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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-11-08 Ella Grant, D.C.

2006-SC-000590-MR

SCOTT MALM — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 05-CR-000371

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, VACATING AND REMANDING IN PART

Appellant, Scott Malm, was convicted of murder, two counts of first-degree robbery, first-degree assault, first-degree trafficking in a controlled substance, and tampering with physical evidence. He was sentenced to life without the benefit of probation or parole for the murder charge, to run concurrently with consecutive sentences totaling 75 years for the other charges. On appeal, Appellant alleges multiple errors: (1) that the trial court erred in sentencing him to consecutive sentences totaling 75 years, (2) that the trial court abused its discretion by not excluding testimony about subsequent bad acts, (3) that the trial court abused its discretion by allowing the prosecution to ask leading questions during direct examination, (4) that the trial court allowed the testimony of a witness despite his violation of the separation of witnesses order, and (5) that the trial court admitted gruesome photographs into evidence. For the reasons set forth herein, this Court affirms Appellant's convictions but vacates the

consecutive sentences totaling 75 years and remands for re-sentencing consistent with KRS 532.110(1)(c).

I. Background

According to testimony at trial, on the night of January 25, 2005, Archibaldo Salcedo-Diaz and Alvis Thomas Agee met with Appellant to participate in a drug deal. Appellant was to buy a half kilogram of cocaine from Agee for $13,000. Salcedo-Diaz obtained the cocaine for Agee, but did not know who the buyer would be. Salcedo-Diaz drove Agee to a nearby dog kennel where the drug deal was to take place. Because the buyer was not at the kennel when Agee and Salcedo-Diaz arrived, Agee borrowed Salcedo-Diaz's cellular phone, and called the purchaser. Moments later an older white car pulled in behind the truck. Agee got out of the truck and approached the driver side of the white car. Salcedo-Diaz testified that he looked into the car and saw one tall man with "big" afro-styled hair and light-complexioned skin. He identified the man during his testimony as the Appellant. Salcedo-Diaz also identified Appellant as the assailant during a photo lineup while in the hospital.

Agee returned to Salcedo-Diaz's truck to retrieve the cocaine and a scale, then walked behind the truck and began weighing the drugs. The driver of the white car got out and approached Agee. At that point Salcedo-Diaz turned his head to face forward, and moments later he heard multiple gun shots fired from behind the truck. When Salcedo-Diaz realized that he had been shot in the finger, he leaned against the door to avoid being shot again. The shooter then approached the driver side of the car and pulled Salcedo-Diaz out of the car. Salcedo-Diaz's eyes were closed, and he pretended to be dead. He felt an unknown metal object pressed against his neck while someone went through his pockets and took his wallet. Moments later the shooter got into the

white car and left the scene. Salcedo-Diaz then went to the back of the truck and saw Agee lying on his back, alive but badly injured. Salcedo-Diaz knocked on the door to the dog kennel, and when his knock went unanswered he returned to his truck and drove off, leaving Agee at the scene.

Salcedo-Diaz immediately went to his home to hide the marijuana that was in his truck, and then went to tell Agee's father that he and Agee had been shot. Agee's father accompanied Salcedo-Diaz to the scene where they found Agee dead, in the same position he was before Salcedo-Diaz left the scene. Agee's father then radioed for help. Police responded shortly thereafter.

While Salcedo-Diaz was at the University of Kentucky Medical Center undergoing treatment for the gunshot wound to his finger, Detective Matt Brotherton from the Lexington Police Department questioned him about the events leading to the death of Alvis Thomas Agee. Detective Brotherton discovered that the last number Agee dialed from Salcedo-Diaz's cellular phone matched the telephone number listed on Appellant's work application at Keeneland, where Appellant and Agee worked together. Appellant's photo was therefore placed in a photo lineup, from which Salcedo-Diaz identified Appellant as the assailant.

The police then obtained an arrest warrant, and later executed a search warrant for Appellant's townhouse. The search warrant led to the discovery of at least 100 grams of cocaine, weighing scales, plastic sandwich bags, marijuana, and other drug paraphernalia. A digital scale and two bags of cocaine totaling at least 17.9 grams were found in the 1993 Oldsmobile Cutlass that Appellant often drove. Additionally, Detective Dave Bochenek located blood on the interior driver side door window of the Oldsmobile.

Appellant had several roommates—Jennifer Faas, Bryan Hunter, Kelly Smith, and Jock Taylor—all of whom testified at trial. Jennifer Faas, Appellant's former live-in girlfriend, testified that she was the owner of the cell phone identified by the police as the last number dialed by Agee. She also confirmed that Appellant often used the phone as his own. Faas also testified that she was the owner of a white 1993 Oldsmobile Cutlass and that she would often let Appellant drive it while she worked. Faas works the night shift at Amazon.com and typically sleeps during the day. Faas was working the night of the shootings and Appellant had both her cell phone and her car that night.

Bryan Hunter gave conflicting testimony. First, during a taped statement, he denied having knowledge of the events surrounding the night of January 25, 2005. The second statement, in which Hunter implicated Appellant as the murderer of Agee, was not taped. At trial Hunter testified that at about 10:00 p.m. on January 25, 2005, Appellant returned to his townhouse with a package of cocaine. The package Appellant pulled out of his pocket appeared to have blood on it. Hunter testified that Appellant had previously spoken to him about robbing Agee of cocaine, so when Appellant returned with a package Hunter immediately knew what it was. Appellant, Hunter, Smith, and Taylor began breaking up and bagging the cocaine. The brown wrapping was tossed into the fireplace and burned, along with a wallet Appellant had brought home and the clothes Appellant had been wearing that evening. Appellant then directed Hunter and Taylor to clean certain areas of the car he had been driving.

Hunter also testified that Appellant admitted to having shot Agee in the face and shooting another man who was sitting in the truck, then pulling him out to be sure that he was dead. Over an objection, Hunter was allowed to testify about a subsequent drug deal that took place the day after the murder. He stated that on the evening of January

26, 2005, Appellant was robbed during a drug deal. The prosecution argued that the cocaine Appellant was robbed of on the evening of January 26th was the same cocaine he had stolen from Agee on January 25th.

Kelly Smith, Hunter's girlfriend, also testified for the prosecution. Her account of the evening of January 25th is similar to that of Hunter's. She stated that when Appellant returned that evening, they bagged the cocaine he had brought home and talked about the events of that evening. Additionally, she testified that Appellant had mentioned, prior to the murder, that he was going to rob Agee of his cocaine and that he may kill him. Smith also stated that she knew Appellant was going to rob Agee because he didn't have enough money to buy the quantity of cocaine he was intending on receiving. Smith also testified that she saw blood on the brown package of cocaine. She stated that they had separated the cocaine in order to calculate how much money was to be made from a subsequent sale. Smith corroborated Hunter's testimony by confirming that Appellant was robbed during the subsequent drug deal on January 26th. When she asked why he didn't use his gun, Appellant replied that he did not have it.

The final roommate, Jock Taylor, testified that Appellant had introduced Taylor to Agee a few days prior to January 25th and that Appellant mentioned that Agee was his supplier. He also testified that Appellant said he was going to do whatever it took to get the cocaine. Taylor was supposed to accompany Appellant on the evening of January 25th, but he fell asleep and Appellant went without him. Taylor stated that he knew that Appellant did not have enough money for the cocaine, and that Appellant had wanted Taylor to carry a pistol when he accompanied him on that evening. Taylor's testimony regarding Appellant's return home on the evening of January 25th mirrored the others' testimony, except that he admitted to having seen Appellant with a gun

before and after the meeting with Agee. Additionally he admitted to helping Appellant dispose of his gun by taking it apart and throwing the pieces out of the car window on the way to Paris, Kentucky, where Taylor worked. During the investigation, pieces of the gun were found along the side of the road on the way to Paris, Kentucky and turned into the Paris Police Department.

Appellant's roommates, with the exception of Taylor, testified that Appellant tried to get them to change their testimony or statements at some point before trial. Additionally, during a taped statement, Appellant admitted to having been robbed during a drug deal on the evening of January 26th, though he denied any involvement in the events of the evening of January 25th.

At trial, Appellant was found guilty of murder, two counts of first-degree robbery, first-degree assault, first-degree trafficking in a controlled substance, and tampering with physical evidence. He was sentenced to life without the benefit of parole for the murder. He was also sentenced to 20 years each on the robbery and assault charges and 5 years for tampering with physical evidence, all to run consecutively for a total of 75 years, to be served concurrently with the life sentence. Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. 70-Year Cap on Consecutive Sentences

The Commonwealth effectively concedes that the trial court violated KRS 532.110(1)(c) by sentencing Appellant to serve consecutive sentences totaling 75 years. Consecutive aggregate sentences are limited: "In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years . . . ." KRS 532.110(1)(c). The trial court's decision to sentence Appellant to serve consecutive

terms totaling 75 years is clearly a violation of the statute. This court vacates this sentence and remands to the trial court for re-sentencing in accordance with this Opinion.

B. Subsequent Bad Act Testimony

1. Direct Relation to the Trafficking Charge.

Next, Appellant argues that the trial court abused its discretion by allowing the jury to hear testimony from multiple witnesses describing a subsequent drug deal occurring one night after the murder of Agee. The statements Appellant objected to include elements of the prosecution's opening statement and the testimony of Detective Jody Sowers and Jennifer Faas. Appellant argues that the testimony concerning the subsequent drug deal is evidence of a subsequent bad act barred by KRE 404(b) as inadmissible to prove the character of an individual who acts in conformity with that behavior. KRE 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. . . ." Additionally, Appellant argues that there was no notice of the bad act testimony as required by KRE 404(c).

However, KRE 404(b) only applies to crimes and other bad acts that are not charged or the subject of the prosecution in question. Anderson v. Commonwealth, 231 S.W.3d 117, 120 (Ky. 2007); see also Smith v. Commonwealth, 366 S.W.2d 902, 906 (Ky. 1963) ("[A]ll evidence which is pertinent to the issue and tends to prove crime charged against defendant is admissible, although it may also prove or tend to prove the commission of other crimes by him or to establish collateral facts.").[1] The testimony

[1] While Smith v. Commonwealth predates KRE 404(b), the rule and modern cases interpreting it are "fully compatible" with the pre-Rules Kentucky case law. Robert G. Lawson, The Kentucky Evidence Law Handbook §2.25[2], at 125 (4th ed. 2003).

regarding the subsequent drug deal on the evening of January 26th was not evidence of a subsequent, uncharged bad act, but rather evidence of a charged crime, namely first-degree trafficking in a controlled substance. The indictment describes the charge of first-degree trafficking as occurring in January 2005, with no specific date. As such, the crime alleged was not limited to the deal on January 25th, as Appellant argues. In fact, Appellant committed the crime of trafficking through his possession of the cocaine with the intent to sell or otherwise distribute it; thus, he was committing the crime the entire time he possessed the drugs, which includes the drug deal on January 26, 2005. Thus, the testimony in question was offered to support the conviction for drug trafficking—not a subsequent bad act, but rather the offense charged. The testimony Appellant complains of simply is not barred by KRE 404(b) because it is directly connected to the charge of drug trafficking. (Appellant's claim of insufficient notice under KRE 404(c) is therefore rendered moot and is not applicable to the present case.)

2. Hearsay

Although it was included in the "other bad acts" discussion in his brief, Appellant also argues that the court permitted the use of hearsay evidence during the testimony of Bryan Hunter. This testimony related to a conversation between Appellant and Taylor, from which Hunter overheard that "Jock had a friend that wanted the coke, most of it."

The trial court overruled the hearsay objection and stated that the testimony of the conversation overheard by Hunter between the Appellant and another roommate was not hearsay because it was not offered to prove the truth of what was said, but rather offered to prove that Appellant was involved in another drug deal, which went to proving the trafficking charge (as discussed above). Additionally, the trial court noted

the statement was used to prove why Appellant was going to a specific location, not that Jock's friend wanted a quantity of cocaine.

While the trial court's admission of Hunter's testimony was correct, a more appropriate basis for admission is under the hearsay exception of statements by a coconspirator. "A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy." KRE 801A(b)(5). A conspiracy in this context is an agreement between two or more individuals to commit a crime. Robert G. Lawson, The Kentucky Evidence Law Handbook §8.30[3], at 608 (4th ed. 2003) [hereinafter Lawson, Kentucky Evidence]. The statement, "Jock had a friend that wanted the coke, most of it," was repeated during Hunter's testimony describing his perception of a conversation between Taylor and Appellant. The context of this conversation was that Taylor was to set up a drug deal for Appellant to sell a quantity of cocaine. Further evidence that Taylor was a coconspirator, for purposes of the KRE 801(a)(5) exception was that he also agreed to accompany Appellant on the previous drug deal on January 25th and helped to package the cocaine on that evening. For the coconspirator exception to apply, there need not be a formal charge of conspiracy against either the party or the declarant. Lawson, Kentucky Evidence §8.30[3], at 608; see also United States v. Smith, 596 F.2d 319 (8th Cir. 1979). This Court concludes that Taylor was thus acting as a coconspirator in Appellant's drug trafficking crime for hearsay purposes.

Along with the requirement of an actual conspiracy, the statement offered must be "during the course and in furtherance of" such conspiracy. Lawson, Kentucky Evidence §8.30[3], at 608. The conversation between Taylor and Appellant was in

furtherance and during the course of a conspiracy to commit the crime of drug trafficking. A conspiracy has commenced as soon as an agreement to commit a crime is reached, and is terminated when either there is an accomplishment of the objective or an unqualified and permanent abandonment of the objective. Id. §8.30[3], at 608. Taylor's own testimony established that he assisted Appellant in packaging the cocaine on the evening of January 25, 2005. Hunter testified that the conversation he overheard between Taylor and Appellant was regarding the cocaine packaged on January 25th. The conspiracy had begun at least as early as the packaging of the drugs and continued until the attempt to sell the cocaine that resulted in the robbery of Appellant. The conversation overheard by Hunter was within that time frame and thus was "during the course" of the conspiracy. The statements overheard by Hunter were also "in furtherance of" the conspiracy. As Professor Lawson has noted, statements designed to advance the objectives of a conspiracy satisfy the "in furtherance" language of the statute. Id. §8.30[3], at 608. Taylor's participation in supplying the client for the January 26th drug deal clearly advanced the objective of completing a drug deal, and was thus "in furtherance" of the conspiracy to commit the crime of drug trafficking.

Thus, this Court concludes that the hearsay statement was properly admissible as a statement by a coconspirator under KRE 801A(b)(5). Although the trial court articulated a different rationale for the admission, its decision was nevertheless correct, and thus the trial court's decision will stand. Newman v. Newman, 451 S.W.2d 417, 420 (Ky. 1970) (trial court's decision to grant a summary judgment for an erroneous reason was proper on another ground, and thus the trial court's decision was upheld).

Arguably, Hunter's testimony was also admissible as an adoptive admission by Appellant. KRE 801A(b)(2) states: "A statement is not excluded by the hearsay rule,

even though the declarant is available as a witness, if the statement is offered against a party and is . . . [a] statement of which the party has manifested an adoption or belief in its truth." KRE 801A(b)(2). As the Seventh Circuit Court of Appeals has noted,

> [A] manifestation of a party's intent to adopt another's statements, or evidence of the party's belief in the truth of the statements, is all that is required for a finding of adoptive admission. In the present case, not only did Slaughter frequently agree with Wells and participate in the give and take of the telephone conversation, the evidence also demonstrated that Slaughter completed the drug deal that he and Wells agreed to during those conversations.

United States v. Rollins, 862 F.2d 1282, 1296 (7th Cir. 1988). Although there are factual variations in the Rollins case and the case at hand, the language of the opinion in that case implies that being an active participant in a conversation, along with completion of the act conversed about, is evidence that the parties have adopted the content of the conversation.[2] Hunter's testimony indicates that Appellant and Taylor were talking about Taylor having friends who would want the cocaine. The evidence shows that Appellant actively participated in the conversation, and that the drug deal spoken of during the conversation was completed and led to the robbery of Appellant on January 26th. Thus, the testimony of Hunter regarding the conversation between Appellant and Taylor was also admissible because the statements made were an adoptive admission by the Appellant.

Finally, Appellant also argues that a statement made by Hunter, implicating other recent robberies, and other admissions of bad acts denied Appellant of a fair trial. However, the court admonished the jury regarding Hunter's statement. Moreover, with

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[2] The relevant facts of the Rollins case are Wells was a government informant for the FBI. Wells was to set up a drug deal with Slaughter. To set up the deal, Wells made a series of six telephone calls to Slaughter that an FBI agent monitored with Wells's permission. These telephone calls were the source of the finding of an adoptive admission by Slaughter, a defendant in the case.

respect to the other bad acts, we have established that such testimony was directly related to the specific crimes for which Appellant was on trial.

3. Opening the Door

Appellant claims that the trial court erred in admitting the testimony of Jennifer Faas about her seeing Appellant with cocaine in the house on "many" other previous occasions. On direct examination of Faas, the prosecution asked if she had observed any sandwich baggies in the room she shared with Appellant, to which Faas answered that she was aware that there had been one baggie, because when Appellant used cocaine, he usually did it in their room. The defense objected because the testimony referred to a prior bad act. The judge then instructed the Commonwealth to move on, and the prosecution proceeded. During cross-examination, the defense asked if Faas had seen cocaine in the apartment before, and whether she has seen the other roommates doing cocaine. The defense specifically asked about cocaine use by Smith, Hunter, and Taylor, to which Faas answered in the affirmative, except as to Jock Taylor. The defense did not inquire as to Appellant's use of cocaine. On redirect, the prosecution reminded Faas of the questions during cross-examination, specifically the question asked about whether she had seen Appellant's roommates using cocaine in the home. The prosecution then asked whether Faas had seen Appellant with cocaine, to which she responded yes, and the prosecution then asked on how many occasions. The defense then objected.

The prosecution justified the line of questioning by stating that the defense had "opened the door" when he asked if Faas had seen the roommates in the house using cocaine, while conveniently excluding Appellant. The prosecution stated that because the defense asked general questions first, then specifically about Smith, Hunter, and

Taylor, the prosecution had the right to ask specifically about Appellant. The trial court allowed the testimony, agreeing that Appellant's attorney had "opened the door" during his examination of Faas. Faas then stated that she had seen Appellant with cocaine "a lot" in their home.

Professor Lawson describes the concept of "curative admission" or "opening the door" as follows:

> 'The term "opening the door" describes what happens when one party introduces evidence and another introduces counterproof to refute or contradict the initial evidence. . . .If the first party objects to the counterproof, or loses the case and claims error in admitting it, typically the objection or claim of error is rejected because he opened the door.'

Lawson, Kentucky Evidence §1.10[5], at 43 (quoting Mueller & Kirkpatrick, Federal Evidence § 12 (2d ed. 1994)) (ellipsis in original). The door is essentially opened when the initial party offers inadmissible testimony, and the opposing party offers otherwise inadmissible evidence to counter the initial inadmissible evidence. The defense has essentially waived the right to object by initially introducing inadmissible evidence.

This line of questioning by the defense implied that the cocaine and baggies belonged to someone other than Appellant. When the defense omitted Appellant from the list of those seen using cocaine in the home, the clear implication was that the cocaine and baggies did not belong to Appellant. The prosecution then countered that testimony by specifically asking about Appellant's prior use of cocaine during cross examination. This was proper rebuttal of the defense's questions implying that the cocaine belonged to the other roommates and not to Appellant. The door was opened for the prosecution to present rebuttal by otherwise inadmissible evidence, i.e., the questioning regarding Appellant's use of cocaine, that contradicted the implication that Appellant did not own the baggies and cocaine. To put it another way, "the appellant[],

having opened the book on the subject w[as] not in a position to complain when [his] adversaries sought to read other verses from the same chapter and page." Harris v. Thompson, 497 S.W.2d 422, 430 (Ky. 1973).

C. Leading Witnesses on Direct Examination

Appellant asserts that the Commonwealth's chronic use of leading questions during the direct examination of several witnesses, including Salcedo-Diaz, Hunter, and Taylor effectively denied Appellant a fair trial. Specifically, Appellant claims that the extensive use of leading questions during Salcedo-Diaz's testimony was a "shocking miscarriage of justice" and thus deserving of a mistrial.

KRE 611(c) states, "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. . . ." Kentucky has historically prohibited the use of leading questions during direct examination. Lawson, Kentucky Evidence §3.20[6], at 245-246. However, allowing the use of leading questions on direct examination is within the discretion of the trial court and is not grounds for reversal unless there is an abuse of discretion and a shocking miscarriage of justice. Tamme v. Commonwealth, 973 S.W.2d 13, 27 (Ky. 1998).

Salcedo-Diaz was not fluent in English and required an interpreter throughout his testimony. Appellant conceded that the language barrier required the use of some leading questions. There is no evidence, upon review of the direct examination, of any abuse of discretion by the trial court and no shocking behavior that would constitute any miscarriage of justice during this portion of the trial. The test for abuse of discretion is whether the trial court decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principle. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581

(Ky. 2000); see also Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The language barrier was significant enough to allow the use of the leading questions in this case. The trial court's allowance of the technique was not arbitrary or unreasonable.

The use of leading questions during Brian Hunter's direct examination was more limited. The questions themselves involved 1) whether Smith was helping Appellant "weigh it up"; 2) whether Hunter saw any blood when cleaning the car, which produced a "No" answer; and 3) whether the cocaine used in the deal was the same cocaine from the night before. This last question led the trial court to sustain an objection. Additionally, the record indicates that Hunter was unable to remember many details of that evening, and/or being evasive during his testimony. As KRE 611(c) establishes, leading questions may be used to help in the development of a witness's testimony. Hunter's lack of memory on specific issues and his "evasive" conduct, as the trial court put it, provided a need for some leading questions. There is no indication that the questions asked, and the answers they produced, were prejudicial to the extent that their admission would be a shocking miscarriage of justice and an abuse of discretion. Thus, it was not an abuse of the trial court's discretion to allow the use of leading questions during Hunter's testimony.

The prosecution also used some leading questions during Jock Taylor's testimony. The leading questions objected to at trial, and identified in Appellant's brief were: 1) whether Agee came into and sat down in the apartment where Appellant and Taylor lived (the answer was in the negative); and 2) whether Appellant was smiling when he came into the home that evening (the answer was in the affirmative). Again, there is no indication that the answers to these questions, leading or not, effected a miscarriage of justice.

D. Separation of Witnesses Violation

Appellant argues next that the trial court abused its discretion when allowing Brian Hunter to testify despite his violation of a separation of witnesses order. The trial court approved the separation order at the request of the Commonwealth pursuant to KRE 615. This order was to apply only to material witnesses, and was announced at the commencement of the trial. During the testimony of the medical examiner, Brian Hunter, a key witness for the Commonwealth and roommate to Appellant, was observed in the courtroom despite the separation order. The record indicates that Hunter was present for approximately five to ten minutes before the prosecutor escorted him out of the courtroom. According to Hunter, he heard the portion of the medical examiner's testimony that described the wounds inflicted upon Agee, specifically that he had been shot in the face and chest, that his lungs had filled up with blood, and that there was evidence of cocaine and valium in his system. During a bench conference, a detective's memorandum was discussed, which stated that Hunter and Smith stated that Appellant told them that he shot Agee in the face. The prosecutor also stated that Hunter had previously and on multiple occasions stated the same prior to trial. During Hunter's testimony, the only statement regarding the murder of Agee was to indicate that Appellant had told him that when Agee approached Appellant's car, Appellant shot Agee in the face.

While KRE 615 removes any discretion whether to separate the witness from the trial court by requiring the granting of a separation order at the request of either party, unless a specific exception applies, the trial court does have broad discretion over whether to permit a witness to testify after violation of the separation order. Henson v. Commonwealth, 812 S.W.2d 718. (Ky. 1991); see also Lawson, Kentucky Evidence

§11.30[2], at 890. The purpose of KRE 615 is to prevent witnesses from hearing other testimony and to keep witnesses from tailoring their testimony to conform to that of others. Smith v. Miller, 127 S.W.3d 644, 646 (Ky. 2004). Additionally, while exclusion of the testimony of a witness who has violated a separation order can be an appropriate remedy, such testimony is not subject to automatic exclusion (or admission). Essentially, a "violation without prejudice would not entitle a party to any relief." Id. at 647.

The trial court permitted Hunter to testify only after considering the importance of his testimony and the effects of his overhearing the medical examiner's testimony. Additionally, the trial court inquired whether Hunter was aware of the information regarding the death of Agee prior to violating the separation order.[3] The trial court properly exercised its discretion by inquiring into whether Hunter's testimony would be prejudicial. The trial court did not abuse its discretion because the decision to permit the testimony was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky. 2006).

E. Admissibility of Photographs

Appellant finally argues that the photograph of Salcedo-Diaz's injured finger and the scene of the shooting were unduly prejudicial, irrelevant, inflammatory, repetitive, and "without probative value." Specifically, he claims that the photograph of the gunshot wound to Salcedo-Diaz's finger was too gruesome, and that a group of sixteen photos depicting the area where the Appellant's gun was discarded was "needless

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[3] Evidence of an affirmative answer is in a detective memorandum which stated that Hunter and Smith previously spoke of Appellant admitting to shooting Agee in the face.

cumulative evidence." These photos were essentially of the roadway, trees, and bridges of the surrounding area.[4]

In determining admissibility of the photographs, this Court must first consider whether the photos are relevant. Relevant evidence is defined as "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. The photograph of the gunshot wound to Salcedo-Diaz's finger was relevant in demonstrating the physical harm inflicted as a result of the Appellant's assault. Appellant argues that the physical harm could have been shown, without prejudice, by Salcedo-Diaz showing his healed finger to the jury. However, the photograph of the fresh wound was the best evidence to show the extent of the injury and was therefore relevant in showing the actual physical harm inflicted on Salcedo-Diaz to prove an element of the first-degree assault charge.

Next, the admissibility of photos must be examined under KRE 403, which states: "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 (emphasis added). More specifically, this Court must discern whether the photographs were sufficiently gruesome so as to find the probative value "substantially outweighed" by the prejudicial effect. As a general rule, photographs do not become inadmissible simply because they are gruesome. Foley v. Commonwealth, 953 S.W.2d 924, 936 (Ky. 1997). Such evidence loses its admissibility when the

[4] Appellant claims that the second group of photos were from the crime scene; however the record indicates that the photos were actually of where the Appellant discarded his gun.

photographs begin to depict a body that 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." Clark v. Commonwealth, 833 S.W. 2d 793, 794 (Ky. 1991). The single photo of Salcedo-Diaz's wounded finger was gruesome relative to his healed finger; however, the threshold is much higher than mere gruesomeness for a photo to be inadmissible. For example, a photograph of a young child victim, where his scalp was pulled back to show there was an intent to kill, was not gruesome enough to preclude the photo evidence from the jury. Quarels v. Commonwealth, 142 S.W.3d 73 (Ky. 2004). In another case, a videotape of the murder scene showing burned bodies of victims, as well as numerous photographs depicting the same, were an accurate description of the crime scene and were properly admissible. McKinney v. Commonwealth, 60 S.W. 3d 499 (Ky. 2001). The photograph of Salcedo-Diaz's finger was properly admitted because it depicted the injury accurately, and is not so gruesome so as to preclude the photograph from evidence. The photograph was properly admitted.

The sixteen photographs of the area where the Appellant's gun was discarded were relevant in proving location of the crime and where the gun was disposed. This volume of photographs, especially when they depict only locations, simply is not great enough to create undue prejudice. The trial court has broad discretion in the admission of photographs as evidence. Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2001). The trial court did not abuse this broad discretion by admitting the sixteen photographs of the location of the gun; its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Brewer, 206 S.W.3d at 320.

III. Conclusion

For the foregoing reasons, Appellant's convictions are affirmed; however, his separate 75-year consecutive sentence is vacated and this matter is remanded for re-sentencing in conformity with this Opinion.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J., not sitting.

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