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RENDERED: APRIL 25, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000700-MR

ROBIN L. MOORE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRVIN G. MAZE, JUDGE
NO. 10-CR-001461

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robin L. Moore, appeals as a matter of right, Ky. Const. § 110, from a judgment of the Jefferson Circuit Court convicting him of murder, tampering with physical evidence, of being a felon in possession of a handgun, and sentencing him to a total of sixty-five years imprisonment.

As grounds for relief Appellant raises the following claims: (1) that palpable error occurred when the Commonwealth used a prior consistent statement to impeach one of Appellant's witnesses; (2) that the trial court erred when it granted the Commonwealth's *Batson* motion and blocked Appellant's attempt to use a peremptory strike on a juror; (3) that the trial court erred by denying Appellant's motion for a mistrial after a witness stated that Appellant was a "bad man" and after another witness testified regarding threats allegedly made on behalf of Appellant; (4) that the trial court erred by permitting the introduction of evidence that a baseball bat and a knife were found in

Appellant's truck following the shooting; (5) that the trial court erred by permitting the introduction of two gruesome autopsy photos of the victim; and (6) that the trial court erred by granting the Commonwealth's motion to exclude evidence that the victim's body tested positive for the presence of marijuana.

For the reasons stated below, we affirm the judgment of the Jefferson Circuit Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Seventeen year-old Charles Eldridge was shot and killed on M Street in Louisville, Kentucky. Appellant admits to being involved in the shooting of Eldridge. He contends that as he attempted to fend off an armed assailant, the gun discharged several times.

The Commonwealth presented the testimony of Delmar Baxter, who upon hearing gunshots, ran toward the intersection of Fifth Street and M Street so he could see what was happening, and saw Eldridge running from Appellant, who was standing in the middle of the intersection shooting at Eldridge. Baxter saw Eldridge run onto the lawn of M Street Baptist Church and collapse, and he then saw Appellant flee the scene. Tiffany Procter testified that she heard gunshots, went out onto her porch and saw Appellant standing in the intersection holding a gun. Howard Snead, who was with Baxter at the time of the shooting, testified that he saw Eldridge ride by on a bicycle when a pickup truck came around the corner toward Eldridge. Eldridge threw his bicycle down, began running, and said "you have the wrong person." Snead

testified that Appellant got out of the truck, chased Eldridge down, and shot him. Baxter testified that Appellant then approached and asked, "Does any more niggers want to die? Or any more nigger lovers?" Appellant is Caucasian; the victim and the eye-witnesses were African-American.

Appellant's version of events was quite different. He testified that he was driving around the area looking for a prostitute, and asked two young men on bicycles "where the ladies were." Appellant said that they told him to park his truck and get his money out, and he complied and stood, resting his arm on the truck window with his money in his hand. As he waited, one of the young men punched him in the mouth, and the other pointed a pistol at him. Appellant testified that he reached defensively for the pistol, but ended up grabbing instead the arm holding the gun. As he repeatedly pushed the arm away from himself, the gun fired several times. Then, due to the blows upon his face, he lost his vision. When he regained his sight, the young men were gone. Appellant was certain that the two young men were attempting to rob him.

As a result of that event, Appellant was indicted for murder, possession of a handgun by a convicted felon, and tampering with physical evidence. At trial, the jury rejected Appellant's version of events, returning a verdict of guilty on all counts and recommending a total sentence of sixty-five years. The trial court entered final judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. IMPEACHMENT OF APPELLANT'S DAUGHTER

Appellant contends that error occurred as a result of the Commonwealth's attempt to impeach Appellant's daughter, Brittany Whitaker, with a statement she made to police on the night of the shooting. Appellant contends that the statement was a prior *consistent* statement, as opposed to a prior *inconsistent* statement, and therefore it was admitted in violation of KRE 801A(a)(l). Appellant concedes that the error is not preserved but requests palpable error review pursuant to RCr 10.26.

We begin our discussion by setting-forth the relevant testimony, beginning with Whitaker's:

> **Commonwealth (CW):** All right, what happened when [Appellant] came back to your house that night.
>
> **Whitaker:** Um, he was bleeding from his mouth, and he was shaking. Um, **he had told me that somebody had tried to rob him**.
>
> **CW:** Okay, when did he tell you that?
>
> **Whitaker:** When he came back to my home.
>
> **CW:** Okay, and what did he do after he told you that?
>
> **Whitaker:** He asked me for the keys to my van, because he needed to go get his extra set of keys to his truck.
>
> **CW:** Okay. Is that all that he said to you at that point?
>
> **Whitaker:** Yes ma'am.
>
> . . . .
>
> **CW:** And did those officers ask you about what your dad had said to you when he came to get the van?
>
> **Whitaker:** Yes.

CW: And did you tell them what you just told us, that **he told you that he needed the keys because he'd been robbed?**

Whitaker: Yeah, he needed to go get his, um, because **they had took the keys to his truck**, he needed to go get his extra key.

CW: All right, **and that's what you told the police officers in your house that night?**

Whitaker: Yes, ma'am

Thus, according to Whitaker's trial testimony, on the night of the shooting she told police that her father had told her that he had been *robbed*. After Whitaker testified, Deputy Mike Smith was recalled to the stand and testified in rebuttal as follows:

CW: All right. And did [Brittany Whitaker] tell you what had happened when her father [Appellant] came to her house? Did you ask . . . ?

Smith: Originally, she said her father had left the residence sometime between 22:00 and 23:00 hours. **He returned a short time later and was bleeding from the nose and mouth area.** She denied having any conversation with him. I asked her how he was able to leave with her van, and she said he had his own key. When I told her his keys had been left at the scene of the shooting, and collected as evidence, **she admitted he had told her he had been assaulted and needed her vehicle key because his had been stolen.** She denied having any knowledge of the shooting or her father having a gun in his possession.

CW: If she had told you that her father had claimed to have been robbed would you have noted that in your report?

Smith: I would have.

CW: And did she make any such statement to you that night?

Smith: She did not.

Appellant contends that Whitaker's statement to Smith to the effect that Appellant said he had been assaulted and his keys had been stolen was the same, in substance, as her trial testimony that Appellant had told her that he

had been robbed, and thus was not subject to impeachment as a prior inconsistent statement. KRE 801A(a)(1) allows admission of a witness's prior inconsistent statement provided the witness testifies at trial and is examined about the statement, subject to the foundational requirements contained in KRE 613. *Tunstull v. Commonwealth*, 337 S.W.3d 576, 590 (Ky. 2011).

The inconsistency, if any, between Whitaker's statement the night of the shooting to the effect that her father "had been assaulted and his keys taken" and her statement at trial that he had been "robbed" is, indeed, quite subtle. As pointed out by Appellant, if someone has been assaulted and bloodied and the assailant takes his keys, the victim has, in fact, been "robbed."[1] On the other hand, Whitaker did not succinctly and specifically state on the night of the shooting that her father had been *robbed*, unlike her trial testimony.

First, we agree with Appellant that the Commonwealth did not comply with the foundational requirements of KRE 613. KRE 613 requires that, "[b]efore other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it."

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[1] *See*, for example, KRS 515.030(1) ("A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft."); *see also* KRS 515.020 (first-degree robbery).

The rule requires that the examining party, here the Commonwealth, must first ask the witness about the difference in the trial testimony and give her a chance to explain it. As the above transcription demonstrates, the Commonwealth at no time gave Whitaker an opportunity to explain the subtle variance between her pre-trial statement to police that her father had been assaulted and his keys stolen, with its *absence* of the terms "rob" and/or "robbed," and her trial testimony that her father had been *robbed*. Compliance with KRE 613 may have resolved the entire controversy, because upon being confronted with the subtle distinction, Whitaker may have clarified that she meant the same thing in both statements.

Second, because we are reviewing this issue pursuant to the manifest injustice standard of RCr 10.26, rather than undertake an academic and legalistic parsing of the subtle distinction between the two statements and reach a conclusion of whether the latter is in fact inconsistent with the former pursuant to KRE 801A(a)(l), we will instead assume Appellant is correct that there is no significant distinction between the two.

Based upon the presumptions that error occurred as a result of the Commonwealth's failure to comply with KRE 613 and that the two statements were not inconsistent, we nevertheless are persuaded that any error did not rise to the level of a manifest injustice. RCr 10.26. Under the palpable error standard prescribed 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.

Upon consideration of the totality of the evidence properly admitted against Appellant, we conclude that the admission of Deputy Smith's "impeachment" testimony did not substantially affect the fairness of the trial. The fact that the distinction between the two statements is exceptionally subtle means that it is highly unlikely that the jury would have drawn from it an unfavorable inference about Whitaker's credibility. Any trivial difference between the two statements could not possibly have affected the verdict.

III. BATSON CHALLENGE TO JUROR 24

Next, Appellant contends that the trial court erred by sustaining the Commonwealth's *Batson* challenge to his peremptory strike of Juror 24. Appellant is Caucasian and Juror 24 is African-American. The victim was also African-American. In exercising his peremptory strikes, Appellant struck, four of the remaining six African-American jurors, including Juror 24. Of the three peremptory challenges other than Juror 24, the trial court agreed that two were appropriately challenged; the Commonwealth withdrew its objection to the striking of one of the jurors.

We begin by noting that a preserved *Batson* error is subject to the usual standards of harmless error analysis. *Rivera v. Illinois*, 556 U.S. 148 (2009)

(holding that there is no federal constitutional right to peremptory challenges; that states are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se; and that states are free to decide, as a matter of state law, that the improper seating of a competent and unbiased juror does not convert the jury into an *ultra vires* tribunal; and therefore the error can rank as harmless under state law). Unpreserved error, therefore, is also subject to the usual manifest injustice standards.

During *voir dire* Juror 24 indicated that she had had a relative who was prosecuted by the Jefferson County Commonwealth's Attorney's office about four years ago. The Commonwealth followed up by asking, "and that's something that you could set aside and understand that it doesn't have any relation to this case?" The video recording does not make clear how the Juror responded to this question, though it appears that she indicated that she could. Neither the Commonwealth nor Appellant further questioned Juror 24 regarding her relationship to the defendant or the specifics of the prosecution.

After Appellant listed Juror 24 as a preemptory strike, the following discussion occurred between the trial court, defense counsel, and the Commonwealth:

> **Trial Court:** Explain to me Number 24 again.
>
> **Counsel:** 24 is – I think she has relatives that was [sic] prosecuted by the Commonwealth's office approximately four years ago – which –
>
> **Trial Court:** Did she say that during I – I don't remember – does that show up on her card?

Prosecutor: Yes, she indicated on her form, as well she responded there and said that it wouldn't affect – it wouldn't bias her in any way.

Counsel: And with somebody being prosecuted four years ago, that's the other thing I was concerned, was that person on probation or in custody or . . . .

Trial Court: I typically handle that, I tend to put them back in the pool – I don't – 24 didn't say anything about being a police officer or have any relatives.

Counsel: I've got written down – I'm reading my notes it says "relative prosecuted" that's what it was.

Prosecutor: Yeah.

Counsel: She had a relative prosecuted by the Commonwealth Attorney's office four years ago.

Trial Court: I think 24 needs to go back in, to be honest with you, I don't hear a good reason. Uh and I can handle it by seating 15. And it'll be a random draw.

Counsel: Then she's automatically on? She goes in and then one more random is drawn?

Trial Court: That's how I propose to handle that – that's fair.

Commonwealth: I agree judge.

Counsel: Just note our objection.

In *Batson*, the United States Supreme Court prohibited deliberate racial discrimination during jury selection. Under *Batson*, we have explained,

> [a] three-prong inquiry aids in determining whether a prosecutor's use of peremptory strikes violated the equal protection clause. Initially, discrimination may be inferred from the totality of the relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a neutral explanation for challenging those jurors in the protected class. Finally, the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.

McPherson v. Commonwealth, 171 S.W.3d 1, 3 (Ky. 2005) (citations and footnotes omitted). The identical rules and analysis apply in the case of a defendant using a peremptory strike based exclusively upon racial motives. *Georgia v. McCollum*, 505 U.S. 42, 59 (U.S. 1992) ("We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges."); *Wiley v. Commonwealth*, 978 S.W.2d 333, 335 (Ky. App. 1998).

The trial court's ultimate decision on a *Batson* challenge "is akin to a finding of fact, which must be afforded great deference by an appellate court." *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007) (citation omitted). "'Deference,' of course, does not mean that the appellate court is powerless to provide independent review, *Miller–El v. Dretke*, 545 U.S. 231 (2005) (holding that the trial court's finding of non-discrimination was erroneous in light of clear and convincing evidence to the contrary), . . . but the ultimate burden of showing unlawful discrimination rests with the challenger." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 757–58 (Ky. 2009). "A trial court's ruling on a *Batson* challenge will not be disturbed unless clearly erroneous." *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000).

When called upon to rationalize the strike of Juror 24, the only viable, race-neutral reason proffered by Appellant's counsel for the strike was his concern that Juror 24 would be biased because a relative had been prosecuted four years earlier and may still be on probation or in custody, implying concern that the Commonwealth may still have some influential impact upon the juror's kinsman. The trial court responded "I don't hear a good reason." As noted, we review the trial court's ultimate *Batson* determination pursuant to the clearly erroneous standard.

Appellant did not further examine Juror 24 to determine the precise relationship between the juror and the relative; what the charges were; what the disposition was; whether she thought there was anything unjust about the prosecution; and the current status of her relative, i.e., whether in prison or on probation or parole. In his brief, Appellant suggests that Juror 24 might have a son on probation or parole, and thus might have been inclined to favor the Commonwealth in order to curry favor for her son.[2] However, there is nothing

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[2] It is worth noting that, as a general observation, strikes against jurors with relatives who have been involved with the criminal justice system are most often exercised by the *Commonwealth*, presumably under the theory that the juror will be biased against the Commonwealth for having prosecuted her relative. *See*, e.g., *Saylor v. Commonwealth*, 144 S.W.3d 812, 816 (Ky. 2004) ("When asked to state his reason for striking Juror No. 102, the prosecutor responded that his office had previously prosecuted members of the juror's family. The trial judge accepted the explanation as race-neutral and not pretextual, and we conclude that the trial judge's finding in this respect was not clearly erroneous.") and *Berry v. Commonwealth*, 84 S.W.3d 82, 88–89 (Ky. App. 2001) (exercise of peremptory strike against juror who admitted that family members had been criminally prosecuted did not violate *Batson*). Accordingly, Appellant's use of a strike to remove this type of juror is atypical, which further calls into question the motivation for the strike. In this vein, a more complete voir dire by Appellant may have disclosed that Juror 24 was irate at the Jefferson County prosecutors for unfairly prosecuting her relative, which would have made her a favorable juror from his perspective.

to this effect in the record and Appellant's assertion is nothing more than conjecture. Stated otherwise, in satisfaction of the second-prong of *Batson,* that is, the duty to offer a race-neutral reason for the strike, Appellant relies upon little more than his intuition. However, as we stated in *Washington v. Commonwealth,* "'[w]hile the [proffered] reasons [for the strike] need not rise to the level justifying a challenge for cause,' self-serving explanations based on intuition or disclaimers of discriminatory motive are insufficient." 34 S.W.3d at 379 (quoting *Stanford v. Commonwealth,* 793 S.W.2d 112, 114 (Ky. 1990)).[3]

Because Appellant's stated reason for striking Juror 24 appears to have been based primarily upon speculation and intuition, the trial court's ultimate decision that to deny the strike, based upon *Batson's* prohibition against striking jurors for race-based reasons, was not clearly erroneous.[4]

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[3] *Cf. Chatman v. Commonwealth,* 241 S.W.3d 799, 804 (Ky. 2007) ("the fact that the Commonwealth did not directly engage in a colloquy with [juror] regarding [a police officer's earlier arrest of someone sharing juror's surname or juror's] failure to respond to a question posed by the Commonwealth before exercising a peremptory challenge upon him in no way negates the facially race-neutral reason given by the Commonwealth for exercising its peremptory challenge.").

[4] Appellant also complains that the trial court failed to proceed step-by-step through the three-step *Batson* test with each step separately indicated along the way. However, he failed to raise this argument at trial, and thus the issue is subject to only palpable error review pursuant to RCr 10.26. Upon application of that standard, we conclude that a manifest injustice did not occur as a result of the trial court's failure to make a separate ruling upon each prong of the *Batson* test. Rather we conclude that the trial court either (1) determined that Appellant had failed to articulate a race-neutral reason at step 2, or (2) combined steps 2 and 3 into a single articulation finding that even if the proffer at step 2 was race-neutral, then nevertheless, the proffered reason was pre-textual. Under either construction the trial court's ultimate ruling was not clearly erroneous, and it follows that there can be no palpable error associated with the underlying details of the trial court's ruling.

IV. DENIAL OF A MISTRIAL

Appellant next contends that the trial court erred when it denied each of his two motions for a mistrial. One of the motions occurred during Baxter's testimony, and the other during Snead's testimony. We address each of the motions in turn below.

A. First Motion – Baxter Testimony

The first motion for a mistrial occurred during Baxter's testimony and was founded upon Baxter calling Appellant a "bad man." The relevant testimony was as follows:

> **CW:** Now, when police asked you if the defendant was the one who shot Charles, what did you tell them?
>
> **Baxter:** I was scared that night and I said no.
>
> **CW:** Now, did you later talk to police about what happened that night?
>
> **Baxter:** Yes, ma'am.
>
> **CW:** And did they ask you again, who you saw shoot Charles?
>
> **Baxter:** Yes, ma'am.
>
> **CW:** And did you talk to them at that point, and tell them what you saw?
>
> **Baxter:** Yes, ma'am.
>
> **CW:** and was your second interview with police the truth about what you saw?
>
> **Baxter:** Yes, ma'am, because I was scared that night.
>
> **CW:** And do you remember about how long it was after the night of the shooting that you talked to police again?
>
> **Baxter:** Probably about two or three weeks after that – or a month. They came to my house.

> **CW:** Why were you afraid to tell the police that night?
>
> **Baxter:** Cause – cause this man, Robert Moore, he's a bad man, known in the –

A mistrial is an extreme remedy and should be resorted to only when there appears in the record "a manifest necessity for such an action or an urgent or real necessity." *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002) (*quoting Clay v. Commonwealth*, 867 S.W.2d 200, 204 (1993)). "The standard for reviewing the denial of a mistrial is abuse of discretion." *Id.*

Here, the brief and fleeting reference to Appellant as a "bad man" certainly did not rise to the level of creating a manifest necessity to terminate the trial. Indeed, and while certainly improper testimony, *see* KRE 404(a), the reference was a rather inconsequential attack on Appellant's character. Further, at the bench following Appellant's objection the trial court offered to admonish the jury concerning the improper characterization, which Appellant declined.

As noted in *Matthews v. Commonwealth*:

> We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition. A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial judge is 'best situated intelligently to make such a decision.' The trial court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion.

163 S.W.3d 11, 17 (Ky. 2005)(citations omitted).

Thus, with an admonition as an available alternative to a mistrial for this rather innocuous introduction of inadmissible evidence, we conclude the trial court's refusal to grant a mistrial was not an abuse of discretion.

B. Second Motion – Snead Testimony

Appellant's second motion for a mistrial occurred during Snead's testimony during direct-examination by the Commonwealth and concerned threats made against the witness apparently warning him not to testify in this case. The relevant testimony was as follows:

> **CW:** Okay, and has anyone from the defendant's family contacted you or talked to you about this case?
>
> **Snead:** Uh, I don't know if it was in his family or not but I had a couple of individuals stop by before and told me that I needed to get amnesia and go blind and deaf and move. Leave.

Following this exchange Appellant moved for a mistrial based upon hearsay and the Commonwealth's failure to provide the statement during discovery. We believe the evidence, which concerns a threat against a witness to the crime, was admissible, and therefore that the trial court properly denied Appellant's motion for a mistrial.

In *Foley v. Commonwealth*, 942 S.W.2d 876, 887 (Ky. 1996), we upheld the introduction of evidence that the defendant's wife and father attempted to intimidate a witness of the Commonwealth. In that case we explained the controlling rule as follows:

> Evidence of intimidation of a witness was competent evidence as it was inconsistent with Appellant's innocence. Any attempt to suppress a witness' testimony by the accused, whether by persuasion, bribery, or threat, or to induce a witness not to appear at the trial or to swear

> falsely, or to interfere with the processes of the court is evidence tending to show guilt. The attempt does not have to be committed by the accused, but someone acting on his behalf.

Id. at 887 (citations omitted). "Evidence that a witness has been threatened or otherwise influenced in an attempt to suppress his testimony is admissible in a criminal prosecution only where the threat was made by, or on behalf of, the accused." *Id.* at 886. Here, while it is not known with absolute certainty who made the threats, there is strong circumstantial evidence that Appellant, or someone acting on his behalf, did so. While incarcerated and awaiting trial, Appellant said to his ex-wife in a recorded phone call that "his best chance was if the witnesses did not appear against him at trial." That statement creates an obvious link between Appellant and the witness being told to "get amnesia" and "move," and it supports the inference that Appellant was responsible for the threatening communication. Accordingly, admission of Snead's testimony on that matter was proper. No mistrial was required as a result of the testimony.

V. EVIDENCE OF OTHER WEAPONS

Appellant next contends that the trial court erred by permitting the Commonwealth to introduce evidence that a sawed-off baseball bat and a dagger knife were found in the rear portion of his vehicle's passenger compartment following the shooting. The Commonwealth introduced pictures of both items as they were discovered in the truck, and also the actual sawed-off bat and knife. Appellant contends that the evidence was irrelevant, and was therefore improperly admitted. The Commonwealth responds that the evidence

of the nearby weapons was relevant because it tended to undermine Appellant's claim of self-defense.

To be admitted at trial, the evidence must be relevant. KRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. However, even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403; *Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010).

Under the facts of this case, the Commonwealth's claim of relevance is weak and unconvincing. We are persuaded that the slight probative value associated with the weapons in the rear of the truck cab is substantially outweighed by the prejudicial effect associated with the admission of the evidence. Their presence does not rebut Appellant's description of the events. Appellant described a sudden and unexpected attack beginning with a punch to his mouth, followed by a gun being pointed at him, and the immediate necessity of grabbing for the gun. The Commonwealth contends that if his claim was true, he would have gone for the bat or knife in the back of the truck rather than grabbing for the gun. That explanation is implausible, but more to the point, it does not rebut his self-defense claim. As we clearly stated in *Major v. Commonwealth*, "weapons, which have no relation to the crime, are

inadmissible. Thus, it was error to introduce these weapons without connection to the crime." 177 S.W.3d 700, 710-11 (Ky. 2005) (citations omitted). Accordingly, the trial court erred by permitting the Commonwealth to introduce evidence concerning the bat and knife.

Nevertheless, this evidence was not particularly critical of Appellant's character and did not link him to prior criminal activity. Thus the erroneous evidence was not inflammatory or otherwise unduly prejudicial. Accordingly, we are persuaded that admission of the evidence did not substantially sway the verdict, and was therefore harmless error. *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009); RCr 9.24.

VI. AUTOPSY PHOTOGRAPHS

Appellant next contends that the trial court erred by permitting the Commonwealth to introduce two autopsy photographs depicting the wounds incurred by the victim during the shooting. The first photograph showed the autopsied victim's open and empty chest cavity with a rod depicting the trajectory of the fatal shot into the victim's chest. The other photograph showed the victims cut-open forearm with the underlying muscles and other tissue exposed to depict the bullet wound to this area.

Appellant contends that the gruesomeness of the photographs rendered the photos unduly prejudicial, and that the same information could have been communicated to the jury by medical illustrations depicting the same information. The Commonwealth responds that the circumstances concerning

the firing of the shots — whether at close range in the scuffle described by Appellant, or at a distance in cold-blooded murder — was the central issue in the case, and thus the actual autopsy photos were crucial to explaining to the jury that the shots could not have been fired as described by Appellant.

A trial court's evidentiary rulings are reviewed under an abuse of discretion standard. *Walker v. Commonwealth*, 288 S.W.3d 729, 739 (Ky. 2009). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The trial court did not abuse its discretion in admitting the photographs. "The general rule is that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous." *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992). "[T]he prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see." *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998).

The photographs were particularly relevant in this case to show the nature and extent of the victim's injuries and the circumstances under which the shots were fired, which was the central issue in the case.. *See* KRE 401. Further, only two photographs were used to illustrate these particular points, and so the evidence was not cumulative and was used appropriately to illustrate an important point. In light of the crucial significance of the photographs in explaining to the jury the forensic conclusions regarding the

circumstances under which the gunshot wounds were incurred, and though the photographs were clearly gruesome, we conclude the trial court did not abuse its discretion in finding that KRE 403 did not require the exclusion of the evidence.

VII. EXCLUSION OF VICTIM'S DRUG USE

Finally, Appellant contends that the trial court erred by granting the Commonwealth's motion in limine to exclude evidence that the victim tested positive for marijuana. Appellant contends that the evidence was relevant because it demonstrated that the victim was a drug user, and therefore had the motive to commit a robbery to get money to buy more drugs.

Appellant's theory is based upon unsupported speculation. While there may be some general correlation between drug use and criminal conduct, there is no evidence that Eldridge's use of marijuana afforded him a motive to rob Appellant. The generality cited by Appellant has no ability to prove that the victim set out to rob Appellant or anyone else, and it was therefore irrelevant. It is well established that a trial court may limit evidence supporting a theory that is speculative or far-fetched, and could confuse or mislead the jury. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). The trial court accordingly did not abuse its discretion in excluding the evidence.

VIII. CONCLUSION

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

Minton, C.J., Abramson, Cunningham, Scott and Venters, JJ., concur. Noble, J., concurs in part and dissents in part by separate opinion. Keller, J., not sitting.

NOBLE, J., CONCURRING IN PART AND DISSENTING IN PART: Appellant is white, and the victim is black. At trial, six of the prospective jurors were black, and Appellant tried to exercise a peremptory strike on four of them. The Commonwealth objected on the grounds of *Batson v. Kentucky,* 476 U.S. 79 (1986), and asked the Appellant to establish the race neutral reasons for his peremptory strike. On two of the four, the trial court was satisfied with the reasons Appellant gave; on one, the Appellant withdrew his proposed strike.

This left Juror 24. This juror had stated in voir dire that a relative had been prosecuted by the Commonwealth's Attorney about four years earlier. She also had told the prosecutor she could be fair. In response to the *Batson* challenge, Appellant's counsel stated a concern about the juror having relatives who had just been prosecuted four years ago, and further stated, "With somebody being prosecuted four years ago, that's the other thing I was concerned, was that person on probation or in custody?" At this point, the trial court summarily granted the Commonwealth's *Batson* challenge.

It is beyond question that race is not and cannot be the proper basis for a peremptory strike. This has clearly been the law since at least 1880. *See Strauder v. West Virginia,* 100 U. S. 303 (1880). But this same law, as laid out in the *Batson* case, does not automatically prevent the use of a peremptory strike on persons from a protected class. Instead, *Batson* established a process

that protects against racial bias but also allows fair exercise of peremptory strikes. The Supreme Court recognized that a litigant "ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried," *Batson*, 476 U.S. at 89 (quoting *United States v. Robinson*, 421 F.Supp. 467, 473 (D. Conn. 1976)), but as the issue was stated in *Batson,* "the State's privilege to strike individual jurors through peremptory challenges ... is subject to the commands of the Equal Protection Clause," *id.*

This reasoning led the Court to lay out a process that requires a prima facie showing that gives rise to "an inference of discriminatory purpose." *Id.* at 94. Upon this showing, "the burden shifts to the [party exercising the peremptory strike] to explain adequately the racial exclusion," *id.*, often referred to as stating racially neutral reasons for the strike.[5] If such reasons are stated, then the burden shifts back to the party opposing the strike to establish, by a preponderance of the *evidence*, that the proffered reason is a pretext to cover up discriminatory intent. The burden is then on the trial court to determine if the party opposing the strike "has established purposeful discrimination." *Id.* at 98. To do this, the trial court must look at the fact that there is a discriminatory effect, and weigh this against the race neutral reason stated by the party making the strike to determine if there is a "monochromatic result" or if it is really being done for discriminatory purposes.

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[5] "Rather, the State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Batson*, 476 U.S. at 94 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

The analysis can be complicated by the fact that the stated reason usually is racially neutral on its face. And, because it is a *peremptory* challenge of a juror, the *Batson* Court emphasized that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97. Indeed, the nature of a peremptory challenge is that the reason for the strike is *not* good enough for a strike for cause. A peremptory strike is simply a privilege granted by a state court that allows a juror to be struck based on a bad feeling or "no reason at all," although in Kentucky we have found that it is a substantial right. *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007). It just cannot be used based solely on the race of the juror.

So, even if the stated reason doesn't make a lot of sense to the judge, or as the judge said here, "I don't hear a good reason," the *Batson* decision requires more: there must be evidence that the racially neutral reason stated for the strike is a sham, or pretext, and other factors exist which allow a trial judge to conclude that the reason cannot be taken on its face.

This has to be more than the judge's gut feeling. Otherwise, the judge is not applying a legal standard or applying *sound* discretion, and is instead simply calling the attorney who stated the racially neutral reason a liar. It is not an undue burden to have the party opposing the strike state evidentiary reasons why the racially neutral statement is pretext. In fact, the law requires it. Nor is it an undue burden for the trial court to state its reasons for finding pretext. Without such, an appellate court cannot make a meaningful review,

and must resort to putting words in the trial judge's mouth in order to divine what he was thinking.

I do not argue that the right to exercise a peremptory strike is more important than ensuring racial fairness; it is clearly not. But neither is it fundamentally fair to inject racially discriminatory motivation into a trial when there is none. For this reason, *Batson* gives a trial court "the duty to determine if the [party opposing the strike] has established *purposeful* discrimination." *Batson,* 476 U.S. at 98 (emphasis added).

Here, all the trial court said was "I don't hear a good reason." He said nothing about purposeful discrimination. He gave no reason why he thought the stated reason for the strike was not neutral, or what facts in evidence led him to believe there was a discriminatory motive. In fact, the sequence of events leading up to this strike would tend to argue to the contrary: the trial court found sufficient neutral reasons to strike two of the black jurors, and the *Appellant* withdrew his challenge on a third. Thus the record to that point did not indicate a racially discriminatory animus.

And it is not totally absurd for Appellant to be concerned about a juror's past experiences with the Commonwealth's Attorney, nor with the question of whether her relatives were still in jail or had received probation, maybe on the Commonwealth's Attorney's recommendation, which might have biased her in the Commonwealth's Attorney's favor. All of these "maybes" or "mights" certainly would not support a strike for cause. But they are more than

adequate for a peremptory strike, and in addition are racially neutral on their face.

What is lacking in the trial court's analysis is an articulation of how there is any purposeful racial motivation for the strike, or how the reason stated is pretextual. Without such, the trial court abused its discretion.

A fair trial is perhaps the last bastion of decency and order in an increasingly chaotic world. This means being fair to both a defendant and the Commonwealth, and for this reason the *Batson* challenge may be brought by either side. Here, it was the Commonwealth who challenged the Appellant's peremptory strike of Juror 24. It was a fair challenge, because the Appellant is white and the juror is black, as was the victim. It is essential to justice that such peremptory strikes be examined for open or hidden bias.

But if that bias cannot be established as more likely than not, then to disallow the strike defeats the purpose of the *Batson* hearing every bit as much as ignoring clear bias would. No bias having been established here, I would reverse and remand for a new trial that allows a fair jury selection to both sides.

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