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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000773-MR

KEWAN HACKETT — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
NO. 11-CR-00222

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Kewan Hackett, appeals as a matter of right from a judgment of the Jefferson Circuit Court convicting him of murder, attempted murder, and tampering with physical evidence, and sentencing him to a total of thirty-six years' imprisonment. The convictions and sentence resulted from a shooting that occurred in January 2011 in Louisville, Kentucky, that caused the death of Kristin Redmon and the wounding of Dajuan Best.

As grounds for relief Appellant contends that: (1) the trial court erred by denying his motion for a directed verdict for the murder and attempted murder charges; (2) that the jury instructions for the tampering with evidence charge violated his rights to a unanimous verdict and/or a majority verdict; (3) that a police detective was impermissibly allowed to narrate surveillance camera video footage; (4) that the trial court erred by permitting the introduction of a photo array which included Appellant's mug shot from a prior arrest; (5) that the trial

court erred by denying his motion to exclude his statement to police in which he told police that he occasionally sells small amounts of marijuana; (6) that the trial court erred when it denied his request for instructions on lesser included offenses on the murder and attempted murder charges; and (7) that the trial court erred by not permitting Appellant to cross-examine the Commonwealth's two principal witnesses about their pending charges for trafficking in heroin, but rather only allowing him to identify the pending crimes as "felonies."

For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 8, 2011, victims Dajuan Best and Kristen Redmon were at Jock's Bar and Grill in Louisville. Appellant was there also, as was Appellant's friend and neighbor, Saleem Muhammad. Appellant, Saleem, and Redmon were regulars at the bar. While playing pool, Best and Appellant had an exchange of words sufficiently disagreeable that it attracted the attention and intervention of the bar's security personnel. Saleem testified that Appellant later told him that he had had a "beef" with someone over two kilograms of cocaine; the Commonwealth theorizes that this "beef" about cocaine was the heated exchange with Best which resulted, ultimately, in the shooting of Best.

A video surveillance system on the premises showed that Saleem, Best, and Redmon engaged in a brief interaction just as they left together through the front door. Best and Redmon led the way and Saleem followed. The video system captured images of Appellant watching as the trio left, and then

immediately moving quickly toward the back exit. Moments later four or five shotgun blasts were fired into Best's vehicle, killing Redmon and wounding Best. Appellant's theory of the case is that there was a drug deal between Best and Saleem that night, and that Saleem was the shooter.

Saleem testified that after leaving the bar he heard the gunshots and then saw someone "creeping" toward and getting into the Cadillac that Saleem knew belonged to Appellant. Saleem testified that the person entering Appellant's car was carrying an object, which the Commonwealth theorizes was the shotgun. The Cadillac then drove away.

Several witnesses at a nearby bingo hall heard the shots. Immediately after the shooting, Robert Wynn saw a Cadillac, presumably Appellant's, drive out of the bar parking lot with its lights off. Brad Gentry looked in the direction of the shots and saw a man standing near the rear of Best's vehicle. Gentry saw the man get into the Cadillac and drive away with its headlights off. Gentry later identified the vehicle as Appellant's Cadillac. Two other witnesses who were present at the bingo hall generally corroborated Wynn and Gentry's testimony.

The Commonwealth's case was further strengthened by testimony of Saleem and his wife, Maria, concerning statements Appellant made after the shooting. After the shooting, Appellant telephoned Saleem and told him, "[You] ain't seen nothing," apparently a warning to keep quiet about what he had seen in the bar parking lot. Saleem also testified that Appellant later came to the Muhammads' apartment, paced nervously about, looked out the window, and

said, "It wasn't meant for her," and then, "no witnesses, no case, no evidence," in an apparent reference to the shooting. Saleem testified that Appellant later asked about getting rid of his Cadillac.

Maria also testified about Appellant's arrival at their apartment after the shooting and his nervous demeanor. She testified that Appellant asked her to turn on the local television news channel that was reporting on the shooting. Upon hearing a report that Best was in stable condition, Appellant commented that that was "not a good thing," adding "he ain't dead" and "no witnesses, no evidence, no case." Maria testified that Appellant asked her if the bar had security cameras in the back; she said he also commented that there was no evidence concerning his clothing.

At trial, Appellant's defense was a denial that he committed the crimes and an effort to show that Saleem was the perpetrator. He aggressively sought to undermine the credibility of Saleem and Maria. Nevertheless, Appellant was convicted and sentenced as noted above; he was acquitted, however, on the charge of intimidating a participant in the legal process involving Maria. This appeal followed.

II. DIRECTED VERDICT

Appellant contends that the Commonwealth failed to present sufficient evidence to prove his murder and attempted murder convictions beyond a reasonable doubt. More specifically, Appellant alleges that there was no physical evidence linking him to the crimes, and that the testimony of the

Muhammads implicating him in the crimes was so unbelievable and contradictory that it would be unreasonable for a jury to believe them.

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

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, the reviewing court may only direct a verdict "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.*; see also *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983).

We are persuaded that upon a review of the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to support the murder and attempted murder convictions. The testimony noted in the previous section of this opinion from Saleem and Maria Muhammad about Appellant's incriminating behavior and statements; the observations of Robert Wynn and Brad Gentry; the video showing Appellant observing the victims leave the bar, and then his departure to the parking lot immediately before the shooting; and Appellant's brief run-in with Best at the bar on the night of the shooting all are circumstances consistent with guilt and, taken together, could easily induce a reasonable juror to believe beyond a reasonable doubt that the defendant was guilty. "Circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was

not clearly unreasonable for the jury to find guilt." *Hampton v. Commonwealth*, 231 S.W.3d 740, 751 (Ky. 2007) (quoting *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994)). Additionally, the testimony of a single witness is enough to support a conviction. See *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 758 (Ky. 2005) (citing *LaVigne v. Commonwealth*, 353 S.W.2d 376, 378–79 (Ky. 1962)).

Appellant nevertheless contends that the testimony of Saleem and Maria Muhammad was so unbelievable and contradictory that it would be unreasonable for a jury to believe them. However, our courts have long held that a jury is free to believe the testimony of one witness over the testimony of others. See *Adams v. Commonwealth*, 560 S.W.2d 825, 827 (Ky. App. 1977). That is, matters of credibility and of the weight to be given to a witness's testimony are solely within the province of the jury. The appellate courts cannot substitute their judgment on such matters for that of the jury. *Brewer v. Commonwealth*, 206 S.W.3d 313, 319 (Ky. 2006) (citing *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994)). We cannot simply reject the Muhammads' testimony and instead choose to believe Appellant's version. Determining the proper weight to assign to conflicting evidence is a matter for the trier of fact and not an appellate court, *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998), with the exception to this rule being that a jury will not be permitted to rest a verdict on testimony at variance with well-established and universally recognized physical and mechanical laws. *Buren v. Louisville Ry. Co.*, 165 S.W.2d 352, 353 (Ky. 1942).

In ruling on Appellant's motion for a directed verdict the trial court was required to construe conflicting evidence in the light most favorable to the Commonwealth. *Benham*, 816 S.W.2d at 187. Construed accordingly, it is clear to us that the trial court did not err in denying Appellant's motion for a directed verdict on the murder and attempted murder charges.

III. UNANIMOUS VERDICT ON TAMPERING WITH PHYSICAL EVIDENCE CHARGE

Appellant next contends that the tampering with physical evidence instruction was phrased so as to deny his right to a unanimous verdict under the Kentucky Constitution or a majority verdict under the U.S. Constitution. However, upon examination of the record, we are constrained to conclude that this argument is not adequately preserved for appellate review. At the conclusion of the Commonwealth's evidence and at the conclusion of the trial Appellant moved for a directed verdict on the tampering with evidence charge, which the trial court denied. Following that, Appellant objected to instructing the jury on the tampering charge on the grounds that there was insufficient evidence to support the tampering charge. He did not, however, argue to the trial court that the instruction should not be given on the basis that the instruction deprived him of his right to a unanimous or majority verdict.[1]

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[1] The instruction permitted a conviction only if the jury believed beyond a reasonable doubt "That . . . the defendant . . . destroyed, mutilated, concealed, removed or altered physical evidence which he believed was about to be produced or used in an official proceeding[.]" (emphasis added). Thus the instruction combined the allegation that Appellant had concealed both the shotgun and his clothing into a single description of "physical evidence," and, moreover, combined these two distinct theories of tampering into a single instruction.

CR 9.54(2) provides that "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection." (emphasis added). Here, as noted, Appellant did not "fairly and adequately" present his argument that the tampering instruction violated his right to a unanimous verdict and/or majority verdict; indeed, he did not present this position at all. This failure to present his position is fatal to his argument on appeal, even under the palpable error standard. *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013) ("when the allegation of instructional error is that a particular instruction should have been given but was not or that it should not have been given but was given, RCr 9.54 operates as a bar to appellate review unless the issue was fairly and adequately presented to the trial court for its initial consideration.").

Therefore we will not address this issue, except to note that the instruction was indeed erroneous because it did not identify the specific items of physical evidence the Commonwealth alleged had been tampered with. As such, the instruction was inconsistent with *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011), where we held that jury instructions for tampering with physical evidence were deficient when they merely referred generally to "evidence" without identifying any specific item about which evidence had been

presented. Instructions failing in that regard do not adequately inform the jury what it had to believe in order to return a guilty verdict.

Here, however, the only evidence the instructions could have possibly referred to was the shotgun and the clothing, and there was sufficient evidence to support the Commonwealth's theory that Appellant had hidden or destroyed both of these items of evidence. Therefore, even if we were to review the issue under the palpable error standard applicable to unpreserved error, we would have concluded that the error did not result in a manifest injustice. *Id.* Similarly, because there was sufficient evidence to support that Appellant concealed both the shotgun (it was not in his home or vehicle) and his clothing (per Maria's testimony), even if there was a split among the jurors regarding whether Appellant tampered with only one, either, or both of the items, because they would all have found that he tampered with at least one of the items, there was no violation of our unanimous verdict rules. *Malone v. Commonwealth*, 364 S.W.3d 121, 131(Ky. 2012) (A jury instruction that combines two theories of a crime does not implicate unanimous-verdict concerns if the evidence supports both theories).

IV. NARRATION OF THE SECURITY CAMERA VIDEO

Appellant next contends that error occurred as a result of Detective Anthony Wilder being permitted to narrate a fourteen-minute security video depicting the movements and activities of Appellant, Best, Redmon, and Saleem inside of the bar on the evening of the shooting. Appellant concedes that his argument is not fully preserved because he did not object at trial to the

narration in general, but rather objected to only two specific aspects of Detective Wilder's narration: Wilder's description of the initial interaction between Saleem and the victims as an "introduction"; and Wilder's statement that upon the victims and Saleem's leaving the bar together the victims walked straight ahead while Saleem turned to the right. Appellant argues that Wilder's exposition is inaccurate and, therefore, it unfairly undermined his theory that Saleem was the perpetrator.

Detective Wilder was not testifying as an expert when he narrated the video, but rather was testifying as a lay witness. In *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999),[2] we addressed the issue of whether a police officer's narrative testimony during the playing of a crime scene video was improper lay testimony. We determined in *Mills* that the proper query for such narrative testimony was whether it complied with KRE 701 and KRE 602. KRE 701 limits testimony by a witness not testifying as an expert to matters "(a) [r]ationally based on the perception of the witness," and "(b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." KRE 602 further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal knowledge. Thus, reading these two requirements together, we determined that the narration of the video was proper because it "comprised opinions and inferences that were rationally based on [the officer's] own perceptions of which he had personal

[2] Overruled on other grounds by *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

knowledge" and "was helpful to the jury in evaluating the images displayed on the videotape." *Mills*, 996 S.W.2d at 488.

Additionally, we have allowed testifying witnesses to provide "simultaneous commentary" of crime scene video. See *Milburn v. Commonwealth*, 788 S.W.2d 253, 257 (Ky. 1989). We have also have found error where pre-recorded narration of a video contained inadmissible hearsay. See *Fields v. Commonwealth*, 12 S.W.3d 275, 280 (Ky. 2000). Thus, the common thread unifying our decisions on testimonial narration of audio and video evidence is that such testimony, like any other, must comport with the rules of evidence. *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009).

Therefore, the principal consideration is whether the witness has testified from personal knowledge and rational observation of events perceived, and whether such information would be helpful to the jury; that is, whether the testimony complies with the rules of evidence. While a witness may proffer narrative testimony within the permissible confines of the rules of evidence, we have held he may not "interpret" audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence. *Cuzick*, 276 S.W.3d at 265–66 (Ky. 2009). "It is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky. 1995) (finding error when witness was allowed to offer testimony interpreting a poor quality audio tape of an

undercover drug buy that was substantially inaudible, rather than simply testifying as to his recollection).

Detective Wilder's narration consisted, for the most part, of identifying individuals depicted in the video, relating features of the bar's interior depicted on the video to his personal observation of them, and the providing of general context as to the situation in the bar. Upon application of the above principles, we conclude that was proper because such details in his narration were within his personal knowledge.

We agree, however, that Detective Wilder's description of the interaction between Saleem and Redmon as an "introduction" was an improper interpretation of the evidence, based upon his conjecture since he had no personal knowledge of what was being said by the participants in the interaction. We also conclude that his testimony about the directions taken by persons after they exited the bar was improper. Once the individuals on the video had been identified for the jury, the jury was then as capable as Detective Wilder to discern what occurred and in what direction each person turned as he or she went through the door.

Nevertheless, there was testimony to the effect Saleem and Redmon were friends, and that Redmon was indeed introducing Best to Saleem at their initial meeting at the bar. Further, since the jury was able to see for itself the directions taken by Saleem, Best, and Redmon upon leaving the bar, it could easily conclude, as Appellant's trial counsel argued, that Detective Wilder's description was simply incorrect.

"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." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). Here we may say with fair assurance that Detective Wilder's impermissible description of the meeting between Saleem, Best, and Redmon as an "introduction," and his improper interpretation of the directions they took upon exiting the bar did not substantially sway the verdict.

V. ADMISSION OF PHOTO ARRAY WAS PERMISSIBLE

Appellant next contends that the trial court erred by permitting the Commonwealth to introduce, and publish to the jury, a photo array of six pictures, one of which included an arrest photo of Appellant, a "mug shot" from a prior arrest.

In *Redd v. Commonwealth*, 591 S.W.2d 704, 708 (Ky. App. 1979), the Court of Appeals established a three-prong test for determining the admissibility of mug shots at trial: (1) the prosecution must have a demonstrable need to introduce the photograph; (2) the photos themselves, if shown to the jury, must not depict elements that imply that the defendant had a criminal record; and (3) the manner of introducing mug shot photos at trial, for example, the authentication testimony, must not draw particular attention to the origin or implications of the photographs. We subsequently adopted this test in *Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky. 1991).

Here, the Commonwealth had a demonstrable need to introduce the photo array, which included Appellant's photograph, because at trial,

Appellant's physical appearance was substantially different from his appearance at the time of the shootings. Best could not recognize Appellant at the trial, but he did so just after the shootings using the very photo array at issue here. Accordingly, this use was proper. *Cane v. Commonwealth*, 556 S.W.2d 902, 905-06 (Ky. 1977) (when the identity of a defendant as the perpetrator of a crime is an issue, a mug shot photo is relevant and admissible to prove identity, but not for the purpose of showing past criminality); *State v. Johnson*, 618 S.W.2d 191, 193-94 (Mo. 1981) (trial court did not err by admitting defendant's arrest photo for the purpose of showing that his facial appearance had changed between the time of the offense and the trial.)

Next, there was nothing about the photograph of Appellant that implied he had a criminal record; for example, there were no booking numbers or other identifying information on the photograph implying that the picture was made in connection with an arrest on a prior criminal charge. In other words, the photograph was nothing more than a passport-type photo. Finally, the manner of the photograph's introduction at trial was not such that it drew particular attention to the source or implications of the photographs.

In summary, we are persuaded that the trial court did not abuse its discretion by permitting the introduction of the photo array which included a prior mug shot of Appellant.

VI. PRIOR EVIDENCE OF APPELLANTS DRUG DEALING WAS PERMISSIBLE

Appellant next contends that the trial court erred by denying his motion to suppress his admission in his interview with police that he "sell[s] a little blunt every now and then." During his interview with police following the shootings, Appellant expressed surprise that he was being arrested in connection with a homicide. He indicated that he surmised he had been arrested at the behest of the federal Drug Enforcement Agency (DEA). When asked why he thought the DEA would be interested in him, Appellant responded that he "sell[s] a little blunt[3] every now and then." Appellant filed a pretrial motion to suppress the introduction of the statement, which was denied.

Appellant contends that the evidence was inadmissible because it had little or no relevance to the charges against him, and that the prejudicial nature of the reference substantially outweighed any probative value it may have had. Appellant also claims the statement served no purpose but to disparage Hackett's character by suggesting a criminal disposition. 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

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[3] A "blunt" is a large marijuana cigarette, often made by hollowing out the tobacco from the inside of a cigar and replacing it with marijuana. The Commonwealth interprets Appellant as having said "sells a little bud" now and then. "Bud," like blunt, is a slang term for marijuana and so there is no substantive difference between the two interpretations. In his motion to suppress Appellant used the term "blunt," and so we follow his own interpretation of his own statement.

evidence." KRE 403; *Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010).

The first test of admissibility is relevance; to be admitted at trial, 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.

The Commonwealth's theory of the case was that Appellant shot at Best because of a problematic drug transaction involving two kilograms of cocaine. Accordingly, evidence tending to show that Appellant was a large-scale cocaine dealer who deals in cocaine at the kilo level would be relevant in support of this theory. Similarly, evidence that he was sought by the DEA would be relevant evidence because it would make it more likely that Appellant shot Best as a result of a drug transaction. Therefore, if the only statement at issue was Appellant's statement that he "sell[s] a little blunt every now and then," we would tend to agree that Appellant's statement was inadmissible; the occasional small-time sale of "a blunt" does not tend to prove the motive proffered by the Commonwealth.

But Appellant's statement revealing his expectation that the DEA was interested in having him arrested is an implied admission that his drug dealing is substantial enough to attract the attention of the federal drug enforcement authorities. Thus, it is not the reference to "selling a blunt every now and then" that made the statement relevant, but, rather, the implication of his

statement that he thought he was being arrested by the DEA. That acknowledgment fits comfortably in with the Commonwealth's theory that the shooting was as a result of a bad drug deal involving two kilograms of cocaine. It is fundamental that we review a trial court's evidentiary rulings for an abuse of discretion. *McDaniel v. Commonwealth*, 415 S.W.3d 575, 577 (Ky. 2013) (citing *Goodyear Tire &Rubber v. Thompson*, 11 S.W.3d 575,577 (Ky. 2000). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Here we are persuaded that the trial court did not abuse its discretion by permitting introduction of the statements under review.

VII. APPELLANT WANT NOT ENTITLED TO AN INSTRUCTION ON THE LESSER-INCLUDED OFFENSES TO MURDER AND ATTEMPTED MURDER

Appellant contends that the trial court erred by failing to instruct the jury on several lesser-included offenses associated with the crimes of murder and attempted murder. We disagree.

With respect to the charge of murdering Redmon, Appellant tendered jury instructions on the following lesser-included offenses: first-degree manslaughter based upon a theory of extreme emotional disturbance (EED); second-degree manslaughter based upon a theory that firing a shotgun several times into an occupied vehicle constituted wanton conduct; and reckless homicide based upon the theory that the same conduct was merely reckless. The trial court denied Appellant's request for these instructions.

On the charge of attempted murder arising out of the shooting of Best, Appellant tendered an instruction for fourth-degree assault. The trial court declined to give that instruction, but it did give an instruction for second-degree assault.

A. Standard of Review

"An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). Further, by its plain terms, RCr 9.54 imposes a duty on the trial court to instruct the jury on the whole law of the case; that is, "this rule requires instructions applicable to every state of the case deducible from or supported to any extent by the testimony." *Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005). The trial court has no duty to instruct on a theory not supported by the evidence. *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983).

B. First-Degree Manslaughter

On appeal, Appellant has now abandoned his claim that he was entitled to a first-degree manslaughter instruction under an EED theory, KRS 507.030(1)(b), and instead, he now argues that he was entitled to a first-degree manslaughter instruction pursuant to KRS 507.030(1)(a), which provides that "A person is guilty of manslaughter in the first degree when: (a) With intent to cause serious physical injury to another person, he causes the death of such

person or of a third person[.]" He argues that a jury could have convicted him of first-degree manslaughter instead of murder because it could have reasonably believed that he intended to injure, not kill Best, and in the effort to do so, he inadvertently caused Redmon's death.[4]

We reject Appellant's argument based upon CR 9.54(2). Appellant did not "fairly and adequately" present to the trial court the theory of first-degree manslaughter that he now espouses. The argument he presented to the trial court was based upon the EED theory of manslaughter, not the theory that he had only the intention to cause injury and not the intent to cause death. This failure to present this position in the trial court is fatal to his argument on appeal, even under the palpable error standard. *Martin v. Commonwealth*, 409 S.W.3d at 346. This issue is not preserved for our review and so we will not address it. We note, however, that it is difficult to conceive that a jury would conclude that firing four or five shotgun blasts into an occupied vehicle evinced an intention to do no more than to cause injury to the occupants.

C. Second-Degree Manslaughter

Appellant contends he was also entitled to a second-degree manslaughter instruction because, given the evidence, the jury could have found that he

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[4] The Commonwealth's theory of the case is that the shooter's primary target was Best, and so the element of intent concerning the homicide of Redmon is based upon the doctrine of transferred intent. *Bolen v. Commonwealth*, 265 Ky. 456, 97 S.W.2d 1, 2 (1936) ("if one by mistake kills one person when he intended to kill another, he is guilty or innocent exactly as though the fatal act had caused the death of the person against whom it was directed, and the homicide is murder or manslaughter or excusable homicide according to the attendant circumstances.").

wantonly caused Redmon's death.[5] KRS 507.040 provides that: "(1) A person is guilty of manslaughter in the second degree when he wantonly[6] causes the death of another person[.]" (emphasis added).

Significantly, the murder instruction permitted the jury to find Appellant guilty of murder if it determined either that he "caused the death of Kristen Redmond intentionally," or that he "was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Kristen Redmond under circumstances manifesting an extreme indifference to human life." This later theory of murder is commonly referred to as wanton murder, which is distinguishable from second-degree manslaughter only in that the former contains the additional element described in the phrase, "under circumstances manifesting extreme indifference to human life." *Berryman v. Commonwealth*, 237 S.W.3d 175, 181 (Ky. 2007). Obviously, Appellant's conduct constituted the disregarding of an obvious, substantial, and unjustifiable risk that the victim would be killed, and is therefore clearly "wanton" so as to implicate a second-degree manslaughter instruction. However, that same conduct must be also characterized as acting "under circumstances manifesting extreme indifference to human life." Indeed, it

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[5] The murder instruction given in this case was a combination instruction which permitted the jury to find Appellant guilty of either intentional murder or wanton murder.

[6] "A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ." KRS 501.020(3).

would be difficult to devise a better example of acting with "extreme indifference to human life" than firing four to five shotgun blasts into an occupied vehicle. Accordingly, no reasonable juror could conclude that Appellant engaged in wanton conduct without also finding the aggravating element of acting with "extreme indifference to human life." See *Hudson v. Commonwealth*, 385 S.W.3d 411, 418 (Ky. 2012) (defendant's taking victim to remote area to meet with gang members the defendant knew suspected the victim of snitching was not entitled to either a second-degree manslaughter or reckless homicide instruction because the conduct was so inherently, and obviously, dangerous).

Accordingly, if the jury was going to find that Appellant acted wantonly in killing Redmon, it would at the same time have to find him guilty of wanton murder, not second-degree manslaughter. As such, the trial court properly denied Appellant's request for an instruction on second-degree manslaughter.

D. Reckless-Homicide

Appellant contends that he was entitled to a reckless homicide instruction because the jury could have believed that "he may have accidentally killed Redmon due to the reckless manner in which he targeted Best."

KRS 507.050 provides that "(1) A person is guilty of reckless homicide when, with recklessness he causes the death of another person."[7] Here, however, because the obvious risk of death inherent in firing four to five shotgun blasts into an occupied vehicle is so manifestly apparent, Appellant could not reasonably have "failed to perceive" the "substantial and unjustifiable risk" that one or more of the two occupants would be killed. Accordingly, we conclude that the trial court did not err in denying Appellant's request for a reckless homicide instruction. See *Hudson*, 385 S.W.3d 411.

E. Fourth-Degree Assault

Appellant also contends that the trial court erred by denying his request for a fourth-degree assault instruction regarding the shooting and injuring of Best. In connection with the shooting of Best the trial court gave an attempted murder instruction and second-degree assault instruction;[8] the jury found him guilty of attempted murder. In support of this argument Appellant contends that "[t]he fact that Best survived the shootings supports the idea that [Appellant] may have simply been trying to send a message by injuring him.

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[7] KRS 501.020(4) defines recklessly as "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

[8] Pursuant to KRS 508.020 "A person is guilty of assault in the second degree when: (a) He intentionally causes serious physical injury to another person; or (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument."

The limited testimony about Best's injuries may have risen to the level of the 'physical injury' contemplated in the fourth-degree assault statute."

KRS 508.030 provides that "(1) A person is guilty of assault in the fourth degree when: (a) He intentionally or wantonly causes physical injury to another person; or (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument." As noted, the underpinning of Appellant's argument is that "The limited testimony about Best's injuries may have risen to the level of the 'physical injury' contemplated in the fourth-degree assault statute." However, in his brief Appellant fails to provide a single citation to the record regarding the level of injuries incurred by Best, or their significance.[9] It is fundamental that it is an Appellant's duty and obligation to provide citations to the record regarding the location of the evidence and testimony upon which he relies to support his position. CR 76.12(4)(c)(v). Similarly, we are not required to scour the record to find where it might provide support for Appellant's claim regarding the severity, or lack thereof, of the injuries suffered by Best. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). As such, Appellant has failed to preserve this error for our review, and we will accordingly not address it on the merits.

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[9] The medical records for Best contained with the Commonwealth's trial exhibits includes such entries as "had multiple puncture wounds to left jaw with a non-expanding hematoma in the posterior neck"; "Orthopedic Surgeon felt the patient would need irrigation and debridement of his left shoulder"; "shoulder puncture wounds[,] shrapnel to left side of face"; and "there are acute comminuted fractures of the distal left clavicle and left acromion process of the scapula, in the region of the left acromioclavicular joint. Additionally, radiopaque foreign material is seen in the region of the fractures." It appears that Best made a full recovery.

F. Summary

In summary, the trial court did not err in denying Appellant's requests for the various lesser-included offenses discussed above.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISALLOWING THE PRIOR HEROIN ARREST OF THE MUHAMMADS

Five months after the shooting of Best and the murder of Redmon, Saleem and Maria Muhammad were charged with trafficking in heroin. The Commonwealth filed a pretrial motion to exclude any evidence of these charges from trial.

The trial court ruled that, without disclosing the nature of the pending charges, Appellant was entitled to impeach the Muhammads' trial testimony by showing that they were facing current criminal charges and, therefore, were motivated to testify favorably to the Commonwealth's case in order to gain an advantage in the resolution of their own pending charges. The trial court also held that Appellant could question Saleem regarding whether he had sold drugs to Best, the assault victim, on the night of the murder, and could argue as an inference from the evidence that he had done so. Appellant argues that he should have been allowed to disclose the specific nature of the charges because "[k]nowledge of the severe nature and high potential penalty range associated with the Muhammads' charges would have helped the jury properly gauge their credibility as witnesses."

The law favors the admission of evidence that is relevant to a jury's determination of a witness's credibility. *Baker v. Kammerer*, 187 S.W.3d 292

295 (Ky. 2006). "The credibility of a witness's relevant testimony is always at issue and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." *Id.* (citation omitted); *see also* KRE 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may [be proved] . . . in the discretion of the court, if probative of truthfulness or untruthfulness . . . ."). Nevertheless, as previously noted, it is fundamental that we review a trial court's evidentiary rulings for an abuse of discretion. *Penman v. Commonwealth*, 194 S.W.3d at 245.

KRS 403 governs the resolution of this issue. 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. *See* KRE 403. Moreover, where the value of evidence for a legitimate purpose is slight and the jury's probable misuse of evidence for an incompetent purpose is great, the evidence may be excluded altogether. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 496 (Ky. 1995).

Here, the essential point was that the Muhammads were facing criminal charges, and so may have had a reason to tailor their testimony to please the prosecutors. The trial court correctly ruled that this evidence was admissible. We are not persuaded that the trial court abused its discretion by excluding the specific nature of the charges. Heroin trafficking is a serious offense but

the fact that the Muhammads were charged with this crime as opposed to some other serious crime adds little, if any, probative value beyond the bias that was permitted into evidence. The trial court did not abuse its discretion by disallowing the identification of specific charges pending against the Muhammads.

IX. CONCLUSION

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

All sitting. All concur.

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