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RENDERED: SEPTEMBER 22, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000034-MR

RANDALL THOMAS HESTER — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 12-CR-00058-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

Appellant, Randall Thomas Hester, appeals from a judgment of the Warren Circuit Court convicting him of first-degree manslaughter in connection with the shooting death of Jonathan Havens, two counts of first-degree wanton endangerment, being a second-degree persistent felony offender, and sentencing him to thirty-five years in prison.[1]

[1] Pursuant to KRS 532.055(2)(c), the jury recommended a separate sentence for each charge, as follows: twenty years' imprisonment for first-degree manslaughter, enhanced to thirty years by the persistent felony offender (PFO) conviction, to be served consecutively to the five year concurrent sentences recommended for each first-degree wanton endangerment conviction. The trial court did not fix a sentence on any of the individual charges, but instead imposed a single sentence of imprisonment of thirty-five years, implicitly encompassing the concurrent five year sentences for wanton endangerment and running them consecutively to the enhanced thirty year sentence for first degree manslaughter. We can presume by doing the math that the trial court imposed the sentences recommended by the jury, but when multiple charges are involved, some of which may not survive appellate review, it is necessary to explicitly state the sentence imposed for each crime, together with the court's determination of its consecutive or concurrent nature.

Appellant cites several grounds for appellate relief. Because we are convinced that the trial court erred by admitting testimony of out-of-court statements of witnesses imputing to Appellant a highly-incriminating, confessional statement, and because we cannot regard the error as harmless, we reverse the convictions and remand the case for retrial. Because we also conclude that RCr 6.18 does not permit the joinder of the wanton endangerment charges with the first-degree manslaughter charge, we direct that a trial on the wanton endangerment charges must be conducted separately from a trial on the first-degree manslaughter charge. We address other issues raised by Appellant which are likely to recur upon remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

The testimony presented at trial included the following. On the evening of November 10, 2011, Appellant and his girlfriend, Jessica Womack, gathered with other drug-using acquaintances at Judy Seabolt's home in Warren County. According to Seabolt, Womack and Appellant had an argument that escalated to physical violence, with Appellant beating Womack and pointing a pistol at Womack and Seabolt. The latter act would later become the basis of Appellant's two wanton endangerment convictions. At trial, Womack denied that Appellant beat her and denied that he pointed a gun at her and Seabolt.

As a result of the altercation, Seabolt called 911 for assistance. Appellant, who had outstanding warrants against him and apparently wanted to avoid contact with police, called his friend and fellow drug user, Wendy Webb, to pick him up at Seabolt's residence. At about the same time, another

associate, Jason Estlack, had also contacted Webb for the purpose of doing drugs together. Estlack was with Webb when she arrived at the Seabolt residence to pick up Appellant.[2] After leaving the Seabolt residence, the trio of Appellant, Estlack, and Webb picked up Jonathan Havens, who was also wanted on outstanding arrest warrants.

The foursome devised a plan for manufacturing methamphetamine and set out to do so with Webb driving her vehicle; Estlack seated in the front passenger seat; Appellant in the left rear seat behind Webb; and Havens in the right rear seat behind Estlack. According to Estlack, when they arrived at a rural spot near Red Pond Road, Appellant told Webb to stop the vehicle. Estlack testified that Appellant, with a pistol in his lap, told Havens to get out of the car; that Havens then grabbed for the gun on Appellant's lap, causing the gun to discharge, shooting Havens in the leg. Estlack said that as Appellant and Havens continued to fight over the gun, it discharged again, with the bullet hitting Havens in the head. Estlack testified that Appellant then pulled Havens out of the car and left him dying on the side of the road as they drove away. Havens was found alive, but later died at the hospital.

The next morning, Estlack went to the police and told the foregoing version of the events to Detective Laura Phillips. Phillips located Webb, who was at first reluctant to talk. Eventually Webb admitted that Havens had been

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[2] Appellant posits Jason Estlack as an alternative perpetrator. Testimony suggested that Appellant and Estlack had recently been in conflict because Appellant believed that Estlack had been secretly involved with Womack.

shot in her vehicle, but she told police that Estlack, not Appellant, had shot Havens.[3] According to Webb's version of events, Estlack started an argument with Havens, accusing Havens of seeing Estlack's girlfriend, Jessica Miller. Webb said that Estlack turned around in the front passenger seat and swung his fist at Havens. She then heard the "pop" of a gunshot and saw Estlack leaning into the back seat fighting with Havens over a gun. She heard a second shot and saw Estlack turn back into the front seat with a gun in his hand. According to Webb's statement, Estlack pulled Havens from the car and ordered her to the passenger seat so that he could drive away. She said that Estlack later ordered her to clean the car and dispose of items belonging to Havens. Webb told Detective Phillips that she never saw Appellant with a gun that day and that she never heard Appellant arguing with Havens.

Police found and arrested Appellant four days after the shooting. Upon interrogation, he denied that he shot Havens and provided an explanation of the incident that largely matched Webb's version. A significant amount of evidence at trial related to an ongoing conflict between Estlack and Havens over Jessica Miller. Appellant was indicted and charged with murdering Havens. He was also indicted for two counts of wanton endangerment based upon Seabolt's allegation that he had pointed a gun at her and Womack several hours before the Havens shooting. Appellant was also indicted for being a second-degree persistent felony offender.

[3] Webb was later convicted of tampering with evidence in relation to the shooting.

At trial, Appellant asserted his innocence by presenting evidence that Estlack shot Havens. The jury heard Webb's account of the shooting. The jury also heard the testimony of several other witnesses that Estlack had an ongoing feud with Havens over Jessica Miller, thus imputing to Estlack an apparent motive for the shooting. Witnesses had also seen Estlack with a pistol in the days before the shooting. One witness testified that Estlack bragged that he had killed Havens and pinned the crime on Appellant. Appellant did not testify but the police interview in which he blamed Estlack for the shooting was played for the jury.

In connection with the shooting of Havens, the trial court appropriately instructed the jury on the offense of murder, either by intentional or wanton conduct, and the corresponding lesser included offenses of first-degree and second-degree manslaughter. For pointing the pistol at Womack and Seabolt, the court instructed the jury on first-degree and second-degree wanton endangerment. The jury found Appellant guilty of first-degree manslaughter and two counts of first-degree wanton endangerment. Enhanced by his second-degree persistent felony offender status, Appellant was sentenced to a total of thirty-five years in prison. This appeal followed.

II. THE IMPROPER ADMISSION OF HEARSAY TESTIMONY REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

Appellant first argues that reversible error occurred when Kandi Hagen and Laurel Ann Heinz were permitted to testify to out-of-court statements allegedly made by Jessica Womack. The prosecutor proffered Womack's out-of-

court statements as prior statements inconsistent with her trial testimony, and therefore, admissible under KRE 801A(a)(1):

> (a) *Prior statements of witnesses.* A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (1) Inconsistent with the declarant's testimony[.]

Appellant objected because the prosecution had failed to lay the proper evidentiary foundation required by the rule: examining the declarant (Womack) about the out-of-court statement as expressly detailed in KRS 613. Absent compliance with this rule, the out-of-court statement simply retains its status as inadmissible hearsay. "Hearsay is not admissible except as provided by [the Kentucky Rules of Evidence (KRE)] or by rules of the Supreme Court of Kentucky." KRE 802.

KRE 613 requires that before evidence can be admitted to show that a witness, other than a party opponent,[4] "made at another time a different statement" he must be asked about that statement "with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it." In *Noel v. Commonwealth*, 76 S.W.3d 923, 930 (Ky.

[4] As defined in KRE 801A.

2002), we explained that "modern cases have consistently required strict compliance with the foundation requirements of . . . KRE 613(a).[5]

The Commonwealth concedes the error but argues that the improper admission was harmless. As an appellee claiming harmless error, the Commonwealth "bears the burden of showing affirmatively that no prejudice resulted from the error." *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) (quoting *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky.1997)). Our attention is thus directed to the harmless error standards established in *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009) and RCr 9.24.[6]

Under *Winstead*, we do not regard a non-constitutional error as harmless unless we "can say with fair assurance that the judgment was not substantially swayed by the error." *Id.* at 688-689. "The inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

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[5] In *Kinser v. Commonwealth*, 741 S.W.2d 648 (Ky. 1987), we "slightly relaxed" the foundation requirements of KRE 613 with respect to the failure to inquire about the date and time of the prior statement, holding that such was not fatal to its admission into evidence where the witness/declarant admitted having the conversation but denied making the statement in question during that conversation. The *Kinser* exception is not applicable here.

[6] "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."

Because Laurel Ann Heinz's testimony purports to impute a confessional statement to Appellant, it presents the more egregious of the two errors. We begin our analysis there.

A. Laurel Ann Heinz's Testimony

Laurel Ann Heinz is the mother of Jason Estlack, the person Appellant identifies as the true perpetrator of the shooting. The Commonwealth called her as a witness, and during her redirect examination, the prosecutor asked her if she had ever heard Womack talk about the shooting. When Heinz affirmed that she had heard Womack discuss the incident, the prosecutor asked Heinz to recite what Womack had said. Appellant's trial counsel objected on hearsay grounds. The prosecutor defended the question by asserting that Womack's out-of-court statement heard by Heinz would be admissible as a prior inconsistent statement because Womack had previously testified that "all she had ever told was that [Appellant] hadn't done it," and that Heinz's response would contradict that assertion. Appellant's counsel pointed out that the rules of evidence, KRE 801A(a)(1) and KRE 613, allow the use of such hearsay only after the out-of-court declarant, Womack, has been asked to explain the apparent inconsistency pursuant to the KRE 613 foundational requirements. The trial court overruled the objection and allowed the testimony to proceed. Consequently, Heinz testified that she overheard Womack telling Estlack that Appellant had said he could not believe what he (Appellant) had done [by shooting Havens], and that he was feeling like committing suicide. The implication of Heinz's testimony was that Appellant

confessed to Womack that he shot Havens and was driven to the brink of suicide for having killed Havens.

Contrary to the rules of evidence, the Commonwealth did not lay the necessary evidentiary foundation for this undeniably dramatic testimony. Womack had testified, but was never asked to verify anything about her alleged statement to Estlack, overheard by Heinz, in which she imputed a confession to Appellant.

The improperly admitted testimony forced the jury to ponder an alleged confession in an otherwise less-than-overwhelming case. The living witnesses to the event were Estlack, Webb and Appellant. Two of those witnesses, Webb and Appellant said that Estlack killed Havens. The verity of Heinz's claim that Womack heard Appellant confess could only be challenged by Womack, and because it was not raised during Womack's testimony, that opportunity never arose. Given the dearth of any direct physical evidence establishing Appellant as the shooter and the conflicting testimony, it is hard to conceive of anything more damning than a guilt-ridden confession. As noted by the United States Supreme Court, "[a] confession is like no other evidence" because it "is probably the most probative and damaging evidence that can be admitted against [a defendant]." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citation omitted). In the context of a coerced confession the Supreme Court has further noted that a defendant is prejudiced by an illegally admitted confession "[p]recisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence," *Lego v. Twomey*, 404 U.S. 477,

483 (1972), and by admitting an illegal confession into evidence, a defendant is "compelled to condemn himself by his own utterances" in violation of his constitutional right to due process of law, *id.* at 485.

The Commonwealth argues that the erroneous hearsay admission of Appellant's putative confession was harmless in light of its forensic expert's testimony that the fatal gunshot to the left side of Havens' head, just above his ear with a back-to-front trajectory of the bullet, could only have been inflicted by a person sitting in Appellant's position in the backseat next to Havens. Correspondingly, the expert opinion suggests that Estlack, seated in the front passenger seat, could not have fired the bullet that followed that trajectory.

We are satisfied that the Commonwealth's seating arrangement theory does little to overshadow the devastating effect of an improperly admitted confession. On cross-examination, the Commonwealth's expert described a scenario in which a person in the front passenger seat could, indeed, inflict a gunshot wound traversing the trajectory applicable here, especially given the testimony of both sides that Havens was fighting in the car with his assailant, whoever that was. The Commonwealth's forensic analysis of the situation is far from dispositive of the factual question of who shot Havens. Given the evidence, there is little doubt that the jury considered Heinz's improper testimony, and we cannot say with "fair assurance" that the resulting verdict and judgment were not substantially swayed by the error. *Winstead*, 283 S.W.3d at 689. Accordingly, we reverse the first-degree manslaughter conviction.

B. Kandi Hagen's Testimony

Appellant also complains on appeal of a second violation of KRE 613 that occurred during the testimony of Kandi Hagen. Because it is an issue that may recur upon remand, we briefly address it here.

Hagen was another member of the extended group of drug-user friends central to this case. When Womack testified she was asked by the prosecutor if she had contacted any witnesses on Appellant's behalf, Womack answered "no." Hagen was called as a witness for the Commonwealth and in an apparent attempt to impeach Womack, the prosecutor asked Hagen if Womack had recently contacted her. Hagen responded that Womack had contacted her. That much of Hagen's answer was clearly proper to refute Womack's answer. But, when Hagen proceeded to describe Womack's out-of-court statement, Appellant's counsel objected.

The trial court overruled the objection. Hagen then testified that Womack had said that she wanted Hagen to talk to Judy Seabolt about whether Seabolt was going to testify that Appellant had a gun. Hagen testified that Womack said she hoped Seabolt did not place Appellant with a gun. Implicit in Hagen's testimony is that Womack wanted Hagen to persuade Seabolt to say that she did not see Appellant with a gun.

For the same reasons explained with respect to Heinz's testimony, Womack's putative out-of-court statement was not admissible as a prior inconsistent statement in exception to the hearsay rule unless the proponent of the evidence, the Commonwealth, complied with the foundational requirements

of KRE 613. While this evidence does not alone deliver the devastating punch of an alleged confession to the extent of swaying the verdict, it provided an additional prejudicial impact on the jury's decision. Upon retrial, if the question again arises, the statement should not be admitted absent compliance with KRE 613.

III. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE OFFENSE OF FIRST-DEGREE MANSLAUGHTER

Appellant argues that the trial court erred by instructing the jury on the lesser offense of first-degree manslaughter. The issue was properly preserved for appellate review by counsel's timely objection to the giving of the instruction. The issue matters, despite the remand for a new trial on other grounds, because if the evidence did not warrant an instruction on first-degree manslaughter, Appellant cannot be retried on that charge. We conclude that the instruction was properly given.

In addition to the instructions on murder, the trial court presented the jury with instructions on second-degree manslaughter based upon the theory that Appellant acted wantonly in causing Havens' death, and instructions on first-degree manslaughter based upon the theory that Appellant acted intentionally in causing Havens' death. Intentional manslaughter can occur in two circumstances. The trial court instructed on each alternative, providing separate verdict forms to assure a unanimous verdict. Appellant was guilty of first degree manslaughter if: 1) he intended to kill Havens but was acting under the influence of an extreme emotional disturbance; or 2) if he specifically

intended, not to kill Havens but to inflict serious physical injury which resulted in his death. The jury convicted Appellant under the latter variant of first-degree manslaughter.

Appellant argues that the instruction was improper because the evidence was not sufficient to support the finding that he had the intent to kill or to injure Havens. We disagree.

In support of his argument, Appellant notes that Estlack was the only witness who testified that Appellant shot Havens. Appellant cites portions of Estlack's testimony which appear to reflect Estlack's belief that the shooting occurred in the course of a struggle over the gun and was, therefore, an accident. Thus, Appellant argues that the only testimony implicating him suggests that the gun discharged accidently when Havens tried to grab it.

We believe the evidence can be reasonably construed to demonstrate that Havens was first shot in the leg, and then a struggle ensued resulting in the fatal head wound. Therefore, a reasonable juror could infer that Appellant's initial intent was to shoot Havens in the leg to inflict a serious physical injury rather than cause death, since a shot to the leg is more indicative of an intent to injure, not to kill. Thus the evidence circumstantially supported the inference that the initial shot was to *injure*, and from that it could similarly be inferred that the second shot was also intended to injure rather than to kill, but went awry because of the struggle and hit Havens' head.

We conclude that the evidence presented adequately supported the trial court's decision to instruct the jury on the offense of first-degree manslaughter

and so, upon remand, Appellant may be retried on that charge. Whether that instruction and the instruction on second-degree manslaughter are appropriate upon retrial depends, of course, on the evidence presented then.

IV. THE MANSLAUGHTER AND WANTON ENDANGERMENT CHARGES WERE IMPROPERLY JOINED

The charges against Appellant were joined in a single indictment. Shortly after his indictment, Appellant moved pursuant to the former RCr 9.16 (now RCr 8.31) to sever the wanton endangerment charges from the murder charge for separate trials. RCr 6.18 allows separate crimes to be joined in the same indictment or information if "the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 9.16 (now RCr 8.31) provides, in relevant part, "[i]f it appears that a defendant . . . will be prejudiced by a joinder of offenses . . . in an indictment . . . or by joinder for trial, the court shall order separate trials of counts . . . or provide whatever other relief justice requires."

The trial court denied Appellant's motion, concluding that the alleged crimes of wanton endangerment (pointing a gun at Womack and Seabolt) and the shooting of Havens were substantially similar and close enough in time as to indicate a continuing course of criminal conduct, and that "presenting the evidence of these offenses in a single trial will not unduly prejudice the defendant."

We have held that "to justify joining separate offenses in a single trial, '[t]here must be a sufficient nexus between or among them.' The required nexus must arise 'from a 'logical' relationship between [the crimes], some indication that they arose one from the other or otherwise in the course of a single act or transaction, or that they both arose as parts of a common scheme or plan." *Cherry v. Commonwealth*, 458 S.W.3d 787, 794 (Ky. 2015) (quoting *Peacher v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013)).

We do not agree that RCr 6.18 authorized the joinder of Appellant's murder charge and the wanton endangerment charges in a single indictment to be tried simultaneously. The two acts, pointing a pistol at Womack and Seabolt and shooting Havens several hours later, bear no similarity of character required for joinder by RCr 6.18. The incidents happened hours apart in different places with different victims in the presence of different witnesses. The only common thread is that both crimes involved a handgun but there is no evidence to indicate that the same gun was used in each crime.

The crimes are obviously not "based on the same acts or transactions" because the action of pointing a gun at Womack and Seabolt was not the same action as shooting Havens. The separate crimes obviously do not "constitut[e] parts of a common scheme or plan" because no "common plan or scheme" is evident, nor has one been identified, for which these disparate acts could each be a part. We cannot conceive of a *common scheme or plan* that encompasses both the pointing of a gun at Womack and Seabolt and the killing of Havens

hours later. Consequently, we conclude that the crimes were from the outset misjoined in a single indictment in violation of RCr 6.18.

We do not conclude that Appellant suffered prejudice by the misjoinder of the offenses in this matter. But having indicated that this case is to be reversed because of other error, we are no longer looking backward to see if prejudice occurred; we are looking ahead to subsequent proceedings in the trial court. RCr 9.16 (now RCr 8.31) provides for the severance of *properly joined* offenses when severance is required to avoid undue prejudice, but nothing in that rule authorizes the joinder of offenses in contradiction of RCr 6.18 even when no prejudice results from the joinder. Therefore, upon remand and retrial, the trial of the wanton endangerment charges shall be severed from the trial of what must now be regarded as the first-degree manslaughter charge.

V. THE CROSS-EXAMINATION OF JERRY BRITT AND KANDI HAGEN WAS NOT IMPROPERLY CURTAILED

Appellant contends that the trial court erred by limiting his ability to cross-examine Commonwealth witnesses Jerry Britt and Kandi Hagen about prior instances of their dishonest conduct. Specifically, Appellant attempted to cross-examine Britt about instances of identity theft and property theft of which Britt was accused but not convicted. The trial court sustained the Commonwealth's objection to this line of questioning. Similarly, the trial court prevented Appellant from inquiring into specific occasions when Kandi Hagen had written cold checks which resulted in convictions. Appellant contends that these rulings violated his due process right to present a complete and

meaningful defense by depriving him of his opportunity to assist the jury in deciding which witnesses to believe.

This issue is controlled by our decision in *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013). In *Allen* we summarized the meaning of and the interplay between KRE 608 (Evidence of Character and Conduct of Witnesses) and KRE 609 (Impeachment by Evidence of Conviction of Crime). *Id.* at 461–67. *Allen* recognized that a trial court is vested with broad discretion in allowing or limiting a party's inquiry into prior instances of dishonest conduct and may indeed permit the introduction of *both* convicted and unconvicted prior instances of conduct reflecting upon dishonesty.

Here, the trial court recognized the *Allen* holding and appropriately applied its discretion to impose limitations on Appellant's efforts to inquire into past specific instances of conduct indicative of dishonesty, stating as follows:

> It appears to me that in this case, especially in this case, there is little need to go beyond that which is convicted to determine . . . your challenge to the witness's credibility. So for the purposes of this trial, I am going to limit counsel, on both sides, to issues that have been convicted.
>
> Now . . . if there's something that is uncharged or unconvicted that you wish to inquire about, just approach the bench and I'll take that up on a case-by-case basis. And I'll tell you why . . . . [If] we get so far afield I'm afraid we get into mini-trials relating to challenges to witnesses, whereas in this case there seems to be a plethora of challenges to these witnesses that do not require us to go to a place of unconvicted offenses. So, right or wrong, I'm going to limit, in my discretion, I'm going to limit us to convictions only.

The trial court's rulings in this case fell well within our holding in *Allen*. In light of numerous other instances of prior dishonest conduct admitted to reflect upon the credibility of both Britt and Hagen, it cannot be said that Appellant was unable to expose the issues of honesty and truthfulness associated with these witnesses. The jury was also aware that these witnesses were willing participants in a drug-dominated social culture that fundamentally relies upon deceit, deception, and dishonesty in the use of their illegal drugs. Accordingly, no error occurred in these evidentiary rulings by the trial court.

VI. THE EXCLUSION OF EVIDENCE CONCERNING ESTLACK'S PRIOR VIOLENT ACTS WAS PROPER

Appellant argues that the trial court erred by limiting his ability to inquire into specific instances of Estlack's past violent conduct. Appellant argues that Estlack's well-documented history of violent conduct was a fundamental element of his defense.

After the trial court sustained the Commonwealth's objection to Appellant's attempt to inquire into Estlack's violent past, he presented by avowal the following episodes of violence: Stephanie Lightfoot obtained a domestic violence order against him upon her claim that Estlack had threatened to kill her; Lightfoot had accused him of assaulting and threatening her on several occasions; Rachel Collins had accused him of threatening and stalking her on two occasions; Ladonna Reeder accused him of domestic violence and abuse; Brandon Hughes said Estlack slapped her multiple times;

Estlack scuffled with police officers, resulting in his being tased; and lastly, Estlack committed a robbery within two weeks prior to his testimony.

As a general rule, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" KRE 404(a). Even when a character trait is admissible, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." KRE 404(b).

Appellant's argument as phrased seems to be that he wanted to introduce Estlack's trait for violent conduct to prove that Estlack most likely shot Havens because such an act would be in conformity with his established trait for violent behavior. That is exactly the prohibited use of evidence espoused by KRE 404(a) and (b). Evidence establishing Estlack as a violent person was not admissible for the purpose of proving that he acted violently on the occasion of the Havens shooting. "We have consistently observed that KRE 404(b) is 'exclusionary in nature,' and 'any exceptions to the general rule that evidence of prior bad acts is inadmissible should be closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.'" *Graves v. Commonwealth*, 384 S.W.3d 144, 147-48 (Ky. 2012) (citing *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (quoting *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982))).

Appellant does not rely upon any of the exceptions to the rule enumerated in 404(b)(1) and (2), i.e., motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake, inextricably intertwined with other evidence. Instead, he relies upon the common law *modus operandi* exception which we have long recognized as a specific addition to the enumerated exceptions. *See Woodlee v. Commonwealth*, 306 S.W.3d 461, 464 (Ky. 2010). However, the application of the *modus operandi* exception requires that evidentiary acts (Estlack's prior violent behavior) and the act to be proven (the shooting of Havens) must show such a "striking similarity" that "'if the act occurred, then the defendant almost certainly was the perpetrator." *Id.* (citing *Clark v. Commonwealth*, 223 S.W.3d 90, 97 (Ky. 2007) (quoting *Billing v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992))). "Although it is not required that the facts be identical in all respects, evidence of other acts of sexual deviance . . . must be so similar to the crime on trial as to constitute a so-called signature crime." *Newcomb v. Commonwealth*, 410 S.W.3d 63, 74 (Ky. 2013) (citations and internal quotations omitted).

The shooting of Havens bears little resemblance to the episodes of domestic violence and other misbehavior cited by Appellant, and thus the *modus operandi* exception has no application to these facts. The trial court properly applied the rules of evidence in excluding the proffered evidence.

VII. APPELLANT WAS NOT PREJUDICED BY THE TIME LIMITS IMPOSED ON CLOSING ARGUMENTS

After discussing the matter with trial counsel, the trial court opted to limit the closing argument for each party to about seventy minutes. After Appellant's counsel had consumed approximately sixty minutes of his allotted

time, the trial court interrupted to ask discretely how much longer would be needed to finish up, cautioning counsel to keep it to fifteen additional minutes. Counsel finished in ten minutes. Appellant complains on appeal that this limitation was an abuse of discretion that impeded his counsel's ability to defend his client.

> [T]he time that shall be allowed for argument is a matter in the discretion of the trial judge, and . . . unless it affirmatively appears that this discretion has been abused to the prejudice of the accused, it will not amount to a reversible error. . . . The trial court should, of course, allow counsel for the accused in every case reasonable time and opportunity to present the reasons why there should be an acquittal; but it is obvious that the time that should be allowed depends upon the facts and circumstances of each particular case. It is not to be altogether regulated by the number of witnesses that are introduced, as a very complicated state of facts might be presented by the testimony of a single witness. It is rather to be controlled by the simplicity of the facts and circumstances surrounding the transaction.

Young v. Commonwealth, 119 S.W.2d 647, 650-51 (Ky. 1938) (citations and internal quotations omitted).

The record discloses that the trial court identified a specific basis for its imposition of a time limitation on closing arguments--the ability of the jury to endure a prolonged oral argument phase at that juncture of the trial proceedings. The trial court expressly invited Appellant's counsel to seek additional time if needed, and he did not opt to do so. We find no error in the limitations imposed under the circumstances of this case.

VIII. MOOT ISSUES

Appellant raised on appeal several issues which we must now regard as moot, and therefore, of no further consequence as they are unlikely to recur upon retrial. Appellant complained that the trial court erred by allowing the introduction of prior acts pursuant to KRS 404(b) despite the Commonwealth's failure to comply with the advance notice requirement of KRE 404(c). With the prospect of a retrial, if the Commonwealth elects to offer the same evidence, the notice requirement of KRE 404(c) must be observed.

Appellant also complained that he was prejudiced by the failure of the Commonwealth to comply with the discovery order directing it to obtain and produce certain Facebook records relating to Estlack. At trial the Commonwealth acknowledged its neglect in failing to obtain the records, and continues to acknowledge Appellant's entitlement to the records in its present arguments addressing the issue. With the remand at hand, ample time is available to cure this deficiency.

Appellant also argues that the trial court failed to adequately address the concerns of the jury expressed in notes delivered to the trial court during the jury deliberations. Because we regard the issue as highly unlikely to recur, we decline to address it further.

Appellant claims that he was prejudiced by the prosecutor's improper use of leading questions. To address the specifics of Appellant's argument on this point would be fruitless if the issue fails to recur. We are confident that the trial court is well aware of the general proscription of KRE 611(c) against

the use of leading questions on the direct examination of a witness and the proper scope of its discretion in administering the rule.

IX. CONCLUSION

For the foregoing reasons the judgment of the Warren Circuit Court is vacated and the proceeding is remanded for a new trial consistent with this opinion.

Minton, C.J.; Keller, Noble, and Venters, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion in which Cunningham, and Hughes, JJ., join.

WRIGHT, J., CONCURRING IN PART AND DISSENTING IN PART: While I concur with the majority in all other respects, I dissent as to its direction that the manslaughter and wanton endangerment charges should be severed on retrial. The trial court noted in its order that "[t]he offenses sought to be severed by the defendant are similar in substance and occurred close in time. In this case, the nature of the charges and their proximity in time to one another is indicative of a continuing course of conduct. Moreover, presenting the evidence of these offenses in a single trial will not unduly prejudice the defendant." As we have stated: "[i]t is well settled that the trial judge has broad discretion with regard to joinder and the decision of the trial judge will not be overturned in the absence of a showing of a clear abuse of discretion or prejudice to the defendant." *Rearick v. Commonwealth*, 858 S.W.2d 185, 189 (Ky. 1993). The trial court is in the best position to make such

determinations—and this will remain true on remand. We should not prospectively remove the trial judge's discretion to consider the evidence and make a ruling in accord with it on remand.

As to the wanton endangerment charge, Seabolt testified that she called police after Appellant beat up his girlfriend, Womack. Seabolt testified that Appellant pointed a gun at her and Womack after Seabolt called 911, and that Appellant said "I can't believe you called the law on me." He then spoke to two individuals to procure a ride and left in a vehicle with them. Womack admitted they were doing drugs at the residence, but denied making drugs.

According to testimony, Appellant had a handgun when he entered the car with the two other individuals. The car soon stopped and picked up Havens, Appellant's alleged victim, who sat in the back seat with Appellant, where the two discussed manufacturing methamphetamine. According to testimony, Appellant and Havens got into a disagreement and Appellant told Havens to get out of the car. Havens then grabbed for the gun Appellant held in his lap pointing in Havens direction. The gun discharged twice during the ensuing struggle—with one bullet hitting Havens in the leg and the other hitting him in the head.

As the trial court found, these crimes are clearly tied in proximity and by a common course of conduct. As to the evidence of one crime being admissible in a trial for the other, the Commonwealth would be entitled to prove that Appellant was in possession of a handgun at the time he committed both crimes. Seabolt testified that Appellant pointed a black pistol at her and

Womack after Seabolt called 911. Appellant then spoke with the two individuals who picked him up in the car and stated that he had to get out of there, as the police were on their way. He entered the car with a black pistol. This is a continuing course of conduct in which proof of the events surrounding the wanton endangerment charge would also be admissible in proving the manslaughter charge.

I believe the charges were "based on the same acts or transactions connected together," RCr 6.18, and would not strip the trial court's broad discretion concerning joinder on remand. *Rearick*, 858 S.W.2d at 187.

Cunningham and Hughes, JJ., join.

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