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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-11-08 E.I.A.Graves, D.C.

2006-SC-000315-MR

GLENN D. MOORE — APPELLANT

V.

ON APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
NO. 04-CR-00060-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal from a judgment of the Lee Circuit Court convicting Appellant of Complicity to Murder. Appellant, Glenn D. Moore, argues (I) that the trial court's Complicity to Murder jury instruction was improper, (II) that the trial court should have granted a directed verdict on the charge of Complicity to Murder, (III) that this Court should overrule its prior precedent regarding interrogator statements suggesting that the defendant is lying, and (IV) that the trial court should have excluded gruesome photographs of the victim's body. For the reasons that follow, we reject Appellant's arguments and affirm the judgment of the trial court.

This case is tragic for both the victim and the Appellant. By all accounts, Appellant was a "normal" boy until the he was eleven years old. When he was eleven, Appellant was run over by a car and suffered a traumatic head injury. He was

no longer himself, and never "grew up" emotionally, despite being in his thirties. Most people considered him to be "slow." Eventually, Appellant became an alcoholic.

On April 1, 2004, in Lee County, Kentucky, Martha Reece, Shane Overbee, and Appellant spent the evening drinking whiskey and beer at the home of Doug Phillips. The next morning, on April 2, the trio ran out of alcohol and hitchhiked to Hobb's Beer Store. Appellant bought an 18-pack of beer. The trio asked the store clerk if they could drink the beer in the store. The clerk told them that they could not, but that they could drink beer in her truck while waiting for a ride home.

A short time later, Frank Blakey arrived with his dog, Charlie Brown, and purchased beer for himself. As Blakey was leaving, Reece spoke with Blakey, and Blakey agreed to give Reece, Overbee, and Appellant a ride. Reece agreed to drive the car, and Appellant sat in the front passenger seat. Blakey and Overbee sat in the back seat. They drove around for some time, drinking beer.

Eventually, the four stopped at Doug Phillip's house. The evidence suggests that, unbeknownst to Blakey, Reece removed Blakey's cooler of beer from the trunk of his car, and placed it inside Phillip's house. The four then resumed driving around Lee County.

On the way back to the beer store, Reece took a shortcut down a secluded dirt road. Some time during this trip, Blakey said that he wanted a beer. Reece stopped the car, and Blakey opened his trunk, only to discover that his beer was missing. An argument ensued, and Blakey and Appellant exchanged blows, though it is not clear who threw the first punch. Eventually, Blakey fell to his knees. According to Overbee's testimony at trial, Reece began beating Blakey over the head with firewood from the

trunk of Blakey's car. Reece then handed a piece of firewood to both Overbee and Appellant, and they participated in the beating.

The trio beat Blakey severely, and he was nearly scalped. There was a large crack in Blakey's skull. After the three stopped beating Blakey, they returned to his car. According to Overbee, as the three drove off, Reece realized that Blakey was still alive, and ran over him. Blakey died of blunt force trauma to the head and trunk.

Allen Mardus discovered Blakey's body two days later, on April 4, while fourwheeling. Dr. John Hunsacker performed an autopsy on Blakey on April 5 in Frankfort. He took a number of photographs, which were introduced at trial. Detective James Devasher interviewed Appellant, and Appellant gave several different versions of events. Appellant first maintained that he had been drunk and passed out. Later, Appellant stated that Overbee had beaten Blakey with a piece of wood, and that Reece had run over Blakey as they left. Detective Devasher taped the interview, and the tape was played at trial.

Appellant was charged with Complicity to Murder and Complicity to Cruelty to Animals, second-degree.[1] The trial court granted a directed verdict on the Complicity to Cruelty to Animals charge, but denied a directed verdict on Complicity to Murder. Appellant was tried by a jury and convicted of Complicity to Murder. The jury recommended, and the trial court imposed, a sentence of 20 years imprisonment. This appeal followed.

[1] The Complicity to Cruelty to Animals charge stems from injuries to Blakey's dog, Charlie Brown. The Commonwealth introduced into evidence a photo of the dog's injuries and a video tape of the dog's rescue. According to the Commonwealth, Reece was to testify at Appellant's trial regarding the dog's injuries. However, Reece refused to testify, and the Commonwealth never presented any evidence linking Appellant to the dog's injuries. The trial court granted a directed verdict on the charge.

I. JURY INSTRUCTIONS

Appellant contends that Complicity requires proof of three elements: an underlying offense, mental state, and conduct. Appellant further argues that the trial court's instructions lacked two of those elements: an underlying offense, and the proper mental state for Complicity. We do not believe this alleged error was properly preserved, therefore, our review is limited to palpable error only.

The trial court's Complicity to Murder jury instruction read as follows:

> You will find the Defendant, Glenn Moore, not guilty of Complicity in Murder under this Instruction unless you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Lee County on or about April 2, 2004 and before the finding of the Indictment herein, he aided and assisted Steven Overbee and Martha Reece in assaulting Frank Blakey with pieces of wood, and a car, thereby causing Mr. Blakey's death;
>
> AND
>
> B. That in so doing, Glenn Moore intended to cause the death of Frank Blakey and not while acting under the influence of extreme emotional disturbance;
>
> AND
>
> C. That in so doing, he was not privileged to act in self-protection.

First, Appellant contends that a Complicity conviction requires proof of an underlying offense. Therefore, Appellant argues, the trial court should have instructed the jury that it must believe that Reece and Overbee killed Blakey, and that they intended to do so. This Court addressed a similar argument in Tharp v.

Commonwealth.[2] In Tharp, the defendant was convicted of wanton murder by complicity for failing to prevent her husband from abusing and killing her daughter.[3] Mrs. Tharp argued that the trial court "erroneously failed to require the jury to determine the mental state of Kenneth Tharp at the time he killed" the girl.[4] This Court concluded that, for Complicity, the principal actor's mental state "is largely immaterial" to the criminal liability of the accomplice.[5]

In this case, Appellant argues that his conviction of Complicity to Murder requires a finding by the jury that the principals (Reece and Overbee) were guilty of Murder. We disagree. A Complicity conviction does not require that the jury believe the principal possessed the requisite mens rea to be guilty of the underlying offense. As we stated in Tharp:

> If one commits a crime and another is actually present aiding, abetting, assisting, or encouraging its commission, the latter thereby becomes a participant, a principal in the second degree, and his culpability is determined by his motives. . . .
>
> Fuson v. Commonwealth, 199 Ky. 804, 251 S.W. 995, 997 (1923).
>
> That proposition was codified in KRS 502.030(1):
>
> In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person pursuant to KRS 502.010 and 502.020, it is no defense that:
>
> (1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question,

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[2] 40 S.W.3d 356 (Ky. 2000).

[3] Id. at 359.

[4] Id. at 365.

[5] Id.

> or has previously been acquitted thereof, or has been convicted of a different offense . . . .[6]

Although Tharp dealt with subsection (2) of the complicity statute,[7] and Appellant's conviction was based on subsection (1), we believe the same reasoning applies. KRS 502.030(1) (no defense that the principal was not convicted) demonstrates a conscious choice by the Legislature to make a principal actor's guilt irrelevant in a Complicity prosecution of an accomplice. The defendant's culpability is determined by his *own* mens rea, and not the mens rea of any other person. Complicity requires that the principal actor engage in a type of *conduct* that makes it possible for the defendant to have the requisite mental state. Here, what is important is Reece's and Overbee's conduct in beating Blakey with the firewood. The question then becomes whether Appellant intentionally aided and assisted them; the jury concluded that he did. Only *Appellant's* mens rea is at issue.

Second, Appellant argues that the jury instruction was erroneous because it required the jury to find that "Glenn Moore intended to cause the death of Frank Blakey," rather than requiring the jury to find that Appellant, as an accomplice, intended that the *principals* (Reece and Overbee) kill Blakey. We find this distinction to be insignificant.

The trial court convicted Appellant of Complicity to Murder under KRS 502.020(1). To be convicted under subsection (1), a defendant must act intentionally.[8]

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[6] Id.

[7] KRS § 502.020.

[8] See KRS § 502.020, cmt. ("To be guilty under subsection (1) for a crime committed by another, a defendant must have specifically intended to promote or facilitate the commission of that offense. This means that the statute is not applicable to a person acting with a culpable mental state other than 'intentionally.'"); Harper v. Commonwealth, 43 S.W.3d 261, 263-64 (Ky. 2001) ("The language of KRS 502.020(1) and the accompanying commentary make clear that intent is an essential element to a conviction under subsection (1) of the statute.").

In Harper v. Commonwealth, this Court found jury instructions in a Complicity case to be insufficient because they failed to instruct on the element of intent.[9] In concluding that the instructions in that case were insufficient, we quoted approvingly jury instructions from Wilson v. Commonwealth. The pertinent portions read as follows:

> The jury will find the defendant, Sheila Wilson, guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (c) That the defendant, Shelia Wilson, aided and assisted said Goff or "Radford" by transporting him to and from the scene of said shooting:
>
> and
>
> (d) That in so aiding and assisting Goff or "Radford" *it was Shelia Wilson's intention to cause the death of Michael Lewis Wilson.*[10]

The jury instructions from Appellant's trial ("That in so doing, Glenn Moore intended to cause the death of Frank Blakey . . . .") were essentially the same as the instructions from Wilson. We described the Wilson instructions as "[setting] forth an adequate instruction concerning a defendant's mental state in a complicity to murder instruction."[11] Therefore, in a Complicity to Murder case, when a jury instruction states that the jury must find that the defendant intended to cause the victim's death, that instruction satisfies the intent requirement of KRS 502.020(1). If anything, the trial court's instruction was advantageous to Appellant, requiring greater culpability than a simple intent to aid. We therefore find no error, and hence, no palpable error.

II. DIRECTED VERDICT

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[9] 43 S.W.3d 261, 264 (Ky. 2001).

[10] Harper, 43 S.W.3d at 264-65 (quoting Wilson v. Commonwealth, 601 S.W.2d 280, 286 (Ky. 1980)) (emphasis from Harper).

[11] Harper, 43 S.W.3d at 264.

Appellant argues that the trial court erred when it refused to issue a directed verdict with regard to the Complicity to Murder charge. We conclude that no error occurred. The Commonwealth contends that Appellant is arguing a new theory on appeal. At the close of all evidence, Appellant moved for a directed verdict on the ground that the Commonwealth failed to prove that Appellant "acted with the intent to cause the death of Frank Blakey." On appeal, Appellant now argues that "the Commonwealth failed to prove that Mr. Moore intended for Reece and Overbee to kill Mr. Blakey." Given our conclusion that a jury instruction on intent with regard to Complicity may state either that the defendant intended to cause the victim's death, *or* that the defendant intended that the principal cause the victim's death, we do not view Appellant's argument on appeal as different from the argument at trial. We therefore consider the merits of Appellant's argument.

We expressed our standard of review for a directed verdict in Commonwealth v. Benham:

> 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. 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]

[12] 816 S.W.2d 186, 187 (Ky. 1991).

Appellant essentially argues that, viewing the evidence in the light most favorable to the Commonwealth, no reasonable jury could find the defendant guilty of Complicity to Murder beyond a reasonable doubt.

The Commonwealth presented evidence suggesting that Appellant aided Overbee and Reece in beating Blakey with firewood. However, the Commonwealth presented no evidence suggesting that Appellant had any knowledge that Reece would run over Blakey with the car, nor that Appellant had any intent to aid her. Dr. Hunsacker, the medical examiner, testified that Blakey died of "blunt force injuries of the head and trunk," and that the trunk injuries were likely caused by a tire. However, he was unable to distinguish between the two injuries as to which was the primary cause of death.

When a defendant is charged with Murder, the jury is clearly instructed on the cause of death. But Complicity to Murder may be less clear-cut: "the acts giving rise to accomplice liability are not so readily defined and may encompass a continuum of events."[13] The jury need not ascertain a specific cause of death for a Complicity to Murder conviction.[14] As such, it was sufficient that the jury conclude that Reece and Overbee were the principals, and that Appellant intentionally aided them in committing murder.

The fact that Reece, the principal actor, killed Blakey only after running him over is irrelevant. To convict Appellant of Complicity to Murder, the jury needed to conclude that he *aided* the principals, and that he acted *intentionally in doing so.* Appellant aided the principals when he beat Blakey with the firewood. This is sufficient aid to support a

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[13] Mills v. Commonwealth, 44 S.W.3d 366, 371 (Ky. 2001).

[14] Id. ("Thus, complicity liability often will not depend on a particular act, but on many different acts that occur at different points in time.").

Complicity to Murder conviction. There was also sufficient evidence—based on the severity of the beating—for the jury to conclude that Appellant intentionally caused Blakey's death.

Viewing the evidence in the light most favorable to the Commonwealth, Reece handed Appellant a piece of firewood, and he began swinging at Blakey's head. The beating was so severe that it nearly scalped Blakey. Appellant aided Reece and Overbee in killing Blakey. The degree of aid (e.g., how many times Appellant swung, how much of the damage he caused, etc.) is irrelevant. It is also irrelevant that Appellant did not aid Reece in running over Blakey. All that is important is that the jury could reasonably conclude that Appellant aided Reece and Overbee, with the intent to cause Blakey's death. There was no error in denying the directed verdict.

III. APPELLANT'S TAPED STATEMENTS TO POLICE

Appellant next argues that the trial court should have redacted the portions of his interview with police in which the Detective suggested that Appellant was lying. At trial, the Commonwealth played for the jury the audio tape of Appellant's interview with Detective James Devasher of the Kentucky State Police. Appellant initially said that he was passed out, drunk, and not aware of what happened to Blakey. Slowly, Appellant changed his story and eventually stated that Overbee had beaten Blakey with a piece of wood, and that Reece had run over Blakey.

As Appellant told his story, Detective Devasher repeatedly told Appellant that he did not believe the story. Examples of Detective Devasher's comments include the following:

> So you are not man enough to tell me all the truth then is that basically what it is? . . .

> You have got to tell the truth. Right now, all I can say is that you are a liar. Because of what you have told me so far I can prove that is not the truth. . . .
>
> You lied to me before. . . .
>
> So you are still lying. Come on man. The lying, lying you learn it from a little boy way back that lying will always get you into more trouble. . . .

The jury heard the complete interview between Detective Devasher and Appellant. Before the tape was played, the trial judge admonished the jury that "the statements that you hear . . . on this tape are not made for the truth of what's – or not played to you for the truth of what is being said in them."

Appellant concedes that this issue is controlled by our decision in Lanham v. Commonwealth.[15] In Lanham, this Court held that an interrogator's recorded statements that suggest a suspect is lying may be retained "in the version of the interrogation recording played for the jury" because these comments "provide a context for the answers given by the suspect."[16] We rejected the argument that such statements by the police officer are impermissible character evidence under KRE 608.[17] However, we held that such comments by the police "are not admissible for the truth of the matter that they appear to assert, i.e., that the defendant is lying"[18] and required that trial courts give the jury a limiting admonition to that effect.[19] In arriving at these conclusions, we surveyed similar cases from a number of jurisdictions.[20]

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[15] 171 S.W.3d 14 (Ky. 2005).

[16] Id. at 27.

[17] Id.

[18] Id.

[19] Id. at 28.

[20] Id. at 23-27.

Appellant asks us to reconsider our decision in Lanham. We decline to do so. This court has stated on multiple occasion that *stare decisis* is an important concept, and we will only overturn prior precedent when "there are sound reasons to do so."[21] We see no reason to overturn Lanham after only three years. As this case continues to be governed by Lanham, the trial court's admonition to the jury that the Detective's statements were not be considered for the truth of what they said was sufficient. The Detective's statements "are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes."[22] The Detective's statements provided necessary context for the answers given by Appellant, and are permissible under Lanham.

IV. PHOTOGRAPHS ALLOWED INTO EVIDENCE BY TRIAL COURT

Appellant argues that the trial court abused its discretion when it admitted photographs of Blakey's body into evidence. Appellant argues that these photographs are unduly prejudicial or cumulative. Appellant also objects to a photograph allowed into evidence of Blakey's dog. Appellant filed a motion in limine, objecting generally to cumulative, unduly prejudicial, and gruesome photographs. Appellant stated in the motion that "[t]he photographs are not numbered so counsel will make specific objections to photographs in court after an identifying system is established." After reviewing Appellant's citations to the record regarding preservation, it appears that Appellant only specifically objected to four photographs (Commonwealth Exhibits 1, 2, 3, and 8). If Appellant objected to any other photographs, he does not cite them in his

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[21] Commonwealth v. Blakely, 223 S.W.3d 107, 109 (Ky. 2007) (citing Gilbert v. Barkes, 987 S.W.2d 772, 776 (Ky. 1999).

[22] Lanham, 171 S.W.3d at 27.

brief, nor are the objections to be found in the record near any of the pages which Appellant does cite. This Court is not required "to search the entire record to ensure the appeal was indeed properly preserved."[23] We therefore consider only Appellant's objections to Commonwealth Exhibits 1, 2, 3, and 8.[24]

All of the exhibits at issue depict Blakey's body in the morgue. Exhibit 1 depicts Blakey's face and head. There is blood and a large amount of foreign debris, including sticks and mud. A head wound on the right side of Blakey's head, behind the ear, is visible. Exhibit 2 more clearly depicts the head wound. A large patch of Blakey's scalp, above and behind his right ear, is separated from the skull. Again, there is blood and foreign debris.

Exhibit 3 depicts the back of Blakey's head after much of the foreign debris was cleansed away. The extent of the head wound is much more apparent. A very large portion of Blakey's scalp has been separated from his head, and his cracked skull is clearly visible. Exhibit 8 depicts Blakey's nude body from his chest to just below his knees. There are a number of bruises and abrasions, and tire tracks appear to be visible on Blakey's right hip. Blakey's genitals are also visible.

We review the admissibility of evidence only for abuse of discretion.[25] The test for determining whether the trial court abused its discretion is "whether the trial judge's

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[23] Hollingsworth v. Hollingsworth, 798 S.W.2d 145, 147 (Ky.App. 1990). See also CR 76.12(4)(c)(v) ("[The argument section of the brief] shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was property preserved for review and, if so, in what manner.").

[24] With regard to the photos that Appellant claims are cumulative, the objection was not properly preserved for appeal.

[25] Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000); Commonwealth v. English, 993 S.W.2d 941, 945 (Ky.1999). See also Ernst v. Commonwealth, 160 S.W.3d 744, 757 (Ky. 2005) (applying the abuse of discretion standard to the admission of crime scene photographs).

decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[26]

Appellant first argues that the photographs were not relevant pursuant to KRE 401,[27] because Blakey's injuries were not in dispute – only Appellant's participation was in dispute. However, we have repeatedly held that "the prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see."[28] In fact, the Commonwealth is entitled to prove every element of its case, even if the defendant pleads guilty.[29] The fact that Appellant did not argue the cause of death does not mean that the Commonwealth is not entitled to prove it. The cause of death is highly relevant in a Complicity to Murder case. Particularly in this case, where the Commonwealth had no evidence that Appellant participated in running over Blakey with the car, the fact that the head injuries contributed substantially to Blakey's death is highly relevant. The Commonwealth had to prove that Appellant intended to kill, or aid in killing, Blakey. The severity of the injuries tends to prove intent. Therefore, the severity of the injuries is relevant under KRE 401.

Next, Appellant argues that the photos were unduly gruesome, and their probative value is outweighed by their prejudicial effect. Therefore, Appellant argues, the photographs should have been excluded pursuant to KRE 403.[30] "The general rule

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[26] English, 993 S.W.2d at 945.

[27] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

[28] Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky. 1998).

[29] Thompson v. Commonwealth, 147 S.W.3d 22, 36 (Ky. 2004).

[30] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

is that a photograph 'does not become inadmissible because it is gruesome and the crime is heinous.'"[31] However, this general rule tends not to apply "when the condition of the body has been materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer."[32]

The photos at issue show Blakey's body several days after it was discovered. The first two photographs depict Blakey's body in the same condition as it was found. Blakey was discovered soon after his death; the record contains no evidence of decomposition or mutilation unrelated to the crime. The medical examiner took all of the photographs prior to performing the autopsy. While the photographs of Blakey are definitely unpleasant, they depict the body as it appeared as a result of the crime. We also do not believe that the mere fact that Blakey's genitals were visible, without something more, makes Exhibit 8 unduly prejudicial or appalling.

The photos are also far less gruesome and more probative than photos that this Court has deemed inadmissible.[33] When a trial court makes a KRE 403 ruling, it must consider three factors: "the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially

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[31] Love v. Commonwealth, 55 S.W.3d 816, 827-28 (Ky. 2001) (quoting Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992)).

[32] Clark v. Commonwealth, 833 S.W.2d 793, 794 (Ky. 1991). See also Funk, 842 S.W.2d at 479 ("[M]uch of what is shown on the photographs was not directly relevant to the issues because the body had been materially altered by animal mutilation, decomposition and other extraneous causes unrelated to the commission of the crime, conditions that tend to arouse passion and appall the viewer.") (internal quotations omitted).

[33] See Funk, 842 S.W.2d at 478 (decomposed corpse with "massive maggot infestation" had been mutilated by dogs, "so the photographs depicted neither the cause of death, nor the condition or location of the body at the time of death"); Clark, 833 S.W.2d at 795 (video depicted defendant's efforts to cover up crime, and not the condition of the body at the time of the murder); Holland v. Commonwealth, 703 S.W.2d 876, 879 (Ky. 1985) (animal mutilation).

outweigh the probative value."[34] On balance, we do not believe that the trial court abused its discretion when it admitted the photos.

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

All sitting. All concur, except Venters, J., not sitting.

[34] Barnett, 979 S.W.2d at 103 (citing Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996)).

COUNSEL FOR APPELLANT:

Shannon Renee Dupree
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Suite 301
Frankfort, KY 40601

COUNSEL FOR APPELLEES:

Jack Conway
Attorney General

Bryan Darwin Morrow
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601