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RENDERED: AUGUST 20, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000177-MR

DWAYNE LEE DURRETT — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
NO. 12-CR-001507

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Dwayne Durrett, shot and killed Dana Maurice Loud and claimed he did so in self-defense. The jury nonetheless convicted him of murder and tampering with physical evidence for hiding the gun he used in the shooting. He was also found to be a second-degree persistent felony offender (PFO) and was sentenced to a total of 30 years' imprisonment. He raises four claims of error on appeal: (1) that evidence of a threat he made to his trial counsel should have been excluded; (2) that the trial court erred in refusing to admit toxicology evidence of the deceased's blood-alcohol content; (3) that improper opinion testimony from the lead detective about how innocent people who act in self-defense typically behave was palpable error; and (4) that his sentence for the murder conviction was erroneously enhanced by his PFO status and should be vacated.

Finding no reversible error, this Court affirms.

I. Background

Shortly before midnight on May 7, 2012, Dewayne Durrett shot and killed Dana Maurice Loud in front of a liquor store in Louisville. Several bystanders were present, but no eyewitnesses testified at trial.

Durrett ran from the scene and turned himself in to police three days later, claiming self-defense.

According to Durrett, he had first encountered Loud at the liquor store at around 8:30 p.m. on the day of the shooting. He testified that his then-pregnant girlfriend had come looking for him and that Loud—who reportedly was socializing in front of the liquor store and drinking out of a paper bag at the time—commented to her, "ho's always going to be a ho and a bitch always going to be a bitch." According to Durrett, he sent his girlfriend home and then confronted Loud about the comment. A brief altercation ensued, during which Durrett claimed Loud exposed a gun tucked in his pants near his left hip and threatened, "I got something for you." At that point, Durrett claimed a bystander intervened, and he walked to his mother's house about ten minutes away.

Durrett claimed that after the altercation, he was afraid of encountering Loud again but nevertheless returned to the liquor store twice for more alcohol. He did not see Loud on the first trip. On his second trip, he purchased alcohol and socialized with a group of people in front of the store window for five or ten minutes.

While Durrett was socializing in front of the store, Loud arrived in a Ford Bronco and parked about 50 feet down the street. He got out of the vehicle and began walking toward the liquor store. He was wearing a black leather jacket and he reportedly locked eyes with Durrett but said nothing. Durrett did not know whether Loud had a gun, but he claimed that Loud had appeared to begin to reach for something inside his open jacket. According to Durrett, at some point, someone said "here" and passed him a handgun over his right shoulder. He then shot Loud several times. Six bullets entered the left side of Loud's body, while two other bullets grazed his left and right arms.

After the shooting, Durrett ran from the scene. He spent the next couple hours talking and drinking with his friend, Curtis Byrd, before leaving for a hotel in Indiana, purportedly out of fear of retaliation. Durrett also wrapped the gun he used in the shooting in his black t-shirt and hid it in a woodpile in Byrd's backyard. Byrd testified at trial that Durrett told him at this time that he had shot Loud in self-defense, but he did not tell this to the police when they interviewed him. Instead, in a recorded statement given to police, Byrd reported that Durrett had told him that he shot Loud because Loud had disrespected his girlfriend.

Durrett was convicted of murder and tampering with physical evidence. He was also found to be a second-degree persistent felony offender (PFO). The jury recommended a prison sentence of 25 years for the murder conviction and five years for the tampering conviction, to be run consecutively, with no PFO enhancements. The trial court sentenced him to a total of 30 years' imprisonment in accordance with the jury recommendations.

He now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b). Additional facts will be developed as necessary in the discussion below.

II. Analysis

A. Admission of Durrett's threat to his trial counsel was not error.

Durrett first claims that the trial court erred in admitting evidence that he yelled at his attorney, "Fuck you, I'll kill you too." A deputy sheriff testified that he heard Durrett yell this at his counsel when the attorney was leaving the holding cell in which counsel and Durrett had apparently just been engaged in a heated debate. Durrett argues that this evidence should have been excluded under KRE 404(b) as irrelevant for any purpose other than to depict him as a bad person with a malicious character.

KRE 404(b) prohibits evidence of other bad acts by the defendant from being admitted to prove his bad character to show that he acted consistent with that bad character in committing the charged offense. Such evidence is admissible, however, if offered for "some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). Despite Durrett's protestations to the contrary, the evidence here was offered for another proper purpose: as proof of his intent or state of mind at the time of the shooting.

Evidence is "relevant" if it has "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.

Durrett cites *Sherroan v. Commonwealth*, 142 S.W.3d 7, 18–19 (Ky. 2004), for support that this threat was inadmissible. In *Sherroan*, this Court noted that "specific threats directed against third parties are inadmissible," *id.* at 18, because they "show[] only a special malice resulting from a transaction with which the deceased had no connection," *id.* (quoting *Jones v. Commonwealth*, 560 S.W.2d 810, 812 (Ky. 1977)). That generalization was the product of pre-rules[1] case law, but it was premised on the same policy underlying KRE 404(b)'s bar against admission of other-bad-acts evidence to prove character. *Id.* And, again, that prohibition does not apply if the evidence is offered for some other proper purpose. *Id.*

Durrett's threat against his attorney was not just any threat against a third party used to show general malice; it referred back to Loud's killing in its use of the word "too." Regardless of whether he meant it or not, the threat was thus relevant indirect evidence of his culpability in shooting Loud. It refutes his claim of self-defense because it is an implicit admission that he caused Loud's death not out of self-defense but out of anger. Obviously, had he carried out his threat against his lawyer, it would not have been out of self-defense. Yet the threat was not just that he would kill his lawyer but that he would kill his lawyer "too." In other words, he was threatening to kill his lawyer in the same way he killed Loud: not as a mere defensive reaction to a perceived imminent threat, but instead driven by anger. Because Durrett's threat was relevant

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[1] The Kentucky Rules of Evidence were adopted in 1990. *See* Act of March 16, 1990, ch. 88, 1990 Ky. Laws H.B. 214.

evidence of his state of mind and intent when he shot and killed Loud, its admission was not barred by KRE 404(b).

Our rules of evidence have a strong "inclusionary thrust," *Perry v. Commonwealth*, 390 S.W.3d 122, 132 (Ky. 2012), and "[a]ll relevant evidence is admissible," KRE 402. Relevant evidence is only inadmissible if a specific exclusionary rule dictates so. *Id.* Thus, the relevant evidence of the threat Durrett made against his lawyer was admissible absent another rule barring it. As explained above, KRE 404 did not prohibit its introduction since the threat was not offered to show Durrett's bad character or criminal disposition. And the danger of undue prejudice from this evidence was not so high that its exclusion was mandated under KRE 403, *see Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994), because an argument can be made that the language refers only to the fact that his action killed another person, and does not preclude doing so in self-defense. Of course this evidence prejudiced Durrett because it tended to show guilt and refute his claim of self-defense. But this is not the type of undue prejudice contemplated by KRE 403's permissive exclusionary rule. The trial court acted well within its discretion in admitting the evidence of Durrett's threat to his trial counsel. There was no error.

B. The trial court did not abuse its discretion in excluding evidence of the deceased's blood-alcohol content.

Durrett next claims that the trial court abused its discretion by excluding evidence of Loud's blood-alcohol content (BAC) at the time of his death. The court allowed the medical examiner to testify that the deceased consumed alcohol on the day that he died, but disallowed testimony that toxicology

results showed he had a BAC of .12% when he was killed. Durrett argues that not allowing this evidence prevented him from presenting a complete and meaningful defense because it precluded him from providing to the jury a means of assessing Loud's level of intoxication at the time of the shooting, which would have provided additional insight into Loud's behavior and Durrett's alleged belief that Loud posed an imminent threat when he shot him.

Because this Court has never specifically addressed the admissibility of a victim's level of intoxication at the time of death where the killer claims self-defense, it is instructive to look to other courts for guidance. As Durrett points out, other courts have concluded that the exclusion of such evidence can be reversible error. For example, *Newell v. State*, 49 So. 3d 66 (Miss. 2010), involved a murder conviction where the shooter claimed he acted in self-defense in response to the deceased's alleged aggressive and violent behavior. The Mississippi Supreme Court held that it was an abuse of discretion to exclude the deceased's toxicology results because it was "relevant to show all the circumstances under which the fatal difficulty occurred, and which would in any manner ... indicate the mental state of the deceased." *Id.* at 73 (internal quotation marks omitted). And the error was deemed reversible because excluding the toxicology results prevented the defendant from fully presenting his theory of self-defense since the results "could have affected the jury's understanding of [the deceased's] motive or intention and [the shooter's] belief in the imminence of his danger." *Id.*; *see also Cromartie v. State*, 1 So. 3d 340, 342–43 (Fla. Dist. Ct. App. 2009) (reversible error to exclude evidence of deceased's BAC of .19% where defendant alleged he punched the deceased in

self-defense because he was acting in an aggressive and threatening manner and under the influence of alcohol); *State v. Baker*, 623 N.E.2d 672, 677 (Ohio Ct. App. 1993) (reversible error to exclude toxicology results showing the presence of alcohol and cocaine because it was relevant to the issue of who was the aggressor where defendant claimed self-defense); *cf. Harris v. Cotton*, 365 F.3d 552, 556 (7th Cir. 2004) (trial counsel's failure to obtain and admit toxicology report showing the deceased had been under the influence of alcohol and cocaine when he died to corroborate the defendant's theory of self-defense in response to the deceased's alleged hostile and erratic behavior was ineffective assistance of counsel).

On the other hand, the Commonwealth cites two cases in which this Court previously upheld the exclusion of evidence of the victim's intoxication. In *Malone v. Commonwealth*, 364 S.W.3d 121 (Ky. 2012), the Court held that the trial court did not abuse its discretion in limiting evidence of, among other things, the victim's blood-alcohol content when there was no proof that the shooting was related to alcohol or drugs. And in *Brown v. Commonwealth*, 416 S.W.3d 302 (Ky. 2013), this Court found no error in the exclusion of toxicology evidence showing the presence of cannabinoids, which indicated that the victim had been a "recent user" of marijuana. *Id.* at 310. Both of these cases, however, are readily distinguishable from Durrett's.

In *Malone*, the defendant argued that blood-alcohol evidence and other drug- or alcohol-related evidence—e.g., the victim's criminal record and his and several witnesses' drinking and drug-use habits—were admissible to establish the context of the shooting crime and show that the witnesses against him

were unworthy of belief and could have themselves been involved in the victim's death. But unlike Durrett, the defendant in *Malone* disclaimed any involvement in the crime, and his defense was premised primarily on discrediting the witnesses' accounts of the shooting and in-court identifications of him as the shooter. He did not assert self-defense. And in the absence of other evidence that, for example, may have shown the witnesses had a motive or opportunity to kill the victim, or that they had some reason to be biased against the defendant or in favor of the Commonwealth, this Court held that the defendant's attempts to impugn their and the victim's character with the alcohol- and drug-related evidence "was nothing more than an invitation to the jury to speculate about causes not supported by the record." *Malone*, 364 S.W.3d at 127–28.

Here, however, Durrett offered the victim's blood-alcohol content not merely as evidence of the general context of the circumstances in which the crime was committed, but rather for the more nuanced purpose of showing the context in which he allegedly defended himself by shooting Loud—i.e., as contextual evidence relating to the deceased's behavior. It is this behavior that Durrett alleges caused him to shoot Loud out of fear for his own safety. So it is clear *Malone*'s holding has little applicability to these facts.

And while *Brown*, on the other hand, did involve a claim of self-defense, it too is readily distinguishable. During an apparent drug deal gone bad, Brown claimed he shot and killed the victim (a would-be purchaser of marijuana) when the victim allegedly tried to rob him at gunpoint. Brown complained of the exclusion of toxicology evidence showing that the victim had used

marijuana "recent[ly]"—i.e., from "within hours of the shooting to several days before the shooting," *Brown*, 416 S.W.3d at 310—which he claimed was relevant to prove the victim's state of mind and intent to rob him. Rejecting Brown's argument, this Court found no error, in part, because the medical examiner was unable to give any opinion as to when the victim may have used marijuana or even if he had done so on the day he was shot.

But here, the doctor who examined Loud's body and obtained his toxicology results was able to affirmatively testify that the deceased had consumed alcohol on the day of the shooting, adding that alcohol does not remain in the body for very long after being ingested. And further distinguishing this case from *Brown* is that, in that case, the fact that the victim robbed the defendant was apparently not a fact in contention; while, in this case, the disputed circumstances in which Durrett shot Loud, including the deceased's behavior and state of mind, were of paramount importance and certainly subject to dispute.

So finding *Malone* and *Brown* distinguishable and the above-cited decisions from other jurisdictions persuasive, it is apparent to this Court that, as a general matter, in cases in which the accused asserts self-defense, evidence of the blood-alcohol content of the deceased may be relevant as circumstantial proof of the behavior and mental state of the deceased.

Anytime someone is killed and the killer claims that he did so to protect himself, the behavior of the victim is obviously going to be of principal importance. And evidence that the deceased was intoxicated when he died can be relevant to assessing who was the aggressor by allowing for a fuller

understanding of the victim's behavior and the killer's perception of imminent harm. In this way, BAC evidence may corroborate a claim that the deceased was acting erratically or violently while under the influence of alcohol, thereby causing the defendant to believe he was in danger of physical harm from the drunken aggressor and act to protect himself accordingly.

So turning to the facts of this case, it is clear that the BAC evidence was relevant and could have been admitted at trial. *See* KRE 401, 402. Durrett's self-defense claim was predicated on his alleged fear of violence from Loud. That fear allegedly arose, at least in part,[2] as a result of the incident that occurred at the liquor store earlier on the day of the shooting when, according to Durrett, Loud made derogatory comments about Durrett's girlfriend and acted aggressively and threateningly, including showing a gun and threatening to use it. Thus, the BAC evidence was relevant insofar as Loud's inebriation might help explain the aggressive behavior alleged by Durrett and thereby corroborate Durrett's version of events. And it could also have been further relevant to explain why Durrett may have been acting under an erroneous belief of the need to act in self-defense or in the degree of force necessary as part of an imperfect self-defense, which Durrett was entitled to have the jury consider.

But trial courts wield substantial discretion in admitting or excluding evidence at trial, and only an abuse of that discretion will warrant relief on

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[2] Durrett also testified that he knew of an instance two weeks earlier where Loud had reportedly pistol-whipped and put a gun to another man's head, and that Loud was known to carry a .25-caliber handgun.

appeal. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A trial court abuses its discretion when it makes such a decision that was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* There was no abuse of discretion in excluding this evidence, in part, because Durrett never claimed to have known Loud was intoxicated and that the actual level of intoxication could have thus corroborated any mistaken belief. Rather, Durrett argued it helps prove Loud's aggressive conduct.

But the alleged aggressive behavior and mental state of the victim that might have otherwise been corroborated by the blood-alcohol evidence is a step removed from the events that culminated in Durrett shooting Loud. By Durrett's own account, he and Loud had exchanged no words nor did they interact in any way (except, possibly, locking eyes) when Durrett shot Loud only seconds after the latter had parked and exited his vehicle. And this took place hours after Durrett's first alleged encounter with Loud. Due to the shooting's temporal remoteness to the only instance of alleged aggressive behavior by Loud, the probative value of the BAC evidence here was very low. Because of this remoteness, it says little about the victim's motive and state of mind when he was shot and, thus, added little to assist the jury in understanding his or Durrett's behavior at the time of the shooting. Moreover, the jury was allowed to hear other evidence that Loud had drunk alcohol that day, which allowed for many of the same inferences that could have been drawn from the more specific BAC evidence; this further decreased the relative probativeness of the toxicology evidence.

In sum, the evidence of Loud's .12% blood-alcohol content at the time of his death was not particularly corroborative of Durrett's claim that he acted to protect himself. Indeed, Durrett's version of events was that Loud had *not* behaved in a manner that could be corroborated by proof of his level of intoxication at the time Durrett shot him. This proof simply was not critical to a full presentation of his theory of self-defense. The decision not to admit it was not an abuse of discretion.

C. Durrett waived any objection to the detective's improper testimony about how innocent people who act in self-defense typically behave.

Durret next claims that it was error to allow the lead detective to testify that, based on his experience as a homicide detective, Durrett's actions after the shooting (running from the scene and hiding the gun) were inconsistent with how people who have innocently injured someone while acting in self-defense typically behave. Durrett concedes that the detective's testimony was not objected to at trial and is therefore unpreserved, but he asks this Court to conduct palpable error review under Criminal Rule 10.26. Because our review of the record makes it clear that Durrett actually waived this error at trial, we decline to review the merits of his claim.

In the realm of unpreserved errors, forfeited errors are distinguishable from waived errors. *See Tackett v. Commonwealth*, 445 S.W.3d 20, 28–29 (Ky. 2014). The former occur when a party merely fails to object to the admission of evidence, and can be subject to palpable error review. *Id.* The latter, on the other hand, occur when the party specifically waives the objection, and are not subject to appellate review. *Id.* An error is waived when the failure to object

"reflect[s] the party's knowing relinquishment of a right" to object. *Id.* at 28 (quoting *Mullins v. Commonwealth*, 350 S.W.3d 434, 439 (Ky. 2011)). In *Tackett*, this Court found that the defendant's explicit statement that he had no objection to the admission of a medical report waived the error and was not subject to review. The circumstances of the admission of the detective's testimony at Durrett's trial were not dissimilar.

At trial, after the defense closed its case, the Commonwealth asked to approach the bench, where the following discussion occurred:

> Prosecutor: I want to call Detective Russ in rebuttal. And I want to talk about this now so we don't have to do it later. When the defendant was on the stand, he said that everybody's instinct is to run after something like that. And I want to ask Detective Russ, in his experience as a homicide detective, "Have you had people stick around and claim self-defense and wait around for the police?"
>
> Defense Counsel: So why are we up here? Are you asking permission to ask that? I mean, why are we up here? Do you have a motion?
>
> Prosecutor: Because—for the same reason that I wanted to talk about the toxicology ahead of time, so that the jury doesn't have to just sit there and watch us for ten—out of courtesy to them and out of courtesy to you and the court, I'm bringing it up now. And I'm telling you what my question is going to be ahead of time, so that you can tell me if you have an objection. Because it's silly for me to call him and say, "Detective Russ, blah blah blah," and then for you to say "objection" then, when I've already put you on notice about what I intend to introduce.
>
> Defense Counsel: Okay. What do you expect the answer to be?
>
> Prosecutor: That he has worked at least twelve cases where self-defense has been asserted and the person has waited for the police to tell them that they were claiming self-defense.
>
> Defense Counsel: To hunt them down. You gonna use those words, "hunt them down"?

Prosecutor: I didn't say anything about hunting down.

Defense Counsel: Okay. Tell me again so I make sure I hear you right. What do you expect him to say?

Prosecutor: I expect him to say something along the lines of he has worked at least twelve cases where somebody has called 911 because they've injured somebody in self-defense and waited around for the police—

Defense Counsel: Okay.

Prosecutor: To rebut his assertion that everybody's instinct is to run.

Defense Counsel: Okay. Okay. *Fine.*

(Emphasis added.)

Based on this discussion, it is clear that, similar to what happened in *Tackett,* Durrett's counsel considered the evidence and affirmatively assented to its admission. The prosecutor summarized (three times) the testimony she expected to elicit from the detective at the bench conference she proactively requested. And she explained why she had initiated the bench conference before calling the witness—namely, to save time by allowing Durrett to raise and have resolved any objections he had to the testimony before questioning got underway. Durrett's counsel was actively involved at the bench conference and considered the Commonwealth's proffer closely before stating that he was "fine" with it. He obviously considered whether to object to the detective's testimony—after all, the prosecutor's whole reason for bringing it up before calling the witness was for Durrett to object then rather than later during questioning—and declined to do so. This was an explicit waiver of any objection to the admissibility of the detective's testimony.

And our review of this testimony, specifically during cross-examination, buttresses our conclusion that this was a knowing and conscious decision not to object to the testimony. On direct, the detective testified that he had worked, as either lead or assisting detective, on twelve to fifteen cases involving self-defense, and that the person asserting self-defense had stayed and waited to speak to police about what had happened in every one of those cases. In only one of those cases, according to the detective, was the person eventually charged with a crime. This was effectively opinion testimony that he did not believe Durrett had acted in self-defense because, based on his experience as a homicide detective, Durrett's actions after the shooting were inconsistent with how innocent people who act in self-defense typically behave.

On cross-examination, however, defense counsel successfully impeached this testimony by having the detective admit that he had only actually been lead detective on three of those dozen or so cases and that he could not remember details of the ten or so other cases he merely assisted on. This called into question the extent of the detective's experience and supposed expertise. And by attacking the detective's experience and qualifications, Durrett cast doubt on the credibility of his testimony. But more importantly, Durrett's counsel also elicited testimony from the detective that, in every one of the cases he could remember, the vindicated self-defender had been sober. To the extent the evidence showed that Durrett had been drinking alcohol for several hours leading up to the shooting, this undercut the detective's opinion, which was actually only about how *sober* people typically behave after innocently acting in self-defense. Indeed, by differentiating his circumstances from other, "typical"

self-defense cases, Durrett's cross-examination actually leant credence to his explanation for why he ran—i.e., that he was scared and drunk, worried about being shot by associates of Loud's in retaliation or even by responding police, and did not know what else to do than get somewhere safe.

It is, therefore, clear that Durrett's counsel's above-referenced acquiescence to the admission of the detective's opinion testimony was knowing and conscious, if not also strategic. The error was thus waived and, accordingly, is not subject to appellate review.

D. The sentence imposed for the murder conviction was not improperly enhanced due to Durrett's persistent felony offender status.

Lastly, Durrett argues that the sentence he received for the murder conviction was "enhanced" as a result of the jury having also found him guilty of being a second-degree persistent felony offender (PFO), and that such enhancement was contrary to statute and must be vacated. This claim is meritless.

To be sure, Durrett is correct that "[m]urder is a capital offense and a murder conviction is not subject to PFO enhancement." *Berry v. Commonwealth*, 782 S.W.2d 625, 627 (Ky. 1990), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). In *Berry*, this Court held that it was reversible error to enhance a life sentence for murder to 200 years as a PFO. This result was dictated by the PFO statute directing the jury to fix punishment under that section "in lieu of the sentence of imprisonment assessed under KRS 532.060." KRS 532.080(1). In light of this clear language—which remains unchanged in the PFO statute's current form—"[i]f the

punishment is not assessed under KRS 532.060, the PFO statute is not applicable." *Berry*, 782 S.W.2d at 627. Accordingly, because capital offenses, such as murder, must be sentenced under KRS 532.030(1), while "[p]unishment for all other felonies is provided in KRS 532.060(2)," *id.* (emphasis omitted), it was reversible error to enhance the sentence for murder.

But, here, despite being found guilty of being a second-degree PFO, Durrett has no cause to complain. This is because, unlike in *Berry*, the sentence imposed for his murder conviction was not enhanced as a result of that status. The trial court sentenced him in accordance with the jury's recommendation that he serve a prison sentence of twenty-five years for the murder conviction. Notwithstanding Durrett's specious mischaracterization of his sentence as "twenty-five years on the murder, enhanced to twenty-five years as a PFO II," the murder sentence was in no way subjected to PFO enhancement and, therefore, not problematic.

And this conclusion is not novel. Not long after *Berry*, this Court again weighed in on the issue in *Offutt v. Commonwealth*, 799 S.W.2d 815 (Ky. 1990). "[V]enturing to observe the inelegance[3] of the present statutory structure," *id.* at 816, the Court clarified that "conviction of a capital offense may indeed establish PFO status, and the appellant is not entitled to dismissal of the PFO charge. *Enlargement of the sentence, however, is not authorized.*" *Id.* (emphasis added). In other words, the "enhancement" of the sentence complained about by Durrett that occurs solely by virtue of being designated a persistent felony

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[3] This particular inelegance is central to the issue at hand and, again, has remained unchanged by the legislature.

offender is not problematic; it is only the *enlargement* of a sentence imposed on a murder conviction that is prohibited.

In his reply brief, Durrett concedes that *Offutt* is controlling but nonetheless asks this Court to reconsider its holding in that case. He urges this Court to find that, even without his prison sentence increasing, he was still improperly subjected to enhancement as a PFO by being made ineligible for "probation, shock probation, or conditional discharge" under KRS 532.080(5). He contends that his PFO conviction thus "enhanced" his murder conviction's probation and parole eligibility under KRS 439.3401 to complete ineligibility. This argument, too, lacks merit.

The simple fact is that the PFO finding is not what made Durrett ineligible for probation. He was also ineligible for probation because he was convicted of a capital offense, making him a "violent offender" under KRS 439.3401(1)(a). Subsection (3)(a) of that section provides, in relevant part, that "[a] violent offender who has been convicted of a capital offense ... with a sentence of a term of years ... *shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.*" (Emphasis added.) Durrett cites to this inartfully drafted italicized language to posit that, because he would have been eligible for probation after serving eighty-five percent of his sentence under the violent-offender statute, his sentence was improperly "enhanced" by the PFO conviction that resulted in complete ineligibility for probation under that statute. This Court will assume that Durrett's argument is not the product of willful misreading of the relevant statutory language.

The violent-offender statute first states that a violent offender convicted of a capital offense with a sentence of a term of years, like Durrett, "shall not be eligible for probation." *Id.* Period. It then adds that the same violent offender "shall not be eligible for ... parole until he has served at least eighty-five percent" of his sentence. *Id.* This is the only way to read this language consistent with how probation works. It is ordered by trial courts at the time of sentencing as a punishment to be served conditionally in lieu of prison time. Of course the trial court could never order probation at sentencing for a murder conviction because 85% of the sentence obviously could not have possibly been served yet. But even setting aside that inescapable logic, Durrett's argument also wholly ignores KRS 532.040, which expressly excludes those convicted of "a capital offense or having been designated a violent offender" from eligibility for probation or conditional discharge.

In sum, since the sentence imposed on Durrett's murder conviction was not enhanced as a result of his PFO status, there is no error.

III. Conclusion

For the reasons set forth above, the judgment of conviction and sentence of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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