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RENDERED: DECEMBER 15, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000469-MR

RANDALL PRICE — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 14-CR-00997

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Randall Edward Price, Jr., appeals from a judgment of the Kenton Circuit Court convicting him of first degree assault and first degree robbery, and sentencing him to a total of thirty years in prison. As grounds for relief, Appellant contends that he was entitled to directed verdicts acquitting him of both charges; that the jury instructions pertaining to self-protection and extreme emotional disturbance (EED) erroneously deviated from the instructions we approved in *Commonwealth v. Hager*, 41 S.W.3d 828 (Ky. 2001); and that the prosecutor engaged in prosecutorial misconduct on multiple occasions during his closing argument. Appellant also contends that the trial court's exclusion of evidence regarding the victim's propensity for drug and alcohol abuse deprived him of the right to present a defense.

For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the verdict, the evidence established the following facts. Appellant entered a small bar in Latonia shortly before closing time and sat next to Nick Robbins, although the two were not acquainted. The bartender, Jennifer Carnes, brought Robbins another drink and placed his change, $7.00, on the bar beneath an ashtray. Appellant tried to take the money, but Carnes caught him and gave the money to Robbins. Appellant and Robbins were the last patrons to leave the bar.

Joyce Smeal, who was waiting in the parking lot to give Carnes a ride home, saw Appellant and Robbins leave the bar and light cigarettes. As the two walked together in her direction, Smeal saw Appellant suddenly, and apparently without warning, throw Robbins violently onto the ground and begin viciously punching and kicking him. According to Smeal, Appellant kicked Robbins with such force that it lifted him off the ground. With Robbins immobilized, Appellant rifled through his pockets and then fled the scene. Smeal testified that she did not see the two men arguing before the attack, that she did not see a gun in Robbins' possession, and that she did not see Robbins enter Appellant's vehicle at any time.

Erin Fleek witnessed the event from her kitchen window in a nearby apartment building. She saw Appellant beat Robbins and then reach into the victim's pockets. Fleek and some of her friends went outside to intervene. They yelled for Appellant to stop the beating, and Fleek saw Appellant deliver

one last kick to Robbins' head before leaving the scene. Fleek called 911 and provided a description of Appellant and his car.

Meanwhile, after finishing her closing duties, Carnes left the bar and saw Robbins lying motionless on the ground so badly beaten and covered with blood she did not recognize him. Sargent Patrick Reece saw Appellant's car leaving the scene. Reece activated his emergency equipment signaling Appellant to stop. Appellant drove on for a short distance before stopping, during which time Reece saw Appellant throw something out of the passenger side window. Further investigation disclosed that the item thrown from the vehicle was Robbins' wallet.

After his arrest, Appellant made several statements to the police. He told police that Robbins had asked him for a ride from the bar to Cincinnati where he planned to get crack cocaine and hire a prostitute. Appellant said he declined Robbins' request, and as they left the bar, Robbins seemed agitated. Appellant said that he told Robbins he would give him two Percocet pills which he had in his car. Robbins got into Appellant's car, and instead of Percocet, Appellant gave Robbins two ibuprofen tablets, which Robbins consumed. Appellant said that Robbins then became angry and aggressive. After Robbins took a swing at him, Appellant "busted his ass." During the police interview, Appellant never claimed that Robbins had a gun, but he testified at trial that Robbins drew a gun and threatened him. A BB gun was found at the scene where Robbins was beaten, although its source was never determined.

Appellant testified that he beat Robbins because Robbins threatened him with a gun.

Robbins suffered devastating injuries to his face, eye, and mouth as a result of the assault. One of the first responders to the scene testified that the victim was bleeding from his head, barely breathing, and not moving. Robbins' recovery from the assault was exacerbated by alcohol withdrawal symptoms and the preexisting conditions of Hepatitis C and cirrhosis of the liver. A few months after the assault, and before the trial, Robbins succumbed to his liver disease and died at the age of fifty-nine.

At trial, Appellant asserted the defense of self-protection, which he claimed was necessary because Robbins had pulled a gun on him and was otherwise threatening him by his actions. Appellant also asserted an extreme emotional disturbance (EED) defense and an instruction was given applicable to that theory. Appellant denied taking Robbins' wallet from his pocket. He claimed that Robbins had inadvertently left his wallet in Appellant's vehicle. The jury rejected Appellant's defenses and convicted him of first degree assault based upon the injuries inflicted upon Robbins and first degree robbery based upon the theft of Robbins' wallet. Judgment was entered accordingly and this appeal followed.

II. APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE FIRST DEGREE ROBBERY CHARGE

Appellant contends that the trial court erred by denying his motion for a directed verdict on the first degree robbery charge. He maintains that no

evidence was presented at trial to establish that he committed or attempted a theft of Robbins' wallet and the $7.00 it contained. He noted that none of the witnesses saw him take the wallet, and that the belief that he assaulted Robbins "for the paltry sum of seven dollars" is not reasonable, especially when much more money was available to be stolen from the bar.

When deciding a motion for a directed verdict "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Questions about the credibility and weight to be given to the evidence are reserved to the jury. *Id.* "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

KRS 515.020(1) provides in pertinent part:

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and . . . (a) Causes physical injury to any person who is not a participant in the crime.

The following evidence tended to prove the theft element of robbery. Fleek testified that immediately after the beating, she saw Appellant reaching

into the victim's pockets. Smeal also saw Appellant rummage through Robbins' pockets immediately after his unprovoked attack upon Robbins. Smeal also testified that Robbins did not get into Appellant's car, which supports the theory that Robbins did not accidently leave his wallet in Appellant's car. Officer Reece saw an object tossed from Appellant's fleeing vehicle where Robbins' wallet was later found. Appellant's flight from the scene and his discarding of the victim's wallet can be reasonably interpreted as consciousness of guilt. *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 218 (Ky. 2003) (quoting *Hord v. Commonwealth*, 13 S.W.2d 244, 246 (Ky. 1928)) ("It has long been held that proof of flight to elude capture or to prevent discovery is admissible because 'flight is always some evidence of a sense of guilt.'"); *Daugherty v. Commonwealth*, 467 S.W.3d 222, 230 (Ky. 2015) ("When a defendant is shown to have hidden or destroyed evidence, that fact shows the defendant's consciousness of his or her own guilt."). From this evidence, a jury could reasonably infer that Robbins did not leave his wallet in Appellant's car as Appellant claimed.

The physical injuries which Appellant admittedly inflicted upon Robbins easily satisfy the final element of first degree robbery. The fact that the wallet contained only $7.00 negates none of the elements of the crime. In light of the foregoing evidence, Appellant was not entitled to a directed verdict on the robbery charge.

III. APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE FIRST DEGREE ASSAULT CHARGE

Appellant contends that he should have been granted a directed verdict on the first degree assault charge because (1) there was no evidence to refute his claim the assault was a justifiable act of self-defense after Robbins drew what Appellant believed was a real gun; (2) the Commonwealth failed to prove that Appellant did not wantonly or recklessly have a mistaken belief in his need to act in self-defense; and (3) there was no evidence that Robbins suffered a serious physical injury as a result of the beating administered by Appellant. In considering this argument, we again apply the *Benham* standard as described above.

KRS 508.010(1) provides that a person is guilty of first degree assault when he:

> (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument;
> or
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

However, KRS 503.050(1), the general self-defense statute, provides that "[t]he use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person." And KRS 503.120, the "imperfect self-defense statute," provides:

> (1) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.
>
> (2) When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

While Appellant's own testimony may have satisfied the elements of self-defense, the jury could reasonably disbelieve Appellant's version of the incident in favor of the contrary evidence offered by the observations of Smeal and Fleek. Far from compelling a directed verdict, the conflicting testimony created an issue for the jury to resolve.

Appellant's additional claim that he was entitled to a directed verdict because the victim did not suffer a serious physical injury is without merit. Serious physical injury "means physical injury which creates a substantial risk of death or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15).

The medical testimony established that Robbins suffered a fracture to the eye socket and a fracture on the inside floor of his eye socket. He was bleeding behind his eyeball, and his cheekbone was free-floating and no longer attached to the related facial muscles. The damage to these facial bones left Robbins with a deformity to his face and a reduced range of motion of his mouth. Surgery was the only way to repair these injuries. His facial surgery involved screwing a titanium plate into his mouth. Even with the surgery, a patient with Robbins' injuries would normally be expected to suffer a permanent 10% to 20% loss in the range of motion to his mouth. Robbins also sustained optic nerve damage.

In summary, Robbins suffered devastating injuries to his facial bones, eye, and mouth, with additional medical testimony demonstrating that Robbins, had he lived longer, would have suffered a permanent loss to his mouth's range of motion as a result of the injuries. We are persuaded that Robbins' injuries easily qualify as a serious physical injury as defined in the statute. The trial court did not err by permitting the assault charge to be presented to the jury.

IV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY

Appellant contends that the jury instructions relating to self-protection, "imperfect" self-protection, and EED erroneously deviated from the model instructions approved in *Commonwealth v. Hager*, 41 S.W.3d 828 (Ky. 2001). The Commonwealth insists that the assault and self-protection, considered as a whole, do not substantially deviate from the homicide instructions in *Hager*

when taking into account the differences between homicide and assault, and that the instructions properly put the burden of proof on the Commonwealth with respect to the self-protection.

Issues relating to the language of jury instructions are reviewed *de novo*; the instructions should accurately state the applicable law of the case; and in reviewing jury instructions, the appellate courts should review the instructions as a whole. *See generally Sargent v. Shaffer*, 467 S.W.3d 198 (Ky. 2015). Aside from his subjective assertion that the instructions are confusing, Appellant does *not* identify with particularity any specific problem with the instructions given by the trial court, nor does he explain how the instructions were inconsistent with either *Hager* or his tendered instructions or how the instructions failed to properly state the law or otherwise misled the jury.

Appellant does not challenge the substance of the instructions insofar as they reflect the essential elements of the crimes charged; rather, as we understand his argument, he challenges the organizational structure of the instructions and questions whether that structure complies with the model homicide instructions set out by Justice Cooper in *Hager*. We therefore confine our discussion of the instructions to these limited areas. The relevant sections are Instructions 5 – 10.

Hager reversed the defendant's conviction because a flawed instruction "erroneously required the jury to find the defendant guilty, thus *not* to have acted in self-protection, before permitting it to first consider the *nature* of self-protection as a defense." 41 S.W.3d at 833. That is, the murder instruction in

Hager directed the jury to the instructions explaining self-protection (and its ancillary components of initial aggressor, absolute self-defense, and imperfect self-defense) *after* otherwise finding the defendant guilty of murder. Here, Instruction 5 does not contain that flaw. After directing the jury to determine the facts essential to the elements of first degree assault pursuant to KRS 508.010, Instruction 5 directed the jury to consider in Instruction 10 the facts relating to self-defense, *before* ascertaining Appellant's guilt. Accordingly, Instruction 5 does not repeat the *Hager* error.

Instruction 6, pertaining to second degree assault, follows the same pattern as Instruction 5, except that it is only triggered if the jury does not resolve the case under Instruction 5. Instruction 6 likewise does not include the defect identified in *Hager*.

Instruction 7 directed the jury, if it found Appellant guilty under Instruction-5 or 6 (and, thus did not believe that he was privileged to use self-protection under Instruction 10), to further consider whether Appellant acted under EED; and if so, to instead find him guilty of Assault Under Extreme Emotional Disturbance. Appellant does not specifically challenge the placement of this EED instruction in the organizational structure of the instructions. We presume he has no objection to this configuration of the instructions, and we see no readily apparent defect in this placement of the EED Instruction. *Hager* provides no guidance on this point because it was a homicide case in which the EED element is embedded within the homicide instruction itself.

Instruction 8 directed the jury, if it had not found Appellant guilty of any of the higher charges, to determine if he was guilty of fourth degree assault. Consistent with *Hager*, Instruction 8 directed the jury to the self-protection instruction (Instruction 10) before making its finding. And, if the jury believed Appellant was found guilty under Instruction 8, Instruction 9 required further consideration of the mitigating effect of EED, reducing the Class A misdemeanor of fourth degree assault to a Class B misdemeanor. Appellant expresses no specific objection to this instruction, and so we will not further examine this instruction for error.

The set of instructions included several references to Instruction 10, the self-protection instruction. Instruction 10 is organized as follows: subsection A presents the absolute self-defense instruction; subsection B sets forth the initial aggressor instruction; and subsection C sets forth the imperfect self-defense instruction. It follows the same pattern approved in *Hager*. 41 S.W.3d at 846. We acknowledge that Instruction 10 is necessarily complicated because the law of self-defense and imperfect self-defense, as well as its underlying factual elements, is complex. Care must be given to prevent turning complexity to confusion. *See Commonwealth v. Hasch*, 421 S.W.3d 349, 369 (Ky. 2013) (Scott, J. concurring); William S. Cooper & Robert G. Lawson, *Self–Defense in Kentucky: A Need for Clarification or Revision*, 76 Ky. L.J. 167, 194 (1987). Despite the unavoidable complexity, we believe Instruction 10 properly sets forth the applicable law of self-defense in a manner that a reasonable jury can comprehend and apply. We find no error in the jury

instructions presented, especially in light of Appellant's inability to identify a particular defect or inconsistency with *Hager*.

V. IMPROPER STATEMENTS OF THE PROSECUTOR DO NOT COMPEL REVERSAL

Appellant contends that reversible error occurred due to multiple instances of prosecutorial misconduct during the prosecutor's closing argument. The comments to which Appellant objects fit generally into four categories: references to Appellant as a punk; disparagement of defense counsel; the tossing of the victim's picture at Appellant; and references to the victim's untimely death and telling the jury that they could be "his voice." Appellant contends that his due process rights to a fair trial were violated as a result of the prosecutor's conduct.

A. References to Appellant as a Punk

At the outset of his closing argument, the prosecutor twice referred to Appellant as a "punk." Specifically, the prosecutor said that Appellant was a punk because he ran away from the scene. He then referred to Appellant as a punk when he argued that Appellant threw Robbins' wallet out of the vehicle "like a punk."

In *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), during closing argument the prosecutor disparaged the appellant referring to him as a "black dog of a night," a "monster," a "coyote that roamed the road at night hunting women to use this knife on," and a "wolf." We condemned the prosecutor's use of such disparagement and we have repeatedly condemned arguments invoking

"scurrilous and degrading terminology." *Id.* at 544-45 (citing *King v. Commonwealth*, 70 S.W.2d 667, 669 (Ky. 1934) (internal quotations omitted) and *East v. Commonwealth*, 60 S.W.2d 137, 140 (Ky. 1933)).

We agree that the prosecutor here could have expressed the intended point without the derogation of Appellant by the use of the term "punk." However, we further regard that term as sufficiently vague and imprecise that it imparts no meaningful or derogatory information to the jury other than the prosecutor's personal distaste for Appellant. The use of such terminology is improper, unnecessary, and contrary to appropriate courtroom decorum, but we see it as creating no significant prejudicial effect upon Appellant.

B. Disparagements of Defense Counsel

Appellant contends that the prosecutor engaged in misconduct based upon several references to defense counsel. The first instance cited by Appellant relates to the prosecutor's repetition of an argument used in a previous trial by defense counsel's supervisor. Over defense counsel's objection the prosecutor said to the jury, "I was trying a case a few months ago and I heard a defense attorney say . . . [objection overruled] . . . when you are looking to find the truth there are three things you look for: consistency, corroboration, and credibility." The prosecutor then structured his closing argument around this alliterative phrase.

The second statement relates to the prosecutor's attempt to impeach Appellant's self-defense and EED defenses:

> And folks I want to take a moment and I want to talk a little bit about this gun. And a few other things. And I wasn't going to do it right here, but I think this is the appropriate time to do it. And I am going to do it by way of kind of telling you a story. In England, several, several hundreds of years ago the royals would engage in what is called fox hunting. Where the royals would go out with their hounds and they would try to find the foxes. And so what they would do is they would have their servants take fish and they take the fish and they drag it along the trails. They drag them along the trails, because they were trying to throw the hounds off of the scent of the fox. To make it a more competitive hunt. And when I think about what the defense counsel is doing today. They are dragging that gun all across the court room. They are dragging EED all across the court room.

The next statement of the prosecutor cited by Appellant rebuts arguments made by defense counsel relating to the police lineup wherein Robbins identified Appellant as the perpetrator:

> As I was saying folks, they are trying to drag this gun across the court room. To take your attention off of the issues. They are trying to drag these police line ups all across the court room to try to take your attention off of the issues. Remember this ladies and gentlemen, [defense counsel] said police line ups about fifteen times during this closing argument . . . .
>
> It is a distraction, they are trying to take your attention off of the issues . . . .
>
> [Defense counsel] would have you to believe that [Appellant] should have been taken to the Holiday Inn, allowed to shower, get a message, go to the spa, go down stairs, and eat a steak dinner before anyone interrogated him. That is absolutely ridiculous.

The final statement Appellant cites as inappropriate is the prosecutor's charge that defense counsel's argument diminishing the severity of the victim's injuries was "offensive." A prosecutor "must not be permitted to make

unfounded and inflammatory attacks on the opposing advocate." *Sanborn*, 754 S.W.2d at 544 (quoting *United States v. Young*, 470 U.S. 1, 9 (1985)). However, that is not what occurred here. We repeated in *Driver v. Commonwealth*, 361 S.W.3d 877, 889 (Ky. 2012) (citing *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004), quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987)), that "a prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." We also said in *Driver* that "[w]hile the prosecutor has a duty to confine his or her argument to the facts in evidence, the prosecutor is entitled to draw reasonable inferences from the evidence, make reasonable comment upon the evidence and make a reasonable argument in response to matters brought up by the defendant." *Id.* (quoting *Childers v. Commonwealth*, 332 S.W.3d 64, 73 (Ky. 2010) (citations omitted)). The statements Appellant complains of are well within the allowable range of proper comment. Accordingly, Appellant is entitled to no relief on this argument.

C. "Tossing" Victim's Picture at Appellant

During his closing argument, the prosecutor picked up a photographic exhibit of the bloodied, beaten victim, and said to the jury:

> Ladies and gentlemen of the jury, [Appellant] should care. He should care. Is this hard to look at? It should be hard to look at. Because this should not happen to anyone. And you shouldn't have to look at it. The only person that should have to look at this photo is the [Appellant].

The prosecutor then walked toward the defense table and "tossed," or as the Commonwealth claims, "placed," the photograph on the table. Appellant responded by mumbling, "It doesn't bother me." The prosecutor then repeated Appellant's statement to the jury.

We need not characterize as appropriate or inappropriate the manner in which the prosecutor left the photograph on the defense table. The trial court was in a much better position to make that call, and we defer to the trial court's consideration of that conduct.

As to the prosecutor's reiteration of Appellant's verbal response, we note that a "prosecutor is entitled to comment on the courtroom demeanor of a defendant." *Hunt v. Commonwealth*, 304 S.W.3d 15, 38 (Ky. 2009), *modified*, (Mar. 18, 2010) (citing *Woodall v. Commonwealth*, 63 S.W.3d 104, 125 (Ky. 2001)). Appellant's verbal response to the display of the photograph was an aspect of his courtroom demeanor. The prosecutor's reiteration of it was a fair comment. We would not condone the tactic of a prosecutor, or any lawyer, to arouse the ire of an adverse party or witness to provoke an unflattering and self-damaging response and then take advantage of the provocation. We are satisfied that did not happen here.

D. Use of Victim's Death to Arouse Sympathy of Jury

The final event Appellant cites as prosecutorial misconduct concerns the following evocative reference to the victim's death made by the prosecutor to arouse the sympathy of the jury:

> Unfortunately, Nick Robbins could not come. He could not come to tell you what happened to him. But those witnesses, they did. And folks, while Nick Robbins no longer has a voice, you have the opportunity to be his voice. You have the opportunity to write the final chapter to this tragedy started and created by the defendant.

We have long and often admonished prosecutors against encouraging the jurors to place themselves in the position of the crime victim, i.e., engaging in a "golden rule" argument. *See Caudill v. Commonwealth*, 120 S.W.3d 635, 675 (Ky. 2003) (citing *Black's Law Dictionary* 700 (7th ed. West 1999)). Asking the jurors "to be [the departed victim's] voice" did just that. We expect jurors to be detached and dispassionate arbiters of the facts, based upon the evidence, dispensing justice without favor or sympathy. Encouraging the jury to act in unison as the victim's "voice" is rhetoric that invites the jury to step outside its proper role. The function of the jury in reaching a verdict is to find the truth. The jury's purpose is not to act as "the voice" of the victim and it is prosecutorial misconduct for a prosecutor to urge them to do so. We accordingly find that this conduct by the prosecutor was improper.

E. Analysis

In summary, two aspects of the prosecutor's argument were improper: referring to Appellant as a "punk," and inviting the jury to put itself in the place of the victim to arouse sympathy for the victim. "We will reverse for prosecutorial misconduct only if the misconduct was 'flagrant' or if we find all of the following to be true: (1) the proof of guilt is not overwhelming, (2) a contemporaneous objection was made, and (3) the trial court failed to cure the

misconduct with a sufficient admonition." *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (citing *Mayo v. Commonwealth*, 322 S.W.3d 41, 55 (Ky. 2010)).

In *Dickerson*, we employed *Mayo's* four-factor test to determine if a prosecutor's improper comments warrant reversal as "flagrant misconduct." Those factors 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.

485 S.W.3d at 329. Ultimately, we will reverse for prosecutorial misconduct only when the offensive conduct was "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Id.* (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citing *Soto*, 139 S.W.3d at 873). "The required analysis . . . must focus on the overall fairness of the trial, and not the culpability of the prosecutor." *Id.* (quoting *Slaughter*, 744 S.W.2d at 411–12 (Ky. 1987) (citing *Smith v. Phillips*, 455 U.S. 209 (1982)).

Upon application of these standards, we are persuaded that the prosecutor's missteps did not constitute "flagrant misconduct," and taken together are not cause for reversal. The case against Appellant is strong and compelling, if not overwhelming. Conversely, Appellant's version of the incident was weak and unlikely. Neither eyewitness to the assault saw anything that tended to confirm Appellant's defense. Appellant's

consciousness of guilt as evidenced by his flight from the scene to evade arrest and his attempt to dispose of the victim's wallet further solidify our confidence in the jury's verdict.

In summary, pursuant to the *Mayo* factors, and in light of the strength of the case against Appellant and the weakness of Appellant's theory of the case, we are satisfied that the prosecutorial misconduct as described above did not result in an unjust verdict. The errors did not substantially sway the verdict, and accordingly, the errors were harmless error under the standard of *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009).

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EVIDENCE OF THE VICTIM'S IMPROPER USE OF DRUGS AND ALCOHOL

Finally, Appellant contends that the trial court erred by denying his motions to introduce evidence of the victim's propensity for drug and alcohol abuse. Appellant contends that the evidence should have been admitted into evidence because it supported his self-defense theory that Robbins was seeking drugs from Appellant on the night of the assault and was thus motivated to respond to Appellant with aggression and violence. Appellant also argued that evidence of Appellant's behavior-related Hepatitis C infection and severe alcoholism was relevant as these conditions delayed his facial surgery, hindered his ability to heal, and thus increased his own suffering.

"The standard of review for a trial court's evidentiary rulings is abuse of discretion." *McDaniel v. Commonwealth*, 415 S.W.3d 643, 655 (Ky. 2013) (citation omitted). "The test for abuse of discretion is whether the trial judge's

decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citation and internal quotations omitted).

The general rule is that "evidence 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). Appellant's argument seems to be that Robbins' trait for drug abuse was admissible to prove that he acted in conformity with that trait when he sought drugs from Appellant on the night of the assault. That is, however, the very use of the evidence prohibited by the general rule. Robbins' character trait for drug abuse would not be admissible to prove that, in conformance with the trait, he was seeking drugs from Appellant.

> KRE 404(b) provides an exception to KRE 404(a) as follows: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"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))).

We perceive no viable theory excepting Appellant's proffered evidence from the general rule of KRE 404(a). The trial court did not abuse its discretion by excluding the victim's Hepatitis C infection and alcohol withdrawal symptoms. These issues had no relevance to the assault, the robbery, or whether the victim had suffered a serious physical injury. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994) (Evidence admissible under KRE 404(b) must also be relevant, probative, and not unduly prejudicial); *see* KRE 401, 402, and 403.

VII. CONCLUSION

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

All sitting. All concur.

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