

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2006-SC-000679-MR

FINAL

DATE 2/12/09 Kelly Klaben D.C.
APPELLANT

JAMES ANTHONY LANE

V.
ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 05-CR-00170

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After a four-day trial, a jury convicted James Anthony Lane of the murder of Jeremy Latham. The trial court sentenced Lane to life in prison. He appeals his conviction as a matter of right,¹ raising a number of alleged trial court errors, only some of which are properly preserved. We affirm the conviction.

I. FACTUAL AND PROCEDURAL HISTORY.

A trucker came upon the body of Jeremy Latham on the roadside. It appeared that Latham died as the result of wounds inflicted by gunshots fired at close range. Within a few days of the discovery of the body, Shatonya Elam, who initially professed ignorance about the shooting, gave a statement to police

¹ Ky. Const. 110(2)(b).

that while she was babysitting at the apartment shared by Lane and his girlfriend, Constance Johnson, she overheard them discussing Latham's murder.

Police then questioned Johnson, who told them that on the morning of Latham's murder, a masked male intruder entered the apartment after Lane left for work and demanded drugs and money. After a struggle, the intruder escaped without taking anything but not before Johnson had succeeded in lifting the intruder's mask just enough to inflict scratches on, and catch a glimpse of, the intruder's face. Johnson identified Latham as the intruder, based on the sound of his voice and the view of the portion of his face. Johnson said that she was familiar with Latham because she and Lane had sold marijuana to him before.

Johnson said Lane returned home after learning of the robbery and picked up two handguns. Later that day, Latham telephoned the apartment wanting to buy marijuana. So Lane and Johnson took Johnson's car to meet Latham ostensibly to make the sale. At the agreed rendezvous point, Latham got into the backseat of Johnson's car; and all three drove to the lane where Latham's body was later found. Johnson said that once Latham was inside the car, Lane accused Latham of the apartment robbery; and Lane shot Latham, who jumped from the moving vehicle.

Witnesses at the scene identified a vehicle matching the description of Johnson's car, driven by persons generally matching Lane's and Johnson's appearance. The state police seized Johnson's car after a consent search

revealed bloodstains in the back seat. A state police firearms and tool examiner later testified at trial that a spent bullet found inside Johnson's car was similar to two bullets removed from Latham's body at the autopsy.

A grand jury indicted Lane on charges of murder and first-degree robbery. At trial, Lane was convicted of murder and acquitted of robbery. The trial court followed the jury's recommendation and imposed a sentence of life imprisonment.

II. ANALYSIS.

A. No Error in Denial of Lane's Request for Second Continuance.

Lane argues that the trial court abridged his right to a fair trial by refusing to grant him a continuance. Three days before trial, Lane's counsel received from the Commonwealth an assortment of video and audio tapes of witness interviews. On the morning of trial, Lane's counsel announced to the trial court that Lane was ready for trial. Following that announcement, jury selection proceeded to completion; and the jury was selected and sworn.

On the second day of trial, Lane's counsel requested a continuance, claiming that Lane felt that he had not had adequate time to consult with his counsel about the taped witness statements. Lane did not move for a mistrial. The trial court granted Lane's counsel's request, allowing a one and one-half day's continuance so defense counsel could review the tapes. When the trial resumed—a total of six days after the day on which the Commonwealth furnished the taped statements—Lane asked for more time, citing the same grounds. This time, the trial court declined a further continuance and trial

proceeded. Lane made no motion for a mistrial at that time. After his conviction, Lane asked for a new trial based upon the trial court's failure to grant the second continuance.

Except for good cause shown, the prosecution must produce 48 hours before trial all written or recorded witnesses' statements relating to the subject matter of their testimony.² Even strict interpretation of the time requirements in this rule does not compel reversal if they are breached; rather the aggrieved party must show actual prejudice.³ While Lane acknowledges that he received all recorded statements more than 48 hours before the trial, he claims he is entitled to reversal because the intent of this rule was not satisfied in this instance. We disagree. The intent of this rule is simply to require the Commonwealth to share all witness statements 48 hours before trial. When the statements were produced ahead of the deadline, the Commonwealth fulfilled its obligation.

Lane argues that because the trial court did not grant him the second continuance, his defense was prejudiced. To show identifiable prejudice, Lane points to his unsuccessful attempt to impeach Johnson through cross-examination. Johnson testified on direct that the intruder into the apartment threatened to kill her. Lane's trial counsel played a tape of Johnson's statement believing it would show that Johnson had not mentioned this death

² Kentucky Rules of Criminal Procedure (RCr) 7.26(1).

³ Beaty v. Commonwealth, 125 S.W.3d 196, 202 (Ky. 2003).

threat in her pretrial statement. But the tape showed just the opposite. Lane blames this aborted impeachment attempt on the fact that he did not have enough time to review adequately Johnson's statement because the trial court denied the second continuance.

The decision about whether to postpone trial proceedings is within the sound discretion of the trial court.⁴ Lane's trial counsel had all of the recorded statements for at least six days before testimony actually began—some for even longer. Despite the fact that defense counsel informed the trial court that the defense was prepared to go forward on the first day of trial, the trial court granted Lane a reasonable continuance on the second day of trial to allow defense counsel to concentrate on reviewing the witness tapes in advance of their testimony. Under these circumstances, we cannot agree that the trial court abused its discretion when it declined Lane's request for a second postponement of the ongoing trial.

B. No Error in Introduction of Autopsy Photos.

Lane argues the trial court prejudiced his right to a fair trial by allowing the introduction into evidence of photographs of Latham's body taken during the autopsy. Lane argues that since he stipulated to the fact that Latham died as a result of gunshot wounds, the Commonwealth lacked a probative basis for introducing these photographs at trial. Lane argues that the Commonwealth

⁴ Williams v. Commonwealth, 644 S.W.2d 335, 336-37 (Ky. 1982).

introduced them improperly to arouse the jury's sympathy, resulting in a verdict "based on emotion instead of reason."

The decision about whether to admit evidence is within the sound discretion of the trial court, whose decision will not be overturned unless the reviewing court finds an abuse of discretion.⁵ Generally, photographs that are otherwise admissible do not become inadmissible simply because they are gruesome and the crime is heinous.⁶ Because these photographs depicted the circumstances and causes of Latham's death, there is no question that they were relevant. So the question becomes whether the unquestionably prejudicial effects of these photographs substantially outweighed their probative value.⁷

A review of the record indicates the autopsy photographs were used to illustrate the medical examiner's testimony. The medical examiner testified that the cause of Latham's death was multiple gunshot wounds. And the photographs allegedly supported the Commonwealth's theory of the case that Latham was shot at close range. The medical examiner testified that the black soot around one of the wounds on Latham's body indicated that the weapon had been pressed against Latham's body when it was fired. This is consistent with the prosecution's theory that the shooting was intentional. Furthermore,

⁵ Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

⁶ Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992).

⁷ Greene v. Commonwealth, 197 S.W.3d 76, 85 (Ky. 2006). *See also* Kentucky Rules of Evidence (KRE) 401, 403.

autopsy photographs were used to illustrate the medical examiner's testimony that Latham showed signs of lacerations from blunt-force trauma, which the Commonwealth argued was caused when Latham jumped or was thrown from Lane's moving automobile. Lastly, the medical examiner testified that the abrasions on Latham's face were not consistent with fingernail scratches. The defense's stipulation as to the cause of death did not conclusively resolve all issues relating to the circumstances of Latham's death. And even if it had, this stipulation would not prevent the Commonwealth from introducing the autopsy photographs into evidence.⁸ Because the probative value of the autopsy photographs is not substantially outweighed by their prejudicial effect, we find no abuse of discretion; and the photographs were properly admitted.

C. Unpreserved Issues of Appeal and Review For Palpable Error.

Lane's remaining issues on appeal were not properly preserved for review. As such, we will review them only for palpable error. A palpable error is one that "affects the substantial rights of a party" and "may be considered . . . by an appellate court even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."⁹ In order to find manifest injustice, the appellate court "must plumb the depths of the

⁸ Payne v. Commonwealth, 623 S.W.2d 867, 877 (Ky. 1981) ("This court knows of no rule or principle of law that requires the Commonwealth's Attorney to try his case by stipulation.").

⁹ RCr 10.26.

proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.”¹⁰

1. No Error in Trial Court’s Comment Regarding Detective Smith.

Lane argues that the trial judge improperly vouched for the credibility of prosecution witness Detective Leonard Smith. Lane’s counsel and Detective Smith engaged in a contentious verbal exchange during cross-examination. Lane’s counsel questioned Smith, attempting to show the improbability of Latham’s having made a cell phone call at 10:55 a.m. before having been found dead on the roadside by 11:00 a.m. When Detective Smith would not give what defense counsel considered to be a responsive answer, defense counsel asked the court to direct the witness to answer the question. The record reflects that the trial court made the following statement:

Ask him the question as a hypothetical, Mr. Cameron. Ask him if he thinks someone could get from Jan Drive to the scene of the crime in five minutes. I’ll ask him. Do you think that if Mr. Latham, the victim, was picked up on Jan Drive as the testimony indicates, could a car be driven from that Jan Drive location to the scene where his body was found within five minutes?

Lane claims these remarks by the trial court prejudiced his defense. To support this, Lane points to laughter in the courtroom that is audible on the record during the trial court’s statement. That statement, Lane argues, “implicitly informed the jury of [the trial court’s] feelings about the defense counsel.” Yet, Lane does not suggest what these “feelings” might have been; and we cannot discern them from the record. The defense, dissatisfied with the

¹⁰ Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

responses provided by Detective Smith, invited the trial court's intervention. The trial court has an obligation, within reasonable limits, to bring out the facts in the case before it.¹¹ Even though laughter is audible following the trial court's comments to defense counsel, we find nothing to suggest that the comments or ensuing laughter prejudiced the defense. So we cannot ascribe any palpable error to these statements by the trial court.

As cross-examination continued, Lane, through counsel, attempted to find out whether Detective Smith had actually independently verified the amount of time required to navigate the route described in the testimony. When he admitted he had not, the trial judge interjected, "[Detective Smith] was an officer in this county for years. I think he knows how long it would take to get from Jan Drive to Caskey Lane." While the better practice would have been for the trial court to refrain from interjecting itself further with this comment, we cannot conclude that this single remark rises to the level of manifest injustice needed before reversal is warranted. And we find no palpable error here.

2. No Error in Limiting Cross-Examination of Shatonya Elam.

Lane argues that he was denied due process when the trial court limited the scope of his cross-examination of prosecution witness Shatonya Elam. Elam was stopped by police for speeding three days after Latham's murder; and she initially gave the police a false name and address, which resulted in

¹¹ Transit Authority of River City (TARC) v. Montgomery, 836 S.W.2d 413, 416 (Ky. 1992).

her arrest. Elam later gave a statement to police implicating Lane, and she was released without being charged. At trial, the court sustained the Commonwealth's objection to Lane's attempt to cross-examine Elam regarding her arrest, but permitted Lane to ask Elam about any deal she might have made with the Commonwealth in exchange for her statement and trial testimony.

At no time did Lane present, or even seek to present, the excluded testimony from Elam by avowal.¹² Since the issue is not properly preserved by a proper avowal, we review only for palpable error.

Trial courts are vested with authority to impose reasonable limitations on the scope of cross-examination "so long as a reasonably complete picture of the witness's veracity, bias, and motivation is developed"¹³ A review of the record indicates that despite the trial court's limitation upon Elam's cross-examination, Lane's trial counsel forced Elam to admit that the police threatened to charge her with complicity to murder if she did not give them a statement, thereby demonstrating Elam's possible motivation to testify favorably for the Commonwealth. Accordingly, we do not find that the trial court's decision to limit the scope of Lane's cross-examination of Elam was an abuse of discretion, much less a palpable error.

¹² Before the 2007 amendment of KRE 103(a)(2), avowal testimony was required to preserve exclusion of evidence for appellate review. The current Rule allows a proffer of evidence by the attorney to preserve the objection; however, this trial was conducted before that amendment.

¹³ Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky.1997) (*quoting* U.S. v. Boylan, 898 F.2d 230, 254 (1st Cir. 1990)).

3. No Error in Commonwealth's Statements Regarding Reasonable Doubt Standard.

Lane claims the Commonwealth improperly defined reasonable doubt during voir dire when the prosecutor couched the matter in the form of a hypothetical question involving a trip to South Dakota to view Mount Rushmore. The prosecutor asked the prospective jurors if they would have any reasonable doubt that they were looking at Mount Rushmore if the view of one of the four figures carved into the mountainside were hidden by clouds. This hypothetical question apparently illustrated the prosecutor's explanation that "beyond a reasonable doubt" was the standard to which the prosecution is held rather than "beyond a shadow of a doubt." Lane argues that this hypothetical question violated his right to due process and a fair trial.

Our jurisprudence holds that reasonable doubt is not to be defined for the jury, whether in the jury instructions¹⁴ or by counsel at trial.¹⁵ But we have recently held that any error in the prosecutor simply stating in voir dire that the standard is not beyond a shadow of a doubt (without engaging in hypotheticals or lengthy discussion) was harmless.¹⁶ And a review of the record indicates that the prosecutor prefaced his Mount Rushmore hypothetical question by stating, "Now what does beyond a reasonable doubt

¹⁴ RCr 9.56(2).

¹⁵ Commonwealth v. Callahan, 675 S.W.2d 391, 392 (Ky. 1984).

¹⁶ Johnson v. Commonwealth, 184 S.W.3d 544, 550 (Ky. 2005).

mean? We don't have a definition." Accordingly, we do not find the prosecutor's statement to be palpable error.

4. No Palpable Error by "Victim Impact Propaganda."

Lane argues that he did not receive a fair trial before an impartial jury because of what he describes as "victim impact propaganda." Before voir dire, the prosecutor noted an unspecified number of spectators wearing t-shirts bearing slogans supporting the victim. The trial judge ordered that the t-shirts could be worn in the courtroom but not by witnesses when they were testifying. Lane's counsel did not object to this order, so we review this issue only for palpable error.¹⁷

Lane characterizes these t-shirts as victim-impact evidence, which is inadmissible during the guilt phase of a trial. But we find nothing in the record to reflect that these shirts were made a part of the evidence during the trial. And the record lacks any suggestion, and Lane does not argue, that these shirts appeared in the courtroom at any time after the trial started. When a similar issue was properly preserved for review by this Court, we held no error occurred when the aggrieved party could only cite to a single instance of t-shirt propaganda before trial.¹⁸ Accordingly, we are unable to conclude from this

¹⁷ In his brief, Lane contends that since the trial judge was aware of the issue, it was adequately preserved. But a failure to pursue relief at the trial level waives the right to appellate review. Wilcher v. Commonwealth, 566 S.W.2d 812, 813 (Ky.App. 1978).

¹⁸ Coulthard v. Commonwealth, 230 S.W.3d 572, 576 (Ky. 2007).

record that a palpable error occurred as a result of the allegedly offending t-shirts.

5. No Palpable Error Shown in Excessive Victim-Impact Testimony.

Lane claims he is entitled to a new penalty phase of the trial, arguing the trial court erred when it allowed the prosecution to present victim-impact testimony from both Latham's sister and his wife. Kentucky Revised Statutes (KRS) 532.055(2)(a)(7) authorizes victim testimony regarding the impact of the crime after a determination of guilt.¹⁹ KRS 421.500(1)(b) allows designation of a relative to offer victim-impact evidence when the victim is deceased and establishes the priority of relatives that may be designated as the victim.²⁰ At the time of Lane's trial, the language of these statutes only permitted one victim-impact witness to give testimony at the sentencing phase of a felony trial.²¹ Therefore, under the statutes in effect at the time of trial, it appears the trial court erred when it permitted more than one of the victim's relatives to testify at the sentencing phase.

However, this error is unpreserved for our review so we review only for palpable error. Palpable error will be found only where a movant shows

¹⁹ At the time of Lane's trial, KRS 532.055(2)(a)(7) only explicitly permitted the presentation of evidence of "impact of the crime upon the victim" The 2008 Amendments to KRS 532.055(2)(a)(7) now explicitly permit the presentation of evidence of "impact of the crime upon the victim or victims"

²⁰ At the time of Lane's trial, KRS 421.500(1)(b) only provided that one relative could be designated as the "victim" if the actual crime victim was deceased. The 2008 Amendments to KRS 421.500(1)(b) now provide for the designation of multiple "victims" where the actual crime victim is deceased.

²¹ Terry v. Commonwealth, 153 S.W.3d 794, 805 (Ky. 2005) (construing language of versions of KRS 532.055 and KRS 421.500 then in effect prior to 2008 Amendments).

“probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.”²² Because Lane has not made this showing in our view, a new sentencing hearing is not warranted.

6. No Palpable Error in Comment on Lane’s Silence.

During the Commonwealth’s direct examination of Detective Smith, the following exchange took place between the prosecutor and Smith:

Q: Now when Mr. Lane was arrested, James Lane, he had an attorney.

A: Right.

Q: And he was asked did he want to make a statement and he said, “I do not want to make a statement.” Is that correct?

A: Correct.

Lane’s trial counsel did not object to this testimony until the following day when moving for a mistrial. Since the objection was not made timely, the issue was not properly preserved for appeal by a timely objection. Again, we review for palpable error.

Later, the Commonwealth mentioned the fact of Lane’s declining to make a statement in its closing argument, stating:

As I stated, when he was arrested, with his attorney, he was asked did he want to make a statement to the police, and he, through his attorney, with his attorney, said, “I do not want to make a statement at this time.”

²² Martin, 207 S.W.3d at 3.

Defense counsel objected to this statement; but the trial judge overruled the objection, stating that the prosecutor's assertion was proper in closing argument since the assertion had come into evidence without objection.

The guarantee of due process prohibits the Commonwealth from introducing evidence or commenting in any manner on the defendant's silence once the defendant has been informed of his rights and taken into custody.²³ But not every comment rises to the level of a due process violation. When analyzing such comments, such as those in the exchange between the prosecuting attorney and Detective Smith, our precedent directs us to determine whether the comment at issue is "reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent."²⁴ In a case involving a preserved objection on this point, this Court held that it was not reversible error when an investigating officer responded under questioning at trial by the prosecuting attorney that the defendant simply "wouldn't talk" when questioned by police following his arrest.²⁵ We reach a similar result here. While we do not approve of the prosecutor's mention of Lane's silence during closing argument, we cannot conclude that palpable error resulted.

²³ See Romans v. Commonwealth, 547 S.W.2d 128, 130 (Ky. 1977) ("During the course of the trial the Commonwealth was permitted over objection to elicit from a police detective, and also from the defendant himself on cross-examination, that when he was arrested and interrogated and after he had received the Miranda warnings Romans did not come forth with the explanation or story upon which he ultimately relied for his defense This was the most egregious error committed in the trial").

²⁴ Sholler v. Commonwealth, 969 S.W.2d 706, 711 (Ky. 1998).

²⁵ Gall v. Commonwealth, 607 S.W.2d 97, 110-11 (Ky. 1980), *overruled on other grounds by Payne*, 623 S.W.2d at 870.

7. No Palpable Error in Comments by Prosecutor.

Lane also claims that prosecutorial misconduct coupled with the comment on Lane's silence, discussed above, requires reversal. Lane claims that the prosecutor offered his personal opinion that Lane was guilty and improperly bolstered the testimony of prosecution witness Constance Johnson by vouching for her credibility. Lane points to two specific instances of vouching at trial. First, during his opening statement to the jury, the prosecuting attorney stated:

People kept telling Constance, "Constance what are you doing? You didn't know he was going to do this, what are you doing? Why don't you tell them, tell them what you know? Don't let him pull you down to protect himself. **Tell the truth. Tell the truth.** Tell the police." Through her attorney, they came forward and told us all about it.[. . .] **And again, she will be up here to testify and she will testify truthfully** what her involvement in this particular case was and that was driving a vehicle. (Emphasis added.)

Later, during the testimony of Detective Smith, an issue arose concerning the prosecuting attorney's presence during the investigation when Johnson gave a recorded statement to the police. To prove that he was present while Johnson gave her statement, the prosecutor played a portion of Johnson's recorded statement during which the prosecutor speaks and identifies himself. On the recording, the prosecutor tells Johnson:

Your attorney contacted me . . . and you would like to make a voluntary statement as to your role in the conduct for which you are now charged and indicted and that **your purpose was to come here today to provide a truthful, truthful statement to these officers about what happened, what you know, what you saw, what you did.[. . .] Now with that said, again the statement needs to be truthful. You need to be honest, tell the whole**

truth not just half the truth, whole truth. (Emphasis added.)

“Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness’s credibility thereby placing the prestige of the office . . . behind that witness.”²⁶ Improper vouching involves either blunt comments (“I think [the witness] was candid.” “I think he was honest.”),²⁷ or an implication that the prosecutor has special knowledge of facts not before the jury, or of the witness’s credibility or the truthfulness of their testimony.²⁸ The prosecutor’s statements in this case do not fit in either category. In the except from the opening statement, the prosecutor previewed for the jury what Johnson was expected to say to explain an earlier inconsistent statement to the police. In the playing of the statements of the prosecutor recorded prior to trial, we cannot find that the prosecutor improperly bolstered Johnson’s testimony to the jury since the recording simply captures the prosecutor’s admonition to Johnson before she made a voluntary statement to police that was inconsistent with an earlier statement she had made to the police. Therefore, no bolstering of the witness’ testimony through improper vouching can be said to have occurred.

When reviewing claims of prosecutorial misconduct, this Court “must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to

²⁶ United States v. Francis, 710 F.3d 546, 550 (6th Cir. 1999).

²⁷ See United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir.1992).

²⁸ See United States v. Carroll, 26 F.3d 1380, 1388 (6th Cir. 1994).

have undermined the overall fairness of the proceedings.”²⁹ Prosecutorial misconduct will only rise to the level of reversible error if the misconduct is flagrant or if the proof of guilt is not overwhelming.³⁰ After a thorough review of the record, we are unpersuaded that the prosecutor’s actions rose to the level of manifest injustice required to support a finding of palpable error.

8. No Palpable Error in Allowing Detective Smith’s Testimony.

Lane next claims the trial court improperly allowed Detective Leonard Smith to testify regarding matters requiring expert knowledge. Detective Smith investigated the murder scene and was present at Latham’s autopsy. Lane argues Detective Smith lacked the knowledge, skill, experience, training, or education needed to testify on such matters as the proximity of the murder weapon to the victim or the presence of “stippling”³¹ near the wounds. By failing to exercise its role as gatekeeper, charged with keeping out unreliable evidence under Daubert v. Merrell Dow Pharmaceuticals, Inc.,³² Lane argues the trial court committed reversible error. The Commonwealth responds that since Detective Smith has worked fifty or more cases involving gunshot wounds, including fifteen to twenty murders, he was qualified to testify in the manner he did.

²⁹ Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006).

³⁰ Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002).

³¹ *Stippling* is a pattern of tiny punctuate abrasions to the skin caused by particles of gunpowder striking the skin. The presence of stippling can indicate that the firearm was in close proximity to the victim’s body. J. Scott Denton, MD; Adrienne Segovia, MD; James A. Filkins, MD, JD, PhD, *Practical Pathology of Gunshot Wounds*, 130 PATHOLOGY AND LABORATORY MEDICINE 9, 1283 (2005).

³² 509 U.S. 579 (1993).

This Court has held that a trial court's failure to conduct a Daubert hearing on its own motion does not constitute reversible error.³³ A review of the record indicates that Detective Smith did not actually testify about the presence of stippling near Latham's wounds, rather that he was asked about his awareness of the phenomenon in general. Similarly, Detective Smith did not testify about the distance between the murder weapon and Latham when the shots were fired and specifically stated that he was not an expert in that area, thus, allowing the jury to determine what weight to give Detective Smith's testimony. We also note there was ample other testimony presented by the medical examiner regarding the contact wounds suffered by Latham. Upon review of the record, we can find no clear error in the trial court's determination that Detective Smith's testimony met the threshold reliability standards of KRE 702. Smith's experience as a police officer and the fact that he has worked fifty or more gunshot cases perhaps qualified him as an expert under KRE 702. Even if we were to conclude otherwise, given Smith's own disclaimer and the later testimony of the medical examiner, any error would not rise to the level of palpable error.³⁴ Accordingly, any error in allowing Detective Smith's testimony could not have resulted in manifest injustice to Lane.

³³ Tharp v. Commonwealth, 40 S.W.3d 356, 367-68 (Ky. 2000).

³⁴ *Cf.* Sargent v. Commonwealth, 813 S.W.2d 801, 802 (Ky. 1991).

9. No Palpable Error by Admitting Hearsay.

Lane also argues that testimony by Officer Stacy Blackburn amounted to impermissible investigative hearsay.³⁵ Blackburn testified that when he interviewed Tony Yeager, Yeager told him that he had given Latham \$35.00 to purchase marijuana for him on the morning Latham was murdered. Since it does not appear that Officer Blackburn offered the testimony to explain any action that he took as a result of the information he received from Yeager, we are inclined to agree that the testimony was excludable hearsay.

The Commonwealth argues that Lane waived any objection as a trial strategy. When Officer Blackburn testified on direct examination that Yeager told him he had given Latham money to buy marijuana, Lane's counsel interrupted to ask if Yeager was present in the courtroom. When it was confirmed that he was, defense counsel asked the trial court to invoke the rule regarding separation of witnesses, but defense counsel did not object to Blackburn's testimony. Later, in his closing argument defense counsel attempted to cast doubt on the Commonwealth's case by arguing that the Commonwealth could only put on second-hand evidence that the victim was attempting to purchase drugs from Lane.

But even assuming Lane's counsel did not strategically waive this objection to the hearsay testimony, any perceived error does not amount to

³⁵ See Sanborn v. Commonwealth, 754 S.W.2d 534, 541 (Ky. 1988) ("Perhaps it would help to state forcefully at the outset that hearsay is no less hearsay because a police officer supplies the evidence. In short, there is no separate rule, as such, which is an investigative hearsay exception to the hearsay rule"), *overruled on other grounds by* Hudson v. Commonwealth, 202 S.W.3d 17, 22 (Ky. 2006).

palpable error. Blackburn's testimony was cumulative of the substantial evidence presented at trial regarding the nature and purpose of Latham's encounter with Lane. Accordingly, we cannot agree with Lane's argument that Blackburn's investigative hearsay testimony warrants reversal.

10. No Violation by Commonwealth of KRE 404(c).

Lane's next unpreserved claim of error is that the trial court improperly permitted the Commonwealth to introduce testimony of bad acts by Lane in order to prove-- without giving reasonable notice of its intention to do so--that Lane was guilty of the offenses with which he was charged. During cross-examination, Lane's counsel asked Constance Johnson why she had given conflicting statements to the police. Johnson responded that she had done so because she was afraid of Lane. Johnson then replied in the negative when asked if Lane had threatened her on the day she made a statement to the police. On re-direct, the Commonwealth asked Johnson why she was afraid of Lane. Johnson replied saying that sometimes Lane would choke her.

Lane correctly states that the Commonwealth must give the defendant reasonable pretrial notice of its intention to introduce "bad act" evidence under KRE 404(b).³⁶ But this only applies when the 404(b) evidence is part of the prosecution's case-in-chief.³⁷ Here, the defense opened the door to the line of

³⁶ KRE 404(c).

³⁷ KRE 404(c) (providing notice requirements to apply "if the prosecution intends to introduce evidence pursuant to subsection (b) of this rule as a part of its case in chief. . . .").

questioning during its cross-examination of the witness.³⁸ Thus, the Commonwealth was under no obligation to disclose the evidence before trial. We find no trial court error on this issue—palpable or otherwise.

III. CONCLUSION.

For the reasons set forth above, we affirm the judgment of the circuit court.

All sitting. All concur.

³⁸ Muncy v. Commonwealth, 132 S.W.3d 845, 847-48 (Ky. 2004); ROBERT G. LAWSON, KENTUCKY EVIDENCE § 1.10[5], at 43-47 (4th ed. 2003).

COUNSEL FOR APPELLANT:

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

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Coleman Shackelford
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601