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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000562-MR

NICHOLAS SALFI — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
NO. 10-CR-000076

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Nicolas Salfi, was convicted by a Jefferson County Circuit Court jury of murder and first-degree assault. For these crimes, Appellant received a total sentence of fifty-five years in prison. Appellant now appeals to this Court as a matter of right.[1]

Appellant asserts five arguments on appeal: 1) The trial court erred by failing to declare a mistrial as a result of improperly admitted character evidence describing Appellant as controlling and manipulative; 2) that the trial court erred by excluding video tape evidence of Appellant's emotional reaction upon learning of the victim's death; 3) that the trial court erred by failing to include the absence of extreme emotional disturbance as an element of first-

[1] Ky. Const. § 110.

degree assault; 4) that the trial court erred by allowing victim impact testimony from the mother of a living assault victim; and 5) that the trial court improperly allowed Appellant to be cross-examined during the penalty phase about the details of his prior offenses.

Upon review, we affirm the judgment of the Jefferson Circuit Court entered herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

After dating and living together for three years, Appellant and his girlfriend, Kelly Doyle, ended their relationship. Appellant harbored hope that he might rekindle the relationship, and drove to her residence late one night. He noticed a strange car in the driveway.

Appellant silently entered the house. When he saw Doyle and Payton Thomas sleeping in the same bed, he attacked Thomas and began striking him with his fists. Thomas escaped from the house, but Appellant pursued Thomas into the front yard and began stabbing him with a knife. Then, upon seeing Doyle in the doorway of the house, Appellant resumed his attack upon her.

Thomas, suffering numerous stab wounds and a collapsed lung, made his way to the house of a neighbor, who called 911 for emergency help. By the time help arrived, Appellant was gone and Doyle was dead. She had suffered 102 sharp force injuries over her face, neck, and upper back, as well as superficial cuts on her hands. Evidence also indicated that she had been beaten with a blunt object and strangled.

After the attacks, Appellant called his father and said he intended to kill himself. He then drove to his mother's house, where he told his stepfather that he had killed Doyle. His clothing was soaked in blood which was later determined to be Doyle's blood, Thomas's blood, and Appellant's own blood. His hands had numerous cuts. Appellant's step-father called police, and when they arrived, Appellant was calmly taken into custody.

The Jefferson County Grand Jury charged Appellant with murder, attempted murder and assault in the first degree.[2] The jury rejected Appellant's claim that he was acting at the time of the crimes under the influence of extreme emotional disturbance. He was found guilty of murder and first-degree assault. His sentences, forty years for murder and fifteen years for first-degree assault, were ordered to be served consecutively for a total of fifty-five years.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL

One of Doyle's friends, Megan Disselkamp, testified at trial that Appellant was controlling and manipulative, and that Appellant "put [Doyle] down" and made her feel insecure. Appellant objected and requested a mistrial, claiming that Disselkamp's description of Appellant as controlling and manipulative was inadmissible character evidence under KRE 404(a), and that Disselkamp's statements about Appellant putting Doyle down and making her feel insecure

[2] Appellant was indicted for tampering with physical evidence; however, this charge was ultimately not presented to the jury.

were inadmissible as prior bad acts under KRE 404(b). The trial court sustained Appellant's objections and offered to admonish the jury not to consider the improper evidence. Appellant declined the admonition, and instead moved for a mistrial, which the trial court declined.

The Commonwealth does not refute the contention that the portions of Disselkamp's testimony to which Appellant objected were inadmissible. Therefore, we examine only the impact of the error on the trial to determine whether the trial court erred by failing to grant a mistrial. For the reasons stated below, we find that a mistrial is not warranted.

"A mistrial is an extreme measure that should only be granted upon a showing of manifest injustice. A manifest necessity is an 'urgent or real necessity' that is 'determined on a case by case basis.'" *Graves v. Commonwealth*, 285 S.W.3d 734, 737 (Ky. 2009) (citations omitted). A trial court's refusal to grant a mistrial is reviewed on appeal for abuse of discretion. *Id.*

The inadmissible portions of Disselkamp's testimony were of an isolated and fleeting nature and the Commonwealth promptly refocused the unsolicited comments when Appellant objected. Most importantly, while her characterization of his remarks was not flattering, it was also not so scandalous, offensive, or inherently prejudicial that the jury might have attached undue significance to them. When considered alongside the overwhelming evidence of Appellant's guilt, we see no harmful effect. Appellant

suffered no manifest injustice. We conclude, therefore, that the trial court did not abuse its discretion when it refused to declare a mistrial.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT PORTIONS OF APPELLANT'S TAPED INTERVIEW

Four hours after Doyle's death, and soon after he was arrested, Appellant was interrogated by Detective Kristin Downs of the Louisville Metro Police. During the interrogation, Appellant admitted that he had injured Doyle and he persistently asked Downs about Doyle's condition. Eventually, Downs told Appellant that Doyle was not merely injured, but that she was dead. Appellant contends that the video tape of the interrogation would show that when he heard that information, he appeared to become emotionally distraught, he fell into a fetal position, he cried, and he vomited.

At trial, Appellant attempted to introduce into evidence that part of the videotaped interrogation so that the jury could see his emotional response. The trial court denied the request to introduce the tape on grounds that: 1) it was hearsay, because it was a party's own out-of-court statement offered to prove the truth of the statement; 2) it was irrelevant; and 3) it constituted improper bolstering.

Appellant was able to cross-examine Downs about Appellant's mental and emotional state during the interrogation. However, only reluctantly did Downs acknowledge that Appellant exhibited an emotional response and, even then, she tended to minimize it. Appellant now contends that the trial court erred by refusing his proffered evidence. We disagree.

Appellant first argues that the trial court erred by incorrectly characterizing his visceral reaction upon hearing that Doyle was dead as hearsay. Appellant contends that the evidence falls outside the realm of hearsay because it was not offered as an assertion of fact; it was offered as evidence of conduct from which the jury could infer his state of mind was that of an individual still under the influence of an extreme emotional disturbance.

Notwithstanding the other reasons the trial court cited for exclusion of the evidence, the reason that draws our attention is *relevance* under KRE 401. Appellant offered the video evidence as relevant to prove his defense that he was affected by an extreme emotional disturbance when he committed the acts for which he was convicted. Upon that issue, the relevance of the tape is, at best, marginal.

Appellant's interview with police occurred several hours after the crime, and at a different location. Since Appellant contends that the video would show the dramatic change in his emotional state when he heard the officer say Doyle was dead, it follows that *before* he received that information, he was *not* exhibiting signs of heightened emotional distress. It is therefore difficult to relate his emotional state at the time he killed Doyle and assaulted Taylor to the moment several hours later when he was told by police that she was dead.[3] His reaction to the "news" of Doyle's death simply does not relate to his state of

[3] The apparent discrepancy between Appellant's statement to his step-father immediately after the incident that he had killed Doyle, as noted previously herein, and his conduct during the interview indicating that he did not know that she was dead, is not explained or discussed by the parties.

emotional distress at the commission of the crime. Indeed, the distress portrayed on the tape may well have been related to the prospect of a long prison sentence. We are therefore unable to conclude that the trial court abused its discretion when he excluded the proffered evidence because it lacked relevance.

Appellant also claims that the same portions of the video tape should have been allowed into evidence to impeach Detective Down's testimony that Appellant cried only for "a little bit of the time," that "he spit up a little bit" and other descriptions of Appellant's physical responses that minimized his apparent reaction to being told that Doyle was dead. Since the trial court concluded that Appellant's emotional reaction during the police interrogation was not relevant, the fact of his emotional state at that time is collateral to the case. Impeachment of Down's testimony about it would be impeachment on a collateral fact. Appellant elicited testimony from Downs on a collateral matter, that he now argues he should have been permitted to impeach present extrinsic evidence to impeach that testimony.

In *Commonwealth v. Prater*, we concluded that regardless of which party opens the door to testimony about a collateral matter, "the trial court has discretion to determine whether or not to permit impeachment on collateral issues." 324 S.W.3d 393, 399-400 (Ky. 2010). The trial court did not abuse its discretion when it refused to admit into evidence the video tape segments proffered by Appellant on the grounds of irrelevance; and, it did not abuse its

discretion by refusing to allow the use of the same evidence to impeach testimony solicited by Appellant on the same matter.

IV. THE ABSENCE OF EXTREME EMOTIONAL DISTURBANCE IS NOT AN ELEMENT OF FIRST-DEGREE ASSAULT

Appellant next claims that the trial court's jury instruction for assault in the first-degree was erroneous because it did not include as an element of that offense the absence of an extreme emotional disturbance (EED) motivating Appellant's conduct. Appellant contends that, just as in the case of a murder charge when a defendant offers evidence of an extreme emotional disturbance, the prosecutor in a first degree assault case has the burden of proving the absence of EED to sustain the burden of proof. We disagree.

Appellant's proposition is unsupported by the applicable assault statute, KRS 508.040.[4] EED is explicitly mentioned in the statute defining murder, KRS 507.020:

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

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[4] In *Engler v. Commonwealth*, 627 S.W.2d 582, 583 (Ky. 1982), we noted that KRS 508.040 puts the burden of proof of proving extreme emotional disturbance on the defendant. However, we have never addressed Appellant's argument.

However, with respect to the concept of EED, the statutory scheme for assault does not parallel the murder statutes. EED does not qualify the crime of first-degree assault as it does for murder.

In short, the legislature did not make the absence of EED an element of first degree assault to be proven by the Commonwealth. Instead, KRS 508.040 provides that the offense of assault under EED is, in appropriate cases, a lesser included offense of first-degree assault. For this Court to impose the absence of EED as an element of first-degree assault would be clearly contrary to the definition of the crime as established by the legislature. Accordingly, we decline to do so.

We note that the trial court instructed the jury upon the offense of first degree assault *and* assault under EED. The instructions properly incorporated the elements of each offense as defined by statutes. There was no error in the assault instructions.

V. THE VICTIM IMPACT TESTIMONY OF ASSAULT VICTIM'S MOTHER WAS IMPROPERLY ADMITTED

Appellant next contends that the trial court erred by permitting Thomas's mother, Patricia Satterly, to testify during the penalty phase of the trial about how the assault had affected Thomas. We agree, although we conclude that the error was harmless.

KRS 532.055(2)(a)(7) states that in the penalty phase of the trial, the Commonwealth may present evidence of "[t]he impact of the crime upon the victim or victims, as defined in KRS 421.500 including a description of the

nature and extent of any physical, psychological, or financial harm suffered by the victim [or victims]." As applicable here, "victim" is defined in KRS 421.500(1) as follows "an individual who suffers *direct* or threatened physical, financial or emotional harm as a result of the commission of a crime classified as . . . assault." Obviously, Satterly does not fit that category.

KRS 421.500(1) provides two instances in which a parent of the direct victim is deemed to be a "victim" and thus authorized to give victim impact testimony: 1) when the direct victim is "a minor or is legally incapacitated[,]" (and 2) when the direct victim is deceased. Thomas, the victim who suffered the direct physical harm, was alive; he was not legally incapacitated; and, he was not a minor. Therefore, his mother was not competent under the applicable statutes to provide victim impact evidence. Upon consideration of her testimony, we do not believe that her testimony "substantially swayed" the verdict in the penalty phase. *See Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2010)("A non-constitutional evidentiary error may be deemed harmless [ ] if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.").

Satterly's testimony was brief, it gave a factual account of Thomas's injury and his medical treatment, and it did not tend to over-dramatize the impact of the crime, nor did it present an appeal for the sympathy of the jury. We conclude that allowing her to testify as a "victim" of the crime was error, but the error was harmless.

VI. THE PENALTY PHASE CROSS-EXAMINATION OF APPELLANT ABOUT HIS PRIOR OFFENSES WAS NOT PREJUDICIAL

Appellant next argues that during the penalty phase of his trial, Commonwealth was improperly permitted to cross-examine him about the details of his prior conviction on a misdemeanor assault charge that exceeded the "nature of the prior offenses" as provided by KRS 532.055(2)(a).

In its penalty phase evidence, the Commonwealth introduced proof that Appellant had two prior convictions for fourth-degree assault that stemmed from a single incident in 2007. Testifying on his own behalf during the penalty phase, Appellant minimized the seriousness of his prior misdemeanor convictions by saying, "It was stupid. It was the night of the UK/ U of L game in Lexington, football game, and afterwards I got into it with a couple UK fans outside a bar. I had to do two weekends of jail. That's pretty much it."[5]

The Commonwealth viewed that testimony as having opened the door on more troublesome allegations about the 2007 incident. So, upon cross-examination of Appellant, the prosecutor, citing an affidavit from one of the victims of that assault, asked Appellant, "If that affidavit characterizes it as you starting the fight, you would disagree with that?" Citing further information gleaned from the affidavit, the prosecutor asked Appellant if he ran away from the scene of that assault and had to be chased down and held for police. The affidavit itself was never introduced into evidence.

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[5] Appellant also explained that his prior conviction for indecent exposure arose after he was apprehended for urinating outdoors.

KRS 532.055 allows the Commonwealth to introduce evidence in the sentencing phase including "the nature of prior offenses." Appellant argues that the trial court's decision to allow the cross-examination violated KRS 532.055 as it was explained in *Mullikan v. Commonwealth*, 341 S.W.3d 99, 108 (Ky. 2011). In *Mullikan*, we said:

> [E]vidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed. We suggest this be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself. Said recitation for the jury's benefit, we feel, is best left to the judge. The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling. The trial court should avoid identifiers, such as naming of victims, which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes."

We agree with Appellant that the introduction of information from the affidavit exceeded the scope of information allowed under KRS 532.055, as we described it in *Mullikan*. However, we also agree with the Commonwealth that Appellant's attempt to offer his own explanation of the prior offenses opened the door for proof to the contrary. If one party offers improper evidence, that party "invites error" or "opens the door" and the opposing party may be afforded the opportunity to rebut or explain the improper evidence with evidence that would otherwise have been inadmissible. R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.10[5], at 43–44 (4th ed. 2003). When a party induces a witness to make an inadmissible assertion, the opposing party is permitted to introduce evidence to the contrary. *Norris v. Commonwealth*, 89 S.W.3d 411, 414 (Ky. 2002), citing R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.10, 30–33

(3rd ed. 1993 and 1 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 731 (Tillers' rev. 1983).

Appellant also claims that the Commonwealth's use of the affidavit to cross-examine his penalty phase testimony improperly allowed the jury to hear and consider the extra-judicial statements of the affiant, in violation of Appellant's Sixth Amendment right to confront the witnesses against him. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (holding that the admission of testimonial hearsay statements in a criminal trial violates the Sixth Amendment unless the declarant is unavailable to testify *and* the defendant had a prior opportunity for cross-examination.).

Even though the affidavit was not formally introduced into evidence and read to the jury, each of the Commonwealth's numerous references to statements in the affidavit asserted a statement of fact, and improperly interjected testimonial hearsay into the trial, which Appellant had no opportunity to cross-examine.

However, here Appellant did not properly preserve this issue for appellate review. KRE 103 provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and... [i]f the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection*, if the specific ground was not apparent from the context . . . ."
> (emphasis added).

Appellant objected to the Commonwealth's line of questioning on the grounds that he had not "opened the door" to that subject of inquiry and that the Commonwealth's questions exceeded the scope of admissible testimony

under KRS 532. 055. He did not inform the trial court of his Sixth Amendment concerns articulated under *Crawford.* However, errors of constitutional magnitude, if unpreserved, are subject to palpable error review. *Walker v. Commonwealth,* 349 S.W.3d 307, 313 (Ky. 2011); *Jones v. Commonwealth,* 319 S.W.3d 295, 297 (Ky. 2010).

Under the palpable error standard articulated in *Ladriere v. Commonwealth,* "reversal is warranted 'if a manifest injustice has resulted from the error,' which requires a showing of the 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" 329 S.W.3d 278, 281 (Ky. 2010)(quoting *Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006)). Manifest injustice is found if the error seriously affected the "fairness, integrity, or public reputation of the proceeding." *Martin,* 207 S.W.3d at 4.

The misuse of the affidavit does not, in this instance, rise to the level of manifest injustice. At the time it occurred, Appellant had been found guilty by the jury of a brutal murder and a violent assault. It is inconceivable that the jury that found Appellant guilty would, in its assessment of the sentence, be unduly moved by the hearsay evidence suggesting that Appellant had once instigated a post-ball game bar fight. There is no reasonable likelihood that this error, despite its constitutional significance, had any impact on the jury's verdict.

VII. CONCLUSION

For foregoing reasons, the Judgment of the Jefferson Circuit Court is affirmed.

Minton, C.J., Abramson, Cunningham, Schroder, Scott and Venters, JJ., concur. Noble, J., concurs in result only.

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