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RENDERED: MAY 19, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000387-MR

WILLIAM GERALD SEIDL — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRVIN G. MAZE, JUDGE
NO. 08-CR-002593

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

William Gerald Seidl appeals as a matter of right[1] from a circuit court judgment convicting him of wanton murder and sentencing him to thirty-five years' imprisonment. Seidl admits killing his wife. But he claims that he was affected by an extreme emotional disturbance (EED) when he shot her and, consequently, that he should have been convicted of first-degree manslaughter rather than murder. He contends that the trial court made erroneous rulings resulting in his being improperly convicted of wanton murder despite the trial court's jury instructions on EED and first-degree manslaughter. We affirm the

[1] Ky. Const. § 110(2)(b).

judgment because we find no reversible error in the trial court's rulings on the issues raised in this appeal.

I. FACTS AND PROCEDURAL HISTORY.

Seidl and his wife, Dorene,[2] were married over forty-six years. During their marriage, they sometimes experienced marital difficulties resulting in periods of separation. Sometimes Seidl required in-patient psychiatric care during these separations. Sometimes Dorene alleged domestic violence.

In the weeks before the shooting, Dorene left the marital home without informing Seidl of her whereabouts and took out an emergency protective order (EPO) against him. The EPO was dismissed in Seidl's favor after a hearing.

On the day of the shooting, Seidl called his son-in-law to ask if he (Seidl) could bring over a handgun for safekeeping. The son-in-law was not immediately available to meet Seidl, so Seidl stuck the gun into his pocket while he did some yard work before taking the gun to his son-in-law. Meanwhile, Seidl's brother brought Dorene to the Seidls' marital home to gather some belongings.

When Seidl entered the house, Dorene was inside collecting her belongings. She presented Seidl with a note stating that he owed her a large amount of money. He said he did not have that kind of money in the house, but he helped her retrieve her jewelry upon her request.

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[2] Seidl's wife's first name is sometimes spelled "Doreen" in the briefs but is spelled "Dorene" in the indictment and jury instructions.

Dorene told Seidl she wanted a divorce. She admitted she had not hired a lawyer but vowed to get one and to get everything she wanted from Seidl. She told him that she did not love him anymore. According to Seidl, her comments "went through him like a hot knife." He impulsively grabbed the gun from his pocket and shot her. He described his firing the gun as an automatic or natural reaction, like taking a breath, and claimed he did not understand why he fired the gun.[3]

The Commonwealth's brief points out that Dorene had five gunshot wounds to various parts of her body. Seidl does not dispute this assertion. After shooting Dorene, Seidl barricaded himself in the house before surrendering after a standoff with police.

The grand jury indicted Seidl for murder (either intentional or wanton). At trial, Seidl testified on his own behalf and presented expert testimony that he suffered from an obsessive-compulsive disorder, which made loss of control from marital difficulties abnormally distressing to him.

The trial court instructed the jury on intentional murder, wanton murder, first-degree manslaughter (with intent to kill), and first-degree manslaughter (with intent to injure). The instructions also gave the jury the option of finding Seidl guilty but mentally ill. The jury found Seidl guilty of wanton murder and recommended a sentence of thirty-five years' imprisonment. The trial court entered judgment accordingly.

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[3] Our description of the events on the day of the shooting is mostly, if not entirely, based on Seidl's trial testimony.

Seidl argues on appeal that we must reverse the judgment because the trial court erred at trial in four main ways:

1) permitting the Commonwealth to cross-examine him concerning the EPO proceedings, which occurred a few weeks before the shooting;

2) not permitting his expert to offer an opinion that Seidl was acting under EED when he shot Dorene;

3) sustaining the Commonwealth's objection to his arguing in closing that the Commonwealth bore the burden of proving lack of EED beyond a reasonable doubt; and

4) instructing the jury that the presence of EED was an element of first-degree manslaughter (with intent to kill).

II. ANALYSIS.

A. No Reversible Error from Trial Court Ruling Excluding Expert Testimony that Seidl Acted Under EED During Shooting.

Seidl contends that the trial court committed reversible error by not permitting his expert witness to state that Seidl acted under EED when he shot Dorene. He argues this error deprived him of a constitutional right to present a defense. We disagree.

Seidl presented the testimony of forensic psychiatrist Dr. Douglas Ruth. Dr. Ruth testified that he reviewed discovery materials and Seidl's medical records and interviewed Seidl and Seidl's son-in-law. Dr. Ruth testified that Seidl's son-in-law, who lived just a block away from Seidl and knew him for

over twenty years, offered many seemingly unbiased observations of Seidl's behavior. Dr. Ruth interpreted the son-in-law's observations as evidence that Seidl suffered from an obsessive-compulsive personality disorder. Dr. Ruth stated that Seidl, like others with the same condition, did not appear to recognize or understand his obsessive-compulsive behaviors.

Dr. Ruth noted the son-in-law observed several examples of Seidl's obsessive-compulsive behavior, including Seidl's hoarding of various seemingly useless objects. Many of Seidl's behaviors appeared to demonstrate an extreme need to keep objects arranged in an exact order and under his control. For example, Seidl became very irritated if refrigerator magnets were moved even slightly from their usual positions or if salt and pepper shakers were moved. Seidl kept track of the exact mileage of his vehicles. Early in his marriage, he reviewed grocery ads to calculate the precise amount of money to allot for Dorene to spend on groceries and then gave her one extra dollar.

Dr. Ruth noted that police accounts of the crime scene also suggested obsessive-compulsive behavior. For example, the police noted that table lamps in the home were placed within 1/16th of an inch of each other and that Seidl apparently picked up the shell casings after he shot Dorene and placed them into a bag before putting them in the trash.

According to Dr. Ruth, these observations indicated that Seidl had obsessive-compulsive personality disorder. People with that condition become very insecure, anxious, tense, and distraught if they cannot control the people and objects around them. Dr. Ruth observed that Seidl required inpatient

psychiatric care during earlier marital separations. He testified that people with an obsessive-compulsive personality disorder are not typically prone to violence but sometimes act without being aware of their motivation. And he described indications that the Seidls' marital difficulties in the weeks before the shooting increased Seidl's anxiety. This increasing anxiety caused more obsessive-compulsive behaviors such as mowing his lawn more than once a day and requesting medications to help "calm him down."

Defense counsel asked Dr. Ruth whether Seidl was suffering from EED at the time of the shooting. The Commonwealth objected, and the trial court sustained the objection.

At the ensuing bench conference, defense counsel insisted he should be permitted to elicit a response to that question because such evidence was necessary to get a jury instruction on EED. The trial court disagreed and assured defense counsel that he had already presented sufficient evidence to warrant a jury instruction on EED. Defense counsel then stated that if the EED instruction was assured, he would withdraw the question. The trial court reiterated its commitment to give an EED instruction, and defense counsel again stated that the question was withdrawn.

Because the question was withdrawn, the issue of the ability of Seidl's expert to express an opinion on EED is not preserved for appellate review. Irrespective of this failure of preservation, we find no error in the trial court's ruling. EED is a legal concept, not a psychiatric or medical diagnosis. EED is

not a mental illness[4] for which an expert's offering a medical opinion or diagnosis of EED would be relevant evidence. EED is "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."[5] And Dr. Ruth, who was not present at the shooting and had no personal knowledge of facts tending to reveal Seidl's state of mind, was not competent to offer factual evidence to assist the jury.

Ultimately, the jury, as fact-finder, was charged with the responsibility of determining whether Seidl acted under EED[6] when he shot Dorene. Dr. Ruth's opinion on whether Seidl was acting under EED would not assist the jury in reaching its determination[7] because he lacked personal knowledge[8] of Seidl's state of mind during the shooting. Dr. Ruth was allowed to offer his opinion that Seidl had obsessive-compulsive personality disorder and to explain to the jury how this disorder might have caused Seidl to have become highly

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4 *McClellan v .Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986) ("Extreme emotional disturbance is something different from insanity or mental illness.").

5 *Id.* at 468-69.

6 *See id.* at 469 (although rejecting appellant's argument that a "rational trier of fact" was compelled to find EED under the evidence presented, holding that the jury should be instructed to determine whether it found EED on remand).

7 *See* Kentucky Rules of Evidence (KRE) 702 (whether expert testimony should be allowed depends partially on whether it "will assist the trier of fact to understand the evidence or to determine a fact in issue"); *Stringer v. Commonwealth*, 956 S.W.2d 883, 889-90 (Ky. 1997) (although retreating from former view that "ultimate issue" testimony was always prohibited in favor of allowing expert testimony that is helpful to the fact-finder noting that "jurors do not need assistance in the form of an expert's opinion that the defendant is guilty or not guilty.").

8 *See generally* KRE 602.

distraught at the loss of control over his wife and marriage and to have acted without understanding his motivation. So Dr. Ruth was allowed to testify in a way that aided the jury in making their own determination about whether Seidl acted under EED in fatally shooting his wife.

Contrary to Seidl's arguments, he was not deprived of his right to present his chosen defense of EED. He was allowed to present appropriate evidence for the jury to consider his EED defense in conformance with governing rules of evidence.[9] The trial court handled the matter appropriately, and we affirm on this ground.

B. No Reversible Error From Trial Court's Sustaining Objection to Defense Argument in Closing that Prosecution Bore Burden of Proving Lack of EED Beyond Reasonable Doubt.

Defense counsel argued in closing that the Commonwealth had the burden of proving lack of EED beyond a reasonable doubt in order to obtain a conviction for intentional murder. The Commonwealth objected to this argument, contending at a bench conference that it did not have the burden to disprove the presence of EED. More specifically, the Commonwealth argued it did not have to offer affirmative evidence of lack of EED to rebut Dr. Ruth's testimony that Seidl acted under EED. The trial court indicated that it believed the defense had the burden to prove the presence of EED, perhaps by a preponderance of the evidence. The trial court agreed with the Commonwealth

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[9] Evidentiary rules should not be applied in such a manner as to preclude a defendant from presenting the chosen defense, but a trial court must apply evidentiary rules "to properly channel the avenues available for presenting a defense." *See, e.g., Walker v. Commonwealth*, 288 S.W.3d 729, 741 (Ky. 2009).

that defense counsel should not continue with its closing argument that the Commonwealth had to disprove EED.[10] Defense counsel conceded he would not continue this argument; but defense counsel stated he would simply argue the content of the jury instructions, which the trial court agreed he was entitled to do.

When closing argument resumed after the bench conference, the trial court did not admonish the jury to disregard defense counsel's earlier argument that the Commonwealth bore the burden of disproving EED. Defense counsel then proceeded to argue to the jury the content of the jury instructions, which included lack of EED as an element of intentional murder to be proven beyond a reasonable doubt. And defense counsel emphasized to the jury that absence of EED was an element of intentional murder under the trial court's instructions and that the jury must find all elements of the crime to exist in the evidence beyond a reasonable doubt to convict.

Seidl argues that when the trial court sustained the Commonwealth's objection to his argument that the Commonwealth bore the burden of disproving EED, he was unfairly prejudiced especially because, in his view, the Commonwealth failed to present any affirmative evidence refuting the presence of EED.[11]

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[10] Technically, the trial court never sustained the Commonwealth's objection. But the trial court did state its agreement with the Commonwealth's argument that defense counsel should not continue to argue that the Commonwealth had to disprove EED. We will construe the trial court's response as sustaining the Commonwealth's objection.

[11] Although the Commonwealth did not counter Dr. Ruth's testimony with expert testimony and may not have presented evidence disputing EED, it is possible the

Three reasons support our holding that Seidl was not prejudiced by the trial court's handling of this matter.[12] First, Seidl was ultimately convicted of wanton murder, which does not require a finding of either the presence or absence of EED. Second, the jury was not admonished by the trial court to disregard Seidl's pre-objection argument in closing that the Commonwealth had the burden of proving the absence of EED beyond a reasonable doubt. Third, Seidl's counsel took full advantage of the opportunity after the bench conference to argue in closing that the jury instructions required the Commonwealth to prove lack of EED beyond a reasonable doubt as an element of intentional murder. We find no reason to reverse the judgment on this ground.[13]

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jury may not have found the evidence presented suggesting EED credible or afforded it much weight or the jury may have made inferences from the evidence that EED was not a factor. Also, as explained later in the opinion, it is possible the jury simply found that intentional murder was not proven and that wanton murder was proven without necessarily making a finding about the absence or presence of EED.

[12] *See Greene v. Commonwealth*, 197 S.W.3d 76, 81 (Ky. 2008) (holding that where there is evidence presented supporting an EED finding, absence of EED then becomes element of murder and burden of proof then shifts to Commonwealth to show lack of EED, although Commonwealth not required to offer affirmative evidence of lack of EED unless defendant would otherwise be entitled to directed verdict because of EED).

[13] *See* Kentucky Rules of Criminal Procedure (RCr) 9.24 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.").

C. Trial Court Did Not Abuse Discretion in Allowing Commonwealth to Cross-Examine Seidl About EPO.

Seidl argues that the trial court abused its discretion in permitting the Commonwealth to cross-examine him about an EPO Dorene took out against him a few weeks before the shooting. We disagree.

At a bench conference, the Commonwealth disclosed its intention to inquire of the Seidls' daughter of the EPO Dorene took out against Seidl a few weeks before the shooting. Because Seidl's state of mind was an issue, the trial court stated it would only allow the daughter's testimony that she drove Seidl to *a hearing* at the courthouse because Seidl was too upset to drive himself. At that point, the trial court stated it would not allow testimony about the EPO or reference to the EPO or other domestic violence proceedings. The trial court warned that its ruling about admissibility of the EPO might change if Seidl took the stand.

Seidl later took the stand. He testified on direct examination to his perspective concerning what happened before, during, and after the shooting. He also described the state of his marriage over the years. And from our review of the record, it appears he acknowledged some marital problems resulting in separations over the years. But he also claimed things were going smoothly between Dorene and him until Dorene had surgery some months before the shooting. Seidl testified that after the surgery, Dorene was irritable and critical of him and abandoned the marital home without letting him know her whereabouts. He proclaimed his love for her and, from our review of his

testimony, essentially described himself as responding to her irritability and criticism in a loving and calm manner.

On cross-examination, the Commonwealth announced its intention to explore the "downs" in the Seidls' relationship. The Commonwealth asked Seidl whether Dorene took out an EPO against him two or three weeks before the shooting. Seidl acknowledged that Dorene got the EPO, but he denied the Commonwealth's claim that he was required to dispose of his guns because of the EPO. A bench conference ensued during which defense counsel moved for a mistrial on the basis that the EPO evidence (1) was inadmissible because the EPO was dismissed and (2) was unduly prejudicial. In the alternative, defense counsel requested a jury admonition to disregard any evidence about the EPO. In response, the Commonwealth argued it should be allowed to ask about the EPO to rebut Seidl's description of a "fairy tale" marriage.

The trial court observed that ordinarily inquiry into the EPO would be improper and the EPO evidence would not be admissible for the purpose of proving someone's character. But the trial court stated it would allow questioning about the EPO because once Seidl took the stand to claim domestic tranquility, the Commonwealth had the right to cross-examine him on that claim. Defense counsel disputed the accuracy of the trial court's characterization of Seidl's testimony, noting that Seidl acknowledged separations and other marital problems. Although defense counsel's argument did not convince the trial court to change course, the trial court indicated it would not allow the Commonwealth unlimited discussion of this issue and

suggested to the Commonwealth "the less said the better." The trial court forbade the Commonwealth from inquiring about earlier domestic violence orders (DVOs) because it found those DVOs too remote in time to be relevant to the pending case.

The trial court did not admonish the jury that the EPO was dismissed in Seidl's favor, as he requested. But the trial court allowed defense counsel on re-direct examination to ask Seidl how the EPO proceedings concluded, and Seidl testified that the EPO was dissolved after the hearing because the judge found that Dorene failed to meet her burden of proof.

On appeal, Seidl claims the Commonwealth violated Kentucky Rules of Evidence (KRE) 404(c) by not giving him pretrial notice of its intent to offer this evidence of prior bad acts under KRE 404(b). Seidl does not indicate to us where he raised this notice argument to the trial court. And we note from our review of the record that the Commonwealth represented to the trial court the defense knew it intended to offer evidence about the EPO, and defense counsel did not dispute this representation before the trial court.

To the extent that the EPO evidence should not have been presented on the basis of failure to provide pretrial notice of such prior bad acts — an issue we consider unpreserved for appellate review —[14] we conclude the error was

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[14] *See* KRE 103(a)(1) (stating that any alleged error in admitting evidence is preserved for review if there is a motion to strike the evidence or an objection stating specific grounds if the specific grounds are "not apparent from the context . . . ."). We are unaware of defense counsel stating lack of proper notice under KRE 404(c) as a specific ground for objecting to this evidence; and lack of KRE 404(c) notice was not "apparent from the context" of the objection especially in light of defense

not palpable.[15] As for the alternative grounds asserted on appeal that the EPO evidence should have been excluded under KRE 404(b) or KRE 403, we conclude the trial court did not abuse its discretion in allowing inquiry about the EPO to rebut Seidl's characterizations of the marriage.

Perhaps the prosecutor may have waxed hyperbolic in arguing that Seidl described a "fairy tale" marriage. Seidl did acknowledge separations over the years, as well as the fact that the marriage had its "ups and downs." Possibly the trial court's characterization of Seidl's testimony as indicating everything was "fine" may have oversimplified the content of his testimony. But Seidl's testimony did indicate the marriage was going smoothly until Dorene became irritable and critical after her surgery and moved out abruptly. From our review of his testimony, he described himself as reacting in a patient and calm manner in the face of Dorene's irritability; and he claimed surprise at her being angry and wanting a divorce. In other words, even if he did not describe a "fairy tale" marriage, he portrayed himself in a favorable light. And from his description of the weeks before the shooting, he claimed to be essentially unaware of marital difficulties other than Dorene's post-surgery irritability and abruptly moving out. Obviously, the EPO entered a few weeks before the shooting had some relevance to rebutting his description of the state of the marriage and his awareness of marital difficulties before the shooting. The fact

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counsel's failure to dispute the Commonwealth's contention at trial that the defense knew of the Commonwealth's intent to introduce EPO evidence.

[15] *See* RCr 10.26 (stating appellate courts may review unpreserved issues for palpable error, and "appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.").

that Seidl testified to the EPO being dismissed for lack of sufficient proof substantially reduced any prejudice arising from the EPO reference. So we do not believe the trial court abused its discretion by allowing the prosecution to cross-examine Seidl about the EPO, particularly because we find no undue prejudice outweighed the probative value of the evidence.[16]

D. No Palpable Error Arose from Trial Court's Instruction that EED was an Element of First-Degree Manslaughter (with Intent to Kill).

Seidl argues that the trial court's instruction on first-degree manslaughter (with intent to kill) erroneously included EED as an element of the offense. He admits the issue is unpreserved for appellate review.

As both parties acknowledge, we recognized that including proof of EED as an element of first-degree manslaughter is error in *Baze v. Commonwealth*.[17] But we recognized in *Baze* this error could actually work to the defendant's practical benefit because it places a higher burden of proof on the Commonwealth than required by law.[18] And we explained in *Baze* that if absence of EED is included as an element of intentional murder and presence of EED is included as an element of first-degree manslaughter in the jury instructions on the same case, a jury could theoretically acquit a defendant of both offenses if it found either absence or presence of EED by a preponderance of the evidence but not beyond a reasonable doubt.[19]

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16 *See generally* KRE 403.

17 965 S.W.2d 817, 823 (Ky. 1997).

18 *Id.*

19 *Id.*

Seidl acknowledges what we said in *Baze* but argues his case is distinguishable. Seidl points out that the *Baze* jury did not receive an instruction on wanton murder as did the jury in his trial. Seidl contends that "if the jury found by a preponderance of the evidence that Mr. Seidl was or was not acting under the influence of EED, then it would have had no choice but to find Mr. Seidl guilty of wanton murder, which does not take into account a defendant's state of mind at the time of the act."

We hold this unpreserved error in instructing on EED as an element of first-degree manslaughter (with intent to kill) does not rise to the level of palpable error under the facts of this case. Contrary to Seidl's position, we also conclude that regardless of whether the jury found the absence or presence of EED by a preponderance of the evidence, the jury was not forced to find Seidl guilty of wanton murder or any other offense. In fact, the trial court instructed the jury it could find Seidl guilty of wanton murder or other instructed offenses only if the jury found the elements of that offense beyond a reasonable doubt. Seidl does not complain that a wanton murder instruction was not supported by the evidence or improperly given.

The absence or presence of EED was only relevant to offenses that required findings that Seidl had intended to kill his wife (intentional murder or first-degree manslaughter with intent to kill). And while perhaps a reasonable jury could infer intent to kill (for intentional murder or first-degree manslaughter with intent to kill) or intent to injure (for first-degree

manslaughter with intent to injure), the jury's finding that Seidl was guilty of wanton murder was the most consistent with Seidl's testimony.

Seidl did not testify he intended to kill or injure his wife. He testified he did not know why he shot his wife. He described shooting her as an automatic or natural reaction to her demands for divorce and denial of loving him. This testimony is consistent with the wanton murder instruction, which required the jury find that he killed Dorene by shooting her and "[t]hat in so doing, he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Dorene Seidl under circumstances manifesting an extreme indifference to human life." Even accepting that Seidl did not intend to kill or even injure Dorene as his conscious objective, a reasonable jury could conclude the act of shooting her multiple times with a handgun was wanton conduct that created a grave risk of death and caused her death under circumstances manifesting an extreme indifference to human life.

The trial court organized the instructions to guide the jury through the offenses in the following order: intentional murder, wanton murder, first-degree manslaughter (intent to kill), and first-degree manslaughter (intent to injure). The trial court set up the instructions so that the jury proceeded to consider the subsequent instructed offense if it found Seidl not guilty of the preceding offense. For example, the intentional murder instruction did not instruct the jury to consider any other offense first, but the wanton murder instruction began with "[i]f you did not find the defendant guilty under

Instruction No. 1 [describing intentional murder], you will find the defendant, William G. Seidl, guilty of Murder under this Instruction" if the elements of wanton murder were met.

Here, it would be reasonable and perhaps even likely that after finding Seidl not guilty of intentional murder, the jury simply went on to find the elements of wanton murder were fulfilled and did not go on to consider the first-degree manslaughter instructions. And even if the jury had considered the first-degree manslaughter instruction, the error in requiring the jury to find EED beyond a reasonable doubt to convict on first-degree manslaughter would actually be to Seidl's benefit as explained in *Baze*. If the jury reviewed the first-degree manslaughter (with intent to kill) instruction and could not find EED beyond a reasonable doubt, it would be required to acquit Seidl of that offense, although it could then go on to consider the instruction on manslaughter (with intent to injure) instruction. And if the jury simply did not find any offense described in the instructions to be proven beyond a reasonable doubt, the reasonable doubt instruction made clear that the jury should not find Seidl guilty of any offense. So the error in requiring proof of EED beyond a reasonable doubt in order to convict on first-degree manslaughter with intent to kill did not prejudice Seidl's substantial rights or result in manifest

injustice,[20] and there is no substantial possibility the result would have been different absent the error.[21]

Seidl also complains that the reasonable doubt instruction given by the trial court should have also stated that if the jury had a reasonable doubt as to EED, it should convict him of first-degree manslaughter instead of murder.[22] But he does not show where this issue was preserved for our review. And, as explained above, because it appears that the jury likely found Seidl not to have intentionally murdered his wife but to have wantonly murdered her without necessarily considering whether or not EED was present, we conclude that any error was not palpable especially because the intentional murder instruction explicitly required that the jury find absence of EED beyond a reasonable doubt to convict him of that offense.

E. No Cumulative Error Meriting Reversal.

Seidl contends that even if no individual error standing alone entitles him to reversal, the cumulative effect of errors occurring in his case warrants reversal. We disagree. Seidl "received a fundamentally fair trial with any errors being so minor that even their cumulative effect does not demand reversal."[23]

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[20] RCr 10.26.

[21] *Miller v. Commonwealth*, 283 S.W.3d 690, 696 (Ky. 2009) (noting that despite presumption that erroneous instructions are prejudicial, not every instructional error arises to the level of palpable error under RCr 10.26 such that there is a "substantial possibility" the result would be different absent the error).

[22] *See Baze*, 965 S.W.2d at 822-23.

[23] *Roach v. Commonwealth*, 313 S.W.3d 101, 113 (Ky. 2010).

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

J. Bart Adams
500 Kentucky Home Life Building
239 South Fifth Street, Suite 500
Louisville, Kentucky 40202

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason Bradley Moore
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204