broad leeway in a closing argument, it was proper to comment on why Don would want to protect Appellant and thus be hostile to the prosecution. Neither did the prosecution persist in the accusation. See Meyer v. Commonwealth, 472 S.W.2d 479, 486 (Ky. 1971) (where there is no concentrated effort to persist in the argument, no prejudice occurs), overruled on other grounds by Short v. Commonwealth, 519 S.W.2d 828 (Ky. 1975). Thus, we find no error under KRE 404(b), (c) or otherwise.

3. Solicitation to Kill the Victim

Appellant also complains of Cynthia's brother, James Rusk's ("James"), testimony that Appellant solicited him to kill Don. Appellant moved in limine to suppress the evidence, but her motion was denied.

At trial, James testified, "Well, she offered me, to pluck [Don] off, [for] his camper, his boat, and his truck. And there was no way I was doing it. I mean that's just a bunch of nonsense, put it that way." Appellant argues the admission of such evidence was error under KRE 404(b).

In a criminal prosecution, the Commonwealth bears the burden of proving each element of the offense beyond a reasonable doubt. KRS 500.070. Here, Appellant was charged with attempted murder and under our criminal code, intent is an element of attempted murder. KRS 502.020; KRS 506.010; KRS 507.020. Specifically, the jury instructions require proof of intent to kill.[3]

Appellant's intent was obviously disputed. Thus, the trial court did not abuse its discretion in admitting testimony that Appellant solicited James to kill Don.

4. The Lovers' Relationship

Evidence presented at trial indicated that Appellant was involved in a romantic relationship with Cynthia. Appellant argues, however, that it was error to admit evidence of the relationship, contending that such was impermissible under KRE 404(b), or, alternatively, unduly prejudicial under KRE 403.

In making the KRE 404(b) argument, Appellant attempts to characterize her relationship as a bad act. We are not persuaded that evidence of a

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[3] "You will find the Defendant, Beverly Clay, guilty ... under this instruction if, and only if, you believe from the evidence, beyond a reasonable doubt, all of the following: ... B. That in so doing, it was Beverly Clay's intention that Don Clay would be killed by shooting him".

relationship between Appellant and Cynthia falls within the scope of KRE 404(b), as her sexual orientation neither qualifies as a crime or bad act. Moreover, such evidence was probative of her involvement in the crime, and thus, not unduly prejudicial.

5. Cumulative Error

Having found no error in the admission of the evidence objected to under KRE 404(b) and/or KRE 403, there could be no cumulative error.

B. Jury Instructions

Appellant next argues that the jury instructions were inconsistent with the indictment, amounting to a constructive amendment of the indictment. The indictment charged Appellant with criminal *attempt* to commit murder, either as a principal or as an accomplice. It read in part, as follows:

> That on or about the 20th day of November, 2004, in Greenup County, Kentucky, the above-named defendant, *acting alone or in complicity with another*, unlawfully committed the offenses of:
>
> *CRIMINAL ATTEMPT TO COMMIT MURDER*, in violation of KRS 502.020, 506.010, and 507.020, a Class B Felony, violation code 09150-01, to wit: with the intent to cause the death of Donald Clay, she solicited, aided, counseled and engaged in a conspiracy with another person in the planning and commission of the attempted murder of Donald Clay

(Emphasis added). Both parties tendered proposed instructions at trial. The trial court, however, instructed the jury on criminal *conspiracy* to commit murder. That instruction read as follows:

> You will find the Defendant guilty of *Criminal Conspiracy to Commit Murder* under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about November 20, 2004 and before the finding of the indictment herein, Beverly Clay entered into an agreement with Cynthia Rusk that Donald Clay would be killed by

shooting him with a handgun or hitting him with a ball bat; Beverly Clay would drive Cynthia Rusk to Donald Clay's house, that if she did so, such actions would constitute a substantial step in a course of conduct intended to culminate in the killing of Donald Clay.

AND

B. That in so doing, it was the Defendant's intention that Donald Clay would be killed by shooting him with a handgun or hitting him with a ball bat.

AND

C. That pursuant to, in furtherance of, and during the continued existence of such an agreement, the Defendant drove Cynthia Rusk to Donald Clay's residence.

(Emphasis added). Conspiracy to commit murder is arguably a different offense from attempted murder. See American Tobacco Co. v. United States, 328 U.S. 781, 789, 66 S.Ct. 1125, 1129, 90 L.Ed. 1575 (1946) (conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy).

Appellant's proposed instructions, however, included an instruction on criminal conspiracy to commit attempted murder.[4] That instruction is remarkably

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[4] Appellant's proposed instruction reads as follows:

You will find the Defendant, Beverly Clay, guilty of Criminal Conspiracy to Commit Attempted Murder under this Instruction if, and only if, you believe from the evidence, beyond a reasonable doubt, all of the following:

A. That in this County, on or about November 20, 2004, and before the finding of the Indictment herein, Beverly Clay entered into an agreement with Cynthia Rusk that Donald Clay would be killed by shooting him with a firearm; that Beverly Clay would drive Cynthia Rusk to the victim's home in order to accomplish the murder, and in so doing, such action would constitute a substantial step in the course of conduct intended to culminate in the killing of Don Clay; and that Beverly Clay would solicit Cynthia Rusk to kill Don Clay by shooting him;

B. That in so doing, it was Beverly Clay's intention that Don Clay would be killed by shooting him; and

similar to the court's instruction. Although there is a discrepancy in the title given to each instruction, in all other respects, both Appellant's proposed instruction and the instruction delivered to the jury set out the elements of the case in substantially the same manner. Despite this, Appellant now complains that the instruction prejudiced her case, arguing that she could only be convicted of a conspiracy to commit attempted murder.

We first address the issue of preservation. A defendant can preserve his claim of error by any one of three methods: (1) *offering a proposed instruction*; (2) by motion pointing out the grounds; or (3) by specific objection prior to the jury being instructed. RCr 9.54(2) (emphasis added). Although defense counsel offered proposed jury instructions, which the trial court rejected, *no attempt was made to correct the instructions used.* In fact, prior to the reading of the instructions to the jury, defense counsel expressly stated he had no objection to the court's instructions. Thus, the trial court was never asked to rule on Appellant's constructive amendment argument. Consequently, this issue is unpreserved, as Appellant's claim was not "fairly and adequately presented to the trial judge". See id.

Thus, we may review only for palpable error pursuant to RCr 10.26. A palpable error is one that "affects the substantial rights of a party". RCr 10.26.

C. That pursuant to, in furtherance of, and during the continued existence of such agreement, Beverly Clay provided the transportation to Cynthia Rusk in order to effect the killing of Don Clay.

Accordingly, we now turn to the substance of Appellant's argument. An indictment may only be amended with leave of the court.[5] The amendment may not charge a new or different offense. Further, an amendment shall not be permitted which would prejudice the substantial rights of the defendant. The general rule is that instructions should substantially follow the language of the indictment and submit the elements of the offense contained in the indictment. Hunter v. Commonwealth, 239 S.W.2d 993, 995 (Ky. 1951). It is palpable error to instruct the jury on an offense not included in the indictment. Caretenders, Inc. v. Commonwealth, 821 S.W.2d 83, 86 (Ky. 1991).

Here, the indictment charged Appellant with attempted murder, either "acting alone *or in complicity with another*". The complicity statute provides that "[a] person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he... *engages in a conspiracy with such other person to commit the offense*". KRS 502.020(1)(a). Thus, participation in a conspiracy is one type of activity that suffices for accomplice liability. Indeed, the indictment alleges that the charged offense was committed by conspiracy.[6] Further, the instruction on conspiracy to

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[5] "The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." RCr 6.16.

[6] The indictment charged, in relevant part, that "[Appellant] solicited, aided, counseled and *engaged in a conspiracy* with another person in the planning and commission of the attempted murder of Donald Clay". (Emphasis added).

commit murder was supported by evidence, which showed that Appellant and Cynthia conspired to actually murder Don, not merely to attempt to kill him.[7]

Concededly, it is palpable error to instruct the jury on an offense not included in the indictment, but Caretenders is not controlling here, as the jury was essentially instructed on one basis for finding accomplice liability under the indictment, not a new or different offense. See 821 S.W.2d at 86; see also American Tobacco, 328 U.S. at 789, 66 S.Ct. at 1129. Appellant's reliance on Fulton v. Commonwealth, 849 S.W.2d 553 (Ky. App. 1992), for the proposition that she was charged with a different offense by constructive amendment of her indictment, is thus misplaced.

In Fulton, the defendants were convicted of promoting contraband in the first degree by complicity. On appeal, the defendants argued that the indictment actually charged them with the misdemeanor offense of conspiracy to promote contraband. This Court concluded that it was not error to instruct on complicity where the indictment charged the defendants with a conspiracy which was, in fact, committed. A defendant can be guilty of complicity by engaging in a conspiracy which results in a completed offense. KRS 502.020(1)(a) and (2)(a).

In addition to the reasons already cited, we note that the jury was clearly aware that Appellant was being tried for attempted murder, not murder, since the victim survived and testified at trial. Thus, if anyone suffered prejudice, it was the Commonwealth because the court's instruction deleted soliciting, aiding, and counseling as bases for accomplice liability. Thus, no error occurred and no substantial rights of Appellant were impaired.

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[7] This is contrary to Appellant's claim that the appropriate instruction should be conspiracy to commit attempted murder.

C. Final Judgment

Appellant also contends that the trial court erred in its final judgment, which stated she was guilty of complicity to commit attempted murder, when the jury was instructed on and returned a verdict finding her guilty of conspiracy to commit murder. According to Appellant, this inconsistency violated the constitutional requirement that the Commonwealth prove every element of the case beyond a reasonable doubt.

The trial court's final judgment states that "the case was tried before a jury which returned the following verdict: Guilty of *Criminal Attempt to Commit Murder*; KRS 502.020 and 506.010 and 507.020, a Class B Felony; Sentence of Twenty years in KSWR." (Emphasis added). Further, the judgment states, "it is ADJUDGED BY THE COURT that the defendant is Guilty of the following charge(s): *Criminal Attempt to Commit Murder*; KRS 502.020, 506.010, and 507.020; Class B Felony."

Appellant concedes that this argument is unpreserved. Therefore, we may review only for palpable error. RCr 10.26.

It has long been the rule that a defendant can be convicted only of the offense charged in the indictment. Lovelace v. Commonwealth, 193 Ky. 425, 236 S.W. 567, 568 (1922). In order to convict a defendant, "[t]he Commonwealth has the burden of proving every element of the case beyond a reasonable doubt". KRS 500.070(1).

Appellant's argument here is essentially a rehash of her jury instruction issue. See supra Part II.B. In addressing that argument, which was

unpreserved, we concluded that the discrepancy between the language of the indictment and the instruction given to the jury was not error.

As to this issue, we conclude the Commonwealth did prove each element of the offense. The indictment charged Appellant with being an accomplice to attempted murder. A defendant is liable as an accomplice for an offense committed by another if she engaged in a conspiracy with such other person to commit the offense, with the intent to promote or facilitate the commission of the offense. KRS 502.020(1)(a). Thus, participation in a conspiracy is one type of conduct which suffices for accomplice liability. The jury was instructed according to this concept and found that Appellant conspired with Cynthia. Consequently, Appellant was convicted of attempted murder, as charged in the indictment. There was no error, palpable or otherwise.

D. Identity of the Drug Dealer

This issue is related to the burglary of Don's home on November 12, 2004. With respect to the burglary, we concluded that Cynthia's testimony was properly admitted under KRE 404(b). See supra Part II.A.1. At trial, Cynthia testified on direct examination that she and Appellant traded property taken during the burglary to a drug dealer in Ohio for OxyContin. During defense counsel's cross-examination, when asked the identity of the drug dealer, Cynthia refused to divulge the name. The trial court ruled that Cynthia was not required to disclose the name of the drug dealer, reasoning that disclosure may tend to incriminate her and threaten her safety. On appeal, Appellant argues that the court erred in refusing to require Cynthia to disclose the name of the drug dealer during cross-

examination because it denied her the identity of a material witness to the transaction.

"The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge. This broad rule applies to both criminal and civil cases". Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1988). Accordingly, we review for abuse of that discretion.

It has long been the rule that trial courts are vested with exceedingly broad control over all aspects of cross-examination. This Court, in a pre-Rules case, stated the following:

> It is ... recognized ... that the trial court is vested with a sound judicial discretion as to the scope and duration of cross-examination. Were this not so, any trial could be rendered a farce and mockery; witnesses could be insulted and threatened; juries would become exhausted and exasperated; justice could be frustrated and thwarted.

Com., Dept. of Highways v. Smith, 390 S.W.2d 194, 195 (Ky. 1965). KRE 611(b) authorizes the trial court to limit the scope of cross-examination when the "interests of justice" so require. In construing KRE 611, this Court indicated the following:

> KRE 611 embodies the "wide open" rule of cross-examination by allowing questioning as to any matter relevant to any issue in the case, subject to judicial discretion in the control of interrogation of witnesses and production of evidence. "[W]hile the trial court may not limit cross-examination because it involves matters not covered on direct, it may limit such examination when limitations become necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack."

Derossett v. Commonwealth, 867 S.W.2d 195, 198 (Ky. 1993). Thus, under KRE 611, trial courts retain the same kind of broad control they always had over the

scope of cross-examination. Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997); Baze v. Commonwealth, 965 S.W.2d 817, 821 (Ky. 1997).

Despite this broad authority, there are circumstances where the Commonwealth is required to disclose the identity of a person not called as a witness. In support of her argument, Appellant cites to Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), and Burks v. Commonwealth, 471 S.W.2d 298 (Ky. 1971), which address the issue of disclosure of the identity of a confidential informant. If the informant is an eyewitness to the crime, the prosecution may not conceal the identity. Burks, 471 S.W.2d at 300-01. However, if the informer has merely provided a tip about criminal activity, disclosure is not required. Taylor v. Commonwealth, 987 S.W.2d 302, 304 (Ky. 1998). The differential reasoning is one of balance. Disclosure of the informer, which is unnecessary to one's defense, might put the informer otherwise in danger. Balance is, of course, in question here.

Upon review of the record, there is no evidence that the Commonwealth received information from the drug dealer or was even aware of his or her identity. Therefore, Roviaro and Burks are not controlling, as the issue in this matter does not involve a confidential informant. Given the trial court's broad power to limit the scope of cross-examination, the insignificance of the point at issue within the context of this case, and the danger it might otherwise present to Cynthia, it was not unreasonable to refuse to require Cynthia to disclose his or her identity. Thus, we find no abuse of discretion.

E. Victim's Statements to the Police

As previously indicated, the victim, Don, was a hostile witness for the Commonwealth. During direct examination, Don denied telling the police that he believed Appellant was involved in the shooting. The Commonwealth therefore sought to impeach Don with statements he purportedly made previously to two police officers, Sheriff Keith Cooper and Deputy Darrell McCarty. Thereafter, over defense counsel's objection, the trial court permitted Cooper and McCarty to testify that Don told them that he believed Appellant was involved in both the shooting and the burglary.

The first statement at issue concerns testimony from Cooper about his conversation with Don a few days after the shooting. The Commonwealth called Cooper as a witness and asked, "Did Don Clay tell you that [Appellant] was involved in not only his shooting but the burglary there?" Cooper testified as follows:

> After Deputy McCarty and I had a conversation with him and I, what we did was have him walk through the scene and just give a preliminary overview of what had taken place, then we updated him on information that we had. He did tell me that, but it was after we had told him where the investigation had led us, that *he told us that he believed she was involved*. Yes, sir.

(Emphasis added). Defense counsel objected to the answer and moved to strike, but was overruled. The prosecutor continued his examination by asking, "Was you, your answer was that *Don Clay said that he thought his wife was in on these things*." Cooper responded, "Yes, sir. He did say that." Cooper further testified to the following:

> How it came about, there were two people that knew when he was supposed to be returning home from work that day, his mother and his wife. And, like I say, we updated him on, on information that we had received during the investigation, and what he offered us was that his wife must, would have been the only one that would have

> told Ms. Rusk, who, the, the one that was actually convicted of the shooting, that she must have given that information to Ms. Rusk because his mother wouldn't have done it. So she had to have been in on it. That's how it came about.

Following Cooper's testimony, the Commonwealth recalled McCarty as a witness. When asked if Don had made statements concerning the shooting at the scene of the crime, McCarty testified, "Yes, sir, that he thought that she was involved and that she may be in the house." McCarty further testified that Don told him that he believed Appellant had been involved in the burglary. According to McCarty, Don stated, "That he believed she had also broke into his house."

On appeal, Appellant contends that the trial court erred because these statements constitute (1) Don's opinion on an ultimate issue and (2) impeachment on a collateral matter. We review for abuse of discretion. English, 993 S.W.2d at 945.

In Stringer v. Commonwealth, 956 S.W.2d 883, 889-92 (Ky. 1997), the Court ruled that an expert witness may testify to an opinion on an ultimate issue. The defendant was convicted of sodomy and sexual abuse of a child. There was expert testimony by a physician that the child's vaginal injuries were consistent with her history of sexual abuse. On appeal, the defendant argued that the physician's testimony was inadmissible opinion evidence on an ultimate issue. Although the testimony constituted an expert opinion on an ultimate issue, this Court rejected the argument that such testimony is always prohibited. Thus, it was held that expert opinion testimony is not inadmissible solely because it speaks to an ultimate issue. Id. at 891-92. That rule was extended to lay opinions in McKinney v. Commonwealth, 60 S.W.3d 499, 504 (Ky. 2001), which held that a lay witness may testify to an opinion on an ultimate issue.

With these principles in mind, we turn to the instant case. Pursuant to the rule in Stringer, which was extended to lay opinions in McKinney, it was permissible for Cooper and McCarty to testify as to Don's belief that Appellant was involved in the shooting. Appellant's reliance on Neal v. Commonwealth, 95 S.W.3d 843 (Ky. 2003), is misplaced because the testimony at issue here does not concern a collateral matter. In Neal, the defendant wanted to impeach the codefendant on a collateral matter, blame-shifting for *an earlier shooting*. Here, Don was contradicted as to what he said to the police after being shot, which related to *the charged offense*. The police officers' testimony was relevant to a material issue in the case, Don's unexplained bias at the time of trial. Thus, the trial court properly exercised its discretion when it admitted this impeachment testimony.

F. Parole Eligibility

Appellant argues that there was error in allowing the jury to hear that she might be eligible for parole after serving 20% of her sentence. During the penalty phase, Probation and Parole Officer Gary Spillman testified that Appellant's minimum parole eligibility for attempted murder, a Class B felony, depends on whether she is designated as a violent offender.[8] If the trial court found that the victim suffered serious physical injury, Appellant, as a violent offender, would not

[8] KRS 439.3401 provides that "'violent offender' means any person who has been convicted of or pled guilty to the commission of ... [a] Class B felony involving the death of the victim or serious physical injury to a victim" and that "[t]he court shall designate in its judgment if the victim suffered death or serious physical injury."

be eligible for parole until she served 85% of her sentence.[9] However, if there was a finding that the victim did not suffer serious physical injury, Appellant would be eligible for parole after serving 20% of her sentence.[10]

Following Spillman's testimony, Appellant moved for a directed verdict on the issue of whether Don suffered a serious physical injury. The court denied Appellant's motion for directed verdict and informed her that it would determine whether Don suffered a serious physical injury at final sentencing. After deliberating, the jury sentenced Appellant to the maximum sentence, 20 years.

The final judgment entered on May 4, 2006, did not initially reflect the court's finding as to serious physical injury. The check box for indicating that the victim suffered death or serious physical injury was left blank. However, on May 22, 2006, the court amended the judgment "to reflect that the victim of the crime committed by the defendant suffered serious physical injury."

Appellant hypothesizes that the judge knew at the time of Spillman's testimony that she would not be eligible for parole until after serving 85% of her sentence, as it was his decision to find that Don suffered serious physical injury. Appellant would now have us impose a duty on trial judges to advise the jury prior to penalty phase deliberations on the issue of serious physical injury.

Appellant concedes that this issue is unpreserved. However, she asks us to review for palpable error under RCr 10.26.

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[9] A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed. KRS 439.3401(3).

[10] 501 Ky. Admin. Regs. 1:030.

In support of her argument, Appellant cites to Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991), a capital murder case. In Lankford, a jury found the defendant guilty on two counts of first-degree murder. Prior to the defendant's sentencing hearing, the prosecutor announced that the state would not seek the death penalty. There was no discussion of the death penalty as a possible sentence at the sentencing hearing, where both defense counsel and the prosecutor argued the merits of concurrent or consecutive, and fixed or indeterminate, sentence terms. At the conclusion of the hearing, the trial judge indicated that he considered the defendant's testimony unworthy of belief and that the seriousness of the crimes warranted more severe punishment than that which the state had recommended. Subsequently, the trial judge sentenced Lankford to death. The U.S. Supreme Court held that due process was violated by sentencing where, at the time of the sentencing hearing, the defendant and his counsel did not have adequate notice that the judge might sentence the defendant to death. Id. at 119-27, 111 S.Ct. at 1729-33.

We are hesitant to find a due process violation in this matter based on Lankford. In Lankford, the defendant's death sentence was overturned on the ground that he and counsel had not received "fair notice" that a sentence of death was anything more than a remote possibility. Id. at 121, 111 S.Ct. at 1729. At the sentencing hearing, defense counsel offered no evidence or argument against a death sentence.

> If defense counsel had been notified that the trial judge was contemplating a death sentence..., presumably she would have advanced arguments [addressing the aggravating circumstances identified by the judge and his reasons for disbelieving Lankford]; however, she did not make these arguments because they were

> entirely inappropriate in a discussion about the length of [Lankford's] possible incarceration.

Id. at 122, 111 S.Ct. at 1730. Here, on the other hand, it was clear to both Appellant and her defense counsel during the penalty phase that she might not be eligible for parole until after serving 85% of her sentence. Therefore, given the "unique" facts of Lankford — where the defendant did not receive proper notice that his life was at stake — that decision is not controlling here.[11]

The violent offender statute provides that "[t]he court shall designate *in its judgment* if the victim suffered death or serious physical injury." KRS 439.3401(1) (emphasis added). The court here stated as such in the amended final judgment and Don did, in fact, suffer serious physical injury. There is no requirement that the judge advise the jury prior to penalty phase deliberations on the issue of serious physical injury, and we are not persuaded to impose such a requirement here under this argument. Thus, we find no error occurred.

G. Serious Physical Injury

Appellant contends that it was error to sentence her pursuant to KRS 439.3401 because there was no evidence that Don suffered serious physical injury.[12] We find no merit in this argument. Don was shot twice, once in the face and once in the chest, with a bullet remaining lodged in his chest. The trial judge

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[11] "The unique circumstance that gives rise to concern about the adequacy of the notice in this case is the fact that, pursuant to court order, the prosecutor had formally advised the trial judge and petitioner that the State would not recommend the death penalty." Id. at 111, 111 S.Ct. at 1725.

[12] "'Serious physical injury' means 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". KRS 500.080(15).

reasonably found that being shot in the face and chest created a substantial risk of death. Thus, the trial court did not err in applying the violent offender statute.

III. Conclusion

For the foregoing reasons, we affirm Appellant's conviction.

All sitting. Lambert, C.J.; Abramson, Cunningham, and Scott, JJ., concur. Noble, J., dissents by separate opinion, with Minton and Schroder, JJ., joining this dissent.

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Supreme Court of Kentucky

2006-SC-000380-MR

BEVERLY CLAY — APPELLANT

V.

ON APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
NO. 05-CR-000006

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE NOBLE

Respectfully, I dissent.

First, the majority holds that it was not error to allow the Commonwealth Attorney to claim in closing argument that Appellant colluded with her husband to file a false insurance claim for the items stolen in a burglary that occurred prior to the attempt on her husband's life. Appellant was separated from the victim, her husband. Prior to the attempt to kill him, the husband's home had been burglarized, with several items stolen. The trial court allowed testimony from the co-defendant that she and Appellant had committed the burglary on the basis that it showed a pattern or scheme between the co-defendant and Appellant which helped establish the motive to attempt to kill the husband. Illustrating the danger of admitting collateral matters, even for a proper purpose, the Commonwealth then pursued testimony about the burglary, and in effect tried that crime as well. Extending attention to the burglary, testimony was elicited that the husband had filed an insurance claim for the items he had insured, but that he failed to tell the police that an uninsured $30,000 coin collection was also taken. At trial, the Commonwealth viewed the husband as a hostile witness because he would not testify

that he believed Appellant was involved in the shooting, which at least begs the question of why the Commonwealth called him as a witness and what difference his opinion made in any event.

Based on this highly collateral material, the Commonwealth argued in closing that the husband refused to claim that his wife was involved in the attempted murder because she had helped him file a false insurance claim, despite the fact that there was no testimony that a fraudulent claim had been made and the fraud theory was based solely on the husband's failure to report the theft of an uninsured coin collection . In short, the Commonwealth accused the husband and Appellant of insurance fraud, a fact not in evidence and based only on the flimsiest of testimony. While the majority opinion is correct that the Commonwealth has discretion in making its argument to the jury, such is not unlimited. The Commonwealth enjoys only "reasonable latitude in argument . . . ." Harness v. Commonwealth, 475 S.W.2d 485, 490 (Ky. 1971). Even with that latitude, "certain behavior exceeds the bounds of what is acceptable and enters the realm of prejudicial error." Wager v. Commonwealth, 751 S.W.2d 28, 30 (Ky. 1988). The Commonwealth was not trying a burglary case or an insurance fraud case, and thus had no reason to argue that the evidence proved either. Defense counsel objected to this, and the trial court should have stopped the collateral detour before it ever came to closing argument. Certainly it is more than mere argument to accuse a defendant of another crime—especially one not found in the evidence—at a point where the defendant cannot make any response, given that the Commonwealth gets the last word in closing. It was not readily apparent when the testimony regarding making an insurance claim was given, seemingly irrelevantly, that the Commonwealth would make the huge leap to claiming insurance fraud in closing argument. As in Wager, "The

Commonwealth's attorney went beyond the evidence presented, and pursued another agenda, quite apart from the legal constraints of the case at hand." Id. at 30-31. This commentary cannot help but be prejudicial, and it was reversible error to allow it.

Next, I disagree that the victim's statements to the police are admissible as opinion evidence. It makes no difference here that a witness may testify to the ultimate issue; there still must be some basis of reliability even for a lay witness. Whether the victim thought his wife, Appellant, attempted to kill him or not is irrelevant, and cannot be made relevant just because at one point in time he thought she did it and at another he thought she did not. All this proves is that he is a confused man who clearly could not have a reasonable basis for either opinion if he can't decide what he thinks. Asking him at trial whether he believed the Appellant was involved just so he could be impeached with a prior inconsistent statement is part and parcel of the bootstrapping that went on in this trial. Since the victim could give no foundation for his belief, he was not a proper lay witness, and admitting such testimony was error.

Finally, given that this case involved "serious physical injury," I would disagree with the majority that it was proper for the Commonwealth to argue in the sentencing phase that the defendant would be eligible for parole after serving 20% of his sentence. It is bad faith to argue such, when as a matter of law the Appellant must be classified as a violent offender pursuant to KRS 439.3401, and under subsection (3) of that statute must serve 85% of the sentence imposed before attaining parole eligibility. Trial courts should not blatantly ignore the law, and if they do, there are consequences. Allowing this argument does not provide "truth in sentencing," and borders on being deceptive.

For the above reasons, this judgment should be reversed.

Minton and Schroder, JJ., join.