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RENDERED: SEPTEMBER 22, 2016
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2014-SC-000535-MR

CARLOS LAMONT ORDWAY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 07-CR-01319

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Carlos Lamont Ordway appeals as a matter of right from a judgment of the Fayette Circuit Court sentencing him to life imprisonment without the possibility of parole for twenty-five years for two counts of intentional murder. Ky. Const. § 110(2)(b). Ordway raises seven issues on appeal: (1) the trial court erred when it refused to allow Ordway to admit specific evidence of Turner's criminal history; (2) the trial court erred in permitting Ordway's nurse to testify about her history treating malingering patients; (3) the trial court erred in permitting the Commonwealth to question Ordway about inconsistencies in his trial testimony; (4) the Commonwealth improperly misinterpreted evidence during closing argument; (5) the trial court erred in informing the jury about sequestration; (6) the trial court erred by shackling Ordway during the penalty phase; and (7) the Commonwealth improperly informed the jury about

Ordway's prior convictions. For the following reasons, we affirm the judgment and sentence of the Fayette Circuit Court.

## FACTUAL AND PROCEDURAL BACKGROUND

During a summer evening in 2007, Ordway was traveling in the front passenger seat of a stolen car with two acquaintances. Rodriquez "Hot Rod" Turner was the car's driver and Patrick "Lee Lee" Lewis was in the back passenger seat directly behind Ordway. According to Ordway, the group was traveling from Louisville to Lexington to traffic in narcotics. The plan was for Ordway to sell narcotics to an acquaintance of Turner.

After reaching Lexington, but prior to arriving at their destination, the group stopped at a convenience store.[1] Turner and Lewis entered the store, while Ordway remained in the vehicle. After getting back in the car, Turner began discussing a homicide he had previously committed. Lewis followed suit, telling Ordway that he had committed a robbery and shot a police officer. According to Ordway, shortly thereafter Lewis took out a handgun and placed it against Ordway's head threatening him by saying, "[g]ive it up, motherfucker or you're gonna die." At the same time, Turner also drew his weapon, placed it in his lap, and told Ordway, "[y]ou know what time it is. Do what he says stupid or you're gonna die." Ordway gave in to their demands, surrendering his cocaine to Lewis and his ecstasy to Turner. However, Ordway testified that

[1] This rendition of the night's events is based on Ordway's testimony in his second trial. As discussed extensively below, there were differences in his testimony between the 2010 trial and the 2014 trial.

Turner and Lewis continued to make threats and demands even after he surrendered the drugs.

Subsequently, Ordway struck Lewis knocking the gun from his hands, while simultaneously seizing the gun that Turner had in his lap. Ordway then fired on Lewis, whom he perceived as the more immediate threat due to his proximity to the dropped gun. Turner who was still driving the vehicle, struggled with Ordway to retrieve his weapon. In response, Ordway said he turned the gun on Turner and began firing, ultimately causing Turner to lose control of the car and crash.

After the crash, Ordway exited the vehicle. He was unarmed as he had dropped the gun in the collision. Ordway then observed Lewis trying to exit the vehicle. Noticing that Lewis was armed, Ordway approached and disarmed him, and then shot him with the gun. Afterward, Ordway thought Turner was reaching for a gun and so he also shot him again.

The sound of the car crash caught the attention of multiple persons in the area. After hearing the crash, Laketta Shelton went outside and observed that her sport utility vehicle, which had been parked in her driveway, had been struck by Turner's vehicle pushing it into her yard. Shelton then heard a gunshot and ran back into her house, while her mother contacted the authorities.

Three bystanders witnessed Ordway's actions after the crash. Justin Bailey informed the 911 operator that he watched Ordway open the door to the vehicle, shoot the passenger in the back seat and then shoot the driver. The

second bystander, Michael Latty, later recalled that after hearing the crash he went to his front door and observed Ordway lean into the vehicle to shoot the driver and then the back seat passenger. The third bystander, John Hessier recounted that after hearing the crash, he went outside and witnessed Ordway walk across the street, draw a gun from his waistband, and shoot into the vehicle twice.

After shooting Lewis and Turner, Ordway approached a car that was stopped at the intersection of Armstrong Mill Road and Appian Way. The driver, Barbra Hurst, recalled that Ordway approached her vehicle and told her to let him in. Ordway also began pulling on the handle of the passenger-side door, to obtain entry to the vehicle. While Ordway was pulling on the door handle with his left hand, a gun was in his right hand pointed at Hurst's daughter who was seated in the front passenger seat. Hurst ran a red light to escape and contacted the authorities. Subsequently, Ordway approached a second vehicle, driven by Susan Jeffries. Ordway commanded Jeffries and her passenger to exit the vehicle and pulled on the door handle in an effort to obtain entry. Additionally, he pointed a gun at Jeffries's passenger's head. Jeffries ran the red light to get away from Ordway and subsequently contacted the authorities.

Officer Chris Darmadji of the Lexington Division of Police (LDP) was dispatched to the intersection of Appian Way and Armstrong Mill Road after receiving a report that shots had been fired in the area. Near the intersection, Officer Darmadji observed Ordway attempting to get motorists to stop, by

waving his arms in the air and banging on the hoods of passing vehicles. After noting that Ordway matched the description of the suspect given by the police dispatcher, Officer Darmadji stopped his vehicle and placed Ordway under arrest.

Other law enforcement and emergency personnel responded to the scene of the crime. Lexington Fire Department (LFD) Lieutenant Jason Shumate assessed Lewis. Lewis was located in the passenger compartment of the vehicle, still secured by his seat belt, with his legs hanging out of the open car door. He was pronounced dead at the scene shortly thereafter. While Lieutenant Shumate examined Lewis, LFD Lieutenant Brian Dawson assessed Turner. Turner was found in the driver's seat of the vehicle, also still restrained by his seat belt. When examined Turner showed signs of "electrical activity" in his heart and was subsequently given CPR and transported to the hospital where he died shortly thereafter.

While emergency personnel were attending to Lewis and Turner, Ordway's strange behavior led to his being transported to the hospital for examination. At the hospital, Ordway's bizarre behavior continued with him alternating between agitation and moments of non-responsiveness. When examined, Ordway admitted to a nurse that he had previously taken ecstasy pills. While at the hospital, LDP Detective Robert Wilson briefly interviewed Ordway. Ordway told Detective Wilson that Turner and Lewis had attempted to kill him and he shot them in self-protection. Ordway initially claimed that

Turner and Lewis were his friends, but later contradicted that by also saying that he did not really know the pair.

As part of their investigation, the police searched Turner's vehicle and discovered a bag of ecstasy pills in the driver-side door compartment and bags of marijuana in the center console and in the back of the vehicle.[2] The police also recovered an audio recorder in the center console of the vehicle. Additionally, two handguns, a 9 millimeter and a .45 caliber, were recovered by the police. Subsequent forensic testing revealed the presence of three DNA profiles (Ordway, Lewis, and a third unknown contributor) on the grip of the 9 millimeter handgun. As to the .45 caliber handgun, Ordway's DNA was present on the grip of the gun along with two unidentified individuals. Forensic analysis was unable to rule out Lewis and Turner as contributors to the DNA found on the .45 caliber handgun.

Subsequently, Ordway was charged with two counts of murder and tampering with physical evidence. Ordway was originally tried, convicted of the murder charges and sentenced to death in 2010. On direct appeal, this Court reversed the convictions and sentence and remanded for a new trial. *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013). During the retrial, Ordway

[2] In addition to the drugs located in the vehicle, examiners found a substance in Lewis's pocket that appeared to be crack cocaine. However, forensic testing revealed that the substance was not a controlled substance. Rather, it was likely a product commonly known as "fleece" a substance manufactured to look like rocks of actual crack cocaine. However, this substance was lost before Ordway could have it independently examined.

again argued that he shot Lewis and Turner multiple times, but that he had acted in self-protection.

After weighing all the testimony and physical evidence, the jury found Ordway guilty of two counts of intentional murder. Following the penalty phase, the jury found beyond a reasonable doubt that Ordway's acts of killing were intentional and resulted in multiple deaths. The jury recommended a penalty of life without parole for a period of twenty-five years for each offense with the sentences to run consecutively. The trial court imposed a sentence of life without the possibility of parole for twenty-five years for each offense, but ordered those sentences to run concurrent with each other as required by law. Ordway brings this appeal as a matter of right.

## ANALYSIS

### I. The Trial Court Correctly Precluded Ordway From Admitting Inadmissible Character Evidence About Turner's Criminal History.

Ordway contends that the trial court erred by not permitting him to admit certain types of evidence about Turner's criminal history. Specifically, Ordway complains of the trial court's decision to bar the testimony of a witness

who Turner had assaulted in 2000 and a certified copy of the record of Turner's second-degree manslaughter conviction.[3&4]

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005) (*citing Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Generally, the character of victims is irrelevant to the disposition of criminal cases. While Kentucky Rule of Evidence (KRE) 404(a)(2) is an expansive general rule on the character of victims, the substantive law of crimes confine the rule's application to a narrow range of cases. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.20[3][b] at 109 (5th ed. 2013) (Lawson, *Kentucky Evidence Law).* Specifically, in cases involving the use of violence in which the accused claims self-protection, "aggression of

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[3] Turner's homicide conviction concerned the June 2000 murder of Michael Mills. According to the facts included in the Commonwealth's Offer on a Plea of Guilty, Turner was tried in Jefferson Circuit Court in 2001 for murder and assault in the second degree. That trial ended in a mistrial after the jury became deadlocked during its deliberations. Subsequently, Turner entered a guilty plea to the amended offense of manslaughter in the second degree. The offense of assault in the second degree was dismissed as part of the plea.

[4] Ordway also alleges prosecutorial misconduct claiming that the Commonwealth argued during closing argument that Ordway fabricated Turner's homicide conviction. That argument will be addressed in a separate portion of this opinion.

alleged victims is material and character is one way of proving that aggression." *Id.* at 110.

Typically such evidence is limited to reputation or opinion evidence, rather than proof concerning specific acts of misconduct. *Saylor v. Commonwealth*, 144 S.W.3d 812 (Ky. 2004) (citing KRE 405(a); Lawson, *Kentucky Evidence Law* § 2.20 [4] at 116 (4th ed. 2003)). An exception to this general rule applies where the defendant alleges that his knowledge of the victim's prior acts of violence or threats made the defendant so fearful of the victim that it was necessary for him to use physical force or deadly physical force in self-protection. *Id.* (citations omitted). Accordingly, the evidence is not offered to prove the victim's character, but rather to prove the defendant's state of mind, his fear of the victim, at the time he acted in self-protection. *Id.*

In the case at bar, prior to the Commonwealth calling their final witness, the prosecution requested that the trial court preclude defense witnesses from testifying about specific acts of violence by Lewis or Turner. The Commonwealth maintained that the witnesses could only discuss the general reputation of Turner and Lewis. Ordway objected arguing that he wanted to introduce the judgment of Turner's manslaughter conviction. Additionally, Ordway wanted to introduce the testimony of a witness to that crime in 2000, who was also shot by Turner in the same incident. The trial court granted the Commonwealth's request and excluded this evidence from admission at trial. However, the trial court permitted Ordway to testify about his personal knowledge of Turner's prior acts of violence, including the homicide conviction,

and how that that knowledge contributed to his fear of Turner and his belief in the need to use physical force in self-protection.[5]

Ordway alleges that the trial court erred by preventing him from presenting specific instances of Turner's prior acts of violence through certified records or through witness testimony. Specifically, he contends that KRE 405(c) authorizes the admission of specific instances of conduct in a self-protection case to prove such character or trait of character. KRE 405(c) permits a defendant to introduce specific instances of conduct when character or a trait of character is an essential element to a defense.

However, Ordway misinterprets KRE 405(c) as Turner's character is not an essential element to Ordway's self-defense claims. "In criminal cases, it is rare (almost unheard of) to find that character is an element in a charge or defense." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 21 (Ky. 2004) (quoting Lawson, *Kentucky Evidence Law* § 2.15[6] at 108 n.45 (4th ed.)). Only where the existence of the character trait determines the rights and liabilities of the parties, is character considered to be an essential element, which can be established by specific instances of conduct. Further, the types of cases in which character is an essential element are rare. Examples of the latter provided by Professor Lawson include: (1) a civil action for defamation, (2) a criminal action involving extortion, and (3) criminal cases where the defense is

[5] As discussed below, in his 2010 trial Ordway never attempted to offer any testimony about his knowledge of Lewis or Turner's criminal histories or any prior acts of violence they had committed.

entrapment. *Id.* at 21-22 (citing Lawson, *Kentucky Evidence Law* § 2.15[6] at 108-09 (4th ed.)). Evidence of Turner's violent character is not an essential element of the claim of self-protection. Rather Ordway's awareness of Turner's character was merely circumstantial evidence relevant to whether Ordway believed he was entitled to or needed to act in self-protection. As such, proof of that trait in the form of specific prior acts of the victim vis-à-vis other people many years before is not admissible under KRE 405(c).[6] Accordingly, the trial court properly excluded the offered evidence.[7]

**II. The Trial Court Properly Permitted the Commonwealth to Inquire of Ordway's Nurse About Her Experiences With Malingering Patients.**

Ordway alleges that the trial court erred by permitting the Commonwealth to ask on redirect examination of the nurse who treated him

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[6] Of course, it remains a long-established principle that a defendant claiming self-protection may introduce evidence of the victim's specific threats and acts of violence toward him personally. *See Commonwealth v. Girkey*, 42 S.W.2d 513, 514 (Ky. 1931) (threats and violent acts on the part of the victim against a defendant claiming self-protection are admissible); *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999), *as modified* (May 3, 1999) (defendant was permitted to present evidence of substantial physical and sexual abuse inflicted upon her by the victim as part of her self-protection claim).

[7] Additionally, Ordway claims that the trial court erred by precluding the admission of "evidence of [Turner] and [Lewis's] character or trait of character for violence . . . ." During a bench discussion on an unrelated matter, the Commonwealth notified the trial court during its case-in-chief that it intended to call family members of Lewis and Turner as its next witnesses. The Commonwealth asked the trial court to bar discussion of Lewis and Turner's prior records at this stage of the proceedings. Ordway objected, requesting to be able to inquire of Lewis and Turner's reputation in the community – namely their character for violence. The trial court granted the Commonwealth's request, noting that questions about Lewis and Turner's reputation were premature at that stage of the proceedings prior to Ordway testifying. However, the trial court advised Ordway that the witnesses would be subject to recall for questioning on that subject at a later time. Contrary to his claim, the trial court did not preclude the admission of this evidence, rather it simply denied Ordway's request to prematurely address this issue. Further, Ordway declined to recall the witnesses during his own case-in-chief. There was no error.

about her experiences treating malingering patients. He argues that this testimony was irrelevant and that even if it were not irrelevant, it was unduly prejudicial.

As noted, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Matthews*, 163 S.W.3d at 19 (citing *Partin,* 918 S.W.2d at 222). Only relevant evidence, that 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," is admissible. KRE 401; KRE 402. According to Professor Lawson, "[t]he inclusionary thrust of the law of evidence is powerful, unmistakable, and undeniable, one that strongly tilts outcomes toward admission of evidence rather than exclusion." Lawson, *Kentucky Evidence Law* § 2.05[2][b] at 80 (5th ed.). Accordingly, "[r]elevancy is established by any showing of probativeness, however slight." *Springer*, 998 S.W.2d at 449.

In the case at bar, the Commonwealth called Renee Cecil, a nurse at the University of Kentucky Medical Center, who treated Ordway. During direct examination, the Commonwealth inquired about the treatment Ordway received in the emergency room and about statements he made while there. Cecil testified that Ordway would alternate between being unresponsive and then being agitated and combative. As part of Ordway's cross-examination, Cecil was asked about whether a CT scan had been performed on Ordway. After informing the jury, that a CT test was not performed on Ordway, Cecil went on to explain that a CT scan of the head could give additional insight into

possible injuries or damage to the head. Through this line of questioning, Ordway tried to link an undiagnosed head injury to Ordway's mental condition and behavior the night of the shootings.

Subsequently, on redirect, the Commonwealth first asked Cecil about her general experience in treating drug addicts and patients with head trauma. Then, the Commonwealth asked, "[h]ave you also attended to people who are trying to present a certain way mentally?" Ordway objected to the question, but the trial court overruled his objection. However, the trial court precluded the Commonwealth from asking Cecil about Ordway's presentation specifically. When asked a second time, Cecil testified that she had attended to patients who had exaggerated their symptoms in an attempt to present in a certain mental state. Additionally, Cecil acknowledged that she did not know why Ordway presented the way he did that night.

Ordway claims that Cecil's testimony that some of her other patients had exaggerated symptoms was irrelevant in this case. While that could be true in many cases, in this case this testimony was permissible due to Ordway's own questioning during cross-examination. During Ordway's cross-examination of Cecil, he questioned whether an undiagnosed head injury could be connected to his mental condition and observed behavior at the hospital. Subsequently, on redirect, the Commonwealth attempted to rebut Ordway's argument, by inquiring of Cecil of her general experience in treating patients with head trauma and patients who attempted to exaggerate their symptoms. While the Commonwealth's questions of Cecil would have been clearly inappropriate

during direct examination, Ordway's cross-examination opened the door to this limited redirect examination. *See Sanders v. Commonwealth*, 801 S.W.2d 665, 675-676 (Ky. 1990) (Defense questioning on cross-examination opened the door to certain redirect examination).[8]

Ordway also claims that even if Cecil's redirect testimony was relevant that it should have been excluded for being unduly prejudicial. We disagree. The Commonwealth's questions were narrowly tailored to respond to the theory raised by Ordway's cross-examination. Further, the trial court limited the Commonwealth's questioning to preclude questions about Cecil's assessment of Ordway's presentation in the hospital. Accordingly there was no error in the trial court's admission of Cecil's redirect testimony.

**III. The Trial Court Properly Permitted the Commonwealth to Cross-Examine Ordway Concerning His Inconsistent Trial Testimony.**

Ordway also contends that the trial court erred by permitting the Commonwealth to question him about contradictions in his testimony between his 2010 trial and the case at bar. Specifically, Ordway argues that the trial court precluded him from testifying in his 2010 trial about events that

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[8] In support of his argument, Ordway argues that our prior opinion in his case affirmed the proposition that "how other people have acted in a situation is not relevant in regards to how a particular defendant acted during a similar situation." During Ordway's first trial, the Commonwealth impermissibly elicited testimony from Detective Wilson about how persons who legitimately exercise the right of self-protection typically behave. *Ordway*, 391 S.W.3d at 775-77. However, this is clearly distinguishable from the issue presented in the case at bar. Here, Cecil's redirect testimony was limited so that she could not offer an opinion as to how she viewed Ordway to be presenting while being treated at the hospital. Further, Cecil acknowledged that she was unable to explain why Ordway presented the way he did that day.

occurred during his trip to Lexington and then allowed the Commonwealth to portray as inconsistent his testimony in the retrial. Additionally, he claims that the evidence about alleged inconsistencies was irrelevant, misleading, and confusing and that the trial court should have barred its admission.[9]

When a case has been reversed for a new trial, the general rule is that a defendant's testimony at the prior trial is admissible against him in subsequent proceedings. *Brown v. Commonwealth*, 313 S.W.3d 577, 605 (Ky. 2010) (quoting *Harrison v. United States*, 392 U.S. 219, 222 (1968)); *See also, Bess v. Commonwealth*, 82 S.W. 576, 578 (Ky. 1904) ("Neither the organic nor statutory law was intended to relieve the accused of the incriminating effect of voluntary statements which he may have made out of court or in court, when he voluntarily went upon the witness stand in his own behalf.").

However, Ordway's prior trial testimony, "was still subject to the rules of relevance, under which irrelevant evidence is not to be admitted, KRE 402, and relevant evidence may be excluded if, among other reasons, it is so unduly prejudicial that its prejudicial effect substantially outweighs its probative value. KRE 403." *Brown*, 313 S.W.3d at 606. We review a trial court's decision to admit evidence for an abuse of discretion. *Matthews*, 163 S.W.3d at 19 (*citing Partin*, 918 S.W.2d at 222). To address fully Ordway's argument, it is necessary to examine in some detail his testimony in the 2010 trial.

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[9] Ordway also alleges that the Commonwealth's questioning constituted prosecutorial misconduct. That argument will be addressed in a separate portion of this opinion.

During his 2010 trial, Ordway testified that he and Turner had planned to travel from Louisville to Lexington to traffic in narcotics. When Ordway's counsel asked him who planned the scenario for that night, the Commonwealth objected. The prosecutor stated:

> I'm going have to object to constant use of hearsay, about what Mr. Turner told him, we can find out what he did from this guy, but we can't hear what Mr. Turner said, I wanted to, we're getting to the point where I think it's probably gonna be significant. So I'm gonna object to, to hearsay and he's gonna have to just say what he did.

The trial court sustained the Commonwealth's objection, explaining that Ordway would only be able to testify about actions as opposed to what others told him. Afterward, Ordway was asked what happened after he rendezvoused with Turner. In response, Ordway offered a hearsay statement about what Turner's plans were. The Commonwealth's objected and Ordway's counsel asked Ordway not to say what someone told him, but rather to say what happened. Ordway explained that he and Turner picked up Lewis and then got on the highway to go to Lexington.

Subsequently, Ordway was asked by counsel whether there was anything significant that happened on the trip from Louisville to Lexington. He responded by saying, "Not significant. Basically, we just smoked a little marijuana, gave Mr. Turner some couple pills, like one and a half, two pills or something, wasn't really, no sir, wasn't nothing significant going on, nothing out of the ordinary." Additionally, when asked by counsel if there were any problems or disagreements, Ordway answered in the negative.

Shortly thereafter, trial counsel asked Ordway if once they got to Lexington if something happened that he did not think was right. After answering in the affirmative, Ordway said that the first thing that happened was Lewis putting a gun to his head, while saying "give it up you know what time it is, or you're going to die." Subsequently, the Commonwealth objected to this statement and the trial court sustained the objection.

After Ordway was convicted, he argued on appeal that the trial court erred by sustaining the Commonwealth's objections to what the victims said to him in the vehicle moments before the shootings. However, the only specific incident raised by Ordway concerned the statement made by Lewis when he allegedly put the gun to Ordway's head: "Give it up, you know what time it is or you're going to die." The Court determined that Lewis's alleged statement was "a threat that would have reasonably put Ordway in fear of his life." *Ordway*, 391 S.W.3d at 779. Accordingly, the statement was admissible to show Ordway's "state of mind—his fear of the victim—at the time he acted in self-defense." *Id.* (citing *Saylor*, 144 S.W.3d at 816). As such, this Court held in *Ordway* that the trial court erred by barring the admission of this testimony.

During the retrial, Ordway testified differently. He stated that after reaching Lexington, but prior to arriving at their destination, the group stopped at a convenience store. Once they left the store, Turner began discussing a homicide he had previously committed. Ordway testified

that "the mood kind of changed" after the discussion of the homicide. Shortly thereafter Lewis took out a handgun and placed it against Ordway's head threatening him by saying, "[g]ive it up, motherfucker or you're gonna die." At the same time, Turner also drew his weapon, placed it in his lap, and told Ordway, "[y]ou know what time it is. Do what he says stupid or you're gonna die." Ordway gave in to their demands, surrendering his cocaine to Lewis and his ecstasy to Turner. Ultimately, Ordway killed both Turner and Lewis, claiming that he did so while acting in self-protection.

During the Commonwealth's cross-examination, the prosecutor pointed out that Ordway had failed to mention stopping at the convenience store in his interview with Detective Wilson at the hospital. After the Commonwealth pointed out additional differences between his statement to Detective Wilson and his testimony in the case at bar, Ordway objected. Ordway argued that the Commonwealth's questions were misleading as he had tried to address these issues in his 2010 trial, but had been barred by the trial court's hearsay ruling discussed above. He requested an admonition, informing the jury that in the 2010 proceeding he had been ordered not to testify as to a large portion of what was said in the car. In response, the Commonwealth explained that its questions about the changes in Ordway's testimony were focused on the visit to the convenience store and whether Ordway had told Detective Wilson about that visit on the night of the shootings. The Commonwealth stated that it was not seeking to question Ordway about statements he was allegedly precluded

from making in the 2010 trial, but rather to ask about the previously unmentioned visit to the convenience store. The trial court agreed with the Commonwealth, noting that Ordway should not be asked about statements in the vehicle that he was unable to testify about in 2010, but that questioning about the visit to the convenience store, which he had never mentioned to Detective Wilson, was proper.

Later in the Commonwealth's cross-examination, the Commonwealth inquired of Ordway whether he remembered being asked in his 2010 trial whether anything significant happened on the trip to Lexington. Ordway responded by saying, "I mean, I remember, but, I, it actually happened, it wasn't significant, I mean they brag about stuff all the time, it wasn't, I didn't think it was significant." As the Commonwealth continued to focus in on the differences between Ordway's testimony in the 2010 trial and testimony on retrial, Ordway objected. Ordway claimed that the questioning was improper, misleading, and confusing in large part because Ordway was precluded from telling the 2010 jury what was said inside the car. The Commonwealth explained that it was focusing on Ordway's 2010 trial testimony that nothing occurred on the way from Louisville to Lexington, which differed from his testimony in the case at bar. The Commonwealth noted that it would focus its questions on the fact that Ordway was now saying the men stopped at a convenience store prior to the shooting. Ordway's objection was overruled and a request for an admonition was denied.

Ordway contends that the Commonwealth's cross-examination "was inadmissible under KRE 401 and, even if relevant, should have been excluded under KRE 403 because it was misleading and confusing, and it violated his due process rights to fundamental fairness and to present a meaningful defense." However, Ordway's sweeping claim is not borne out by a review of the facts of this case.

The Commonwealth's questions of Ordway about stopping at the convenience store were proper. Ordway did not mention stopping at the convenience store during his interview with Detective Wilson. Likewise, Ordway did not mention the convenience store visit in his 2010 trial testimony. During that proceeding, Ordway was specifically asked by his own counsel whether anything significant happened on the trip from Louisville to Lexington. Ordway replied in the negative, explaining that there was "nothing out of the ordinary" during their trip from Louisville to Lexington. Further, Ordway testified that there were no problems or disagreements on the trip down. Rather, according to Ordway, the first sign of discord between the men was when Lewis put a gun to his head and threatened him with death.

However, during the retrial, Ordway testified to a different version of events. Rather than an uneventful drive to Lexington, Ordway now claimed that the men stopped at a convenience store. Further, Ordway claimed that after the stop at the convenience store that "the mood changed" and that Turner began bragging about a murder that he had committed. According to

Ordway these events took place prior to Lewis drawing his gun and threatening him.

The inconsistencies between Ordway's 2010 trial testimony and his testimony in the case at bar were relevant as the stop at the convenience store began a series of events that culminated in the alleged robbery of Ordway by Lewis and Turner. While Ordway had been barred from presenting certain hearsay testimony from Lewis and Ordway in his 2010 trial, that ruling did not bar his testimony about objective events that occurred or actions that he took on the trip to Lexington. As such, there was nothing preventing Ordway from testifying about stopping at the convenience store in the 2010 trial, but, for whatever reason, he did not do so. His decision to omit that portion of his later version of that day's events was relevant for the jury to consider in weighing the truth of his self-protection claim. Additionally, the Commonwealth's inquiry into those differences was not "unduly prejudicial," KRE 403, to Ordway.[10]

[10] It is clear from reviewing the bench conferences that the trial court and the Commonwealth were trying to avoid questioning Ordway about hearsay statements that he claimed he had been barred from making at his 2010 trial. While Ordway referenced these hearsay statements during cross-examination, the Commonwealth avoided detailed questioning on these statements, rather focusing on the inconsistencies in Ordway's statements concerning the stop at the convenience store. While the Commonwealth's questioning may have briefly touched on the hearsay statements, those moments were limited and did not prejudice Ordway. Further, as discussed below, there was never any attempt to introduce in the 2010 trial some of the evidence he allege he was prohibited from introducing.

**IV. The Alleged Prosecutorial Misconduct Does Not Support Reversal.**

Ordway alleges several instances of prosecutorial misconduct. Ordway contends that the Commonwealth engaged in a pattern of misconduct by: (1) misrepresenting the testimony of Marci Adkins the Commonwealth's DNA expert witness during closing argument; (2) misrepresenting the testimony of Detective Wilson during closing argument; (3) improperly questioning Ordway about his 2010 trial testimony; (4) arguing that Ordway and his counsel made up the self-defense claim; and (5) suggesting that Ordway lied about Turner's homicide conviction during closing argument.

Prosecutorial misconduct is "a prosecutor's improper or illegal act . . . involving an attempt to . . . persuade the jury to wrongly convict a defendant or assess an unjustified punishment." *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011) (quoting *Black's Law Dictionary* (9th ed.2009)) (brackets and ellipses omitted). It "may result from a variety of acts, including improper questioning and improper closing argument." *Id.* "Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004) (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001)).

When reviewing an allegation of prosecutorial misconduct in closing argument, we consider the arguments "as a whole" while keeping in mind that counsel is granted wide latitude during closing argument. *Brewer v.*

*Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006) (quoting *Young v. Commonwealth*, 25 S.W.3d 66, 74-75 (Ky. 2000)). "The long standing rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom." *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010) (citing *East v. Commonwealth*, 60 S.W.2d 137, 139 (Ky. 1933). Reversal is required "for prosecutorial misconduct in a closing argument only if the misconduct is 'flagrant' *or* if each of the following three conditions is satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with a sufficient admonishment to the jury." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citing *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994); *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979)).

First, Ordway assigns as error the prosecutor's argument that the presence of Lewis's DNA on the 9 millimeter handgun could have been the result of blood spatter rather than his handling the weapon. The Commonwealth's argument was as follows:

> Similarly, the DNA on the grip of the 9mm. It's Patrick Lewis, it's the defendant, and an unknown person. Just because the DNA is on the grip of the gun, doesn't mean they handled that gun. Because you remember Marci [Adkins] said that it's, the DNA could come in many forms: bodily fluid, saliva, skin cells. So, it could be touching it. It could be from trying to grip in defense. It could be from the blood that spattered that was too small for her to see.

Ordway objected alleging that the Commonwealth was misstating the evidence. Specifically, he alleged that the Commonwealth's argument

misstated Adkins testimony where she explained the touch DNA analysis that she performed.

To understand Ordway's argument it is necessary to explain what is referred to as "touch DNA." At the onset while we note that the use of a term such as "touch DNA" may be "a misleading simplification of a series of complex processes," it is proper "when referring to the collection of minute biological samples at [a] crime scene or the process of collecting and extracting the tiny amounts of material within the sample in the forensic laboratory." *Commonwealth v. Clark*, 34 N.E.3d 1, 13 n.13 (Mass. 2015) (quoting van Oorschot, Ballantyne & Mitchell, Forensic Trace DNA: A Review, 1:14 Investigative Genetics 1, 2 (2010)).

The human body, during the course of the day, sheds thousands of skin cells. Angela L. Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, J. Ass'n Crime Scene Reconstruction 18(1) 1-5 (2012). A portion of those cells may be transferred to the surfaces our skin contacts. *Id.* Touch DNA concerns

> the genetic information recovered from epithelial (skin) cells left behind when a person makes contact with an object. During the commission of a crime, an assailant can leave touch DNA samples behind . . . on a victim's clothing or other items implicated in the crime. Touch DNA uses the same STR and PCR technology used to test more traditional sources of DNA—blood, semen, saliva, and other bodily fluids—to test recovered epithelial cells. The difference between "traditional" DNA testing—the testing of bodily fluids—and touch DNA testing is the material from which the DNA is collected, not the method by which the DNA sample is analyzed.

*Bean v. State*, 2016 WY 48, ¶ 13, 373 P.3d 372, 377 (Wyo. 2016) (quoting Victoria Kawecki, *Can't Touch This? Making A Place for Touch DNA in Post-Conviction DNA Testing Statutes*, 62 Cath. U. L. Rev. 821, 828-29 (2013)). The quantity of skin cells deposited on a given object depends "on a number of factors, including the rate at which an individual sheds skin cells (which can vary), the friction with which an item is touched, and even whether the person touching the item has dry or sweaty skin." *Id.*

Touch DNA can occur by a process known as secondary transfer. *Id.* at ¶ 14. Unlike, primary transfer which concerns the deposit of DNA "directly between two persons or objects," "[s]econdary transfer refers to the possibility that an individual or object may serve as a conduit between a source and a final destination without any direct encounter." David L. Faigman, et al. *Modern Scientific Evidence: The Law and Science of Expert Testimony*, 4 Mod. Sci. Evidence § 30:13 (2015-2016 ed.).

With this background, we turn to the DNA results for the two handguns. As to the 9 millimeter handgun, Adkins testified that her forensic analysis of the gun's grip revealed the presence of three DNA profiles—Lewis's, Ordway's, and that of an unknown individual. Subsequently, Adkins informed the jury that Ordway's DNA was present on the grip of the .45 caliber handgun along with that of two unidentified individuals. Further, Adkins was unable to rule out Lewis and Turner as DNA contributors to the DNA found on the .45 caliber gun.

Prior to Adkins's discussion of the DNA results for the .45 caliber handgun, there was the following exchange:

> Commonwealth: Can DNA come from more than one source? Like, for example, you see that that was a reddish brown stain, it was a presumptive test positive for blood. Does DNA just come from blood, or can it come from like touching or something along those lines? Does that make sense, the question I'm asking?
>
> Adkins: Yes. Yes it does. DNA can come from any body fluid or even skin cells. So, when you have a mixture like this on a gun, I couldn't tell you who is contributing what kind of fluids or what they are contributing, only that their DNA profile is present.
>
> Commonwealth: So, on the previous gun, where you have on the grip that Mr. Lewis and Mr. Ordway's DNA present, DNA profiles are present, you're not able to tell if that is by way of touching it, spitting on it, bleeding on it, something along those lines?
>
> Adkins: That would be correct.

While the handguns were tested for touch DNA, Adkins acknowledged in her testimony that such a test cannot definitively say how the DNA was transferred to the object. As previously discussed, this is due to the potential for DNA to be deposited by means of secondary transfer.

Accordingly, in closing argument the Commonwealth elected to highlight that Adkins was unable to determine how the DNA was transferred to the handgun. It is clear that the Commonwealth's argument did not misstate Adkins testimony. Rather, the

Commonwealth's statement was a permissible argument on the state of the evidence. There was no error.[11]

Second, Ordway contends that the Commonwealth misstated Detective Wilson's testimony about his interview with Ordway. At trial Detective Wilson testified that Ordway told him the following: "[w]e was driving and the guy in the back, in the back of the car put a gun to my head. We fought, then the driver pulled a gun. I got the gun from the first guy, shot him, then shot the driver." During closing argument, the Commonwealth made the following statement:

> Then he talks about disarming them in the car and he talks about his quick ninja-like reflexes and he's able to disarm two people without either one of them firing one single shot. To Detective Wilson he says he swats the gun that Lewis had away from his head he struggles with Turner, he takes the gun from Lewis, shoots him several times, then takes the gun from Turner and shoots him. But then he got the autopsy report. And then he got what ballistics will recover from the victims and the car.

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[11] In support of his argument, Ordway relies on *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010). In *Duncan*, a DNA expert testified regarding DNA testing that was performed on the underwear of the victim of an alleged sex crime. *Id.* at 86. The Court reversed Duncan's conviction based on errors made by the prosecution during trial. *Id.* at 97. Specifically, during cross-examination the Commonwealth erred by suggesting that the DNA evidence contradicted Duncan's version of events. *Id.* at 91. Additionally, in closing argument, the Commonwealth misstated the results of the DNA test. *Id.* While the Commonwealth initially acknowledged the DNA expert's conclusion that Duncan could not be excluded as a source of the DNA in the victim's panties, the Commonwealth went on to argue that "not excluded" means "included." *Id.* During the DNA expert's testimony there was nothing said "about how likely or unlikely it was for such a partial match to occur, and most assuredly it did not say that Duncan was the source." *Id.* at 92. However, *Duncan* is clearly distinguishable from the case at bar. As explained, the Commonwealth did not misstate the DNA evidence. Rather, the Commonwealth's closing argument closely followed the testimony of the DNA expert.

Ordway contends that the Commonwealth's closing argument is a misstatement of what he told Detective Wilson. However, Ordway himself notes that his "statement does not have to be interpreted as the prosecution interpreted it." As this statement suggests, there were multiple ways that Ordway's statement could have been interpreted. It was permissible for the Commonwealth to advocate for the jury to accept their interpretation of the statement. There was no error.

Third, Ordway alleges that the Commonwealth's cross-examination about inconsistencies in Ordway's 2010 trial testimony and his testimony in the case at bar constituted prosecutorial misconduct. He contends that the Commonwealth improperly questioned him about statements he had been precluded from making in his 2010 trial. As we have previously discussed, the Commonwealth's questioning was proper as it concerned contradictions between Ordway's prior testimony in which he never mentioned stopping at a convenience store and a change in "the mood" and his testimony on retrial. And, while the Commonwealth never questioned Ordway in the 2014 trial about why he had not mentioned in 2010 Turner and Lewis's bragging about their criminal histories, to the extent Ordway is suggesting that occurred, the basic premise is erroneous. A review of the 2010 trial establishes unequivocally that Ordway never attempted to testify to that effect and thus he was not precluded from so testifying. Even if the trial court's broad hearsay ruling was seen as a bar, Ordway was obligated to preserve the issue by avowal, KRE 103, which he did not do. Contrary to Ordway's claim, the

Commonwealth did not mislead the jury as to omissions in Ordway's prior testimony. There was no error.

Fourth, Ordway argues that the Commonwealth improperly told the jury in closing argument that he and his counsel made up his self-protection claim. Ordway acknowledges that this claim of error was unpreserved and requests that the Court review for palpable error under RCr 10.26 and KRE 103. The Commonwealth's statement that Ordway had made up his self-protection claim was the culmination of a discussion about a recording that had been found on an audio recorder in Turner's vehicle.

Prior to the start of the 2010 trial, the Commonwealth informed Ordway that there was nothing recorded on the device. However, during Ordway's trial, he learned that the recorder had captured the voice of a man saying, at least according to Ordway's interpretation, ". . . going to the store to get ready in about ten minutes to practice okay, we gonna see if he's gonna cry, we gonna record it. Okay." Subsequently, Ordway made a motion for a mistrial due to the Commonwealth's failure to disclose the existence of the recording, which was denied. While the recording was later discussed by both Ordway and the Commonwealth during closing argument it was not played in the 2010 trial. However, during the retrial Ordway played the recording and had a witness authenticate the voice on the recording as that of Turner.

During the Commonwealth's closing argument, the prosecutor focused on the contradictions in Ordway's 2010 trial testimony and his testimony on retrial. The Commonwealth argued that the tape recording did not match the

version of events that Ordway gave in his 2010 testimony. According to the prosecutor, Ordway had to alter his version of events for the retrial, by testifying about the stop at the convenience store, so as to not conflict with the audio recording. The Commonwealth concluded that this was all part of an effort by Ordway to manufacture a self-protection claim.

As we have previously explained, "[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that—*an argument.* A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth,* 744 S.W.2d 407, 412 (Ky. 1987) (emphasis in original). Accordingly, the prosecutor was permitted to point out the inconsistencies in Ordway's version of events and suggest that the self-protection defense was an invention. While it was inadvisable for the Commonwealth to suggest that Ordway's counsel was complicit with Ordway in making up a self-protection defense, the prosecution's remark does not constitute palpable error.

Last, Ordway assigns as error the Commonwealth's argument that he had made up details about Turner and Lewis's criminal history. The Commonwealth's closing argument was as follows:

> When you kill your two witnesses who really know what happened, you can claim and argue whatever you want to. They can't defend themselves, they can't clarify, they can't give you the true information about their past, so the defendant is free to make up whatever he wants, he's free to trash them however he wants, he's free to claim whatever crimes he claims that they committed all he wants.

Ordway objected to this line of argument contending that the Commonwealth was suggesting that he was lying about Turner's homicide conviction. Further, he requested that the trial court admonish the jury, informing them that Turner indeed had a prior conviction. The trial court concluded that the Commonwealth's statement was a permissible argument on the evidence and overruled the objection.

We agree with Ordway that this portion of the Commonwealth's closing argument was improper. While parties are given substantial latitude in closing argument, the Commonwealth's argument exceeded the bounds of permissible commentary. The Commonwealth's argument called into doubt whether Ordway had testified truthfully about Turner's prior homicide conviction. Previously, the Commonwealth had succeeded in barring the admission of a certified record of that conviction and the testimony of a surviving witness to that incident in 2000.[12] Rather, Ordway was limited to his own testimony to detail Turner's criminal history. The Commonwealth's closing argument sought to portray Ordway as a liar and called into question the truth of his statements about Turner. As the existence of Turner's conviction was not in dispute, the Commonwealth's statement was outside the bounds of proper argument.[13]

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[12] As noted above, these evidentiary rulings were not an abuse of the trial court's discretion.

[13] The Commonwealth claims that it was not calling into question the truth of Ordway's statements about Turner in closing argument. Rather, the Commonwealth notes that the prosecutor was making general comments and used the word "witnesses," (meaning both Turner and Lewis) as opposed to just Turner during closing argument. Further, the Commonwealth maintains that its comments were

Despite the fact that the prosecutor's remarks were clearly improper reversal is only required if the misconduct is "flagrant" or if each of the *Barnes* factors is satisfied. While defense counsel made a timely objection and the trial court failed to cure the error with an admonition to the jury, the prosecutor's misconduct does not warrant reversal under *Barnes* as there was overwhelming proof of Ordway's guilt. The jury heard the testimony of multiple eye-witnesses of Ordway shooting both victims after their vehicle crashed and the victims were incapacitated. Ordway was also apprehended at the scene of the crime after trying to flee by attempting to carjack two passing motorists. Further, police recovered the murder weapon which Ordway admitted using to kill both victims. As such, there was overwhelming evidence presented of Ordway's guilt.

However, this does not end our inquiry, because reversal is justified if the closing argument comments were flagrant and, as such, rendered the trial fundamentally unfair. We employ a four-part test to determine whether a prosecutor's improper comments amount to flagrant misconduct. The four factors to be considered are: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Hannah v. Commonwealth*,

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permissible arguments on the evidence. We disagree. It is clear from the context of the Commonwealth's argument that the prosecutor sought to portray Ordway's statements about Turner's criminal history as lies.

306 S.W.3d 509, 518 (Ky. 2010) (citing *United States v. Carroll*, 26 F.3d at 1385), superseded by statute KRS 503.055 and 503.050).

As to the first factor Ordway was prejudiced by the Commonwealth's statement. The Commonwealth's statement cast doubt on Ordway's testimony to the jury about Turner's criminal history. Based on the Commonwealth's argument, the jury could have believed that Ordway was lying about Turner's homicide conviction. This factor weighs in Ordway's favor.

As to the second factor, the Commonwealth's statement was isolated. After the prosecutor made this impermissible argument, she moved away from suggesting that Ordway lied about his victims' criminal history to focus on arguing that Ordway's claim of self-protection was meritless. While Ordway contends that this was an extension of the Commonwealth's previous impermissible argument, it was not. Rather, it was proper argument for the Commonwealth to call into question the veracity of Ordway's self-protection claim. Further, it is important to note that the Commonwealth's remarks occurred during the closing argument of a lengthy trial. This factor weighs in the Commonwealth's favor.

As to the third factor, we can only conclude that the comments were deliberately placed before the jury. This factor weighs in Ordway's favor. The fourth factor is the weight of the evidence against Ordway. We have previously explained how strong the evidence of Ordway's guilt was, and thus this final factor weighs in the Commonwealth's favor.

As such, the results of four-factor test to determine whether the Commonwealth's argument was flagrant are two factors weighing in Ordway's favor, while two weigh in the Commonwealth's. In such a "state of relative equipoise," the Court employs the general test for whether relief for prosecutorial misconduct is proper—namely whether the improper comments undermined the essential fairness of Ordway's trial. *Mayo v. Commonwealth*, 322 S.W.3d 41, 57 (Ky. 2010) (citing *Torrence v. Commonwealth*, 269 S.W.3d 842, 844 (Ky. 2008)).

We cannot conclude that the prosecutor's closing statements questioning whether the victims really had criminal histories (which Turner clearly did) was so egregious as to undermine the essential fairness of Ordway's trial. The Commonwealth skated perilously close to the line with this argument, however, and is admonished that such conduct may well justify reversal in future cases.

**V. The Trial Court Properly Informed the Jury About Sequestration.**

Ordway argues that the trial court erred by informing the jury that the parties would not agree to waive sequestration. Specifically, he contends that the trial court's announcement "alienated and antagonized" the jury as to both parties.

Rule of Criminal Procedure (RCr) 9.66 provides: "[w]hether the jurors in any case shall be sequestered shall be within the discretion of the court, except that in the trial of a felony charge, after the case is submitted for their verdict, they shall be sequestered unless otherwise agreed by the parties with approval of the court." The plain language of this rule provides that sequestration is

mandatory (unless the parties agree otherwise) after a felony case has been submitted to the jury for its verdict. *Davidson v. Commonwealth*, 555 S.W.2d 269, 271 (Ky. 1977); *See also Bowling v. Commonwealth*, 873 S.W.2d 175, 182 (Ky. 1993) *as modified on denial of rehearing* (Mar. 24, 1994) ("Sequestration is required only after a felony case has been submitted to a jury for its verdict.").

In the case at bar, during the jury's guilt deliberation, the jury sent out a note that they wanted to conclude their deliberations for the day and then resume the following morning. After the trial court informed the parties about the jury's note, Ordway advised the trial court that he would not agree to waive the sequestration of the jury. During the ensuing discussion, the trial court informed counsel that the jury would be advised that the parties did not waive the rule against sequestration. As such, the jury could return to its deliberations that evening, but if they still wanted to break or were unable to reach a verdict that evening that they would be sequestered. Ordway objected to the trial court's intention to inform the jury that the parties did not waive the rule regarding sequestration. The trial court overruled Ordway's objection and informed the jury of their options. Afterward, the jury continued its deliberations and returned a verdict later that evening.

Ordway alleges that the trial court erred by informing the jury that the parties did not waive sequestration. He contends that the trial court's announcement "alienated and antagonized" the jury, *albeit* with respect to both parties. Further, he contends that the trial court is prohibited from suggesting in any way who is responsible for the sequestration. In support of this

position, Ordway cites this Court to *McIntyre v. Commonwealth*, 671 S.W.2d 775 (Ky. App. 1984). In *McIntyre*, during the jury's guilt deliberations the trial court elected to adjourn the proceedings for the evening. *Id.* at 776. Subsequently, McIntyre requested that the trial court sequester the jury. *Id.* The trial court denied the motion and proceeded to inform the jury about the motion and that the defense had made it. *Id.* On appeal, the Court of Appeals concluded that reversal was required due to the mandatory nature of RCr 9.66. *Id.*

However, the case at bar is clearly distinguishable from *McIntyre*. Unlike in *McIntyre*, the trial court was aware of its obligations under RCr 9.66 and informed the jury if they were to adjourn for the evening that they would be sequestered. Additionally, the trial court did not identify which party was unwilling to waive the rule requiring sequestration. The trial court's statement to the jury simply restated the requirements of RCr 9.66,[14] and as such, was an acceptable explanation of the jury's options during their deliberations and the rule governing sequestration. There was no error, but we do note that the

[14] Ordway also relies on *Morton v. Commonwealth*, 284 S.W.2d 670 (Ky. 1955), to argue that the trial court's statement to the jury concerning sequestration was error. In *Morton*, the trial court, in the presence of the jury, asked Morton's counsel if he had any objection to excusing the jury for a lunch break. *Id.* at 672. Morton's counsel answered in the negative. *Id.* On appeal, our predecessor Court, deemed it improper for the trial court to put counsel in the position of having to agree or object to the separation of the jury while in their presence. *Id. Morton* is also clearly distinguishable from the case at bar. Ordway's counsel was not asked in front of the jury for his views on sequestering the jury. Rather, Ordway's request was made outside the presence of the jury and the jury was not informed which party would not waive sequestration.

better practice is not to attribute sequestration to the parties. Sequestration can be explained as simply a requirement of Kentucky law when the jury is deliberating and has not yet reached a verdict.

**VI. It Was Not Reversible Error For the Trial Court to Shackle Ordway During the Penalty Phase.**

Ordway next contends that the trial court improperly ordered that he be shackled during the penalty phase of his trial. After concluding his opening statement for the penalty phase, Ordway's counsel became aware that Ordway had been shackled. He then objected to the shackling and requested a mistrial. In overruling Ordway's motion, the trial court explained that the shackling was mandatory due to jail policy.

"Under the common law, shackling a defendant during trial, absent exceptional circumstances, was heavily disfavored." *Barbour v. Commonwealth*, 204 S.W.3d 606, 610 (Ky. 2006) (citing *Deck v. Missouri*, 544 U.S. 622, 626, 125 S. Ct. 2007 (2005)). In *Tunget v. Commonwealth*, 198 S.W.2d 785, 786 (Ky. 1946) our predecessor court as a general rule condemned the shackling of a defendant during trial. The *Tunget* Court, explained that "[a] court would hardly be justified in permitting [shackling] to be done in one murder case out of an average hundred coming to trial." *Id.* Rather, the Court opined that shackling should be reserved for only the most exceptional cases, cases in which the trial court has grounds to believe that a defendant "might attempt to do violence or to escape during their trials." *Id.*

The *Tunget* Court's concern over the shackling of prisoners was later addressed in our Kentucky Rules of Criminal Procedure. RCr 8.28(5) states: "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." This restriction does not just apply to the guilt phase of a trial, but applies to all jury-observed aspects of a criminal trial. *Barbour*, 204 S.W.3d at 612. When reviewing the decision to keep a defendant shackled before the jury, we accord the trial court great deference. *Id.* at 614. However, that discretion is not unfettered and a decision by the trial court to shackle a defendant without "any substantive evidence or finding . . . that [a defendant] was either violent or a flight risk" is an abuse of that discretion. *Id.*

In the case at bar, the shackling of Ordway was not based on any specific finding of extraordinary circumstances, but rather the trial court's mere explanation that shackling was "jail policy." By failing to consider the individual circumstances of Ordway's case to determine if there were extraordinary circumstances which warranted shackling, the trial court unquestionably abused its discretion.

However, while it is clear that the trial court erred, additional analysis is necessary to determine whether that error requires us to vacate Ordway's sentence. Ordway argues that his shackling not only violated RCr 8.28(5), but also the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The violation of RCr 8.28(5) is subject to harmless

error analysis.[15] *Barbour*, 204 S.W.3d at 614. As to his constitutional claims, "[t]he fact that an error involves a constitutional right does not preclude harmless error analysis." *Talbott v. Commonwealth*, 968 S.W.2d 76, 83-84 (Ky. 1998) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967)). Rather, it is required that the complained errors be shown to be "harmless beyond a reasonable doubt" in order to be deemed harmless. *Id.*

Ordway does not suggest what impact his being shackled had on the sentence that he received. Rather, he simply notes that his shackling was error. The Commonwealth contends that while it was error for the trial court to shackle Ordway, the error was harmless beyond a reasonable doubt. We agree.

During the penalty phase the jury was asked to consider a single aggravating factor—that Ordway's acts were intentional and resulted in multiple deaths. As the jury had previously found Ordway guilty of two counts of intentional murder it was inevitable that the jury would find the existence of the aggravating factor. Subsequently, the jury recommended a sentence of life imprisonment without the possibility of parole for twenty-five years for each of the two counts of murder. Ordway notes that this was not the minimum

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[15] RCr 9.24 governs the application of harmless error review. It reads:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

sentence that the jury could have recommended. However, it also was not the maximum because the jury had the option to recommend life without the possibility of parole or even death. Further, the jury's recommended sentences of life without the possibility of parole for twenty-five years, were contrary to the recommendation made by the prosecutor who advocated for the imposition of the death penalty or alternatively for life imprisonment without the possibility of parole.

Additionally, during the penalty phase the Commonwealth informed the jury that Ordway had been convicted of the following felony offenses as an adult: four counts of first-degree wanton endangerment in 1998; six counts of first-degree wanton endangerment and first-degree criminal mischief in 2000; possession of a firearm by a convicted felon in 2001; and second-degree escape in 2006. As such, the jury was aware that in addition to committing two intentional murders that Ordway had a significant criminal history. Yet, the jury declined to recommend either of the two most severe penalties available. Therefore, while the trial court's shackling of Ordway was error, we conclude it was harmless beyond a reasonable doubt.

**VII. The Trial Court Followed KRS 532.055 in Permitting the Commonwealth to Inform the Jury of Ordway's Prior Convictions.**

Ordway's final claim of error is that the trial court erred by permitting the Commonwealth to exceed the scope of KRS 532.055 when it told the jury about his prior convictions. Specifically, he alleges the error arose when the Commonwealth informed the jury that Ordway's prior convictions for first-

degree and second-degree wanton endangerment and second-degree assault were accomplished through the use of a handgun.

KRS 532.055(2)(a) provides in relevant part, that in the sentencing stage of felony cases, "[e]vidence may be offered by the Commonwealth relevant to sentencing including: 1. [m]inimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; [and] 2. [t]he nature of prior offenses for which he was convicted . . . ." In *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011) we held "that the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." Further, we suggested that this be achieved "either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself." *Id.*

In the case at bar, the trial court permitted the Commonwealth to read from portions of the indictments of the circuit court cases in which Ordway had been found guilty. In its presentation for each conviction the Commonwealth identified: the case number; the date of the offense; and a short summary of the elements of that offense. The Commonwealth offered the following summaries of Ordway's convictions:

> Court exhibit B is case number 97-CR-1669. The date of the offense is May 16th of 1997. The offense [is] four counts of wanton endangerment in the first-degree. The defendant's name is Carlos Ordway. Count one—On or about the 16th day of May 1997, Jefferson County, Kentucky, the above named defendant, Carlos Lamont Ordway, committed the offense of wanton endangerment in the first-degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engaged in conduct which created a

substantial danger of death or serious physical injury to a person when he fired a handgun in his direction.

Court exhibit C is case number 99-CR-420. The date of the offense is November 11th of 1998. The offense is six counts of wanton endangerment first-degree and one count of criminal mischief first-degree. The defendant's name is Carlos Ordway. Count one – On or about the 11th day of November 19098, in Jefferson County, Kentucky, the above-named defendant, Carlos Ordway, acting alone or in complicity, committed the offense of wanton endangerment in the first-degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engaged in conduct which created a substantial danger of death or serious physical injury to a person when he fired a weapon in his direction.

Court exhibit G is case number 04-F-12282. The date of that offense is September 2nd of 2004. The offense is wanton endangerment in the second-degree. The defendant is Carlos Ordway. On September 2nd, 2004, the defendant committed the offense of wanton endangerment second-degree when he pointed a gun at another person.

Court exhibit J is case number 92-FJ-3243-27. The date of that offense is May 22nd of 1995. The offense is assault second with a gun. Defendant's name is Carlos Ordway. On May 22nd of 1995, the defendant committed the offense of assault second-degree with a gun when he shot someone with a gun, a deadly weapon.

Ordway argues that these summaries were improper as the Commonwealth was not permitted to inform the jury that he committed the offense of first-degree wanton endangerment by firing a handgun or second-degree wanton endangerment by pointing a gun at another person. However, the Commonwealth was permitted to explain the method employed by Ordway to wantonly endanger his victims. As we explained in *Mullikan* the Commonwealth was empowered to use an "acceptable form book" to convey the elements of the crimes previously committed to the jury. The summaries employed by the Commonwealth

were substantially similar to the exemplars contained in William S. Cooper and Donald P. Cetrulo, *Kentucky Instructions to Juries, Criminal* § 3.58, § 3.59 (5th ed. 2007) [hereinafter Cooper's *Instructions*].

For example, in Cooper's *Instructions* the elements of first-degree wanton endangerment are as follows:

> A. That in this county on or about _____ (date) and before the finding of the Indictment herein, he _____ (method);
> B. That he thereby wantonly created a substantial danger of death or serious physical injury to _____ (victim);
> AND
> C. That under the circumstances, such conduct manifested extreme indifference to the value of human life.

The proof presented by the Commonwealth regarding Ordway's prior convictions covered only these elements, including identifying the method employed to commit the offense. As for the second-degree assault conviction from 1995, the Commonwealth properly omitted the name of the victim and his occupation as a police officer, when informing the jury of that prior conviction. Similarly, the Commonwealth followed the elements listed in Cooper's *Instructions* when presenting Ordway's conviction for second-degree assault. In sum, there was no error in how the Commonwealth presented Ordway's prior convictions to the jury.[16]

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[16] Ordway argues that that the final judgments for each of Ordway's prior convictions are silent as to whether Ordway fired a gun. He states that "the contention that the offenses involved shooting a gun relies on hearsay and hearsay is unreliable. It may convey a misleading or inaccurate impression of what actually occurred." While the final judgments do not contain a detailed synopsis of the facts underlying Ordway's convictions, there was sufficient information present in the certified records to support the summaries employed by the Commonwealth.

## VIII. There is No Cumulative Effect of Multiple Errors That Would Justify Reversal.

Finally, Ordway requests that this Court overturn his convictions on the grounds of cumulative error. *See Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992) (stating that "the cumulative effect of the prejudice" from multiple errors can require reversal). This doctrine essentially recognizes that "multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown*, 313 S.W.3d at 631. Yet, the application of the doctrine has been limited so as to apply to those situations "where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Id.* (citation omitted). If the errors have not "individually raised any real question of prejudice," then cumulative error is not implicated. *Id.* (citing *Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky. 2002). While Ordway's trial certainly was not error free, the errors did not individually or cumulatively render the trial fundamentally unfair. Accordingly, we reject Ordway's cumulative error argument.

## CONCLUSION

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

All sitting. All concur.

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