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RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000659-MR

CYNTHIA WALLACE — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 07-CR-00484

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Cynthia Wallace appeals her convictions for wanton murder, knowing neglect of an adult by a caretaker, and knowing exploitation of an adult over $300.00, stemming from the death of her elderly mother while in her care. Upon review of the Appellant's various claims of error, we affirm the convictions on all three offenses.

On Sunday, October 29, 2006, Lexington police officer Christopher Flannery responded, along with the coroner, to a report made by Cynthia Wallace that her elderly mother had died in her (Cynthia's) home. When Officer Flannery arrived at the home, he testified that before he even went into the house, he smelled a foul odor. Once inside the house, Flannery observed piles of trash, refuse, clutter, and flies throughout the house. The photos of the

home indicate that some of the piles were as high as four feet tall. Officer Flannery described the conditions in the home as "horrendous" and "unforgettable."

Upon making his way to the room of the deceased, Officer Flannery observed the deceased, Wanda Wallace, in bed with a comforter pulled up to her neck. When Flannery and the coroner pulled the cover down and moved the deceased's body to check for injuries, the deceased's skin on her backside tore. According to Flannery, her whole backside looked like a bed sore. There was no diaper on the deceased, and she had on clothing that was pulled up to her waist. A large amount of feces could be seen inside the clothing all along the back and buttocks area.

When Officer Flannery spoke with Cynthia Wallace at the scene, Cynthia stated that the deceased was her mother and that she was her caretaker. She told Flannery that she would give her mother two bottles of Ensure per day and that she had last spoken with her mother the previous morning (Saturday) at 8:00 am. Because of the condition of the home and the appearance of the deceased, Flannery determined that the death warranted further investigation.

Cynthia was first interviewed by police later that same day, Sunday October 29. During this interview, Cynthia stated that her mother had been in good health until about one month before her death, when she had stopped walking around and had become bedridden. She confirmed that her mother needed help bathing and feeding herself, and stated that she had been feeding

her mother Ensure and chicken breast recently. According to Cynthia, the last time her mother had seen a doctor was six months before her death, for a broken wrist. Cynthia told the detectives in this interview that she had last spoken with her mother at 8:00 am on Saturday, when she brought her an Ensure and changed her diaper. She claimed that she checked on her mother every one to two hours on that Saturday.

After this interview, the detectives began investigating whether there had been any wrongdoing regarding Wanda's financial affairs. In reviewing Cynthia's and Wanda's bank accounts, it was discovered that from July 2006 through late November 2006, all of the money in Wanda's savings account ($20,000) and almost all the money in Wanda's checking account ($55,000) had been transferred to Cynthia's checking account. During this same time period, Cynthia's expenditures tripled compared to six months prior.

On November 3, detectives returned to Cynthia's house to question her again. During this second interview, Cynthia stated her mother seemed okay on Friday night when she talked to her before going to bed. She said that she checked on her mother ten-plus times on Saturday and the same on Sunday. As the interview progressed, however, Cynthia's story began to change and she admitted that she had not paid as much attention to Wanda as she had earlier claimed.

Cynthia admitted that she got tired of bathing and caring for her mother and that it wore her out. She could not remember the last time she changed her mother's diaper. She stated that the last time she recalled bathing her was

three weeks before her death. Although she claimed that she had her mother's permission, Cynthia admitted that she took about $20,000 from her mother's bank account and used it to buy food, buy things for her son, and pay bills.

According to Dr. Jennifer Schott, the forensic pathologist from the medical examiner's office who conducted the autopsy on Wanda, Wanda was 61 inches tall and weighed 90 pounds at her death. When Wanda was last at the doctor in March 2006, she weighed 120 pounds. Dr. Schott determined that Wanda's cause of death was starvation and dehydration as a result of elderly neglect.

Cynthia was indicted on charges of wanton murder, knowing neglect of an adult by a caretaker, and financial exploitation of an adult over $300. Pursuant to a five-day jury trial, Cynthia was found guilty of all three charges. In accordance with the jury recommendations, the trial court sentenced her to thirty years on the wanton murder and ten years each on the neglect and exploitation convictions, with the exploitation sentence to run concurrently, for a total of forty years. This matter of right appeal followed.

INSUFFICIENCY OF THE EVIDENCE – WANTON MURDER

Cynthia argues that there was not sufficient evidence to support the wanton murder conviction. Cynthia maintains that the Commonwealth did not meet its burden of showing that she acted "under circumstances manifesting extreme indifference to human life." KRS 507.020. The trial court denied Cynthia's motion for a directed verdict, finding that there was sufficient evidence to convict her of wanton murder.

To be convicted of wanton murder, the Commonwealth must show that the defendant, acting "under circumstances manifesting extreme indifference to human life, . . . wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KRS 507.020(1)(b). The definition of "wantonly" is set out in KRS 501.020(3) as follows:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

KRS 501.060(3) provides in pertinent part:

> When wantonly or recklessly causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of recklessness, of which he should be aware unless:
> . . .
> (b) The actual result involves the same kind of injury or harm as the probable result and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

Cynthia's two older brothers, Stephen and Ed Clay, neither of whom lived in Lexington, testified for the Commonwealth. Stephen testified that he talked to his mother twice a week. About five to six months before his mother's death, Stephen learned that Cynthia had cancelled the land telephone line at her house. He became concerned about his mother during this time because he

had no way to reach her, as her cell phone had been turned off as well. When he contacted Cynthia, she told him that their mother had been diagnosed with dementia.

Stephen testified that the last time he talked to Cynthia was the Thursday before his mother's death. During that conversation, Cynthia told him that their mother was "fine," that she had taken her to the doctor, fed her some lunch, and put her down for a nap. At no point did Cynthia indicate that their mother was bedridden. Stephen stated that he would have provided help in caring for his mother if Cynthia had just asked. Stephen testified that his mother had lived with him for five months in the 1990's when Cynthia was sent to Korea for military duty.

Ed Clay testified that he too had taken care of his mother for about a year when Cynthia was in Korea. Like Stephen, Ed testified that he would have taken care of his mother again if Cynthia had asked for help.

Upon being notified of Wanda's death, Ed and Stephen traveled to Lexington and went to Cynthia's home. Ed and Stephen testified to the deplorable conditions in the house. The brothers attempted to clean the house and collected 25 bags of trash the first day, which scarcely made a dent in the mess.

Four months before Wanda's death, on June 26, 2006, Adult Protective Services received a report of "self-neglect" regarding Wanda. The following day a social worker, Danny Dittman, visited the house. Dittman testified that the condition of the house that day was very cluttered, but not as bad as at the

time of Wanda's death. Cynthia told Dittman that she was Wanda's caretaker and that her teenage son looked after Wanda when she was at work. According to Dittman, at the time of this visit, Wanda appeared to be physically healthy and not underweight, but she seemed to have some short-term memory problems. Before leaving, Dittman told Cynthia that she needed to clean up the house to make it safer for Wanda to move around.

Three weeks later, Dittman again visited Cynthia's house after receiving another report of self-neglect. When he knocked on the door, Wanda answered and was alone in the house. Cynthia later told Dittman that she had been out shopping. On this visit, Dittman did not enter the house. After this visit, Dittman did not visit the house again.

Cynthia herself testified at trial. She stated that she was the adopted daughter of Wanda and maintained that she had always been close to her mother. Cynthia testified that Wanda had lived with her and her son, Matthew, since 1993. At the time of Wanda's death, Wanda was still living with Cynthia and Matthew, who was then fourteen years old, and Cynthia was working full-time as an x-ray technician at University of Kentucky Hospital.

Cynthia testified that towards the end of Wanda's life, Cynthia became overwhelmed with her full-time job, her son, and taking care of her mother. She stated that several months before her death, Wanda became less mobile. Cynthia claimed that around three weeks prior to her death, Wanda began to exhibit signs of dementia and became bedridden. Cynthia testified that Wanda refused to go to the doctor or be bathed. Despite promising her mother she

would not put her in a nursing home, Cynthia claimed she had started inquiring about nursing homes.

Cynthia testified that she would give her mother solid food in addition to two Ensure shakes every day. However, she admitted that she would not always stay in her room to see that she ate the food or drank the shakes. In the last three weeks of her mother's life, Cynthia admitted that she would not remove the uneaten food from her mother's room and, thus, did not know how much her mother was eating. Cynthia testified that she never tried to feed her mother because she did not believe she needed help to eat.

Cynthia acknowledged that her mother suffered from bedsores toward the end of her life. She testified that she bought her mother a special pillow and some antibiotic spray to help with the sores. Cynthia admitted, however, that the last time she bathed and changed her mother's diaper was three weeks before she died.

Contrary to what she told police, Cynthia testified that the Friday before her mother's death was the last time she spoke to her mother. She testified at trial that she spoke to her that morning when she got home from work and brought her an Ensure. She testified that on Saturday, she did not check on her mother, other than peering in her room as she walked down the hall. Cynthia admitted lying to police when she told them that the last time she spoke with Wanda was on Saturday when she fed her and changed her diaper. Cynthia acknowledged at trial that she should have checked on her mother on Saturday. When asked when she knew her mother was dead, Cynthia

responded that she knew for sure on Sunday. She added that she suspected she was dead on Saturday, but did not want to believe it.

Dr. Schott testified that, from her examination of the body and other information regarding the conditions of the home, it was her opinion that Wanda died as a result of starvation and dehydration caused by elderly neglect. Dr. Schott testified that she based her opinion on several factors: dried food stuck to the body, abundant dried feces on the buttocks and the back of the lower extremities, decubitus ulcers (bedsores) along the upper and lower backside, very long fingernails with abundant imbedded debris, excess skin folds, a low body mass index (17), a large amount of impacted stool, and her emaciated appearance. Although Dr. Schott cited as contributing factors dementia and cardiovascular disease, she stated that neither of those conditions alone would have caused Wanda's death.

Dr. Martin Smith, a psychologist who examined Cynthia to evaluate her mental state for purposes of competency and criminal responsibility, testified for the defense. He testified that while Cynthia was competent to stand trial, she suffered from recurrent major depressive disorder. He also testified that Cynthia's IQ was around 125.

Under *Commonwealth v. Benham*, where a motion for directed verdict has been denied, the question on appeal is whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 816 S.W.2d 186, 187 (Ky. 1991). As stated above, to convict a

defendant of wanton murder, the Commonwealth must prove, among other things, that Cynthia engaged in conduct creating a grave risk of death and that she perceived that risk but disregarded it. KRS 507.020(1)(b); KRS 501.020(3).

The evidence in this case was undisputed that Cynthia was responsible for Wanda's care at the time of her death and that Wanda died from starvation and dehydration. Cynthia argues that the Commonwealth failed to prove that she was aware that there was a substantial risk that the amount of food and liquid she was giving her mother would result in her mother's death. We do not agree.

Cynthia had an above-average IQ and worked in the health care field as an x-ray technician. By Cynthia's own admission, she was aware that her mother was bedridden and was suffering from dementia. Cynthia further testified that Wanda was having problems with her dentures and it was becoming harder for her to eat. The fact that Cynthia had given Wanda Ensure, a nutritional supplement, demonstrates that she knew Wanda was having trouble eating solid food. Although Cynthia claimed that she brought Wanda solid food and Ensure shakes every day, she admittedly did not stay to see if she ate or drank any of it and failed to remove the uneaten food, which would have indicated how much she had eaten. At the time of Wanda's death, she had lost 30 pounds, nearly 25 percent of her body weight, in six months. The photos clearly show Wanda to be extremely emaciated.

There was abundant circumstantial evidence that Cynthia acted wantonly in depriving her mother of food and water in this case. The evidence

that she failed to bathe or change her mother's diaper for three weeks, the horrible living conditions in the house, and the uneaten food left in Wanda's room show a pattern of neglect of her mother. From this evidence, jurors could reasonably conclude that Cynthia likewise ignored her mother's need for sufficient food and water.

Cynthia testified that she simply became depressed and overwhelmed with taking care of her mother. However, she knew her brothers had taken care of Wanda in the past and that social services was available as a resource. Yet Cynthia never called anyone to ask for help in caring for Wanda. The evidence of Cynthia's financial exploitation of Wanda would certainly explain why she did not seek anyone else's help in caring for Wanda. From that evidence, it would be reasonable to conclude that she did not want anyone else to have access to Wanda's money or, once spent by Cynthia, did not want to alert anyone to the fact that she had spent all of Wanda's money.

In sum, we believe there was sufficient evidence in this case to convict Cynthia of wanton murder. Accordingly, the trial court did not err in denying the motion for directed verdict.

INSUFFICIENCY OF THE EVIDENCE – NEGLECT

Cynthia argues that there was also not sufficient evidence to support the conviction for knowing neglect of an adult by a caretaker. KRS 209.990(2) provides, "Any person who knowingly abuses or neglects an adult is guilty of a Class C felony." "Neglect" is defined in KRS 209.220(16) as

> a situation in which an adult is unable to perform or obtain for himself or herself the goods or services that

> are necessary to maintain his or her health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult.

KRS 209.220(6) defines a "caretaker" as

> an individual or institution who has been entrusted with or who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily or by contract, employment, legal duty, or agreement.

As we shall discuss further in the next argument, there was no question that Cynthia was Wanda's "caretaker" pursuant to KRS Chapter 209. As the daughter of Wanda, it was undisputed that Cynthia had voluntarily assumed the responsibility for caring for Wanda.

The Commonwealth presented evidence that Wanda became bedridden at the end of her life and was dependant on Cynthia for all of her basic needs – food, drink, bathing, dressing, diaper changing, obtaining medical care, and a safe and sanitary living environment. There was evidence that Wanda was deprived of all of these. As discussed above, the evidence established that Cynthia failed to see that Wanda was sufficiently nourished and hydrated. By Cynthia's own admission, Wanda had not been bathed or changed in three weeks. Cynthia also testified that she had not sought medical treatment for Wanda's severe bedsores. Finally, the filthy, garbage-laden condition of the home posed both a health and safety hazard to Wanda.

Cynthia argues that she could not be convicted of the neglect offense because the instructions limited the date of the offense to one day – October

29, 2007 – and the evidence was that Wanda was dead on this date. Thus, Cynthia contends that she could not have neglected Wanda if she was dead.

This argument is not well taken. The indictment states that the offense of neglect was committed "[i]n October 2006," and the instructions state that the offense was committed "**on or about** October 29, 2006 and before the finding of the Indictment herein." (emphasis added). It has been recognized that the phrase "on or about" a particular date "could have covered a period of several days." *James v. Commonwealth*, 482 S.W.2d 92, 93 (Ky. 1972).

Cynthia herself testified that she last talked to Wanda on Friday, October 27, 2006. Thus, there was evidence that Wanda was alive within several days of October 29, 2006. And there was abundant evidence that Wanda was neglected by Cynthia during this time period. Accordingly, there was more than sufficient evidence to support the neglect conviction.

ERRONEOUS JURY INSTRUCTIONS

Cynthia argues that the trial court erred in failing to include in the jury instructions on the wanton murder charge that the jury find that Cynthia owed a duty to Wanda to provide her with adequate care. Cynthia admits, however, that this issue was not properly preserved for appellate review. She seeks review under RCr 10.26 for palpable error.

KRS 501.030 provides:

> A person is not guilty of a criminal offense unless:
>
> (1) He has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is physically capable of performing; and

> (2) He has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense, except that this requirement does not apply to any offense which imposes absolute liability, as defined in KRS 501.050.

Cynthia argues that because the wanton murder charge was based on her failure to perform a duty – to provide Wanda with sufficient food and liquid – the jury was required to find, as an element of the offense, that Cynthia owed a duty to Wanda which the law imposed. In *West v. Commonwealth,* a case similar to the case at bar wherein appellants were charged with manslaughter and reckless homicide for failure to provide adequate care to the disabled adult victim, the Court of Appeals stated:

> We agree that before defendants can be found guilty of either reckless homicide or manslaughter, there must exist a legal duty owed by the defendants to the victim. A finding of legal duty is a critical element of the crime charged. As stated in KRS 501.030 and demonstrated by case law, the failure to perform a duty imposed by law may create criminal liability. Clearly, in the case of reckless homicide or manslaughter, the duty must be found outside the definition of the crime itself. The duty of care imposed may be found in the common law or in another statute.

935 S.W.2d 315, 317 (Ky. App. 1996). The court then went on to find the existence of a legal duty to care for the victim via the definition of "caretaker" in KRS 209.020(6). The court noted that the instructions required the jury to be "convinced beyond a reasonable doubt that [the defendant] was under a duty to provide [the victim] with appropriate care and that he had breached that duty of care before liability could be imposed." *Id.*

The wanton murder instructions in the instant case did not contain an element that required the jury to find that Cynthia owed Wanda a duty to provide her with adequate care. Accordingly, it was error to not include this element in the wanton murder instructions. *See Harper v. Commonwealth,* 43 S.W.3d 261 (Ky. 2001). The question now is whether this defect in the instructions constituted palpable error under RCr 10.26.

An erroneous jury instruction is presumed to be prejudicial, and a party claiming such an error to be harmless bears the heavy burden of showing that no prejudice resulted from it. *Harp v. Commonwealth,* 266 S.W.3d 813, 818 (Ky. 2008). An error in the instruction can also rise to the level of palpable error. *See Sanders v. Commonwealth,* 301 S.W.3d 497, 500-501 (Ky. 2010). However, there are cases where the error in the instructions was found not to constitute palpable error. *See Tharp v. Commonwealth,* 40 S.W.3d 356 (Ky. 2000).

In *Tharp,* wherein the appellant was charged with complicity to wanton murder, the trial court failed to include as an element of the offense that the appellant was the parent and custodian of the victim, pursuant to KRS 502.020(2)(c), which allows for a complicity charge where the defendant has a legal duty to prevent the conduct. *Id.* at 367. This Court held that it was not palpable error to omit this element from the instructions because the appellant did not deny being the mother and legal custodian of the victim. *Id.*

Similarly, in the instant case, Cynthia did not deny that she had voluntarily undertaken the duty of being Wanda's caretaker pursuant to the

definition thereof in KRS 209.020(6). Moreover, the instructions on the neglect charge required the jury to find that Cynthia was Wanda's caretaker.[1] Because the jury necessarily found Cynthia to be Wanda's caretaker when it found Cynthia guilty of knowing neglect of an adult by a caretaker, we adjudge that the failure to include Cynthia's legal duty to care for Wanda in the wanton murder instructions was not palpable error.

Cynthia also argues that the jury instructions were defective because they failed to specify the method of death in the wanton murder instruction and the type of conduct comprising the neglect in the neglect instruction. Cynthia asserts that because the instructions on the wanton murder and neglect were not factually distinguished, her constitutional right to a unanimous verdict was violated. We reject the contention that more factual detail was necessary in the instructions in the instant case because Cynthia was only charged with one count of each offense. As noted by this Court in *Harp v. Commonwealth*, "Our precedent does not support a conclusion that a trial court is required to include any identifying evidentiary detail in instructions in which a defendant is charged with only one count of an offense." 266 S.W.3d at 821 n.25 (citation omitted). Hence, there was no unanimous verdict issue in this case.

DOUBLE JEOPARDY

[1] ". . . an individual or institution who has the responsibility for the care of the adult as a result of a family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, by contract, or agreement." *See* KRS 209.020(6).

Cynthia argues that her convictions for wanton murder and knowing neglect of an adult by a caretaker violate the double jeopardy clauses of the Kentucky and United States Constitutions. United States Const. amend. V; Ky. Const. § 13. Cynthia maintains that, because her alleged acts of neglect served as the basis of the wanton murder charge, she could not be convicted of both offenses. The test for determining whether a defendant can be convicted of more than one crime arising out of the same act or acts is whether each charge requires proof of a fact that the other does not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). Cynthia concedes that, on their face, the offenses of wanton murder and knowing neglect of an adult by a caretaker each require proof of a fact that the other does not. Indeed, the element of acting with "extreme indifference to human life" in KRS 507.020(1)(b) is not an element of knowing neglect of an adult by a caretaker. And conversely, the deprivation of "goods or services that are necessary to maintain his or her health or welfare" under KRS 209.990(2) and KRS 209.220(16) is not an element of the offense of wanton murder. Additionally, there is the difference in the mental states for the two offenses – "knowing" versus "wanton" – and one offense requires causing the death of the victim, while the other does not.

Cynthia argues that it was nevertheless improper to convict her of both offenses under KRS 505.020, which provides:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:

> (a) One offense is included in the other, as defined in subsection (2); or
> (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
> (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.
>
> (2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

Specifically, Cynthia contends that under KRS 505.020(2)(a), the knowing neglect conviction was established by proof of the same or less than all the facts required to establish the commission of wanton murder. We do not agree. As noted above in our *Blockburger* analysis, the Commonwealth was required to prove facts demonstrating extreme indifference to human life and the causing of death to the victim for wanton murder, which was not required to prove the knowing neglect offense. Although some of the same facts may have been considered to convict Cynthia of wanton murder, that does not mean there is a double jeopardy violation. *See Meredith v.*

Commonwealth, 164 S.W.3d 500, 505 (Ky. 2005) (citing *Bennett v. Commonwealth*, 978 S.W.2d 322, 327 (Ky. 1998)) ("[T]he facts proving the element of endangerment necessary to convict of first-degree robbery may be the same facts which prove the element of aggravated wantonness necessary to convict of wanton murder."). "An overlap of proof does not, of its own accord, establish a double jeopardy violation." *Clark v. Commonwealth*, 267 S.W.3d 668, 677 (Ky. 2008) (citing *Dishman v. Commonwealth*, 906 S.W.2d 335, 341 (Ky. 1995)).

There were a host of facts in this case that constituted evidence of neglect and not wanton murder – failing to bathe and change Wanda's diaper, failing to seek treatment for Wanda's bedsores, and the unsafe and unsanitary condition of the home. According to the evidence, none of these acts of neglect caused Wanda's death. The evidence established that Wanda died of starvation and dehydration.

Cynthia also argues that the knowing neglect offense was designed to prohibit a continuing course of conduct pursuant to KRS 505.020(1)(c), and thus she could not be additionally charged with wanton murder. We agree that it is questionable whether Cynthia could have been charged with numerous counts of neglect during the uninterrupted period of these charges under this section. *See Welborn v. Commonwealth*, 157 S.W.3d 608 (Ky. 2005). However, the wanton murder charge was a different offense with separate and distinct elements.

We likewise reject Cynthia's assertion that knowing neglect and wanton murder are offenses that differ only in the respect that a less serious injury suffices to establish its commission pursuant to KRS 505.020(2)(d). Wanda suffered other injuries as a result of Cynthia's neglect, beyond the starvation and dehydration which ultimately caused her death. The most significant injuries, unrelated to the starvation and dehydration, were the severe skin ulcerations and bed sores on her backside which were the result of, or made worse by, the failure to be turned periodically in bed, lack of bathing, lack of diaper changing, and failure to receive medical treatment.

DISCOVERY VIOLATION

During the testimony of Dr. Schott, the medical examiner, defense counsel was permitted to review the notes relied on by the witness. In reviewing these notes, defense counsel discovered a document that had not been provided to the defense during discovery. The document was entitled Coroner's Authorization for Post-Mortem Examination and was signed by the deputy coroner, Miles White. The document was a form filled out by White, which specifically gave the Kentucky Medical Examiner's Office authority to conduct an autopsy on the deceased and contained basic information about the death – identity of the deceased, location of the body, date of death, time of death, and history taken at the site. On the line providing for "Type of Death That Is Suspected," Miles had entered "Natural vs. Accidental."

Defense counsel moved for a mistrial based on his not being provided the document prior to trial. The trial court thereupon held a hearing on the matter

outside the presence of the jury. The prosecutor maintained that she had not seen the document before, that it was not something that the Commonwealth had intended to introduce, and that it was not discoverable unless it was exculpatory.

Upon questioning by the court about the document, Dr. Schott stated that she sometimes staples the coroner's authorization form to her report, but sometimes she does not include it if the attorneys contact her directly for the report. Dr. Schott stated that she did not always attach the form to her report because she did not consider the form to be part of her report. Dr. Schott explained that she viewed the information on the form as simply being the initial impression by the coroner on the cause of death, and that the information on the form "may be true in the end, or it may have nothing to do with the answer."

The trial court questioned the value of the document to the defense because the coroner, who was not a medical doctor, would not have been qualified to testify as an expert on the cause of death under KRE 702. Defense counsel argued that regardless of whether the coroner would have been able to testify at trial, the information would still have been of value in his pre-trial preparation and in the formulation of his strategy in the case. In particular, defense counsel asserted that had he had access to the coroner's authorization form, the defense may have retained its own forensic pathologist to further investigate the cause of death. Although the trial court found that the medical examiner should have given the document to the defense prior to trial, the trial

court ultimately denied the motion for a mistrial. Cynthia argues on appeal that the discovery violation warrants reversal of her conviction.

Assuming that the document was something that should have been provided to the defense in this case, it has been held that "[a] discovery violation justifies setting aside a conviction 'only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different.'" *Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky. 1997) (citations omitted). Furthermore, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Similarly, the Commonwealth has a duty to disclose to the defendant any exculpatory witnesses. *See Lowe v. Commonwealth*, 712 S.W.2d 944, 946 (Ky. 1986). However, to be entitled to a new trial, appellant bears the burden of showing that the evidence withheld is favorable to him and material to either guilt or punishment. *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Thus, appellant "has the burden of establishing that there is a reasonable probability that the result of the trial would have been different if the allegedly withheld exculpatory [evidence] were disclosed to the defense." *Id.* at 386 (citing *Strickler v. Greene*, 527 U.S. 263, 279 (1999)).

The coroner's form at issue in this case indicates that it was simply the coroner's initial impression at the death scene. The deputy coroner's entry of "Natural vs. Accidental" was not his definitive conclusion on the cause of death, but rather the "**suspected**" cause of death. Under the "History" portion of the form, the deputy coroner noted that the deceased looked very frail and had bruising on her facial area, abundant feces in her clothes, and bedsores covering her back. The deputy coroner clearly had some question about the cause of death since he ordered the medical examiner's office to perform an autopsy on the body. As recognized by the trial court, the deputy coroner in this case was a layperson, not a medical doctor, and thus would not have been allowed to testify as an expert on cause of death under KRE 702. As to defense counsel's claim that he would have explored a different defense strategy if he had had the coroner's form, it is pure speculation that had defense counsel hired his own forensic pathologist, he would come to a different conclusion on cause of death.

From the above, we cannot say there was a reasonable probability that, had the defense been provided the coroner's form in discovery, the result at trial would have been different. Hence, there was no error in the denial of the motion for a mistrial.

INSUFFICIENCY OF THE EVIDENCE – FINANCIAL EXPLOITATION

Cynthia argues that the Commonwealth failed to present sufficient evidence to support the conviction for knowing exploitation of an adult over $300.00. In particular, Cynthia contends that the Commonwealth never

proved the extent of Wanda's permission for Cynthia to spend her funds, how far that permission was exceeded, and that the amount of the exploitation was over $300. KRS 209.990(5) provides that "Any person who knowingly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars ($300) in financial or other resources, or both, is guilty of a Class C felony." KRS 209.020(9) defines "exploitation" as "obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources."

The Commonwealth presented the testimony of Morris Gahafer, a forensic accountant, who testified that from July 2006 to November 2006, all of the money in Wanda's savings account ($20,000) was transferred to Wanda's checking account. Gahafer testified that during that same period, almost all the money ($55,000) in Wanda's checking account was transferred to Cynthia's checking account. An examination of Cynthia's expenses during this period revealed that Cynthia was spending large sums of money on electronics ($3,963), video games for her son ($15,313), and restaurants ($4,377). The financial records from this period also showed that Cynthia was obtaining large amounts of cash from her checking account ($12,293). Gahafer testified that his comparison of Cynthia's expenditures during this period to the time period before Wanda's funds were transferred to Cynthia's bank account showed that Cynthia's expenditures had tripled.

We adjudge there was more than sufficient evidence to support the conviction for knowing financial exploitation of an adult over $300. There was evidence that Wanda was suffering from some degree of dementia during the period that Cynthia transferred Wanda's funds to her own bank account and spent the money. There was likewise evidence that any permission that Wanda had given for Cynthia to spend her money was limited. Although Cynthia testified that she had her mother's permission to spend her money, she admitted at trial that she exceeded her mother's permission by "a whole lot." Cynthia testified, "I took the permission she gave me and went overboard on it." We believe this evidence showed that Cynthia obtained Wanda's money through "deception . . . or similar means, with the intent to deprive [Wanda] of those resources." Accordingly, the trial court properly denied the motion for directed verdict on the financial exploitation charge.

IMPROPER JOINDER

Prior to trial, Cynthia objected to the consolidation of the financial exploitation and knowing neglect indictment with the wanton murder indictment, arguing that the financial exploitation charge was in no way connected to the neglect and murder charges. Pursuant to RCr 9.12, the court may order multiple indictments to be tried together if the offenses could have been joined a single indictment. RCr 6.18 allows for the joinder of offenses provided that the offenses are of "the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Joinder is improper if the defendant or the

Commonwealth will be unduly prejudiced. RCr 9.16. A significant factor in identifying prejudice due to joinder is the extent to which evidence of one offense would be admissible at trial of the other offenses. *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993). The trial court's decision with respect to joinder is reviewed for abuse of discretion. *Cannon v. Commonwealth*, 777 S.W.2d 591, 597 (Ky. 1989).

In the instant case, the allegations of financial exploitation were connected to the neglect and murder charges in that the exploitation occurred around the same time period (April 2006 to October 2006) and was part of a common scheme or plan regarding Wanda. The financial exploitation of Wanda could reasonably be seen as a motive for the neglect and wanton murder of Wanda - to insure that Wanda would not find out that Cynthia was spending all of her money. The financial exploitation would certainly explain why Cynthia failed to seek outside help in caring for Wanda. Had there been separate trials, the evidence of the financial exploitation would have been admissible under KRE 404(b) as proof of motive or plan. Accordingly, the trial court did not abuse its discretion in joining all three offenses for trial.

ULTIMATE ISSUE TESTIMONY

When asked by the Commonwealth what she determined to be the cause of Wanda's death, Dr. Schott testified that it was her opinion that she died from "starvation and dehydration due to elderly neglect." The defense made no objection to this testimony. On appeal, Cynthia argues that this testimony was improper because it constituted testimony on the ultimate issue of guilt.

Conceding that the issue was unpreserved, Cynthia asks that we review this argument for palpable error pursuant to RCr 10.26.

In *Stringer v. Commonwealth,* this Court departed from the prior "ultimate issue" rule and adopted the following four-part test for admissibility of expert opinion evidence:

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

956 S.W.2d 883, 892 (Ky. 1997). Cynthia maintains that Dr. Schott's testimony on the cause of Wanda's death did not satisfy the first, third, and fourth factors in the above test.

The parties in this case stipulated to Dr. Schott's qualifications in this case. The evidence established that she was educated and trained as a forensic pathologist and worked in the Kentucky Medical Examiner's office at the time the autopsy was conducted in this case. Thus, she was qualified to render expert testimony on cause of death. *See Baraka v. Commonwealth,* 194 S.W.3d 313, 315 (Ky. 2006).

We likewise reject Cynthia's claim that the subject matter of the testimony was more prejudicial than probative under KRE 403. We view the medical examiner's testimony as extremely probative in this case because she conducted the autopsy on the victim's body and was giving an opinion based

on her scientific knowledge and the findings made during her examination of the body.

Cynthia's primary problem with Dr. Schott's testimony was her conclusion that the starvation and dehydration was the result of elderly neglect. Cynthia contends that the opinion on the manner of death (neglect versus natural causes) was not helpful to and invaded the province of the jury.

In *Baraka v. Commonwealth*, this Court held that the medical examiner's opinion that the manner of death was homicide was properly admissible. 194 S.W.3d at 315. The Court noted that "it is axiomatic that a determination of the cause and manner which led to a person's death is generally scientific in origin and outside the common knowledge of layperson jurors." *Id.* (citing *Stringer,* 956 S.W.2d at 889-90).

In the present case, we believe the medical examiner's expert opinion on the manner of death was important because layperson jurors would not have sufficient scientific or medical knowledge to determine whether Wanda's starvation and dehydration were the result of a medical condition (e.g. inability to swallow or digest food and liquid) or the result of neglect. Dr. Schott testified to a litany of factors on which she based her opinion, some of which would not be known to a layperson to be indicative of starvation and dehydration resulting from neglect (e.g. impacted stool, a body mass index of 17). As noted by the *Baraka* Court:

> Medical examiners must make such determinations every time they indicate on a death certificate whether a death was natural, accidental, suicidal, homicidal, or undetermined. Such conclusions are an inherent part

> of the medical examiner's duties and have never been thought to invade the province of the jury.

194 S.W.3d at 315.

Accordingly, there was no error, much less palpable error, in allowing Dr. Schott to testify to her opinion that the cause of death was the result of elderly neglect.

GRUESOME PHOTOGRAPHS

The Commonwealth offered into evidence eleven photographs of Wanda's dead body. Three of these photos were taken at the scene, and the other eight were taken approximately 24 hours later during the autopsy. The photographs are undeniably gruesome. Many of the photos show Wanda's torn, raw, and severely discolored skin on the back and front parts of her body, in various stages of decomposition.

One of the photographs taken during the autopsy was a close-up shot of Wanda's head and face with her mouth open. Upon close inspection, a milky, whitish substance can be seen in Wanda's mouth. According to the testimony of Dr. Schott, the whitish area in her mouth is the formation of maggots. Officer Flannery confirmed in his testimony that the deceased had maggots in her mouth when he arrived at the scene.

Cynthia argues on appeal that the photographs showing Wanda's decomposing body and the photo of the maggots in her mouth were not relevant to any issue in the case and were unduly prejudicial under KRE 403. However, in reviewing the record, the defense only objected to the admission of

the photograph of the maggots in the deceased's mouth.[2] The defense filed a pre-trial motion entitled "Motion To Exclude Gruesome Photograph," which addressed only the photo showing the maggots. The trial court held a hearing on the motion and, after conducting a KRE 403 analysis of the photograph, ruled that it was admissible. Because defense counsel properly preserved his argument only as to the single photograph showing the maggots, we shall address only that photograph. RCr 9.22.

"The general rule is that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous." *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992). However, it has been held that

> [t]he general rule that photos, otherwise admissible, do not become inadmissible simply because they are gruesome and the crime is heinous 'loses considerable force when the condition of the body has been materially altered by . . . decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer.'

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[2] During the pre-trial hearing on the motion, when defense counsel was asked if he had an issue with the other photographs, he indicated that he did not. Later in the hearing, defense counsel expressed some reservation about showing a photo of the deceased's torn skin on her backside because her body was turned over to take the photograph, and thus was arguably manipulated. However, defense counsel did not seek a ruling from the court on this photograph. *See Bell v. Commonwealth*, 473 S.W.2d 820 (Ky. 1971) (holding that once an objection is made, the party making the objection must insist that the trial court rule on the objection, or else it is waived). Defense counsel also appeared to inquire if the Commonwealth would cover an area in question on one of the photos, which we presume were the genitals of the deceased, which were ultimately blacked out on the photographs admitted at trial. When defense counsel renewed his objection to the photo showing the maggots during trial, he expressed a vague objection to one other of the photographs, but failed to state the basis of the objection and failed to seek a ruling on this photograph.

Foley v. Commonwealth, 953 S.W.2d 924 (Ky. 1997) (quoting *Clark v. Commonwealth*, 833 S.W.2d 793, 794 (Ky. 1991)). "The rule prohibiting the exhibition of inflammatory evidence to a jury does not preclude the revelation of the true facts surrounding the commission of a crime when these facts are relevant and necessary." *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003). Review of the court's decision to admit photographs is reviewed, like any evidentiary ruling, under the abuse of discretion standard. *Ernst v. Commonwealth*, 160 S.W.3d 744, 757 (Ky. 2005).

The instant case is distinguishable from *Funk*, wherein this Court adjudged that the decomposition and maggot-infestation shown in the photo of the body had no direct relation to the crime. 842 S.W.2d at 478. Unlike *Funk*, the condition of Wanda's body was caused by Cynthia's neglect of her mother in the commission of the crimes. Cynthia was charged with knowing neglect and wanton murder based on allegations that she ignored her mother's most basic and life-sustaining needs. In demonstrating the extent of this neglect, the Commonwealth presented evidence (via Dr. Schott) that Wanda had been dead anywhere from 24 hours to one week when Cynthia discovered Wanda dead and called to report her death. So, while it is true that Cynthia was not charged with any offense related to Wanda's corpse, the fact that Wanda had been dead for 1-7 days before Cynthia knew her mother was dead was relevant to this pattern of neglectful behavior. Thus, the evidence of the maggot formation in the body had some probative value in this case.

"In making a KRE 403 ruling, a trial court must consider three factors: the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth." *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998) (citation omitted). In viewing the photo at issue in this case, we cannot say that the risk of undue prejudice outweighed its probative value. There is no allegation that the body or the image were manipulated in the photo. The body appears to be in the same condition it was found at the time of death. The whitish substance in the deceased's mouth is barely discernable. If it were not for the testimony of the witnesses identifying the substance as the formation of maggots, one would not know what it was. In comparing this photo to the other photos of the body, we find it the least disturbing. Hence, we cannot say that the trial court abused its discretion in allowing this photo to be admitted.

For the reasons stated above, we affirm the judgment of the Fayette Circuit Court.

All sitting. All concur.

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