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RENDERED: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000786-MR

BRADLEY DALE DAY — APPELLANT

V.

ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
NO. 07-CR-00083

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant Bradley Dale Day was convicted of first-degree manslaughter in the death of Sheila Hargrove and sentenced to twenty years' imprisonment. On appeal, he alleges numerous errors, including that the trial court should have granted a mistrial because of the Commonwealth's failure to disclose a witness's inconsistent statements, which undercut his ability to prepare a defense. Because this Court finds that the Commonwealth's failure to disclose the witness's inconsistent statements was a discovery violation that mandated a mistrial, the trial court's judgment is reversed and remanded for further proceedings consistent with this opinion.

I. BACKGROUND

Sheila Hargrove was murdered on June 3 or 4, 1991. Her body was found riddled with multiple stab wounds and dumped into a water-filled pit in an abandoned strip mine. This murder went unsolved for many years.

In response to renewed police investigation into the Hargrove murder, Karen Campbell, Day's ex-wife,[1] admitted to police she had previously given them a false alibi for Day. At his request, she initially told investigators that Day was at home when Hargrove was killed. The truth was that she did not know if he was home at the time. Because of this important change in Karen's account and because some finger and palm prints possibly linked Day to the scene of the crime,[2] Day became the focus of suspicion. These prints were the only physical evidence linking Day to the crime. Ultimately, Day was indicted for Hargrove's murder; and the case proceeded to trial.

Trial testimony revealed that Day had a romantic relationship with Hargrove shortly before she was killed. According to Karen's trial testimony, Day was absent from home on several evenings leading up to the night of Hargrove's killing, and she became suspicious that he was lying to her about where he was going.

Karen recalled that Day had arrived home about 8:30 p.m. on the night when Hargrove's killing apparently took place. Karen's daughter also testified to being at home and observing Day's arrival home. Based on the time he arrived home, Karen realized he did not come home directly after work. She

[1] At the time of Hargrove's killing, Karen was married to Day and known as Karen Day. At the time of Day's trial, she was known as Karen Campbell. We refer to her by her first name because her last name changed between the killing and Day's trial.

[2] Finger and palm prints identified as Day's were found on a door of Hargrove's home where a large amount of blood had been found. Day asserts that his prints found on the door were not bloody. And he also avers that he has never denied being at Hargrove's home. Some degree of inconsistency in Day's statements to law enforcement apparently contributed to suspicions that Day had killed Hargrove.

confronted him about where he had been, and Day eventually admitted he had been with Hargrove.

Karen did not know Hargrove personally, but she knew Hargrove was a customer of the water hauling business the Day couple operated together. Karen asked Day why he had been going to Hargrove's home. He explained that Hargrove was afraid to be alone because her ex-husband had just gotten out of jail, and that Hargrove had testified against her ex-husband.[3] He also claimed that Hargrove did not have transportation so he took Hargrove to buy groceries.

Day called Hargrove around 9 p.m. that evening and told her he wanted her to speak to Karen. Karen then spoke to a person on the phone who identified herself as Sheila Hargrove. Karen asked her if Day had been coming to her house, and Hargrove responded that he had. Karen then asked her if Day and Hargrove had been sleeping together. According to Karen, Hargrove responded by asking what Day had said about that. Karen said that Day denied sleeping with Hargrove. Hargrove then said that Day was not lying.[4]

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[3] This explanation comes from Karen's account of what Day told her. Hargrove's ex-husband testified at trial that he and Hargrove had both been arrested on drug charges, that they had entered into plea bargains, and that Hargrove did not provide evidence against him.

Day points to testimony that when Hargrove's body was found, there were cut or scratch marks on her face in a pattern resembling the whiskers of a rat and argues that this perhaps indicates that she was killed for "ratting on" her ex-husband.

According to the ex-husband's testimony at Day's trial, the ex-husband was indicted for murder-for-hire of Hargrove a couple of years after her murder, but the indictment was dismissed because of the discovery that evidence against him was false.

[4] Some statements that Day gave to law enforcement were inconsistent with Karen's testimony in that they indicated that Hargrove told Karen that she had been physically intimate with Day. But there appears to be no dispute that Karen

After this phone call, Karen demanded that Day stop seeing Hargrove. Karen threatened to leave Day and take the house and the family business if Day had any further contact with Hargrove. After this confrontation, Karen refused to speak to Day or get into bed with him that night. She went to sleep for the night shortly after this exchange.

According to Karen's trial testimony, she could not account for Day's whereabouts from the time she went to bed until he woke her up around 5:30 the next morning. Karen testified that Day was acting strangely that morning, claiming that he needed to call Hargrove. He tried to call Hargrove, but Hargrove did not answer her phone. He said he was afraid she had done something to herself, and he needed to find out where she was. According to Karen, he left the house around 6 a.m.

Other witnesses—Hargrove's mother and sister-in-law—testified that Day called them that morning asking if they had seen or spoken to Hargrove because he was concerned something might have happened to her. And he again called them later reporting that he was at Hargrove's house, she was not there, and blood was everywhere. Hargrove's mother went to the house, where she saw a lot of blood. She told Day to call 911, and police soon arrived.

Police dispatched to the scene later noted that Hargrove's house was in a remote area. They saw a large number of blood splatters in the house, and they also saw a bloody trail, which they interpreted as indicating that someone or something had been dragged out the front door, across the porch, down to the

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discovered that night that Day had been meeting Hargrove and that Karen spoke by phone with Hargrove that night to confront her about Hargrove's dealings with Day.

sidewalk, and then across the yard to the driveway. Day told one officer he had gotten a key to the house from Hargrove's car and entered through the back door. Even though an officer specifically asked him to point out everything he had touched, Day did not indicate that he had touched the front storm door at any point.

Police took photographs and videos of the crime scene. They noted no signs of forced entry and no signs of disarray in the house. The video showed the blood trail and blood splatters and also showed Day's black truck in the driveway. And there was some trial testimony that the truck appeared very clean despite the fact that Hargrove's house was accessed via a gravel road.

Although Hargrove and her mother had cleaned the front storm door the day before Hargrove was killed, investigators found fingerprints and palm prints on it that were later identified as belonging to Day. Detective Ray Albro, who died shortly after the investigation began, interviewed Day at the scene. He prepared a written statement that Day signed. According to this statement, Day revealed that he had been dating Hargrove for several days and had last spoken with her about 11:30 p.m. Day claimed Hargrove had invited him for dinner earlier in the evening, but he declined in order to work on his truck. He claimed that his wife knew he had been talking to Hargrove, and he claimed to have used the front door when entering Hargrove's house.

Later in the day, Hargrove's body was recovered from the strip pit. An autopsy reported 20 stab wounds to her body. The contents of her stomach included undigested strawberries. Her mother later testified that Hargrove had

eaten strawberries at her house around 9:00 the night before Hargrove was killed. The medical testimony indicated that Hargrove must have died around midnight.

That same day, police interviewed Day and Karen together. Day claimed to have been at home with his wife the entire night, and Karen appeared to agree with his statements. Later, another detective conducted separate interviews of Karen and Day. This interviewer noted that some of Day's responses were inconsistent with his original written statement. So he recorded an interview with Day. This time, Day said that Hargrove told Karen that she (Hargrove) had slept with Day. But he claimed that he and Karen talked and worked out their problems, that he slept at home that night, and that he never left overnight. For nearly twenty years, Karen continued to vouch for Day's being at home the night Hargrove was murdered.

Kentucky State Trooper Steve Silfies[5] picked up the Hargrove cold case to investigate in his spare time. Silfies determined that Day and Karen were still suspects, especially because of the domestic conflict between them and Hargrove very shortly before Hargrove's killing. So he re-interviewed Karen, who stuck with her story that Day stayed home on the night Hargrove was killed. But after seeing a television program about identifying a homicide victim's time of death from undigested strawberries in the victim's stomach, Silfies decided to challenge the time frame of Hargrove's death because of the presence of undigested strawberries in her stomach.

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[5] Apparently, Silfies was promoted to detective by the time of trial.

After being confronted with discrepancies in time details on the night Hargrove was killed, Karen eventually proclaimed she was going to tell the truth and changed her story. She stated that Day had arrived home that evening around 8:30 and that she fell asleep later that evening. She did not know if Day left the house that night before he awoke her early the next morning. So Silfies concluded that Day no longer had an alibi and sought an indictment against him.

The trial court instructed the jury on murder and first-degree manslaughter with extreme emotional disturbance. The jury acquitted Day of the murder, but found him guilty of first-degree manslaughter and recommended a sentence of twenty years' imprisonment. The circuit court sentenced Day in accordance with the jury's recommendation. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. ANALYSIS

Day claims that the trial court committed several reversible errors. Specifically, he alleges that (1) the trial court should have granted a mistrial because of the Commonwealth's failure to disclose a witness's inconsistent statements, (2) the trial court erred in giving a jury instruction on first-degree manslaughter because there was insufficient evidence of extreme emotional disturbance, (3) it was error to allow Day's ex-wife to testify about confidential marital communications in violation of KRE 504, (4) it was error to allow the investigating officer to give expert testimony about crime scene evidence without the proper foundation under KRE 702, and (5) the trial court should

have granted a continuance to allow testing of items in a package sent to the prosecutor shortly before trial.[6]

A. The Prosecutor's Failure to Disclose Linda Forbes's Inconsistent Statement Required a Mistrial

Day argues that the trial court erred in denying his motion for a mistrial based on the prosecutor's failure to disclose a statement made by Linda Forbes to the prosecutor only a few days before the trial began. Because this statement should have been disclosed to the defense, and because the statement goes to the core of the case against Day, the trial court should have granted a mistrial.

Linda Forbes was a friend of the victim, Sheila Hargrove. Forbes made three different statements to the police and prosecution during the investigation of this case about a conversation she had with Hargrove the morning before the murder.

She made the first statement to Detective Albro on June 11, 1991. He wrote down her statement on a "Witness Interview Sheet," and she signed it. That statement was as follows:

> On Sunday, June 2, 1991, I had breakfast with Sheila. I ask [sic] her if she was still dating Rickie Lock. She indicated yes but said she was also seeing someone else. She wouldn't tell me who but she did say she had been going with him about 3 weeks.

Forbes's second statement was made to State Trooper Silfies during his investigation. At trial, Silfies testified that Forbes had told him that Hargrove said she was planning to break up with Day. Apparently in that statement

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[6] This opinion does not address the fifth issue because it is now moot.

Forbes did not say whether Hargrove specified *when* she planned to break up with Day. Silfies wrote a report about this interview, but he did not include anything in it indicating that Forbes and Hargrove discussed a future break-up with Day.

Finally, Forbes spoke to the prosecutor on the phone on the Thursday before the trial began on Monday. At that point, Forbes told the prosecutor that Hargrove had said she was planning to break up with Day the evening after Forbes and Hargrove met for breakfast—the evening the murder occurred. Unlike the earlier statements, or at least the written versions disclosed to the defense, Forbes specifically identified Day as Hargrove's paramour and claimed the break-up was imminent on the day of the murder. The prosecutor did not inform the defense about this new information, and the first time the defense heard about it was when Forbes testified during the trial.

Forbes's trial testimony on this issue was as follows:

Q: Did you know Dale Day?

A: No. I did not know him.

Q: Did you know who he was?

A: [Hargrove] had told me of him. Yes, sir.

Q: Were you aware that they might be dating?

A: Yes, sir.

Q: Had you and she discussed that?

A: We discussed that they were dating. Yes.

Q: Did you talk to her that day?

A: About that day? Yes, sir. I did.

Q: Were you aware that he was coming to her house that night?

A: Yes, I was.

Q: Did she bring that up or did you?

A: She brought that up. That's why I went to the restaurant. She wanted to talk to me.

Q: About what?

A: That he was married. She had not told me that, yet. And that she was fixing to break things off.

Q: That day?

A: That day, that night, she was going to break things off.

Day contends that the undisclosed statement Forbes made to the prosecutor a few days before trial (which was apparently the same as her testimony at trial) was inconsistent with the Written Interview Sheet from 1991 for two reasons. First, the new statement identified Day as the previously unnamed married man whom Hargrove was dating. Second, it introduced the fact that Hargrove planned to break up with Day the evening the murder occurred.

During cross-examination, Forbes admitted that Hargrove had not used the name "Dale Day" during their conversation. But she said that she had told Detective Albro in that first interview on June 11, 1991 about Hargrove's plans to break up with the unnamed married man. Forbes stated that she had told the police more than the information contained in the written statement. She even expressed some doubt that the written statement accurately recounted

what she had told police. Forbes explained that she may have signed the statement even if it did not fully or accurately recount what she told police possibly because the detective was a "smart man" who had the responsibility of recording the information needed.

After excusing Forbes from the witness stand, the trial court expressed an unsolicited concern at a bench conference that Forbes's testimony disclosing Hargrove's plans for a breakup could create "palpable error" because of hearsay concerns. But the trial court postponed action on this concern. After this bench conference, another witness testified, and then the trial court recessed for the evening.

The next morning in chambers, the trial court brought up the hearsay concern from the preceding day and asked whether defense counsel wanted to argue this issue. Defense counsel declined the trial court's invitation to make a hearsay argument[7] but instead argued that the prosecutor had failed to comply with the discovery request for witness statements that were inconsistent with each other.

The prosecutor admitted that he had interviewed Forbes a few days before trial. So the prosecutor knew before trial that Forbes would testify about Hargrove's plans for breaking up with Day. But the prosecutor believed he did not need to disclose this information because it was merely additional information not inconsistent with Forbes's written statement. The prosecutor

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[7] The parties and trial court eventually reached consensus that the statement was not excluded under the hearsay rules because it fit an exception to hearsay under KRE 803(3).

also believed this was "work product" that he was not required to reveal and noted that he did not file reports every time he talked with a witness. The prosecutor also suggested that defense counsel could have interviewed Forbes before trial.

Defense counsel continued to argue a discovery violation, asserting that Forbes's testimony was inconsistent with her written statement and that a discovery violation had occurred. The trial court asked defense counsel what remedy Day wanted for this violation, and defense counsel replied "a mistrial." The trial court decided to postpone ruling on this issue to a later time.

On the following morning, the trial court took up the issue again in chambers before the presentation of evidence resumed. The trial court denied the mistrial motion, finding that Forbes's testimony was not inconsistent with her written statement[8] because the written statement did not say anything about whether or not there were plans for a breakup. Even though it denied the mistrial motion, the trial court voiced a concern with police sandbagging if police intentionally left out some information provided in their witness statements. The trial court observed that determining whether sandbagging by the police occurred here would be impossible because the detective who took Forbes's original statement was dead and many years had passed since the Hargrove murder investigation began.

Following the denial of the mistrial motion, Silfies testified that Forbes told him that Hargrove planned to break up with Day, although she did not

[8] The trial court also found that Forbes's testimony was not inconsistent with any other witness's prior statements.

specify that Hargrove planned the breakup for the same evening in which Hargrove was killed. Silfies admitted that this information was not included in his written report.

The main question, then, is whether the trial court erred in denying the mistrial. We review trial court rulings on mistrial motions for abuse of discretion and consider a mistrial to be an extreme remedy that should only be granted "when there is a fundamental defect in the proceedings" that creates a "manifest necessity" for a mistrial. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004) (quoting *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002)). Day argues that the trial court should have granted the mistrial motion for three reasons: the prosecutor violated two discovery rules, RCr 7.24 and 7.26; the prosecutor failed to comply with the defense's discovery requests; and the prosecutor violated a duty to disclose Forbes's testimony as exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

Though we conclude that the prosecution did not violate any discovery rules, we do find that the prosecutor failed to disclose information he agreed to disclose, that this discovery violation was prejudicial, and that the error was severe enough to require a mistrial. We do not decide the question whether the discovery violation violated the constitution under *Brady*, as it is unnecessary to reach that issue.

1. The Commonwealth Did Not Violate the Discovery Rules

Day argues that our discovery rules, specifically RCr 7.24 and 7.26, required that he receive pretrial notice of Forbes's expected testimony about

Hargrove's communications about her relationship with Day. But these rules, by their plain language, simply did not create a duty for the prosecutor to disclose Forbes's expected testimony about Hargrove's plans to break up with Day.

RCr 7.24 does not create a duty to disclose all witnesses' statements. This rule simply requires that the Commonwealth disclose known incriminating statements made by the defendant to a witness. RCr 7.24(1). But the statements that Day complains of were not his own. Indeed, Forbes did not testify or provide any statements about Day making any incriminating statements to her. Arguably, other provisions of RCr 7.24, specifically subsection (2), could be read to cover written or recorded statements of witnesses, but that subsection specifically states that "[t]his provision authorizes pretrial discovery and inspection of official police reports, *but not* of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)." RCr 7.24(2) (emphasis added).

Witness statements not recounting a defendant's incriminating statements are covered by RCr 7.26. But that rule also does not require disclosure of everything a witness tells a prosecutor. This rule only requires the Commonwealth to make pretrial disclosure no later than 48 hours before trial of "statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and

which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness." RCr 7.26(1).

Day argues that the prosecutor knew exactly what Forbes would say and thus must have had written notes about the conversation, which would have a "substantially verbatim statement" by Forbes that should have been disclosed to the defense 48 hours before trial under RCr 7.26. But we do not believe this is within the scope of the rule, which requires a document or recording of the witness's statement, and does not specifically encompass every oral statement made by a witness to the prosecutor. This rule only concerns statements in documents or recordings that are signed or initialed by the witness or that are represented to be a "substantially verbatim statement made by the witness." There was no document or recording here, and we will not speculate that the prosecutor might have had notes about the conversation that occurred shortly before trial. And even if the prosecutor had taken notes, they were not discoverable under this rule because they would have been work product. *Hillard v. Commonwealth*, 158 S.W.3d 758, 766 (Ky. 2005) ("The prosecutor did not purport to have taken a written or recorded statement from [the witness] during the ex parte interview. RCr 7.26. Thus, the prosecutor's notes were his own work product and, like memoranda prepared by police officers, were not discoverable under RCr 7.24.").

Simply put, neither RCr 7.24 nor 7.26 apply here, so the Commonwealth did not have a duty to disclose under these discovery rules.

2. *The Commonwealth Failed to Disclose an Inconsistent Statement by a Witness*

Day next argues that the Commonwealth did not comply with his discovery request to disclose any inconsistent statements by witnesses. Prior to trial, the defense made two discovery motions requesting, among other things, statements by any witness that were inconsistent with other statements made by the same witness. It is not clear whether the trial court ever granted the defense's motions because no order appears in the record. But in its brief the Commonwealth refers to the "trial court's discovery order," and the Commonwealth's position at trial and now on appeal is that it was required to disclose inconsistent witness statements but Forbes's statement does not fall in this category. Regardless of whether the discovery order was ever granted, the Commonwealth does not dispute that it was required to disclose any inconsistent witness statements before the trial began. No issue has been raised nor argued regarding whether the Commonwealth was legally obligated to provide such statements. Absent such an issue being raised, and lacking a better record, this Court will address only the argument as raised.

In *Barnett v. Commonwealth*, 763 S.W.2d 119, 123 (Ky. 1988), this Court recognized that when the prosecution "seemingly agreed" to provide certain information and then withheld it, it created "the possibility that victory was obtained by ambush and surprise." *Id.* at 123. *Barnett* was about an "open file" policy, while in the present case there is no evidence of any such broad agreement between the Commonwealth and defense. But the Commonwealth does not dispute that it was required to disclose any inconsistent witness

statements before trial, so a failure to do so would result in a discovery violation.

Day argues that the Commonwealth failed to make the required disclosure by not turning over Forbes's inconsistent statement made to the prosecutor a few days before the trial began. The Commonwealth argues that Forbes's statement was not inconsistent with her previous written statement and that any error was harmless.

Day identifies two ways that Forbes's statement to the prosecutor was inconsistent with her signed statement. First, at trial Forbes identified Day as the man Hargrove was dating, while in her previous statement she said that Hargrove would not tell Forbes the name of the "married man." On cross-examination, Forbes admitted that Hargrove never used Day's name. Rather, Forbes later figured out that Day must have been the "married man" Hargrove was dating. Despite the clarification on cross-examination, the fact remains that Forbes's signed statement does not mention Day by name, and Forbes's belief that Day was the "married man" was a new assertion that was inconsistent with her previous statement.

Second, and more importantly, Forbes testified that Hargrove was planning to break up with Appellant the evening the murder occurred. The written statement that the defense received before the trial did not include any reference to Hargrove's plans to break up with Appellant that evening or any other evening.

The Commonwealth urges this Court to find that the two statements are not inconsistent because the second statement merely added additional information rather than inconsistent information. While it is technically correct that the statements do not contradict each other, there is a fundamental difference between a statement that "Sheila was seeing a married man," and a statement that "Sheila was seeing Dale Day and planned to break up with him that night." These are very different statements, and the new statement should have been disclosed to the defense.

3. Discovery Violation Was Prejudicial to the Defense

The Commonwealth's failure to disclose the new statement was prejudicial to the defense. A portion of the defense's opening statement focused on the issue of motive. Defense counsel argued that Karen, Day's then-wife, had a motive to kill Hargrove because of the affair, and that Hargrove's ex-husband who had just gotten out of jail had a motive to kill Hargrove. But according to defense counsel's opening statement, Day did not have a motive. At the time, this was a reasonable argument to make. The first time the defense learned of the theory that Day killed Hargrove because she wanted to break up with him was during Forbes's testimony at trial.

In *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky. 2005), this Court held that a discovery violation that caused the defense counsel to "labor[] under a misconception that there was no physical evidence" required reversal of the convictions because the defense counsel would have changed his theory of the case if he had had all the necessary information. *Id.* at 417. In *Chestnut v.*

Commonwealth, 250 S.W.3d 288, 299 (Ky. 2008), the Court held that a discovery violation that withheld a confession "essentially gutted Appellant's defense." *Id.* The Court continued, "we cannot say that had the Appellant been presented with [the information about the confession] prior to trial, he would have proceeded with his defense in the same manner or that the trial would have achieved the same result." *Id.* But the Court nonetheless found a violation. Similarly, in *Grant v. Commonwealth*, 244 S.W.3d 39, 43 (Ky. 2008), the Court held that the prosecutor's failure to disclose a recording of the defendant's incriminating statements on a jail house phone call required a new trial because the discovery violation "prevented the defense from making an informed decision as to proper strategy." *Id.*

Like the defendants in *Akers*, *Chestnut*, and *Grant*, Day went into trial with one theory of his case only to be surprised by essential information that the Commonwealth had failed to disclose. This Court and its predecessor have long condemned such actions by the Commonwealth: "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972).

For these reasons, the Commonwealth's failure to disclose Forbes's new statement to the prosecutor was a discovery violation that necessitated a mistrial. This case is therefore reversed and remanded. Because the jury acquitted Day of murder, he cannot be retried for murder. *Green v. United*

States, 355 U.S. 184, 190 (1957); *Smith v. Commonwealth*, 737 S.W.2d 683, 688 (Ky. 1987). He can be retried for first-degree manslaughter.

B. Jury Instruction on First-Degree Manslaughter

Day also argues that it was error for the trial court to give a jury instruction on first-degree manslaughter with extreme emotional disturbance (EED) because the Commonwealth's evidence was insufficient to support the charge. It is appropriate to address this issue even though the conviction is reversed and remanded, because if Day is correct that there was insufficient evidence of first-degree manslaughter, he is entitled to acquittal.

In Day's brief, this argument is primarily framed as a jury instruction issue, but the brief also discusses the closely related argument that the trial court should have granted a directed verdict of acquittal because there was insufficient evidence to support the manslaughter charge. We hold there was no error under either claim because the Commonwealth is not required to prove the existence of EED as an element of first-degree manslaughter and the evidence was otherwise sufficient to support his conviction for that crime.[9]

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[9] Technically speaking, neither of these issues was preserved for review. Day did not object to the jury instruction or tender one of his own. RCr 9.54(2). And while he did move for a directed verdict of acquittal at the close of the Commonwealth's case and again at the close of all the evidence, the motion claimed only that the Commonwealth failed to prove that he was at Hargrove's house at the time the murder occurred. This at best an indirect claim that the Commonwealth failed to prove the elements of the offense, yet this Court's rules require a motion for a directed verdict to "state the specific grounds therefor," CR 50.01, and this state's "appellate courts have steadfastly held that failure to do so will foreclose appellate review of the trial court's denial of the directed verdict motion." *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004). Appellant did raise the specific sufficiency-of-the-evidence claim that he now raises—that the Commonwealth did not prove EED—after trial in his Motion for Judgment of Acquittal. Arguably, this may have been sufficient to preserve the error, since it would have been the first time he could have argued about the EED in the

The Commonwealth argues that the instruction for first-degree manslaughter could only be beneficial to Day because it allowed him to be convicted of a lesser offense than murder, and it points out that in most of this Court's cases on the issue it is the *defendant* who wants the first-degree manslaughter instruction. The Commonwealth's position is that the instruction could not be prejudicial to Day because it benefitted him. But we agree with Day's argument that improperly instructing a jury on a lesser-included offence for which there was no evidentiary support could be an error prejudicial to the defendant. *See Sanders v. Commonwealth*, 269 S.W.2d 208, 209 (Ky. 1954) (holding that it was error to instruct on a lesser-included offense of rape when the only question was whether the victim consented to the intercourse, and the defendant was actually convicted of the lesser-included offense). However, there was no error in this case because there was evidentiary support for first-degree manslaughter.

First-degree manslaughter with EED is defined as intentional murder committed while the defendant was under extreme emotional disturbance. KRS 507.030.[10] In order to support a finding that a defendant was acting

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context of pure sufficiency of the evidence. But a claim that the evidence does not support giving a jury instruction on an issue is essentially the same as a claim that the evidence is insufficient to support a conviction, and Day made no such claim. He has requested palpable error review under RCr 10.26. Instead of trying to parse whether he has suffered "manifest injustice" from the claimed error, it has proven simpler to first decide whether an error occurred at all. Because there was no error, the palpable-error analysis need not be undertaken.

[10] "A person is guilty of manslaughter in the first degree when ... [w]ith intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020." KRS 507.030.

under EED, there must be evidence of a triggering event that caused the EED. In *McClellan v. Commonwealth*, 715 S.W.2d 464, 468–69 (Ky. 1986), this Court defined EED as a "temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." In *Hudson v. Commonwealth*, 979 S.W.2d 106, 108 (Ky. 1998), this Court held that the triggering event must cause "the explosion of violence on the part of the defendant" and that "the triggering event itself must be sudden and uninterrupted."

The question of which party has the burden of proving EED is a difficult one that has come up in a number of our cases. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 782 (Ky. 2008) (acknowledging the "quandary" of how EED relates to the intentional murder statute). The murder statute, KRS 507.020(1)(a), requires the jury to find that the defendant had the intent to cause the death of another person and did cause the death, but it states that a person is not guilty of murder if he acted under EED.[11] First-degree manslaughter with EED requires the jury to find the same elements of intentional murder, but if the defendant acted under EED, the criminal act is

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[11] "A person is guilty of murder when ... [w]ith intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime ...." KRS 507.020(1)(a).

first-degree manslaughter rather than murder. KRS 507.030. Thus, the statute for murder requires the elements of intentional murder *but not* EED, and the statute for first-degree manslaughter requires the elements of intentional murder *plus* EED. "[T]he same act, or series of acts, may be murder or manslaughter in the first degree depending on a finding of EED." *Greene v. Commonwealth*, 197 S.W.3d 76, 80–81 (Ky. 2006).

While this Court has recognized that the lack of EED is a statutory element of murder, rather than a defense that must be raised by the defendant, *id.* at 80, this Court has held that the Commonwealth does not have to prove the lack of EED in every prosecution for murder. If there is no evidence that would support a finding of EED, the Commonwealth does not have to show that the defendant was *not* acting under EED. *Id.* at 81. But once some evidence of EED is introduced that could create reasonable doubt as to the lack of EED, the trial court must give an instruction including the lack of EED as a statutory element of murder, and the Commonwealth must prove this element beyond a reasonable doubt. *Id.*; *Benjamin*, 266 S.W.3d at 782.

Further, the Commonwealth does not have to prove beyond a reasonable doubt that the defendant acted under EED in order to obtain a conviction for first-degree manslaughter. In *Baze v. Commonwealth*, 965 S.W.2d 817, 822–23 (Ky. 1997), this Court held that it was erroneous to require the Commonwealth to prove the presence of EED as an element of first-degree manslaughter. The logic of this holding becomes clear when one considers that in many homicide prosecutions, the jury will be instructed on both murder and first-degree

manslaughter. Requiring the Commonwealth to prove EED as an element of first-degree manslaughter would create a contradictory burden of proof for the Commonwealth:

> The inclusion of this additional element required the Commonwealth to prove the absence of extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of murder ... and to prove the presence of extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of first-degree manslaughter. Theoretically, the jury could have found by a preponderance of the evidence, but not beyond a reasonable doubt, that [the defendant] was or was not acting under the influence of extreme emotional disturbance. If so, the jury would have been required to acquit [the defendant] of both charges.

Id. at 823. This Court reaffirmed this interpretation of the statute in *Sherroan v. Commonwealth*, 142 S.W.3d 7, 22 (Ky. 2004), which held that an instruction for first-degree manslaughter that did not include the presence of EED as an element was a correct statement of the law.

In a case with evidence that could reasonably support the lack of EED as well as evidence that could reasonably support the presence of EED, the jury should be instructed on both murder and first-degree manslaughter, and the question of EED is decided by the jury. *Greene*, 197 S.W.3d at 81. If the jury believes that the defendant intentionally killed the victim but cannot find beyond a reasonable doubt that he did not act under EED, the jury should convict him of first-degree manslaughter. *Sherroan*, 142 S.W.3d at 23 (noting that an instruction to this effect is required if requested and if supported by the evidence).

Here, the trial court was right to instruct the jury on first-degree manslaughter under our cases interpreting the interplay between the murder and first-degree manslaughter statutes.[12] Evidence was presented at trial that could create reasonable doubt as to the lack of EED. Specifically, there was evidence of possible triggering events that could have allowed a reasonable jury to conclude that Day had killed Hargrove but had acted under the "impelling force of the extreme emotional disturbance." *McClellan*, 715 S.W.2d at 468. First, it was undisputed that there was a confrontation between Day, Karen, and Hargrove on the night of the murder. Karen testified that she confronted Day about his relationship with Hargrove and that she demanded that Day end further contact with Hargrove. Second, there was evidence that Hargrove planned to break up with Day the night of the murder.[13] Third, there was evidence that the victim suffered multiple stab wounds in a short period of time. While this Court has held that evidence that the victim suffered multiple wounds does not, by itself, necessitate a finding of EED, *Morgan v. Commonwealth*, 878 S.W.2d 18, 20 (Ky. 1994), the nature of the victim's wounds provides at least some support for the trial court's finding that there

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[12] Although the trial court was correct to give an instruction on first-degree manslaughter, the substance of the instruction was incorrect. This issue is addressed later in the opinion because on retrial the trial court will again give an instruction on first-degree manslaughter.

[13] Whether this break-up actually occurred was, of course, hotly disputed at trial, and the prosecutor's failure to disclose the information that Hargrove planned to initiate the break-up was the basis for this Court's decision to reverse the conviction. But the harm of the prosecutor's discovery violation was that Day was unable to adequately prepare a defense (which is why a mistrial was required), not that the evidence should not have been admitted at all. The parties agreed that Hargrove's statement to Forbes about the break-up would be admissible hearsay under KRE 803(3).

was evidence that created reasonable doubt about the lack of EED. Because of this evidence that showed the defendant may have acted under EED, the trial court did not err in giving the jury instruction on first-degree manslaughter.

Turning to Day's sufficiency-of-the-evidence claim, Day argues that none of the evidence proves beyond a reasonable doubt that Day was under the influence of EED, and so the trial court should have granted a directed verdict of acquittal. On appellate review, this Court reviews the trial court's rulings on motions for a directed verdict as follows: "If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983) (quoting *Trowel v. Commonwealth*, 550 S.W.2d 530, 533 (Ky. 1977)).

Day argues that because the evidence for EED was weak, the Commonwealth did not meet its burden of proving EED. But the Commonwealth is not required to prove the presence of EED in order to obtain a conviction for first-degree manslaughter. *Baze*, 965 S.W.2d at 822–23; *Sherroan*, 142 S.W.3d at 22. To sustain a conviction for manslaughter, the Commonwealth is only required to prove the positive elements of intentional murder—and Day does not dispute the sufficiency of the evidence for those elements. To sustain a conviction for the higher offense of murder, the Commonwealth would have to prove an additional element: the lack of EED. But there is no parallel requirement that the Commonwealth prove the existence of EED to sustain a conviction for the lesser offense of first-degree

manslaughter. KRS 507.030(1)(a). Because the Commonwealth is not required to prove EED as an element of first-degree manslaughter, there could be no sufficiency-of-the-evidence problem related to the EED. It was not error, palpable or otherwise, for the trial court to decide not to enter a directed verdict of acquittal.

Although the trial court did not err in its decision to give instructions for both murder and first-degree manslaughter, the substance of the instructions was erroneous. The jury instruction for murder was as follows:

> You will find the Defendant guilty of Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following: ... That in this county on or about June 3 or June 4, 1991 and before the finding of the Indictment herein, he intentionally, as that term is defined in Instruction No. 3, killed Sheila J. Hargrove by stabbing.

The jury instruction for first-degree manslaughter was as follows:

> If you do not find the Defendant guilty of Murder ... you will find the Defendant guilty of First-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following: ... That in this county on or about June 3 or June 4, 1991 and before the finding of the Indictment herein, he intentionally, as that term is defined, killed Sheila J. Hargrove by stabbing while acting under the influence of extreme emotional disturbance, as that term is defined in Instruction No. 3.

Thus, the murder instruction did not discuss EED, but the first-degree manslaughter instruction did. This was incorrect. Since there was evidence of EED, the murder instruction should have included the absence of EED as an element of murder. *Greene*, 197 S.W.3d at 80–81. The first-degree manslaughter instruction should not have included any discussion of EED, and should instead have merely listed the elements of intentional murder.

Sherroan, 142 S.W.3d at 22. Cooper and Cetrulo's sample instructions for murder and first-degree manslaughter may be used as guides for writing these instructions. 1 William S. Cooper & Donald P. Cetrulo, *Kentucky Instructions to Juries, Criminal* §§ 3.21, 3.25 (5th ed. 2006).

This error was necessarily harmless, since it placed a higher and legally unnecessary burden on the Commonwealth to prove the element of EED for the conviction it actually obtained. *Baze*, 965 S.W.2d at 823. But it creates something of an instructional conundrum if the evidence is substantially the same on retrial. On retrial, Day may only be charged with first-degree manslaughter because he has been acquitted of murder. *Green*, 355 U.S. at 190; *Smith*, 737 S.W.2d at 688. Ordinarily, an EED-manslaughter would be linked to a higher murder charge. Because Appellant cannot be convicted of murder on retrial and EED is not a true element of the offense, EED is no longer an issue and should not be the subject of a jury instruction at all. The instruction for first-degree manslaughter should follow Cooper and Cetrulo's sample instruction:

> You will find the Defendant guilty of First-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about ____ (date) and before the finding of the Indictment herein, he killed ____ (victim) by ____ method);
> AND
> B. That in so doing, he intended to cause the death of ____ (victim).

1 Cooper & Cetrulo, *supra*, § 3.25. In other words, on retrial there is no need for the jury to make a finding about EED.

C. Other Issues

Because Appellant's conviction is being reversed for the discovery violation, the remaining issues are addressed only to the extent they are likely to arise again during a new trial. *See Bell v. Commonwealth*, 245 S.W.3d 738, 743 (Ky. 2008) ("Because the judgment has been reversed for the foregoing reasons, we will address only those additional assignments of error that are likely to recur upon retrial."); *Terry v. Commonwealth*, 153 S.W.3d 794, 797 (Ky. 2005); *Springer v. Commonwealth*, 998 S.W.2d 439, 445 (Ky.1999).

1. Admission of Karen's Testimony that Day Asked Her to Communicate a False Alibi to Police

Day contends that it was error for the trial court to allow Karen to testify that Day asked her to convey a false alibi for him to police because it violated the marital communications privilege. Because it is likely that the Commonwealth will again attempt to admit this evidence on retrial, and because there is a recent case on point, it is appropriate to provide some guidance on the issue.

KRE 504(b) explains the marital communications privilege[14]:

> An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage .... A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

[14] Because Karen was no longer married to Day by the time of trial, the spousal testimony privilege in KRE 504(a) was no longer applicable. *Winstead v. Commonwealth*, 327 S.W.3d 386, 391 (Ky. 2010). The marital communications privilege in KRE 504(b) survives divorce. *Id.* at 391–92.

This Court recently held in *Winstead v. Commonwealth*, 327 S.W.3d 386 (Ky. 2010), that a confidential request for one's spouse to communicate a false alibi to authorities is protected from disclosure under the marital communications privilege despite the fact that the alibi itself is intended for disclosure to others.[15] *Id.* at 394. In *Winstead*, this Court said: "Despite our disapproval of the act of requesting one's spouse to give false information to police, we nonetheless must follow the plain language of KRE 504(b) to prohibit admission of such requests where such a request is communicated privately to the spouse and the request itself is not intended for disclosure to others." *Id.*

Although the request to give a false alibi may be protected under the marital communications privilege, the privilege does not bar a spouse from testifying about what the spouse actually told police and whether this information was true. *See id.* at 394–95. Also, an observation of what time a spouse arrived, left, or remained at home is not a confidential communication subject to the privilege if such an observation could have also been made by others, such as other people staying at the house or neighbors. *Id.* at 393.

In a new trial, the trial court should follow *Winstead* in dealing with the admissibility of Karen's testimony that Day asked her to provide a false alibi.

2. *Detective Silfies's Testimony that He Believed Killing was Done in "Rage" Because of a Conflict from the Previous 48 Hours*

In describing his investigation of the case, Detective Silfies testified that the crime scene indicated "rage or something like that." According to his

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[15] There was some dispute as to whether Day's communications with Karen were truly confidential because they may have been observed by her child. This factual issue will likely have to be addressed on retrial.

testimony, this led him to look for recent conflicts in Hargrove's life "[b]ecause that's what usually causes it, you know. It's not going to be something that was protracted, that happened years ago. It was probably going to be something that happened in the last forty-eight hours." Silfies went on to say that Hargrove's only conflict within this forty-eight-hour time frame was with Dale and Karen Day.

The emotions of the killer and the timing of the conflict that led to the murder were relevant because there was an alternate theory that Hargrove's ex-husband had killed Hargrove, perhaps in retaliation for her testimony against him in a drug case.[16] The ex-husband had apparently been released from jail shortly before the murder. The ex-husband was indicted for murder-for-hire of Hargrove a few years after the murder, but the indictment was dismissed because the evidence against him was found to be false. The defense referenced this alternate theory throughout the trial.

Day argues that Silfies's testimony on this issue was expert testimony that was offered without the proper foundation under KRE 702.[17] Because Silfies is likely to testify about this information on retrial, it is appropriate to address this issue.

The Commonwealth argues that Silfies's testimony was not offered to establish that Day acted in rage to murder Hargrove. Instead, it was meant to

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[16] It was disputed whether Hargrove actually testified against her ex-husband in the drug case.

[17] Day did not object to the evidence at trial.

explain why Silfies proceeded in his investigation the way he did and to respond to the defense's strategy of painting the police investigation as sloppy.

After review of the record, it appears that the thrust of Silfies's testimony on this issue was to establish a psychological profile of the killer (someone who was in a rage because of a conflict with the victim in the previous forty-eight hours) and then to state that the defendant fit the profile. This testimony goes beyond merely explaining Silfies's actions and instead goes toward establishing Day's guilt.

This case touches on (but does not require us to answer) the interesting question of whether a Kentucky court should admit a psychological profile of a killer developed by a police expert based on *crime scene evidence*. This Court has repeatedly held that evidence that a defendant does or does not fit a *general* criminal profile "is inadmissible in criminal cases to prove either guilt or innocence." *Kurtz v. Commonwealth*, 172 S.W.3d 409, 414 (Ky. 2005) (quoting *Dyer v. Commonwealth*, 816 S.W.2d 647, 652 (Ky. 1991)). For example, in *Kurtz*, this Court held that it was error for an expert to testify about the common characteristics of perpetrators of child sex abuse in a prosecution for child sex abuse. *Id.* But this Court has not had an opportunity to decide whether a profile developed from a *particular* crime scene, rather than a profile of a general category of offenders, is admissible. Other courts have addressed this issue and have reached varying conclusions. *See, e.g., State v. Fain*, 774 P.2d 252, 257 (Idaho 1989) (holding that an FBI psychological profile based on crime scene evidence was properly excluded); *Masters v. People*, 58

P.3d 979 (Colo. 2002) (allowing expert testimony about the characteristics of the killer based on crime scene evidence); *see also* James Aaron George, Note, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?*, 61 Vand. L. Rev. 221, 244–50 (2008) (collecting and analyzing cases dealing with crime scene profiling).

There is no need to answer the broader question of whether crime scene profiling is ever admissible because no foundation was laid to show that Silfies was qualified to give such an opinion in this case. KRE 702. Here, the Commonwealth did not lay any foundation that Silfies had training or experience in developing psychological profiles based on crime scene evidence. *See Allgeier v. Commonwealth*, 915 S.W.2d 745, 746–47 (Ky. 1996) (police officers may testify as experts in the areas of their training and experience). And it seems unlikely that even an expert could come up with the forty-eight-hour time frame with any degree of certainty.

Silfies's testimony created an aura of expertise; he implied that he was able to interpret the evidence at the crime scene to mean that it was a crime of rage, and he implied that he had expert knowledge that these types of murders are usually the result of conflicts in the previous forty-eight hours. There was no foundation laid that Silfies's experience or training prepared him to give such testimony, and it was not established that "(1) [the] testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of this case." KRE 702.

It may be proper in some cases for the Commonwealth to offer evidence of how a police investigation proceeded to show that the investigation was not incomplete or biased in some way. In a new trial of Day, if the thoroughness of the police investigation is challenged, Silfies may testify about why Day was a suspect, but he should not be allowed to give expert testimony unless he meets the requirements in KRE 702.

In this case, it is not clear that there is any need for expert testimony on why Silfies considered Karen and Dale Day to be suspects. It is common sense that an officer would investigate people who had recent conflicts with a murder victim. There is no need to dress up Silfies's reasonable investigative decisions with evidence about psychological profiling that could mislead the jury.

III. CONCLUSION

For the foregoing reasons, the trial court's judgment is reversed and remanded for further proceedings consistent with this opinion.

All sitting. Noble, Schroder, Scott and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Abramson and Cunningham, JJ., join.

MINTON, C.J., DISSENTING: I respectfully disagree with the majority's conclusion that the Commonwealth's failure to disclose pretrial a prior inconsistent statement so infected the entire trial proceeding that the trial court's failure to grant a mistrial compels a reversal. In my view, the trial court's denial of Day's mistrial motion reflects properly exercised judicial

discretion following a thorough analysis of the circumstances and a proper application of the law. For that reason, I must dissent.

The threshold question here is whether Forbes's trial testimony is truly inconsistent with her prior statement. After hearing argument on the issue, the trial court was satisfied that it was not; and the trial court's ruling comports with our inconsistent-statement precedent under Kentucky Rules of Evidence (KRE) 613.

"Kentucky has adopted Professor Wigmore's definition of inconsistency. Inconsistency is to be determined not by individual words or phrases alone but by the whole expression or effect of what has been said or done." Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers* § 27:3 (2010). Our jurisprudence holds that "[s]eemingly the test should be, could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor?" *Com. v. Jackson*, 281 S.W.2d 891, 896 (Ky. 1955) (overruled in part on other grounds by *Jett v. Com.*, 436 S.W.2d 788 (Ky. 1969)). Because I believe it was understood that Day was the married man in Forbes's prior written statement, I do not believe Forbes's trial testimony was inconsistent. So I conclude the trial court did not abuse its discretion when it did not grant a mistrial.

Although there is no applicable provision in the criminal discovery rules establishing a duty to disclose Forbes's expected testimony here, Day requested in his discovery motions the disclosure of statements that were inconsistent with other witness statements. The Commonwealth responded to this request

by saying that it provided the requested discovery to the extent possible unless there were clear conflicts with discovery rules.

Although Day claims that an inconsistency arises from Forbes's identifying Day at trial as the boyfriend, Forbes stated in her testimony that Hargrove never referred to Day by name. Forbes's trial testimony that she figured out who Day was and that she was aware he might be dating Hargrove was not inconsistent with her written statement that Hargrove did not give Forbes the name of the married man Hargrove was seeing. The information about Hargrove's plans to break up was not inconsistent with her prior statement but simply additional information.

In light of all the other evidence adduced at trial and defense counsel's thorough cross-examination of the witness, which established that the breakup plan was not mentioned in Forbes's written statement, this testimony likely had minimal, if any, prejudicial effect on Day's defense. Day himself admitted to his extra-marital affair with Hargrove in statements he gave to police, and these statements were presented as evidence at trial. And, possibly, this evidence may have even inured to Day's benefit by supporting a defense of EED to the murder charge.

For these reasons, I would affirm the judgment of conviction.

Abramson and Cunningham, JJ., join.

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