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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 19, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000644-MR

KENNETH P. GATEWOOD — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
NO. 08-CR-001184

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jefferson Circuit Court jury found Appellant, Kenneth Gatewood, guilty of murder, for which he received a thirty-year prison sentence. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

Appellant now alleges four assignments of error: (1) the trial court abused its discretion in denying his motion for continuance; (2) the trial court erroneously precluded him from cross-examining Rochelle Jackson and from introducing Christopher McPherson's statement; (3) the trial court erred by denying his motion for directed verdict; and (4) prosecutorial misconduct arose from the government asking Derrick Small to characterize Detective Hoffman as a liar, implying that Appellant "bought" Small's testimony with drugs,

shifting the burden of proof onto Appellant, and asking jurors to speculate about future dangerousness when fixing the penalty. And, in the event this Court determines none of his allegations merit relief individually, Appellant claims he should be entitled to relief on the basis of cumulative error.

I. Background

Appellant was indicted by a Jefferson County grand jury and charged with one count of murder, first-degree robbery, and tampering with physical evidence. At trial, the jury heard testimony from Rochelle Jackson, who indicated that she was in the Sheppard Square area of Louisville on March 17, 2006. Early that morning, Jackson heard two shots; although she did not see who fired the first shot, she saw Appellant fire the second shot which struck the victim, Kerivan Vargas. Jackson further testified that it appeared Vargas was trying to get out of a car when Appellant shot him. According to Jackson, she again saw Appellant later that morning, at which time he said he had shot Vargas because the victim did not heed his instructions.

Nina and Ron Stevenson also testified on behalf of the Commonwealth. Nina testified that Appellant came to the home she shared with Ron in the early morning of March 17, 2007, wherein Appellant told Ron that he shot Vargas because he did not "give up" drugs or money. Although Ron believed that Appellant's visit did not occur on the day of the shooting, he otherwise corroborated Nina's testimony. According to Ron, Appellant told him that "[Vargas] should have gave it up, so I shot him."

Appellant called Derrick Small to undermine the testimony of Jackson. According to Small, he and Jackson had been on the back porch of his mother's apartment at the time of the shooting and that, from the porch, Jackson could not have seen the shooting. Small also testified that he only heard one shot at the time of this incident.

The Commonwealth rebutted Small's testimony by calling Detective Gary Hoffman. Detective Hoffman testified that, on two occasions, Small told him that he was inside his mother's house at the time of shooting. Detective Hoffman further testified that Small also told him that he heard two shots when he gave his prior statements.

Concha Robinson testified on behalf of Appellant, who supported Small's contention that Jackson had been on the back porch at the time of the shooting. And Appellant offered his own narration at trial, denying his involvement in the shooting and further testifying that, although he heard people arguing over money and then a shot, he could not see who was involved or what was happening, as he was on the porch of a residence away from the scene.

As it had already directed a verdict of acquittal on the charge of tampering with physical evidence, the trial court submitted the case to the jury on charges of murder and first-degree robbery. The jury found Appellant guilty of murder, found him not guilty of first-degree robbery, and recommended a thirty-year prison sentence. This appeal followed.

II. Analysis

A. Motion for Continuance

Appellant argues that the trial court erred when it refused to grant a continuance of less than one day so that defense counsel could present an alibi witness.[1] Because his trial counsel failed to properly follow RCr 9.04, we reject Appellant's argument.

RCr 9.04 outlines the requirements to move for continuance due to the absence of a witness:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. *If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.* If the attorney for the Commonwealth consents to the reading of the affidavit on the hearing or trial as the deposition of the absent witness, the hearing or trial shall not be postponed on account of the witness's absence. If the Commonwealth does not consent to the reading of the affidavit, the granting of a continuance is in the sound discretion of the trial judge.

(Emphasis added).

In *McFarland v. Commonwealth*, 473 S.W.3d 121, 122 (Ky. 1971), our predecessor Court found no basis to evaluate whether there was error in the denial of the continuance in the absence of an RCr 9.04 affidavit. Similarly,

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[1] Appellant's trial counsel told the trial court that "the gist of [the alibi witness'] testimony is that he was also at the back of the building and observed [Appellant] at the back of the building, and they both went to investigate, to see, the shooting and that [the alibi witness] felt that [Appellant] could not have gotten from the location of the shooting to where he was in the period of time after the shot."

the Court of Appeals found no abuse of discretion when a trial court denied continuance in order to secure testimony where no affidavit was filed in support of the motion. *McIntosh v. Commonwealth*, 582 S.W.2d 54 (Ky. App. 1979).

In this case, Appellant concedes that he did not present the trial court with an affidavit as required by RCr 9.04. According to Appellant, though, we should ignore his counsel's procedural failings because to do otherwise would elevate form above substance. We find this argument unpersuasive and decline to remedy Appellant's procedural defects.

Because Appellant failed to submit an affidavit in support of his motion as required by the rules of criminal procedure, we cannot say the trial court abused its discretion in denying the motion.

B. Evidentiary Issues

Appellant next alleges that the trial court erroneously precluded him from cross-examining Rochelle Jackson and from introducing Christopher McPherson's statement to police.

1. Cross-Examination of Rochelle Jackson

Appellant contends that the trial court erred by sustaining the Commonwealth's objection to him cross-examining Jackson regarding an altercation with Appellant's girlfriend. According to Appellant, sustaining the objection denied him his right to confront Jackson and the evidence that Jackson had been in an altercation with Appellant' s girlfriend was relevant to

show her motive for testifying against him.

The Commonwealth responds that Appellant's right to confrontation was satisfied because Jackson testified and was subject to cross-examination. According to the Commonwealth, the trial court properly limited cross-examination on the altercation because it was irrelevant and potentially confusing. We agree.

The Supreme Court has long recognized that "[t]he Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'" *Davis v. Alaska,* 415 U.S. 308, 315 (1974); *See also* Ky. Const. § 11; *Williams v. Commonwealth,* 569 S.W.2d 139 (Ky. 1978). And, of course, the "primary interest secured by [the confrontation clause] is the right of cross-examination." *Davis,* 415 U.S. at 315 (*citing Douglas v. Alabama,* 380 U.S. 415 (1965)).

Via cross-examination, an accused can attack a witness' credibility "by revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* at 316. However, the scope of such examination is not without limitation:

> [O]nce the essential facts constituting bias have been admitted, *a trial court "may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness,* to take account of such factors as 'harassment, prejudice, *confusion of the issues,* the witness' safety, or *interrogation that [would be]* repetitive or only *marginally relevant . . . .'" Olden v. Kentucky,* 488 U.S. 227, 232 (1988), *quoting Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).

Weaver v. Commonwealth, 955 S.W.2d 722, 726 (Ky. 1997) (emphasis added).

In this case, Jackson testified that Gatewood shot Vargas. On cross-examination, Jackson further testified that she and Appellant's girlfriend had engaged in an altercation. The trial court, though, prohibited Appellant from eliciting details of that altercation from Jackson because it believed such details to be irrelevant.

Jackson's testimony provided evidence that she had been in a prior altercation with Appellant's girlfriend. As a result, essential facts constituting bias were admitted into evidence. *Id.* Therefore, Jackson gave the jury enough information to permit a fair appraisal of her possible bias.[2] *Id.* Based on the admission of the altercation and the legitimate desire to circumscribe jury confusion amidst marginally relevant evidence, we believe that the trial court's ruling was a reasonable limitation on Appellant's attempted exploration into Jackson's motive or bias. *Id.*

2. Christopher McPherson's Statement

Appellant also alleges that the trial court erred when it prevented him from questioning Detective Hoffman as to a statement given by Christopher McPherson, who did not testify at trial. In support, Appellant cites KRE 803(1),

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[2] Appellant points this Court to our decision *Barrett v. Commonwealth*, 608 S.W.2d 374 (Ky. 1980), to demonstrate that essential facts constituting bias were not admitted into evidence. Appellant's reliance, though, is misplaced. In *Barrett*, a government witness revealed hostility between himself and the appellant, stating that "every time we get mixed up with them ([the appellant's family]) one of us wind up in trouble." *Id.* at 375. Later, the trial court denied the appellant an opportunity to set forth the grounds for such familial hostility, which included a fight, arson, and a shooting. *Id.* Conversely, in this case Jackson went beyond making a vague reference to hostility, as she testified that she and Appellant's girlfriend had engaged in an altercation. Unlike *Barrett*, wherein a fact-finder could only speculate as to the cause of the "bad blood" between the families, the jury here thus enjoyed sufficient facts to fairly appraise potential bias.

argues that he intended to use McPherson's statement to impeach Jackson's testimony, and, essentially, contends that our state's evidentiary rules must yield to his right to present a defense. We reject each contention.

a. KRE 803(1)

KRE 803(1) provides that present sense impressions "are not excluded by the hearsay rules." A present sense impression is "[a] statement describing or explaining an event or condition *made while the declarant was perceiving the event or condition, or immediately thereafter.*" KRE 803(1) (emphasis added). Time is thus an important element of the present sense impression exception. *Jarvis v. Commonwealth*, 960 S.W.2d 466, 469 (Ky. 1998).

In *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001), this Court deemed a statement by an unavailable witness to a police officer to not be a present sense impression because it "was not made contemporaneously with the event she was describing or immediately thereafter." The witness provided the statement approximately seven minutes after the incident occurred. *Id.* at 166-167.

Here, police interviewed McPherson four hours after the shooting. If a statement made merely seven minutes after an event cannot be considered "immediately thereafter" under KRE 803(1), a statement made four hours after a shooting certainly does not qualify. Thus, McPherson's statement cannot be admitted pursuant to KRE 803(1).

b. Impeachment

Impeachment constitutes an attack upon the credibility of a witness. 81 Am. Jur. 2d *Witnesses* § 828 (*citing State v. Anderson*, 364 S.E.2d 163, 164 (N.C. Ct. App. 1988). Therefore, it must be remembered that the purpose of impeachment is to attack one's credibility – not to prove the facts stated.[3] *Id.* (*citing People v. McKee*, 235 N.E.2d 625, 628 (Ill. 1968). Furthermore, the impeachment of a witness must be conducted as prescribed by law. *Id.*

In Kentucky, a "witness may be impeached by the use of *any evidence relevant to testimonial credibility.*" R. Lawson, Kentucky Evidence Law Handbook, § 4.00(A) (2d. ed. 1984) (emphasis added). For instance, an ordinary witness may be impeached by introducing evidence of bias, interest, or hostility, prior inconsistent statements, character evidence, and criminal convictions. Lawson, §§ 4.10, 4.15[2], 4.20, 4.25 (4th ed. 2003); *See also* KRE 608; KRE 609; KRE 613.

Unlike evidence showing a witness' interest, bias, hostility, inconsistent statements, character, or prior convictions, an inconsistency between one witness' testimony of the events and that of another is not impeachment. Such a conclusion would blur the distinction between evidence offered for the truth of the matter asserted and evidence offered to contest testimonial credibility, thereby rendering our well-established hearsay rules moot. *See, e.g.*, KRE 801.

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[3] We acknowledge, though, that a prior inconsistent statement can be used as substantive evidence. *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997); *See also* KRE 801A(a)(1). However, a declarant must at least be questioned regarding the prior inconsistent statement before evidence of it may be offered, unless the declarant is absent and the impeaching party acted in good faith. KRE 613(a).

In this case, defense counsel made an avowal that McPherson's statement of the events "was significantly different" from Jackson's testimony. McPherson told detectives that, from the passenger seat of a car, he watched Vargas go up onto a porch and talk to someone he believed to be a woman. As the woman shut the apartment door and Vargas began to walk away, he walked up to the window of a white car and spoke with the occupant. According to McPherson, the passenger got out of the car, approached Vargas, and shot him. Admittedly, McPherson's statement contrasts Jackson's narrative, as she testified that she heard two shots, that she was "right there at the corner" and saw Appellant shoot Vargas, and that Vargas was shot as he attempted to get out of his car.

While McPherson's statement may have been "significantly different" from Jackson's testimony, we cannot say that it was relevant to testimonial credibility or impeachment. As a result, the trial court correctly recognized that McPherson's statement was not being admitted to impeach Jackson, as it was clearly being offered for the truth of the matter asserted therein. KRE 801(a). Thus, it was hearsay:

> . . . A legitimate nonhearsay use of an out-of-court statement always involves relevancy in the *mere utterance of the words* comprising the statement (i.e., a logical connection between the utterance of the words and some material element of the case). Absent such relevancy, a claim of nonhearsay must be regarded as nothing more than a pretext for violating the hearsay rule.

Lawson, § 8.05[3] (citation omitted) (emphasis in original); *See also Moseley v. Commonwealth*, 960 S.W.2d 460, 461-462 (Ky. 1997).

We agree with the trial court and hold that Appellant's claim of a nonhearsay purpose (i.e. impeachment) in offering McPherson's statement to be nothing more than a pretext for violating the hearsay rule.

c. Right to Present a Defense

Unable to qualify McPherson's statement under an established hearsay exception or offer it for another purpose besides the truth of the matter asserted, Appellant finally argues that the trial court's ruling, excluding McPherson's statement, violated his right to present a defense. We disagree.

We heed the Supreme Court's repeated exhortation that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotations omitted); *See also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). However, "state and federal rulemakers have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials" because a "defendant's right to present relevant evidence is not unlimited." *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998) (emphasis added). This latitude is impermissibly exceeded when an accused's right to present a defense "is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are *arbitrary or disproportionate* to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324 (internal quotations omitted)

(emphasis added).

Here, Appellant sought to introduce McPherson's statement via a third party, i.e. Detective Hoffman. Appellant, though, fails to argue that our hearsay rules are either "arbitrary or disproportionate to the purposes they are designed to serve." *See Harrison v. Commonwealth*, 858 S.W.2d 172, 176 (Ky.1993) (explaining that hearsay is inadmissible primarily due to its inherent unreliability). Instead, Appellant invites to us accept his bald assertion that the trial court "significantly undermined fundamental elements of [his] defense" because the jury deliberated without considering McPherson's statement. *Scheffer*, 523 U.S. at 315. Just as we have already rejected Appellant's invitation to obfuscate the dichotomy between evidence offered for the truth of the matter asserted and evidence offered to contest testimonial credibility, we must also decline to obliterate our hearsay rules.

Because McPherson's statement was inadmissible hearsay, the trial court properly denied Appellant's request to have Detective Hoffman testify as the differences between his statement and Jackson's testimony. We reiterate our declaration in *Mills v. Commonwealth*, 996 S.W.2d 473, 489 (Ky. 1999) that "*Chambers* . . . does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense." As in *Mills*,

exclusion of the testimony in question did not violate Appellant's right to due process of law.[4]

C. Directed Verdict

Appellant next argues that the trial court erred when it failed to grant a directed verdict due to an insufficiency of evidence. Appellant moved for a directed verdict at the close of the Commonwealth's case and at the close of the evidence.

The Commonwealth responds that the trial court properly denied Appellant's motion. The Commonwealth notes that it is the responsibility of the jury to evaluate the credibility of witnesses and weigh the evidence. We agree.

The standard of review for the denial of a directed verdict is set forth in *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky.1991):

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

For our purposes, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.* (*citing Commonwealth v. Sawhill,* 660 S .W.2d 3 (Ky.1983)); *See also Beaumont v.*

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[4] We note that Appellant was permitted to introduce other evidence to both undermine Jackson's testimony and show that he was not present at the scene of the shooting via his own testimony, as well as that of Small and Robinson.

Commonwealth, 295 S.W. 3d 60 (Ky. 2009). Thus, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham,* 816 S.W.2d at 187-88. However, we reemphasize that an evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont v. Commonwealth,* 295 S.W. 3d 60, 68 (*citing Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

In this case, Jackson testified that she both saw Appellant with a gun in his hand and saw him shoot Vargas. Nina and Ron Stevenson also testified that Appellant confessed to the shooting. Viewing this testimony in the light most favorable to the prosecution (and abstaining from evaluating the credibility of these witnesses), we believe the Commonwealth set forth more than "a mere scintilla of evidence."

Because the testimony was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Appellant murdered Vargas, we must affirm the conviction.

D. Prosecutorial Misconduct

Appellant alleges four instances of prosecutorial misconduct: (1) asking Derrick Small to characterize Detective Hoffman as a liar, (2) implying that Appellant "bought" Small's testimony with drugs, (3) shifting the burden of

proof onto Appellant, and (4) asking jurors to speculate about future dangerousness when fixing the penalty. We address each instance below and, based on our analysis of each allegation, ultimately conclude that the government's conduct did not violate Appellant's right to a fair trial.

1. Cross-Examination of Derrick Small

Appellant argues that the government committed prosecutorial misconduct by asking Derrick Small to characterize Detective Hoffman's testimony as a lie. Conceding that this issue was unpreserved, Appellant requests palpable error review pursuant to RCr 10.26.[5]

The Commonwealth responds that, even if the questions were improper, they did not amount to palpable error. We agree.

In *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), this Court held that "[a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying" because doing so "places the witness in such an unflattering light as to potentially undermine his entire testimony." However, this Court also concluded that such a line of questioning did not constitute palpable error. *Id.*

Here, the prosecuting attorney twice requested Small to characterize Detective Huffman's testimony as a lie. However, Appellant's failure to object

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[5] RCr 10.26 reads:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

compels us to follow our decision in *Moss* and again decline to regard such improper questioning as palpable error, as we do not believe the questions in this case resulted in a manifest injustice.[6]

2. Implying Appellant "Bought" Testimony

Appellant also claims that the government improperly implied that he "bought" Small's testimony with drugs during its guilt-phase closing argument, thereby committing prosecutorial misconduct. As Appellant failed to contemporaneously object during trial, he again requests palpable error review pursuant to RCr 10.26.

The Commonwealth responds that the prosecuting attorney's characterization of Small's motive to testify falls within the wide latitude afforded parties in making closing arguments. We agree.

In *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010), we succinctly outlined our precedent with respect to prosecutorial misconduct during closing arguments:

> Counsel has wide latitude during closing arguments. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). The longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom. *East v. Commonwealth*, 249 Ky. 46, 52, 60 S.W.2d 137, 139 (1933). This Court recently explained the appropriate standard of review for prosecutorial misconduct during closing arguments, stating that reversal is required "only if the misconduct is 'flagrant' or if each of the following are satisfied: (1) proof of

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[6] We note that this Court repeatedly refused to find palpable error arising from a *Moss* violation even when the death penalty has been imposed. *See Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 554 (Ky. 2004); *Caudill v. Commonwealth*, 120 S.W.3d 635, 662 (Ky. 2004); *Tamme v. Commonwealth*, 973 S.W.2d 13, 28 (Ky. 1998).

> defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky.2009) (emphasis removed, quoting *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002)). Additionally, this Court "must always consider these closing arguments 'as a whole.' " *Id.* (quoting *Young v. Commonwealth*, 25 S.W.3d 66, 74–75 (Ky. 2000)).

During his closing argument, the prosecuting attorney in this case described Small, a witness testifying on behalf of Appellant, in the following manner:

> He's a little punk on a crack leash. I could walk into Sheppard Square right now with a bag of crack and I could have ten people in here saying whatever you want to hear'em say. I could hear'em, they'd come in here and tell you it's Sunday, tell you the sky is green and the grass is blue. And that's exactly what he is. That's his dealer. That's his armed dealer. That's his street tough dealer. That's his hood thug dealer. And he depends on him for crack and doesn't want to cross him, so he's going to get his ass up here on the chair, and sit down, and say what he wants him to say.

Unquestionably, the prosecution's closing argument sought to characterize (and thereby attack) Small's motive to testify.[7] Yet, Appellant does not contest that evidence had been introduced showing that Appellant had, on prior occasions, supplied Small with controlled substances. Accordingly, "enough evidence was introduced to make the prosecutor's inference reasonable." *Id.*

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[7] According to Appellant, the closing conveyed that, because Appellant was a drug dealer, he would stoop to anything, including inducing a witness to testify for him, in order to be acquitted of a crime. As a result, Appellant asserts that the closing amounts to an introduction of evidence and his argument focuses on probativeness and prejudicial value. In reviewing the closing, we view the prosecutor's statement as a general assault on Small's motive, premised upon evidence admitted; we cannot say that the prosecutor introduced evidence of a definitive transaction between Appellant and Small to "buy" testimony. Accordingly, Appellant's claim of error encompasses an entirely different review than a claim of evidentiary error.

Because the prosecutor's inference was reasonable, and in light of the wide latitude afforded parties during closing, we find no error.

3. Improper Burden Shifting

Appellant next contends that the government improperly shifted the burden of proof onto Appellant during its guilt-phase closing argument in contravention of KRS 500.070.[8] Specifically, Appellant argues the government implicitly suggested that, because Appellant failed to identify the shooter, there was no alternative suspect, thereby misleading the jury into believing Appellant bore the burden. We disagree.

We consider "any burden shifting to a defendant in a criminal trial [to] be unjust." *Butcher v. Commonwealth*, 96 S.W.3d 3, 10 (Ky. 2010). However, counsel enjoy wide latitude during closing arguments and may comment on the evidence presented at trial. *Padgett, supra.* Furthermore, we evaluate closing arguments "as a whole." *Id.*

Here, the prosecuting attorney pointed out that, during his initial statement to Detective Hoffman, Appellant claimed that he knew about the Vargas shooting but denied any knowledge as to how it occurred, although he then told Detective Hoffman that he knew who committed the offense after

[8] KRS 500.070(1) states that "[t]he Commonwealth has the burden of proving every element of the case beyond a reasonable doubt . . . ."

being charged with the crime. Despite this, as the prosecutor noted, Appellant never told Detective Hoffman or the jury the name of the perpetrator.[9]

The government's closing did not, in any way, suggest that Appellant failed to disprove an essential element. Rather, the closing merely recited the evidence presented at trial, presumably to undermine Appellant's defense. There was no error.

4. Speculation About Future Dangerousness

Finally, Appellant contends that the government committed error when it argued for a stiffer penalty based upon what Appellant might do in the future. However, this allegation of error was not preserved for review by an objection from trial counsel. As such, any review undertaken by this Court would be limited to palpable error review pursuant to RCr 10.26.

Appellant, though, fails to request palpable error review. Accordingly, we decline to evaluate the government's penalty-phase closing argument. *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) ("Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.") (citations omitted).

E. Cumulative Error

Having determined that none of the individual errors merit relief, we address Appellant's request for relief on the basis of cumulative error.

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[9] Appellant's trial counsel told the trial court that "rumor and hearsay" was that Patrick "LeeLee" Lewis was the shooter, but that counsel could not bring that sort of hearsay onto the stand.

Although we agreed with Appellant that the prosecuting attorney committed a *Moss* violation by twice requesting Small to characterize Detective Huffman's testimony as a lie, we did not believe those questions resulted in a manifest injustice and therefore declined to reverse and remand. And with respect to the other allegations of error pertaining to prosecutorial misconduct, as well as the denial of continuance, the cross-examination of Jackson, McPherson's statement, and the denial of a directed verdict, we disagreed with Appellant and found no error.

In *McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986), we held that, because "the individual allegations have no merit, they can have no cumulative value." Similarly, because the *Moss* violation did not warrant relief individually, we cannot say, then, that it became meritorious when considered cumulatively with other errors, as no such errors existed.

III. Conclusion

For the foregoing reasons, Appellant's murder conviction and corresponding thirty-year prison sentence are affirmed.

All sitting. All concur.

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