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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

MODIFIED: FEBRUARY 21, 2013
RENDERED: OCTOBER 25, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000042-MR

U. B. THOMAS, III — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 09-CR-001734

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART; REVERSING, IN PART; AND REMANDING

A circuit court jury convicted U. B. Thomas, III, of charges arising out of his setting fire to four rooming houses early one morning near downtown Louisville. The trial court sentenced Thomas to twenty years' imprisonment. He appeals as a matter of right[1] his convictions for first-degree arson, second-degree arson, third-degree arson, two counts of wanton endangerment, and for being a first-degree persistent felony offender (PFO 1).

Thomas contends (1) the trial court erred by not giving a jury instruction for third-degree arson for one of the fires, (2) the trial court erred by not giving a jury instruction for criminal mischief for another of the fires, (3) the trial court erred by not giving a jury instruction on voluntary intoxication for all of

[1] Ky. Const. § 110(2)(b).

the fires, and (4) palpable error occurred in the sentencing phase of the trial because of the Commonwealth's introduction of prejudicial evidence of Thomas's prior convictions, requiring reversal of his PFO 1 conviction and resulting sentences.

We affirm the convictions and the sentences except for the second-degree arson conviction, which we reverse because we agree with Thomas that the trial court erred by failing to give a third-degree arson instruction.

I. FACTUAL AND PROCEDURAL HISTORY.

According to Thomas's statement given to police, Shane McCain, the owner and manager of several rooming houses, removed Thomas and his girlfriend Pebbles from their room in McCain's house at 2506 Rowan Street and took them to another of his houses at 1798 West Hill Street. The following morning, according to Thomas's statement, McCain and one of McCain's workers awakened Thomas and forcibly ejected him from the room in the West Hill Street house. After a brief altercation, for which the police were called, Thomas went to his brother's apartment where he said he drank the rest of the day. He remained in his brother's apartment until the early morning hours of the following day when, over the span of about five hours, Thomas set fire to four of McCain's rooming houses. Thomas does not deny he set the fires.

A. Fire at 1798 West Hill Street.

When firefighters arrived at 1798 West Hill Street, they found smoldering clothes scattered about the backyard. Burn patterns on the floor in the

interior of the residence led investigators to conclude that the fire began inside and was dragged outside.

Andre Sloss testified that he was sitting on the front porch of this West Hill Street house when Thomas arrived, banged on the side door, and went around to the back of the house. Thomas then ran out the front of the residence, and Sloss noticed smoke minutes later. Sloss grabbed the basket of flaming clothes and dragged it outside and, with the help of other residents, extinguished the flames before firefighters arrived. Thomas later told police that he was smoking a cigarette, saw some paper in the back room of the house, took out his lighter, and ignited the paper.

B. Fire at 328 East St. Catherine Street.

Rebecca Hilton awoke in the early morning hours to someone banging on the door of her apartment at 328 East St. Catherine Street, another McCain property. Because this disturbance was common in a rooming house, Hilton did not become alarmed until she heard someone screaming "fire!" She grabbed a handful of her belongings and evacuated to find the side of the house afire.

Thomas told police that he lit a piece of paper and used it to ignite the vinyl siding. His purpose, according to his statements to police, was to force a confrontation with the McCain worker with whom he had the altercation the preceding day at the West Hill Street house.

C. Fire at 2506 Rowan Street.

The fire department was called to a fire at McCain's house at 2506 Rowan Street at approximately 5:08 a.m. Upon arrival, firefighters encountered an active fire on the first floor that had reached the second floor. Fortunately, the residence was unoccupied at the time. Arson investigators determined that the fire started near the center of a front room on the first floor and progressed to the second floor.

Thomas told police that he became angry when he discovered the removal of all of the belongings he had left behind at Rowan Street. He then lit a candle on a table in the front room of the first floor, pulled the tablecloth from underneath the candle, and walked out of the house.

D. Fire at 2545 Duncan Street.

After leaving the Rowan Street residence, Thomas went to McCain's house at 2545 Duncan Street. There, Thomas attempted to start a fire by lighting several pieces of paper and stuffing them under a window and a door. Naji Hughes, a resident, encountered Thomas after being awakened by the sound of breaking glass. Hughes made an out-of-court identification and described Thomas's behavior as "hyper." The fire department was not called to this fire, but McCain reported it to investigators the following day.

E. Thomas Arrested on Charges Stemming from the Fires and Convicted.

Police arrested Thomas within days, and he admitted starting the fires. At trial, the jury convicted him of[2]

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[2] The jury acquitted Thomas of the third-degree arson charges relating to the fire at 2545 Duncan Street.

- first-degree arson for the East St. Catherine Street fire, for which the jury recommended a twenty-year sentence;
- second-degree arson for the Rowan Street fire, for which the jury recommended a twenty-year sentence;
- third-degree arson for the West Hill Street fire, for which the jury recommended a five-year sentence;
- two counts of second-degree wanton endangerment, misdemeanors, for which the jury recommended a twelve-month sentence on each count; and
- being a PFO 1, for which the jury recommended enhancement of the sentences on the felony arson charges to twenty-five years, twenty-five years, and fifteen years, respectively, all to be served concurrently for a total of twenty-five years to be served.

At sentencing, the trial judge rejected the jury's recommended sentences and imposed instead a PFO sentence of twenty years for first-degree arson, twenty years for second-degree arson, fifteen years for third-degree arson, and twelve months each for two counts of second-degree wanton endangerment. And the trial court ordered all sentences to be served concurrently, for a total effective sentence of twenty years. Thomas appealed the decision to this Court for review.

II. ANALYSIS.

A. Thomas was Entitled to a Jury Instruction on Third-Degree Arson for the 2506 Rowan Street Fire.

At trial, Thomas tendered an instruction for third-degree arson for the charges relating to the Rowan Street fire. The trial court denied Thomas's request and instructed the jury only on second-degree arson. We find the trial court erred in this ruling, and the conviction and sentence for this charge must be reversed.

The trial judge must prepare and give instructions based on the whole law of the case "applicable to every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony."[3] But this duty does not require an instruction on a theory with no evidentiary foundation.[4] An instruction on a lesser-included offense is required if, and only if, a reasonable juror, considering the totality of the circumstances, might have a reasonable doubt as to the defendant's guilt of the greater offense and, yet, believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.[5]

A *lesser-included offense* is defined in Kentucky Revised Statutes (KRS) 505.020(2) as an offense "established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . .

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[3] *Rice v. Commonwealth*, 472 S.W.2d 512, 513 (Ky. 1971) (citation and internal quotations omitted); *see* Kentucky Rules of Criminal Procedure (RCr) 9.54(1).

[4] *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (citations omitted).

[5] *Id.* (citation omitted).

consist[ing] of an attempt to commit the offense charged or to commit an offense otherwise included therein; . . . differ[ing] from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or . . . differ[ing] 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."

Thomas argues that third-degree arson can be established through the proof that he did not intend to damage or destroy the building. He argues the trial court erred by refusing to give his tendered third-degree arson instruction for the charges involving the Rowan Street fire. We agree.

To prove third-degree arson, evidence must show that the accused *wantonly* caused destruction or damage to a building.[6] But to prove second-degree arson, evidence must show that an individual *intended* to destroy or damage a building.[7] Third-degree arson is a lesser-included offense because it requires "proof of the same or less than all the facts" required to prove second-degree arson. And third-degree arson differs from second-degree arson "only in the respect that a lesser kind of culpability suffices to establish its commission."

Thomas told police that he entered Rowan Street and discovered all of his belongings had been removed. The fire started when Thomas pulled a tablecloth off a table on which he had lit a candle. When questioned by the

[6] KRS 513.040.

[7] KRS 513.030.

police about whether or not he cared about his actions catching the building on fire, Thomas said that he did not care. A reasonable juror, given the totality of the evidence, could have believed beyond a reasonable doubt that Thomas did not intend to cause damage to the property. The jury should have been so instructed.

Generally, "refusal to allow such an instruction [on a lesser-included offense], when supported by the evidence presented, constitutes reversible error."[8] This Court has previously held that failure to give a necessary lesser-included offense cannot be deemed harmless.[9] For this reason, we reverse Thomas's conviction and sentence for second-degree arson involving 2506 Rowan Street.

B. Thomas was not Entitled to an Instruction for Criminal Mischief for the 1798 West Hill Street Fire.

Thomas urges that the trial court abused its discretion in failing to instruct the jury on third-degree criminal mischief in regard to the 1798 West Hill Street fire. We review a trial court's decision not to give an instruction under the abuse-of-discretion standard.[10] The trial court declined Thomas's properly tendered instruction on third-degree criminal mischief, and we find the trial court did not abuse its discretion in doing so.

Criminal mischief is not a lesser-included offense of arson. The offense does not fit within the statutory requirements for a lesser-included offense

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[8] *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995).

[9] *Commonwealth v. Swift*, 237 S.W.3d 193, 196 (Ky. 2007) (citations omitted).

[10] *See Crain v. Commonwealth*, 257 S.W.3d 924, 930 (Ky. 2008).

because it requires proof of *more* facts, rather than the "same or less." The elements of criminal mischief are "intentionally or wantonly defac[ing], destroy[ing,] or damag[ing] any property causing pecuniary loss" of at least $1,000 or $500, depending on degree.[11] First-degree arson requires a person to intend to "destroy or damage a building" by starting a fire or causing an explosion.[12] And the building must be inhabited or occupied, or the person must have reason to believe the building may be inhabited or occupied, or any other person sustains serious physical injury as a result of the fire or explosion.

It is clear that criminal mischief requires proof of an element that first-degree arson does not. There is a valuation element in criminal mischief that is absent from first-degree arson. As a result, criminal mischief has a wholly individual element and cannot be a lesser-included offense of first-degree arson. The trial court did not abuse its discretion, and we find no error in its ruling.

C. Thomas was not Entitled to a Voluntary Intoxication Instruction.

Thomas next argues that the trial court erred when it denied his request for jury instructions on the defense of voluntary intoxication. The trial court denied the request because, in its judgment, the evidence was insufficient to show the necessary level of intoxication. This was not an abuse of discretion.[13]

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[11] *See* KRS 512.020; KRS 512.030.

[12] KRS 513.020.

[13] *Crain*, 257 S.W.3rd at 930.

A trial court is required to instruct the jury on every theory of the case that can be reasonably deduced from the evidence.[14] But "the entitlement to an affirmative instruction is dependent upon the introduction of some evidence justifying a reasonable inference of the existence of a defense."[15] An affirmative instruction must be rejected if the evidence does not warrant it.[16]

Under KRS 501.080(1), voluntary intoxication is only a defense to a criminal charge if the intoxication "[n]egatives the existence of an element of the offense." In the instant case, voluntary intoxication can conceivably negate the intent element of the felony arson charges against Thomas.[17] Thomas argues that the jury could have reasonably believed he was too intoxicated to form the intent to start the fires at issue and that he should have received an instruction on a lesser degree of arson.

This Court has consistently interpreted KRS 501.080(1) "to mean that the [voluntary intoxication] defense is justified only where there is evidence

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[14] *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000) (citations omitted).

[15] *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (*quoting Grimes v. McAnulty*, 957 S.W.2d 223, 226 (Ky. 1997)).

[16] *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (citation omitted).

[17] We note that the mental state of "wantonness" is required for other charges against Thomas; however, voluntary intoxication does not negate this mental state. "In its definition of 'wantonness,' KRS 501.020 requires as an element of this culpable mental state an awareness by the actor of a substantial and unjustifiable risk that a result will occur or that a circumstance exists. This element of 'awareness' is used to distinguish 'wantonness' from 'recklessness.' In making this distinction[,] KRS 501.020 expressly provides that 'unawareness' of a risk, if caused solely by voluntary intoxication, does not preclude a showing of 'wantonness.' Thus, while affording relief to an 'intentional' offense[,] a defendant's intoxication will not afford relief to an offense having 'wantonness' as its essential element of culpability." Commentary to KRS 501.080. As a result, intoxication would not be a defense to the wanton endangerment or third-degree arson charges against Thomas.

reasonably sufficient to prove that the defendant was so drunk that he did not know what he was doing."[18] A showing of "mere drunkenness" is not sufficient to warrant a voluntary intoxication instruction.[19]

The evidence in this case does not support a voluntary intoxication instruction. Thomas told police that he had been drinking all day, but there was little evidence presented to show how his behavior or mental state was affected. A surveillance video was introduced displaying Thomas showing the effects of alcohol intoxication, but a voluntary intoxication instruction requires more. The only witness testimony that would conceivably indicate intoxication described Thomas as "hyper"; hardly enough to warrant a jury instruction. Thomas also argues a voluntary intoxication instruction was warranted because, upon his arrest, he was placed in the detoxification program for three days to deal with the physical effects of withdrawal from drugs and alcohol. Past alcohol abuse or dependency does not prove that Thomas was so intoxicated at the time of the fires that he did not know what he was doing. Again, an instruction for voluntary intoxication requires a "more advanced degree of drunkenness."[20]

We find no abuse of discretion because the evidence presented by Thomas was insufficient to compel an intoxication instruction. The trial court

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[18] *Harris*, 313 S.W.3d at 50 (citations and internal quotations omitted).

[19] *Jewell v. Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977) (citation omitted), *overruled in part on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867, 870 (Ky. 1981).

[20] *Foster v. Commonwealth*, 827 S.W.2d 670, 677 (Ky. 1991).

did not abuse its discretion in refusing to instruct the jury on the defense of voluntary intoxication.

D. The Commonwealth's Introduction in the Sentencing Phase of Detailed Information of Prior Convictions did not Rise to Palpable Error.

During the penalty phase at trial,[21] the Commonwealth introduced evidence of Thomas's prior convictions. In presenting its case, the Commonwealth introduced as exhibits eight packets of documents, which appear to be photocopies of the entire clerk's record of seven prior felony indictments and one misdemeanor. Thomas made no contemporaneous objection to the introduction or use of these exhibits. He admits that the matter is not preserved by objection but submits that the admission of these documents constituted a palpable error that affected Thomas's substantial rights.

We review an unpreserved error only if the error is "palpable" and "affects the substantial rights of a party."[22] And only if the error is clear and plain under current law is the error "palpable."[23] Generally, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment."[24] Even if the error is palpable, relief is only appropriate "upon a determination that manifest injustice has resulted from

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[21] Thomas's penalty phase was a combined truth-in-sentencing and persistent felony offender proceeding.

[22] *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009); *see also* RCr 10.26.

[23] *Id.* (citation omitted).

[24] *Id.* (citation omitted).

the error."[25] And manifest injustice will not be found, even if the unpreserved error is palpable and prejudicial, unless the "error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'"[26]

This Court has consistently endorsed the benefits of having a well-informed jury charged with the task of fixing punishment in a trial proceeding.[27] And the General Assembly has evinced its intent to provide "the jury with information relevant to arriving at an appropriate sentence for the particular offender"[28] through the truth-in-sentencing statute, KRS 532.055.[29] But we have disapproved of allowing the jury to retry the prior crimes through the admission of extensive prior-crime evidence in the sentencing phase.[30] As a result, generally, "all that is admissible as to the nature of a prior conviction is a general description of the crime."[31] And this general description is limited to evidence that "convey[s] to the jury the elements of the crimes previously

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[25] *Id.*

[26] *Id.* (*quoting Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

[27] *See, e.g., Mabe v. Commonwealth*, 884 S.W.2d 668, 672 (Ky. 1994) (citations omitted).

[28] *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996) (*quoting Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky. 1991)).

[29] KRS 532.055 allows evidence of "[t]he nature of prior offenses for which he was convicted; the date of commission, date of sentencing, date of release from confinement or supervision from all prior offenses"; and other relevant information to be offered by the Commonwealth. For the persistent felony offender aspect of the penalty phase at trial, this Court has previously held that evidence admitted should be relevant in "establish[ing] the elements necessary for demonstrating the statutory requirements of being a persistent felony offender." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 263 (Ky. 2009) (citations omitted); *see also* KRS 532.080.

[30] *Robinson*, 926 S.W.2d at 855.

[31] *Id.*

committed[,]" preferably by either "a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself."[32]

In the instant case, the Commonwealth exceeded the boundaries set by our precedent. Although this Court has allowed the recitation of facts from a complaint,[33] reading of a prior uniform citation,[34] and testimony of parole officers,[35] we have condemned the use of detailed evidence arising to the level the Commonwealth submitted in this case.[36] The information provided to the jury during the penalty phase included amended charges, plea agreements, dismissed charges, names of victims, conditions of release, and detailed factual recollections of prior criminal acts. We find the admission of this type of detailed factual evidence to be error and unduly prejudicial.

Given the specific facts of this case, however, we do not find the error to be palpable. In *Chavies v. Commonwealth*,[37] this Court held that while prejudicial, the introduction of a prior indictment was not palpable error. The jury in *Chavies* found Chavies guilty of PFO 2. We did not order a new penalty phase, despite the admission of prejudicial evidence, because Chavies did not

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[32] *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011).

[33] *See Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky. 1991).

[34] *See Cuzick*, 276 S.W.3d at 262-64.

[35] *See Brooks v. Commonwealth*, 114 S.W.3d 818, 824-25 (Ky. 2003).

[36] *See Blane v. Commonwealth*, 364 S.W.3d 140, 152-53 (Ky. 2012) (holding it was error to allow amended charges to be admitted.); *Chavies v. Commonwealth*, 354 S.W.3d 103, 114-16 (Ky. 2011) (finding error in the admission of prior charges that were later amended.).

[37] 354 S.W.3d 103 (Ky. 2011).

receive the maximum penalty for the relevant convictions; and it was more likely that the jury reached its verdict based on the multiple prior convictions presented to them, rather than the prejudicial amended charges from an earlier indictment.[38]

We face a similar situation now. Thomas was prejudiced by the admission of such detailed evidence of prior crimes, but the fairness of the proceedings was not seriously affected. The jury recommended a sentence of twenty-five years for first-degree arson, ten years for second-degree arson, five years for third-degree arson, and twelve months on each wanton endangerment conviction, all to be served concurrently. The jury also found Thomas guilty of being a PFO 1 and recommended enhanced sentences on the felony arson charges of twenty-five years, twenty-five years, and fifteen years, respectively, all to be served concurrently. But the trial court rejected the jury's recommended sentence. The trial court imposed instead a twenty-year sentence for first-degree arson, the statutory minimum for arson in the first degree, a class A felony.[39] On a retrial of the penalty phase, Thomas could not, as a matter of law, receive a lower sentence than the twenty years he received.

While this Court has previously ruled to grant a new penalty phase and PFO proceeding as a result of similar evidence being admitted, the facts of this case do not warrant such action. In *Blane v. Commonwealth*,[40] we found the

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[38] *Id.* at 115-16.

[39] *See* KRS 513.020(2); KRS 532.020.

[40] 364 S.W.3d 140 (Ky. 2012).

admission of testimony as to amended prior charges to be prejudicial and palpable error. We ordered a new penalty phase because Blane received the "maximum penalty on all counts for which he was convicted."[41] And we ordered a new PFO proceeding because the "facts necessary to convict [Blane] of being a first-degree PFO as to Count 1 were *incapable* of being proved."[42]

The facts of the instant case are easily distinguishable from *Blane.* Thomas did not receive the maximum sentence for any conviction. Instead, he received the minimum sentence allowed by statute. And there were sufficient facts to convict Thomas of being a PFO 1. The error arose out of the manner in which those facts were conveyed to the jury. A new penalty phase and PFO proceeding was necessary in *Blane* to remedy the error. It is not necessary here.[43]

The error in this case was not one that "so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'"[44] We are constrained to find no palpable error.

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[41] *Id.* at 153.

[42] *Id.* at 154.

[43] Moreover, as further evidence the error was not palpable, we note that Thomas's parole eligibility is not affected by the PFO 1 conviction. Under the persistent felony offender statute, KRS 532.080, a PFO 1 shall not be eligible for parole until he has served a minimum of ten years in prison, "unless another sentencing scheme applies." Thomas was convicted of first-degree arson, a class A felony; and parole for such offenses is controlled by KRS 439.3401. Pursuant to that statute, Thomas must serve at least eighty-five percent of the sentence imposed. This is regardless of any PFO conviction.

[44] *Jones*, 283 S.W.3d at 668 (*quoting Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

III. CONCLUSION.

For the foregoing reasons, we reverse Thomas's conviction and sentence for second-degree arson and affirm all other convictions and sentences imposed by the trial court's final judgment. The case is remanded to the trial court for further proceedings consistent with this opinion.

All sitting. All concur.

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Supreme Court of Kentucky

2011-SC-000042-MR

U. B. THOMAS, III — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 09-CR-01734

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER GRANTING PETITION FOR MODIFICATION

The Petition for Modification, filed by the Appellee, of the Memorandum Opinion of the Court, rendered October 25, 2012, is **GRANTED** and the Opinion is **MODIFIED** on its face by substitution of the attached opinion in lieu of the original Opinion. The modification does not affect the holding of the original Opinion rendered by the Court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

ENTERED: February 21, 2013.

CHIEF JUSTICE