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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 24, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000171-MR

ISMAEEL K. AL KINI — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
NO. 11-CR-000731

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Ismaeel Al Kini appeals as a matter of right from a Judgment of the Jefferson Circuit Court convicting him of attempted murder and first-degree burglary. Ky. Const. § 110(2)(b). Al Kini raises multiple issues on appeal. For the reasons explained herein, we now affirm the Jefferson Circuit Court.

RELEVANT FACTS

Ismaeel Al Kini and Rasha Al Shafey Hussien had a tumultuous marriage, punctuated by domestic abuse and abandonment, culminating in the institution of divorce proceedings in early 2010. On January 30, 2011, Al Kini traveled to his estranged wife's apartment under the guise of dropping off the couple's three children. Hussien[1] greeted the children and let them inside the apartment, locking the door behind her. The couple's custody arrangement

[1] In the record and the appellate briefs, the victim is frequently referred to by her maiden name, Al Shafey. By the time Al Kini stood trial, the victim had remarried and changed her name. This opinion will refer to the victim by her married name at the time of the trial.

had been modified several days prior to allow Hussien joint custody of[2] the children. Mere minutes after the children arrived, Al Kini knocked on Hussien's door, explaining that their eldest son had forgotten his school clothes in Al Kini's car. Hussien did not open the door for Al Kini, but instead sent her son outside to retrieve the clothes. Al Kini then directed the boy to knock on the front door and tell his mother that he was alone, when in fact Al Kini waited by the doorway, out of view, armed with a kitchen knife. When Hussien opened the door, Al Kini forced his way into the apartment. He stabbed Hussien repeatedly in her chest and back. Hussien's hands and fingers were cut as she tried to wrest the knife from Al Kini. Neighbors heard Hussien and the children's screams and called 911. One neighbor followed Al Kini to his car and recorded his license plate number. Hussien's eldest son identified Al Kini as the perpetrator to a 9-1-1 operator.

Hussien was transported by ambulance to the emergency room at the University of Louisville Hospital. Treating physicians observed two penetrating wounds to her chest and back, as well as injuries to her right hand. She was intubated, and chest tubes were inserted to drain the blood from her wounds. She suffered a collapsed lung and an extreme drop in blood pressure, for which she was sedated and closely monitored. The injuries to her right hand required

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[2] Prior to the custody modification, Al Kini had sole physical custody of the children. According to the record, this arrangement was established after Hussien fled to Michigan in early 2010 to escape further physical abuse, leaving the children in Kentucky with Al Kini. She returned to Kentucky to live and to seek custody of the children in December 2010. The joint custody order allowed Hussien to keep the children on alternating weeks.

corrective surgery and six-months of physical therapy. Despite these efforts, Hussien never regained full use of her right hand.

Meanwhile, Al Kini fled the city. The Louisville Police department launched a two-week search for Al Kini, to no avail. Law enforcement agencies in Pittsburgh and Detroit (where Al Kini formerly resided) aided in the search. Al Kini remained at large for a year, and was ultimately captured at a border crossing in Nogales, Arizona.

Al Kini's trial commenced in December, 2013. He called no witnesses and presented no evidence, aside from what was elicited during cross-examination of the Commonwealth's witnesses. The trial court directed a verdict in favor of Al Kini on a tampering with physical evidence charge. The jury found Al Kini guilty of criminal attempt to commit murder and burglary in the first degree, fixing his sentence at two consecutive twenty-year prison terms. The trial court sentenced Al Kini in accordance with the jury's recommendation. This appeal followed.

ANALYSIS

I. Trial Court Acted Within Its Discretion In Denying Al Kini's Fourth Motion For A Continuance.

Al Kini argues that the trial court abused its discretion in denying his motion for a continuance four days before his trial was set to begin. At that time, attorney Scott Drabenstadt moved to enter an appearance on behalf of Al Kini, having been retained as counsel just days before. Attorney Drabenstadt's motion was conditioned upon a request that the trial court grant a continuance. The Commonwealth objected, asserting that the request was a

delay tactic and that Al Kini would suffer no prejudice should the trial continue as scheduled. The trial court agreed and denied the motion. Al Kini now asserts that this denial operated as a denial of his right to counsel of his own choosing in violation of his Sixth Amendment rights. For the reasons explained fully herein, we disagree.

Kentucky Rule of Criminal Procedure ("RCr") 9.04 vests trial courts with the authority to grant a continuance upon of showing of "sufficient cause." The trial court enjoys broad discretion in ruling on motions for continuances; so much so that this Court will reverse only when the trial court has plainly abused its discretion, resulting in manifest injustice to the moving party. *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) (internal citations omitted). Factors that a trial court may consider when ruling on a continuance motion include the "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991) (*overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)). The unique circumstances of a case will dictate whether a continuance should be granted or denied. *Id.*

Having reviewed the record, we agree that the trial court did not abuse its discretion when it denied Al Kini's motion for a continuance. The attack occurred in January 2011 but Al Kini evaded capture for a year, and a further

twenty-two months had elapsed before his trial finally began in December 2013. Attorney Michael Lemke had been appointed to represent Al Kini several months after his arraignment.[3] During the lengthy pretrial period, Al Kini requested (and received) three continuances,[4] including one on the very day trial was set to commence. This undoubtedly caused difficulty with witnesses who had to reschedule their appearances. Some of the witnesses required the assistance of a court interpreter, necessitating further schedule shifting and juggling of valuable court resources.

Had Al Kini desired to retain new counsel,[5] he should have made such arrangements at the time of his third continuance request when Al Kini first complained of disagreements with Attorney Lemke over trial strategy. Finally, Al Kini has failed to produce any evidence of prejudice as a result of the trial court's denial of the continuance. The right to counsel of choice must be "balanced against the court's authority to control its own docket." *United States v. Krzyske*, 836 F.2d 1013, 1017 (6th Cir. 1988). Observing these

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[3] Prior to that time, Al Kini was represented by another attorney in Attorney Lemke's office before the case was reassigned for reasons not reflected in the record.

[4] The first continuance was granted to allow Attorney Lemke time to prepare for trial after the case had been reassigned. A second continuance was granted after Attorney Lemke informed the trial court that two new witnesses had come forward. Seven months later, on the day the trial was set to begin, Al Kini moved for another continuance on the grounds that he and Attorney Lemke had a disagreement over trial strategy and his sudden need for an interpreter. The trial court granted the motion, but expressed concern that Al Kini was engaging in gamesmanship.

[5] During the August 6, 2013 *ex-parte* hearing with the trial court, Al Kini expressed his desire to continue being represented by Attorney Lemke so long as he could testify on his own behalf with the aid of an interpreter. Attorney Lemke, a bit flummoxed, explained that Al Kini's proposed approach was "totally at odds" with his prepared trial strategy.

pretrial delays, it is clear that the trial court was entitled to exercise that authority here. Accordingly, we find no abuse of discretion.

II. Al Kini's Challenges to the Jury Selection Are Without Merit.

Al Kini raises three issues in connection with the jury selection. First, Al Kini asserts that the trial court erroneously deprived him of his opportunity to fairly inquire into the venire's potential national origin/religious bias. The second and third alleged errors involve the trial court's denial of two strikes for cause. We will address each challenge in turn.

A. The trial court did not prevent Al Kini from questioning the venire about cultural bias.

During voir dire, Al Kini's counsel asked the panel various questions about biases towards Muslims. One panel member responded that he understood that Muslims subordinate women. In response to that question, Al Kini's counsel asked another panel member if she believed that Al Kini "started in the hole" based on the notion that Muslim men treat women differently than men in other cultures treat women. She responded affirmatively. Counsel repeated the question, with minimal rephrasing, and some panel members indicated they agreed with the statement by raising their hands.

The Commonwealth objected and asked the trial court to address those panel members who responded affirmatively at the bench. The trial court indicated that it would consider the best approach after a short recess. After lunch and before the venire panel returned, the Commonwealth expressed concern that defense counsel's strange phrasing of his question likely influenced even those panel members who did not respond affirmatively. The

prosecutor asked the trial court to admonish the panel that Al Kini was innocent until proven guilty, and that his Muslim heritage had nothing to do with the trial. In response, defense counsel maintained that the trial court should not admonish the jury in such a way that would influence the panel to answer the questions in a particular way.

After the recess, the trial court addressed the entire panel, repeated defense counsel's question, and encouraged the panel to consider if any among them held the belief so strongly that they could not "overcome" the belief,[6] regardless of what the evidence in the case supports. Defense counsel then continued to question the prospective jurors about cultural biases without any limitation by the trial court.

There was no objection by defense counsel to the trial court's handling of this issue. However, Al Kini now asserts that the trial court's statement to the jury erroneously foreclosed his opportunity to question the panel about potential biases towards Muslims and people of Arabic decent. This complaint is unfounded. Despite possessing the clear authority to limit voir dire when

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[6] The trial court stated the following: "We were talking about the issue of Muslim men and their treatment or regard for women, and the belief that it's somewhat different in their culture than in ours. The question was asked, and there were some responses: does the defendant, and I think the words used, 'start in a hole' with you because of that? And there were a number of people who raised their hands. And I think both sides got those numbers. And Mr. Lemke is going to further explore that with you. But I kind of wanted to bring us back a step. Do you—and for those of you who raised your hand on that—do you believe that you hold that belief—that because of his culture he starts in a hole—do you believe that so strongly that you can't overcome that belief whether or not the evidence in this case that you hear supports that belief? So with that in mind, I'm going to go ahead and allow Mr. Lemke to talk about that, but I would like for you to hold that question in your mind as you answer these questions." Jurors were not asked to respond to the court's question but rather answer defense counsel's questions.

necessary, *see Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005), the trial court did not disallow any of defense counsel's inquiries, nor did it require defense counsel to cease or curtail his questioning on the subject of cultural bias. In fact, Al Kini's counsel continued to question the panel members as to cultural biases without any interference from the trial court.

Furthermore, the trial court's statement did not unduly influence the venire to Al Kini's detriment. The question of cultural bias, and specifically, the question of whether gender disparities exist in other cultures, was clearly raised by Al Kini's counsel. The trial court's statement to the panel encouraging them to consider whether any cultural biases could be set aside was, in essence, an articulation of the rule set forth in RCr 9.36, mandating that a prospective juror who cannot render a "fair and impartial verdict on the evidence . . . shall be excused as not qualified." The trial court did not improperly pressure the panel to answer questions in any particular way. *Cf. Jackson v. Commonwealth*, 392 S.W.3d 907 (Ky. 2013). If anything, the trial court encouraged the panel to consider carefully their ability to remain impartial in light of cultural biases that may or may not exist. The onus was on Al Kini's counsel to extract and assess each individual panel member's bias. While the trial court's question could have perhaps been more carefully worded, neither the question nor the handling of this difficult issue in any way constituted palpable error under RCr 10.26.

B. Strikes for cause were properly denied.

Al Kini moved to strike Juror #700557 and Juror #852264 for cause. When the trial court denied his motions to strike, Al Kini used peremptory strikes against those jurors.[7] He now argues that the trial court's refusal to strike Juror #700557 and Juror #852264 was reversible error. *See Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). This Court has held that a decision to remove a juror for cause "lies within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion." *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). The determination of whether a juror should be removed for cause is premised on whether the prospective juror can "conform his views to the requirements of the law and render a fair and impartial verdict." *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). The burden of proving a juror's unfitness is on the moving party. *Cook v. Commonwealth*, 129 S.W.3d 351 (Ky. 2004). Having reviewed the record, we agree that the trial court acted within its discretion in denying Al Kini's motions to strike.

1. Juror #700557

Al Kini's challenge for cause to Juror #700557 was based on the prospective juror's response to the questions relating to cultural bias (discussed *supra*), as well as her personal experiences with domestic abuse.

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[7] Al Kini designated two other jurors which would have been excused with peremptory strikes had the trial court granted his motions to strike, thereby preserving the issue for appellate review. *Hurt v. Commonwealth*, 409 S.W.3d 327 (Ky. 2013).

During voir dire and the discussion of cultural differences pertaining to the treatment of women, another panel member stated that she did not assume that Al Kini was guilty because he was Muslim, but that he may have to establish his character for her to believe that he is innocent. Juror #700557 and seven other jurors raised their hands to indicate that they tended to agree with that sentiment. Al Kini's attorney did not ask any additional follow-up questions of those eight jurors.

Later, Juror #700557 was called to the bench to address her experiences with violent crimes. She explained that she was the victim of domestic abuse until her divorce in 1984. She also described an incident of abuse toward her foster sister. Al Kini's counsel asked Juror #700557 if she would be "somehow influenced by the memories" of abuse upon hearing the evidence, and she replied that she did not know. Juror #700557 explained that her personal experiences would not cause her to be more inclined to find Al Kini guilty. She also unequivocally stated that she would hold the Commonwealth to its burden of proving all of the elements of the crime beyond a reasonable doubt.

The trial court did not abuse its discretion when it denied Al Kini's motion to strike Juror #700557 for cause. Although Juror #700557 indicated by raising her hand that she tended to agree with another juror's comments about Al Kini "proving" his character, Al Kini elected to not explore that answer any further. Taken alone, this singular response was not enough for Al Kini to establish a lack of impartiality— that is, it simply does not prove that Juror #700557 was unable to conform to the strictures of the law to render a fair

verdict. As for Juror #700557's answers to the questions about domestic violence, she clearly related that her personal experiences would not hamper her ability to hear the case. Her statement that she would hold the Commonwealth to its burden of proof allayed any lingering concerns about bias related to the unexplored earlier response regarding Al Kini's character. *See McDaniel v.* Commonwealth, 341 S.W.3d 89 (Ky. 2011). Based on the entirety of her answers, it is clear that Al Kini failed to establish a disqualifying bias in Juror #700557. *See Epperson v. Commonwealth*, 197 S.W.3d 46 (Ky. 2006).

2. Juror #852264

Al Kini moved to strike Juror #852264 for cause on the basis that she was acquainted with the victim advocate assigned to his case. When asked how she knew the victim advocate, Juror #852264 explained that they attended the same church. Al Kini's counsel asked if they were "fairly close," to which Juror #852264 simply replied that the two had "known each other for a number of years." Further questioning revealed that the prospective juror had no knowledge of what the victim advocate had done in Al Kini's case, though they had generally discussed the nature of her work in the past. Al Kini's counsel then asked if she would "have some explaining to do" to the victim advocate if she sat on the jury and returned a verdict unfavorable to the Commonwealth. Juror #852264 replied that she would not. Al Kini's counsel did not ask the prospective juror any follow-up questions.

Despite her familiarity with the Commonwealth's victim advocate, Juror #852264's responses to voir dire questions did not reflect bias. While Al Kini's

brief characterizes the juror and victim advocate as "very close friends," Juror #852264 only indicated that they had known each other for a "number of years," without ever employing the word "friend." As the Commonwealth points out, the "close friend" terminology came from defense counsel's question not the juror's response. A prospective juror's familiarity with a party involved in a criminal proceeding is not a sufficient basis for excusing a juror absent proof of bias. *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009); *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002). For whatever reason, defense counsel elected to only explore the issue to a very limited degree. Given the full scope of Juror #852264's responses, we find no abuse of discretion in the trial court's decision not to strike her for cause.

III. Evidence Of Al Kini's Past Abuse Of The Victim Was Properly Admitted.

Next, Al Kini complains that the admission of evidence of past abuse deprived him of a fair trial. Before trial, the Commonwealth filed a notice of intent to introduce evidence of two prior acts of violence committed by Al Kini against Hussien. Al Kini filed a written response, arguing that evidence of prior domestic abuse was prohibited under Kentucky Rule of Evidence ("KRE") 404. The trial court determined that the evidence of the two prior incidences was admissible. Later, during Hussien's testimony, she revealed that she had sought and received a protective order against Al Kini from a Michigan court. Al Kini objected and moved for a mistrial. The trial court denied the motion for a mistrial, offering instead to admonish the jury. Al Kini, however, declined to have the trial court admonish the jury.

A. Evidence of instances of domestic violence was properly admitted.

Character evidence—that is, evidence tending to prove that the accused, a victim, or a witness acted in conformity with a particular character trait—is generally disallowed under our rules of evidence. KRE 404. An exception to this broad prohibition is set forth in KRE 404(b), allowing evidence of other "crimes, wrongs, or acts" to come in for "some other purpose," such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(2).

Time and time again, this Court has held that prior threats against the same victim are probative of the defendant's motive, intent, or lack of mistake or accident under KRE 404(b)(2). *Driver v. Commonwealth*, 361 S.W.3d 877 (Ky. 2012); *Benjamin v. Commonwealth*, 266 S.W.3d 775 (Ky. 2008); *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006); *Sherroan v. Commonwealth*, 142 S.W.3d 7 (Ky. 2004); *Davis v. Commonwealth*, 147 S.W.3d 709, 722 (Ky. 2004); *Moseley v. Commonwealth*, 960 S.W.2d 460 (Ky. 1997); *Smith v. Commonwealth*, 904 S.W.2d 220 (Ky. 1995). Here, the jury heard evidence of a prior attack on Hussien where Al Kini beat her, dragged her about by her hair, held a knife to her throat, and threatened to kill her as she and their children begged for mercy. Hussien testified that she believed Al Kini used the same knife in both attacks. The jury also heard of Al Kini's apparent attempt to strike Hussien with his car while their young sons clung to him from the back seat. The evidence that Al Kini had violently attacked, menaced, and

threatened to kill his wife was relevant to prove his intent and motive in the subsequent attack for which he was charged and indicted. *See Harp v. Commonwealth*, 266 S.W.3d 813, 822-23 (Ky. 2008) (holding that "[e]vidence of similar acts perpetrated against the same victim are almost always admissible."). In sum, we agree that these facts satisfy KRE 404(b)(2)'s exception to the prohibition against character evidence

Not only does the evidence pass KRE 404(b) muster, we agree that it was admissible under our "gatekeeper" provisions of KRE 402 and 403. As discussed, the evidence was relevant to prove that Al Kini had a motive and intent to attempt to kill his wife. *See* KRE 402. And while *any* evidence of domestic abuse is inflammatory by its nature, the probative value of this evidence was not so substantially outweighed by the danger of undue prejudice as to necessitate exclusion under KRE 403. There was not any real question as to *who* stabbed Hussien. There was no attempt on Al Kini's part to deny his part in the attack. Rather, Al Kini's theory of the case was (in the words of defense counsel's closing argument) that he did not fully appreciate his actions, and that Hussien's frequent departures from the family home had caused a rift between the couple. The evidence of a history of domestic violence is probative as evidence of calculation and volition on Al Kini's part, and the prejudicial nature of that evidence was not so great as to outweigh its relevance. *See*

Benjamin, 266 S.W.3d at 791.[8] The trial court acted within its discretion in admitting the evidence.

B. The victim's testimony about a protective order was harmless.

The statement regarding the Michigan protective order did not necessitate a mistrial. Hussien's statement was not "of such character and magnitude" as to deny Al Kini a "fair and impartial trial[.]" *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009). By this point in the Commonwealth's case, the jury had observed photos of Hussien's injuries from the earlier attack when Al Kini placed a knife to her throat. In this light, evidence of a protective order from another state would not shock or inflame the jury to the point that a mistrial was required. Furthermore, a mistrial should issue only when the prejudicial effect of the evidence "can be removed in no other way." *Cardine*, 283 S.W.3d at 647. Any error caused by Hussien's mention of the protective order would have been cured by an admonition, had Al Kini agreed to the trial court's offer to make one. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) ("A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error."). Having declined to receive an admonition, we presume that Al Kini was satisfied with the trial court's resolution of the matter—that is, to not advise the jury to disregard the evidence of the protective order. *See Blount v.*

[8] Moreover, this evidence is highly probative even in light of the trial court's denial of an extreme emotional disturbance instruction, discussed *infra*.

Commonwealth, 392 S.W.3d 393, 395, 398 (Ky. 2013). As such, we find no abuse of discretion.

C. Other statements by the victim were properly handled.

Al Kini's challenges to other portions of Hussien's testimony are likewise unfounded. First, the trial court sustained Al Kini's objection to the victim's statement that he was "on the run" while she recovered in the hospital. Al Kini requested no additional relief after making the objection, so we find no abuse of discretion. *See id.* Later, Al Kini moved for a mistrial when Hussien testified that Abdul Swadi, a friend of Al Kini, encouraged her to drop the charges against Al Kini. At that point in the trial, the parties were under the impression that Swadi would be called as a witness. The trial court declined to declare a mistrial, but precluded the Commonwealth from asking any questions that would attribute Swadi's actions to Al Kini. The trial court then admonished the jury to ignore the statement. *See Johnson*, 105 S.W.3d at 441 (jury presumed to follow admonition to disregard evidence). Further, the statement about Swadi's visit was not so appreciably serious as to justify a mistrial as the only possible remedy. *See Cardine*, 283 S.W.3d at 647. In short, the jury was properly admonished, and Swadi never testified. There was no abuse of discretion.

IV. Al Kini Was Not Denied His Right To Present A Defense.

Next, Al Kini argues that the trial court improperly limited the examination of a witness which prevented him from fully presenting his defense. During the defense's cross-examination of the lead detective assigned

to the case, Al Kini asked the detective if he believed that another officer correctly interpreted an interview with a Spanish-speaking witness taken at the scene. The Commonwealth objected on the grounds that the detective was being asked to speculate as to what another officer understood. The trial court permitted the defense counsel to question the witness about his perception of the other officer's understanding, but advised counsel to avoid asking him to speculate as to whether the other officer understood the witness.

The trial court's narrow limitation of Al Kini's cross-examination of the detective in no way foreclosed his right to present a defense. The crux of the question discussed above was the contention that an officer who responded to the scene failed to record an accurate interpretation of a Spanish-speaking neighbor's account of what she had witnessed. Not only did the neighbor testify and answer the defense's questions on cross-examination, Al Kini's counsel was able to elicit from the detective testimony regarding the interpreting-officer's difficulty in communicating with the witness. To the extent that the trial court limited the detective's cross-examination,[9] it did so properly.

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[9] On appeal, Al Kini raises a second, tangential issue relating to the detective's testimony. During the Commonwealth's re-direct, the detective stated that early in the investigation he believed there had been a verbal altercation on the day of the attack, though "there ended up there wasn't one." Al Kini's counsel objected on the grounds that the detective could not testify that there was not a fight that preceded the attack because he lacked any personal knowledge to make such a claim. The trial court sustained the objection and admonished the jury to disregard the answer. Any defect in the testimony was cured by the trial court's admonition, *Johnson*, 105 S.W.3d at 441. Because Al Kini failed to request any additional remedy, we must assume that he was satisfied with the remedy he received. *Blount*, 392 S.W.3d at 398.

V. The Challenge to Serious Physical Injury Instruction Is Unavailable For Review.

Al Kini asserts that the jury was improperly instructed on a serious physical injury finding necessary to determine whether he would be subject to parole restrictions as a statutory Violent Offender. Because the trial court did not include the necessary designation in the judgment pursuant to the statute, there is nothing for this Court to review in this regard. Given that the Violent Offender statute is often the source of confusion, we shall endeavor to explain our reasoning for declining to review this "non-issue."

Al Kini was charged with criminal attempt to commit murder, first-degree assault, and first-degree burglary. During a discussion of the proposed jury instructions, the Commonwealth requested that the jury make a finding of serious physical injury for the purpose of determining whether Al Kini would be subject to the parole-eligibility restrictions of KRS 439.3401, known as the "Violent Offender" statute. After some discussion, Al Kini agreed with this approach, and the jury was directed in the criminal attempt instruction to state on the verdict form whether it found that the victim "sustained serious physical injury" as defined in a separate instruction.[10]

Under KRS 439.3401(1), a defendant who is convicted or pleads guilty to the commission of certain crimes is subject to parole restrictions as a Violent Offender. Among the offenses enumerated in the statute, the Violent Offender

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[10] The definition portion of the instructions defined "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ."

status will be conferred upon those defendants who have been convicted of committing a capital offense, a Class A felony, or a Class B felony "involving the death of the victim or serious physical injury to a victim[.]"[11] KRS 439.3401(1)(a)-(c). This language has been interpreted to require a factual finding as to whether a victim has sustained serious physical injury before the Department of Corrections ("DOC") can classify a defendant as a Violent Offender for the purposes of determining parole eligibility. *See Biederman v. Commonwealth*, 434 S.W.3d 40 (Ky. 2014); *Hoskins v. Commonwealth*, 158 S.W.3d 214 (Ky. App. 2005); KRS 439.3401(1). A defendant convicted of a Class B felony who qualifies as a violent offender must serve eighty-five percent

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[11] Other offenses subject to violent offender classification include:

(d) An offense described in KRS 507.040 or 507.050 where the offense involves the killing of a peace officer or firefighter while the officer or firefighter was acting in the line of duty;

(e) The commission or attempted commission of a felony sexual offense described in KRS Chapter 510;

(f) Use of a minor in a sexual performance as described in KRS 531.310;

(g) Promoting a sexual performance by a minor as described in KRS 531.320;

(h) Unlawful transaction with a minor in the first degree as described in KRS 530.064(1)(a);

(i) Human trafficking under KRS 529.100 involving commercial sexual activity where the victim is a minor;

(j) Criminal abuse in the first degree as described in KRS 508.100;

(k) Burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060;

(l) Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040; or

(m) Robbery in the first degree.

KRS 439.3401(d)-(m).

of the sentence imposed before becoming eligible for parole. KRS 439.3401(3)(a).

When classifying a defendant as a Violent Offender, DOC must rely on the trial court's judgment to determine whether the defendant qualifies under the statute. *See generally Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). To this end, a trial court need not designate the defendant as a "Violent Offender" in the judgment in order to provide a sufficient finding to support the DOC's classification. *Id. at* 533. A judgment reflecting a capital or Class A felony conviction will, in and of itself, suffice to prove the Violent Offender qualification without any further designation. The same cannot be said for a judgment reflecting a Class B felony conviction, where the Violent Offender classification is applicable *only* when the offense involves "the death of the victim or serious physical injury to a victim[.]" KRS 439.3401(1). Accordingly, in those cases the trial court must designate in its judgment that a victim "suffered death or serious physical injury." KRS 439.3401(1); *see also Benet*, 253 S.W.3d at 535 n.19.

Turning to the instant case, the jury found Al Kini guilty of criminal attempt to commit murder, a Class B felony under KRS 506.010(4). In the verdict form, the jury indicated that it found that Rasha Hussien sustained serious physical injury.[12] The trial court then entered a judgment finding Al

[12] The supervising physician who treated Hussien testified that the she arrived in the emergency room with three penetrating wounds to her chest and back. Hussien suffered an *in extremis* drop in her blood pressure and a collapsed lung. The doctors and nurses intubated Hussien and inserted chest tubes for the purpose of draining excess blood. Her care status was elevated to the highest level. She was sedated and

Kini guilty of criminal attempt to commit murder and burglary in the first degree. In its judgment, the trial court ordered that Al Kini be sentenced to two twenty-year sentences (one for each conviction) to run consecutively for a total term of forty years. The trial court *did not* designate in its judgment that the victim suffered serious physical injury.

The jury's finding notwithstanding, DOC could not classify Al Kini as a Violent Offender because the judgment does not designate that he was convicted of a Class B felony "involving the death of the victim or serious physical injury to a victim[.]" KRS 439.3401(1)(c). Parole classifications come under the authority of the DOC, not the trial court. *Jones v. Commonwealth*, 319 S.W.3d 295, 298 (Ky. 2010) ("The power to grant parole is a purely executive function.") (*internal quotations omitted*)). In the event DOC classifies Al Kini as a Violent Offender based on the judgment of the trial court, Al Kini may then bring a declaration of rights action against the DOC. At present, this matter is not subject to review for the obvious reason that this Court has nothing to review. Therefore, we decline to address the unpreserved allegation of error in the jury instructions as to "serious physical injury."[13]

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remained unconscious for several days. Two days after she was released from the hospital, Hussien underwent surgery to repair injuries to her right hand. The hand surgeon who operated on Hussien testified that scar tissue from that type of injury would limit a patient's use of the hand to 50%. At the time of trial, Hussien had not regained full use of her right hand. The surgeon agreed that the corrective surgery failed to restore full use of Hussien's right hand.

[13] Any fact that exposes a defendant to a higher penalty than would otherwise apply must be submitted for a jury finding beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013) (holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury.")). Parole eligibility,

VI. Al Kini Was Not Entitled To Instructions Incorporating Extreme Emotional Disturbance.

Next, Al Kini maintains that the trial court abused its discretion when it declined to tender instructions, as requested by his counsel, on attempted first-degree manslaughter while under extreme emotional disturbance ("EED") as a lesser-included offense of attempted murder.[14] He asserts that the trial court applied the wrong standard in determining whether an EED instruction was appropriate, which precipitated that court's erroneous conclusion that the evidence did not support an EED instruction. A trial court has a duty to instruct on the entire case, including "instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999); RCr 9.54(1). An instruction on a lesser-included offense is warranted only when the totality of the evidence would lead a jury to reasonably doubt the defendant's guilt as to a charged offense, but believe the defendant is guilty of a lesser offense beyond a reasonable doubt. *Holland v. Commonwealth*, 114 S.W.3d 792 (Ky. 2003). A defendant may be entitled to an instruction on attempted manslaughter when

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however, does not implicate the length of a defendant's sentence, and therefore does *not* entail a factual finding that must be made by a jury. The finding may be made by the trial court alone. *See Biederman v. Commonwealth*, 434 S.W.3d 40, 46 (Ky. 2014) (finding no palpable error in court making finding but noting "it would behoove the Commonwealth to avoid this issue in the future and put the question of finding serious physical injury before the jury").

[14] KRS 507.030 provides in pertinent part: "(1) A person is guilty of manslaughter in the first degree when . . . (b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020."

the evidence shows that the defendant acting "under the influence of EED [took] a substantial step towards killing a person with the intent to do so[.]" *Id.* at 806. A trial court's decision not to give a jury instruction is reviewed for an abuse of discretion. *Harris v. Commonwealth*, 313 S.W.3d 40 (Ky. 2010). Based on the evidence as a whole, we agree that the trial court did not abuse its discretion in declining to instruct the jury on EED and the lesser-included attempted manslaughter offense.

A. The trial court applied the correct EED standard.

First, we do not agree with Al Kini's claim that the trial court applied the wrong standard in assessing the propriety of his proposed EED/attempted manslaughter instruction. To be sure, the trial court's early remark that Al Kini must first testify to secure an EED instruction was an incorrect statement of the law—a mistake which was recognized by the trial court and promptly corrected on the record, with a recitation of the correct standard. Specifically, the trial court reasoned that the evidence was too speculative to support an EED/attempted manslaughter instruction, citing *Whitaker v. Commonwealth*. *See* 895 S.W.2d 953 (Ky. 1995). In *Whitaker*, our predecessor Court held that evidence of EED must be "definite and nonspeculative" to support an EED jury instruction, including evidence of a triggering-event. *Id.* at 954.

Al Kini argues that *Whitaker* is no longer good law in light of *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006), a more recent decision which Al Kini insists "reformulated" our EED law. This argument is unavailing. In *Greene*, this Court explained that the threshold determination of whether the

evidence is sufficient to warrant an EED instruction remains with the trial court. *Id.* at 82. Once sufficient evidence is found, the question of whether EED caused the defendant to act is a question for the jury to decide. *Id.* On its face, this holding does not constitute a rejection of the accepted notion set forth in *Whitaker* and other cases that evidence of EED must be nonspeculative.

B. The trial court did not abuse its discretion.

Al Kini argues that his discovery of an online "video-chat" between Hussien and a male friend during which Hussien did not wear her head scarf, coupled with the recent change in the custody arrangement of their three children was sufficient proof of EED. We disagree, and find that the trial court correctly concluded the quantum of proof was insufficient to support Al Kini's requested EED/attempted manslaughter instruction. Our *Greene* holding reaffirmed the principle that a defendant cannot prove EED based on evidence of "a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown." *Id.* at 81-82 (*quoting Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991)). This triggering-event must be "sudden and uninterrupted," absent any intervening "cooling-off" period. *Id.* at 81; *Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (Ky. 2008).

It is clear from the evidence presented that even if Al Kini suffered some victimization (a highly dubious position) there was no such triggering-event. Rather, the evidence of Al Kini's prior violence and threats towards Hussien paints the picture of a volitional pattern of abusive conduct. *See Harp*, 266

S.W.3d at 823-24; KRE 404(b)(2). Even considering Al Kini's discovery of the "video chat" between Hussien and a male friend, the twelve months between that event and the attack constituted a significant "cooling-off" period. *See Benjamin*, 266 S.W.3d at 783. And the event closest in time to the attack—a family court ruling granting Hussien joint custody—took place several days prior to Al Kini's carefully orchestrated attack.

Al Kini is correct that this Court has accepted EED proof in the form of the "cumulative impact of a series of related events[.]" *Benjamin*, 266 S.W.3d at 775, 782. We have also acknowledged that EED may "fester in the mind" of the defendant, rather than manifest itself as the response to a single, provocative event. *Springer v. Commonwealth*, 998 S.W.2d 439, 452 (Ky. 1999). But while the triggering-event need not be contemporaneous with the crime, it must nevertheless be "sudden and uninterrupted." *Benjamin*, 266 S.W.3d at 782-83. Here, the testimony revealed that Al Kini launched a premeditated, ambush-style attack, using what appeared to be the same knife that he had used to threaten the victim the year before. The attack occurred almost a full year after the video-chat incident, and several days after a court-ordered custody modification. *Cf. Holland*, 114 S.W.3d at 807 (EED instruction was proper where suicidal, medicated defendant shot her lover and his ex-wife the day after discovering them in bed together); *Benjamin*, 266 S.W.3d at 783 (evidence was sufficient to tender an EED instruction where defendant killed his wife the day after discovering her extramarital affair with his cousin). Not only were there significant "cooling-off" periods, there was also no indication

that Al Kini suffered from a "sudden and uninterrupted" triggering-event. Furthermore, evidence of Al Kini's emotional state was also totally lacking from the proof. There was simply no definite and nonspeculative evidence to demonstrate[15] that Al Kini suffered "a temporary state of mind so enraged, inflamed, or disturbed as to overcome [his] judgment[.]" *Greene*, 197 S.W.3d at 81-82 (*quoting McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986)). The evidence of adequate provocation was simply insufficient to support an EED instruction. Without sufficient proof of EED, an instruction on attempted manslaughter under KRS 507.030(1)(b) was unwarranted. Accordingly, we agree that the trial court did not abuse its discretion.

VII. The Commonwealth's Closing Argument Did Not Constitute Reversible Error.

Al Kini asserts that the Commonwealth's closing argument included an improper statement regarding his national origin calculated to inflame the passions of the jury. Having reviewed the record, it is clear the comment was made in response to Al Kini's own closing argument, which included a lengthy discussion of Al Kini's cultural and religious background, specifically in regard to the dynamics of married couples. The prosecutor then addressed Al Kini's closing argument as follows:

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[15] We do not suggest that Al Kini was required to prove EED. As an element of the substantive offense of manslaughter as defined in KRS 507.030(1)(b), the Commonwealth bears the burden of proof. *See Greene*, 197 S.W.3d at 81. However, this places the cart before the horse—the issue is whether the trial court acted within its discretion in declining to instruct on EED/attempted manslaughter. For the reasons explained above, the trial court correctly determined that the evidence as a whole did not support an EED instruction.

> Now, I don't want to do this, but I've been forced to address it. I have to address this idea of there being these cultural differences that—and I'm not really sure what the argument is, but I think that it is—because of how he grew up, and because of what his religion teaches him, this mitigates the state of mind that you're required to find in order to find him guilty. And I don't know any other way to say it, but violence is violence is violence. And Islam is not some fringe religion that only a small pocket of people on this planet believe. It's not. And I'm not Muslim, so I can't tell you what it teaches. But I submit to you that the notion that in his world, in his religion, somehow this is okay—

Al Kini objected on the basis that the Commonwealth mischaracterized his argument to the jury. The trial court admonished the jury not to consider the Commonwealth's statement.

We review a closing argument for plain error, cognizant of the "wide latitude" enjoyed by the parties during summations. *Young v. Commonwealth,* 25 S.W.3d 66, 74-75 (Ky. 2000). The Commonwealth's closing argument does not constitute reversible error for a variety of reasons. First, the trial court immediately admonished the jury, thereby curing any defect introduced by the prosecutor's statement. *Johnson*, 105 S.W.3d at 441. Second, there was nothing overtly inflammatory or prejudicial in the comments regarding Al Kini's cultural differences. *See Major v. Commonwealth*, 177 S.W.3d 700, 711 (Ky. 2005) ("The criteria by which to judge statements and actions during closing argument is whether or not the act is inflammatory, substantially prejudiced the defense, or violated the Appellant's constitutional rights."). Finally, the statement was made in response to Al Kini's own closing argument. And while the "responsive commentary" argument does not relax our well-accepted parameters in closing arguments, it does render such statements harmless

when the statements do not prejudice the defendant or inflame the jury. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (*discussing Commonwealth v. Mitchell*, 165 S.W.3d 129 (Ky. 2005)). Finding the comment neither prejudicial nor inflammatory, we decline to reverse on these grounds.

VIII. Cumulative Error Analysis Does Not Apply.

Finally, Al Kini contends that the trial was so overrun with a proliferation of national origin/cultural bias errors, that our cumulative error standard demands reversal. This Court will reverse if the cumulative effect of individual errors rendered the defendant's trial "fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). The cumulative error analysis will apply only where a trial's individual errors "were themselves substantial, bordering, . . . [on] the prejudicial." *Id.*; *see also Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012).

Upon careful review, none of the errors alleged by Al Kini has been deemed an error, much less so substantial or prejudicial as to trigger the application of our cumulative error analysis. The evidence against Al Kini was compelling, and none of the issues raised on appeal demonstrate prejudice. To paraphrase an earlier decision of this Court, we cannot conjure prejudice from the absence of prejudice.[16] Accordingly, Al Kini's cumulative error argument fails.

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[16] "Where, as in this case, however, none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." *Brown*, 313 S.W.3d at 631.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence of the Jefferson Circuit Court.

All sitting. All concur.

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