

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

# Supreme Court of Kentucky

2015-SC-000311-MR

BRITT DECKERT

APPELLANT

V. ON APPEAL FROM CRITTENDEN CIRCUIT COURT  
HONORABLE C. RENE WILLIAMS, JUDGE  
NO. 13-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Britt Deckert, was twenty-six years old in the summer of 2013. He lived with his father, his half-brother, A.J., and A.J.'s wife, Emma Belle, and step-daughter, Jessica,<sup>1</sup> in a small house in Marion, Kentucky. Appellant and Emma Belle had previously been engaged in a sexual relationship. On August 1, 2013, A.J. was attempting to help Appellant repair a television at their home. While A.J. had his back turned to Appellant, Appellant attacked A.J. with a taser. Appellant then began hitting and kicking A.J. A.J. eventually broke free from his brother's assault and grabbed a kitchen knife from a nearby table. A physical altercation ensued and Appellant forcibly removed the knife from A.J.'s grasp.

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<sup>1</sup> A pseudonym is being used for the child victim.

While A.J. had Appellant pinned on the kitchen floor, Appellant grabbed a “wolverine claw”<sup>2</sup> that was located in a nearby box and began stabbing A.J. in the back. Emma Belle ran into the kitchen, screamed, and struggled with Appellant, allowing A.J. to temporarily break free and retreat to the bathroom. Emma Belle was cut by the wolverine claw during this ordeal. Soon thereafter, A.J. grabbed Emma Belle and Jessica and pushed them out the back door. Appellant continued to stab A.J. while he was helping his family to safety.

Offering no reprieve, Appellant followed A.J. outside where the two continued to fight. Appellant eventually relinquished the wolverine claw and ceased stabbing A.J. A.J. was subsequently taken to the hospital where he died from blood loss caused by the multiple stab wounds inflicted by Appellant.

Appellant was indicted for murder (A.J.), second-degree assault (Emma Belle), and first-degree wanton endangerment (Jessica). A Crittenden Circuit Court jury convicted Appellant of first-degree wanton endangerment and also of the lesser included offenses of fourth-degree assault and first-degree manslaughter. The jury recommended a total sentence of 25 years’ imprisonment which the trial court imposed. Appellant now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Three issues are raised and addressed as follows.

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<sup>2</sup> The wolverine claw is a life-sized model of a hand containing two blades protruding from the knuckle area of the device. The blades appear to be between approximately 9 and 10 inches in length.

### **Excluded Evidence**

Appellant argues that the trial court's ruling excluding evidence denied him the right to present a defense. More specifically, the court foreclosed the introduction of evidence demonstrating that A.J. had sexually abused Appellant, Emma Belle, and Jessica. However, the trial court did allow the defense to introduce evidence that A.J. had a history of physical abuse toward Appellant. Appellant properly preserved his argument that an evidentiary violation occurred. We will review for an abuse of discretion. For the first time on appeal, Appellant also raises a constitutional argument. That argument is unpreserved and will be reviewed for palpable error. *Walker v. Commonwealth*, 349 S.W.3d 307, 313 (Ky. 2011) ("even alleged constitutional errors, if unpreserved, are subject to palpable error review."); see also *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010).

Appellant introduced by the avowal testimony of Emma Belle and Jessica that A.J. had physically and sexually abused them. The defense also obtained screen shots of Emma Belle's Facebook account revealing electronic conversations between Emma and her paramour, Police Officer Jerry Parker. In one message, Officer Parker responded to Emma Belle concerning the sexual abuse perpetrated by A.J., telling her to keep it a secret because it could "mess up" the then pending criminal case against Appellant. Appellant also sought to introduce records from The Pennyroyal Center, a mental health provider, alleging that A.J. had molested a young relative while he was a teenager.

Based on this evidence, the defense argued that Appellant killed his brother in order to teach him a lesson and to prevent the possibility of additional abuse by his brother. The trial court determined that the evidence indicating sexual abuse was more prejudicial than probative. The court also determined that since the Facebook messages occurred after A.J.'s death, they were not relevant. However, the court permitted the defense to present evidence of A.J.'s physical abuse against Appellant.

We addressed a similar issue in *McGaha v. Commonwealth* and determined that the defendant's proffered evidence demonstrating the victim's acts of domestic violence against the victim's wife was inadmissible. 414 S.W.3d 1 (Ky. 2013). Relying on *Driver v. Commonwealth*, 361 S.W.3d 877, 885–86 (Ky. 2012), we specifically concluded that the domestic violence evidence—which occurred some fifteen years prior to the crime being tried—was too remote to be admissible. *MaGaha*, 414 S.W.3d at 9.

Unlike the evidence presented in *McGaha*, Appellant has offered no specific evidence concerning the remoteness of the alleged sexual abuse described in the avowal testimony. However, Appellant states in his brief that he was sexually abused starting when he was a “young child.” Appellant also claims that the alleged instances of sexual abuse towards Jessica occurred “a couple years before, when she was thirteen.” Appellant provides no details concerning the remoteness of the alleged sexual abuse against Emma Belle. Thus, there is no evidence that any of the alleged acts of sexual misconduct committed by A.J. occurred so close in time to A.J.'s murder, “as to be

considered a part of the same transaction.” *Driver*, 361 S.W.3d at 885–86 (observing that prior bad acts against third parties are generally inadmissible).

The privileged mental health records were also inadmissible unless Appellant satisfied at least one of the exceptions enumerated in either KRE 506(d) or KRE 507(c). *See also Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003) (providing circumstances in which defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege). A *Barroso* hearing was neither requested nor conducted here.

Moreover, any evidentiary error that may have occurred was harmless. The jury heard testimony that A.J. physically abused his family, including Appellant. Critically, the jury convicted Appellant of the lesser-included offense of first-degree manslaughter. Appellant also enjoyed the benefit of a self-protection instruction.

Therefore, although the jury determined that self-protection did not require acquittal here, it convicted Appellant of the most reduced degree of homicide permitted in the jury instructions. And although Appellant also received the maximum sentence permitted for that crime, mere speculation concerning what reduced sentence the jury may have recommended had the sexual abuse evidence been introduced does not require reversal in this instance.

In that same vein, Appellant has failed to establish that the court's evidentiary determination deprived him of the right to present a defense and to

due process. Therefore, there was no constitutional violation here, and certainly no palpable error requiring reversal.

### **Directed Verdict**

For his second argument, Appellant contends that the trial court erred by denying his motion for a directed verdict on the wanton engagement charge. We will reverse the trial court's denial of a motion for directed verdict "if under the evidence as a whole, it would be *clearly unreasonable* for a jury to find guilt[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983) (emphasis added)). Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011).

Appellant specifically argues that he never touched Jessica during the physical altercation with A.J. and Emma Belle. Jessica testified that she looked back as she was fleeing and witnessed Appellant stabbing A.J., who was close behind her. As such, the evidence indicates that Appellant was wielding the wolverine claw within close proximity of Jessica. More precisely, Appellant was stabbing A.J. while A.J. was herding Emma Belle and Jessica out the back door to safety. He was flailing around with a deadly instrument in the immediate proximity and in the direction of the escaping victim, Jessica.

Therefore, Appellant's conduct towards Jessica clearly constitutes an "extreme indifference to the value of human life . . . which creates a substantial danger of death or serious physical injury to another person." KRS 508.060. *See also Port v. Commonwealth*, 906 S.W.2d 327, 334 (Ky. 1995) (affirming

wanton endangerment conviction where defendant “created a dangerous atmosphere where people would be struggling with him to stop the shooting.”). Thus, the trial court did not abuse its discretion in denying Appellant’s directed verdict motion.

### **Domestic Violence Victim Exemption**

For his final argument, Appellant complains that the trial court erroneously determined that he did not qualify for the domestic violence victim exemption. KRS 439.3401(5). This statute exempts a defendant from being classified as a violent offender for parole purposes if the court determines that the defendant is a victim of domestic violence.

As stated in *Gaines v. Commonwealth*, “to qualify for the exemption, the violent offender must have been a victim of domestic violence or abuse and that violence or abuse must also have occurred ‘with regard to’ the crime committed by the violent offender claiming the exemption.” 439 S.W.3d 160, 164 (Ky. 2014) (citation omitted). This requires “some connection or relationship between the domestic violence suffered by the defendant and the underlying offense committed by the defendant.” *Commonwealth v. Vincent*, 70 S.W.3d 422, 424 (Ky. 2002).

During the trial and at sentencing, testimony was introduced indicating that A.J. had terrorized his younger brother throughout his earlier life. Appellant provided specific instances of abuse that were perpetrated against him by A.J. Appellant has failed to demonstrate the necessary “connection or



relationship between the domestic violence suffered by the defendant and the underlying offense committed by the defendant.” *Id.*

As previously noted, Appellant concedes in his brief that these instances of alleged abuse occurred when he was a “young child.” And as we stated in *Vincent*, “a prior history of domestic violence between a violent crime victim and the criminal defendant who perpetrated the violent offense does not, in and of itself, make the defendant eligible for the parole exemption of KRS 439.3401(5).” *Id.* at 425. Moreover, and very importantly, it is undisputed that Appellant initiated the attack that eventually caused A.J.’s death. Therefore, Appellant has failed to establish a sufficient nexus between the alleged abuse and the killing of his brother.

### **Conclusion**

For the foregoing reasons, we hereby affirm the judgment of the Crittenden Circuit Court.

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

WRIGHT, J., CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority except that I respectfully dissent on the wanton endangerment conviction. The trial court erred by not granting the motion for a directed verdict on the wanton endangerment charge relating to Jessica. The Commonwealth failed to offer testimony establishing that Appellant actually put Jessica in danger.

Appellant was fighting with his brother, A.J., who retreated from the Appellant and locked himself in the bathroom. A.J.'s wife, Emma Belle, arrived on the scene and began struggling with the Appellant. A.J. emerged from the bathroom and tackled Appellant.

The Commonwealth offered testimony that after he tackled Appellant, A.J. grabbed his wife, Emma Belle, and they then retrieved his step-daughter, Jessica, from the bedroom. A.J. pushed Jessica and Emma Belle out the back door. Jessica testified she was the first out the door, followed by Emma Belle, then A.J. Appellant regained his footing and began stabbing A.J. in the back, with a wolverine claw, as they were exiting the door.<sup>3</sup> Jessica testified that once she was out the back door, she then turned around and saw Appellant stabbing A.J. in the back with a wolverine claw. A.J. told Jessica to go for help and she ran to the neighbor's house. When Jessica was asked if the Appellant was going after her, she replied "no."

Two adult bodies, those of Emma Belle and A.J., and the space created by A.J. pushing them out the door, separated Jessica from the Appellant and his wolverine claw. The blades of the claw were ten (10) inches long and it is doubtful the blades could have penetrated all the way through A.J.'s body. In this case, the claw would have had to go through two bodies and the space between them before it could reach Jessica. It is impossible for the wolverine claw to harm Jessica when the blades were stabbed into A.J.'s body.

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<sup>3</sup> A wolverine claw is a weapon made to emulate the comic book and movie character "Wolverine." The claw straps to the hand and has two ten-inch-long blades.

The doorway through which they exited forced all involved into the narrow linear space of the doorway, thus limiting Appellant's angle of attack and eliminating the possibility that the Appellant could reach Jessica with the wolverine claw. The door frame limited Appellant's ability to reach around A.J. and Emma Belle in order to reach Jessica. Even if Appellant missed when he attempted to stab A.J. in the back and the door frame did not block the movement of his arm or the blades attached to his hand, then it would still be impossible for Appellant to reach around two adult bodies and the space between them to injure the third person in front of him.

Under the evidence as a whole—specifically the lack of testimony putting Jessica within the danger-zone of Appellant's wolverine claw—I believe it was clearly unreasonable for a jury to find guilt. See *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Therefore, I would reverse Appellant's wanton endangerment conviction and vacate the corresponding five-year sentence of imprisonment relating to that charge.

Noble and Venters, JJ., join.

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