RENDERED: AUGUST 29, 2019
TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000633-MR

ANTHONY L. BEARD, JR. — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 16-CR-00979

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE HUGHES

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

Anthony Lamont Beard, Jr. appeals from a judgment of the Fayette Circuit Court convicting him of first-degree burglary, second-degree assault, and second-degree wanton endangerment, and sentencing him to thirty years in prison. Beard contends the trial court erred by 1) allowing inadmissible hearsay testimony into evidence; 2) denying his requested instructions on second-degree burglary and first-degree criminal trespass; 3) providing instructions to the jury during deliberation; 4) not correcting the Commonwealth's misstatement of his parole eligibility on the first-degree burglary charge; and 5) improperly limiting his testimony during the penalty phase. For the reasons set forth below, we affirm Beard's convictions, but reverse and remand for a new penalty phase.

FACTUAL AND PROCEDURAL BACKGROUND

On August 20, 2016, Beard visited the home of Fayola Chenault. While there, Beard confronted Grm'yko Chenault, Fayola's grandson and Beard's cousin, and used coarse language threatening to sodomize him. According to Desha Chenault, Grm'yko's mother, there were rumors that Grm'yko touched Beard's daughter, but the investigation conducted by the police, social services, the school, and the children's advocate did not result in charges against Grm'yko. Fayola told Beard to leave.

Beard returned to the house the next morning, but Fayola did not let him in and told him to go home. He came back about three hours later and Fayola encountered him outside of her home. When Beard stated he was going in the house, Fayola told him not to. While her attention was diverted, Beard entered the house.

When Fayola went inside, Grm'yko and Desha were sitting on the couch. According to Fayola, she was standing in front of the two when Beard came from the direction of the hallway, stood beside her, and shot Grm'yko multiple times. Fearing Beard would shoot her, Fayola went outside. Beard came out afterward, remarked "That's what you get for my daughter," and got on his bicycle and left. James Chenault, Fayola's son who also lived there and was in the back of the home, came into the living room when he heard the shots.

Desha testified that after Beard entered the house, he fumbled in the hallway and then came over and shot Grm'yko. After shooting Grm'yko, Beard

put the gun to her head and she heard the gun clicking. Beard said, "Bitch, this is for my daughter." Beard then left.

The jury found Beard guilty of first-degree burglary, second-degree assault, and second-degree wanton endangerment and recommended a thirty-year sentence. The trial judge sentenced Beard in accordance with the jury's recommendation and this appeal followed.

Additional facts pertinent to Beard's claims of error are set forth below.

ANALYSIS

Beard claims the trial court committed errors during both the guilt and penalty phases of his trial. He specifically claims the trial court erred by 1) admitting inadmissible hearsay testimony into evidence; 2) denying his requested instructions on lesser-included offenses; 3) providing instructions to the jury during deliberation; 4) not correcting the Commonwealth's misstatement of his parole eligibility; and 5) improperly limiting his testimony during the penalty phase. These claims are addressed in turn.

I. Introduction of Non-testifying Witness's Statement Does Not Warrant Palpable Error Relief.

At trial, the Commonwealth played Beard's videotaped interview with the police. During that interview, the detective told Beard multiple times that (1) four people identified him as the individual who shot the victim and (2) those four individuals would testify against Beard. According to the detective, each of those four individuals identified Beard as the victim's shooter by signing the back of a photo depicting Beard. The detective showed and read aloud to Beard the four signatures. The four signatures included Grm'yko, Desha, and

Fayola, who testified at trial, and James Chenault, who did not testify. Beard did not object to the Commonwealth playing the specific recorded statements regarding the four witnesses,[1] nor did he request a limiting instruction. He now requests palpable error review pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.26.

Citing *Crawford v. Washington*, 541 U.S. 36 (2004), Beard argues that admission of testimonial hearsay — that James Chenault identified him as the assailant — through the detective's videotaped interview violated his rights to confront accuser Chenault under the Sixth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution. *Crawford* holds that when an out-of-court "testimonial" hearsay statement of a declarant who is unavailable for cross-examination is introduced into evidence, a defendant's Sixth Amendment right to confront witnesses against him is violated. Beard asserts that this Court recognized in *Staples v. Commonwealth*, 454 S.W.3d 803, 826 (Ky. 2014), that admitting a police interrogation that references another's statements regarding the defendant violates *Crawford*, but unlike the error in *Staples*, the error in this case should result in reversal. Beard contends that Chenault's eyewitness identification of him as the shooter is not simply harmless cumulative evidence.

The Commonwealth responds that Beard's constitutional rights are not implicated because the detective's statements made during the interview were

[1] Based solely on his allegation that he was intoxicated at the time of the interview, Beard objected to the playing of the whole recording.

not being offered to prove the truth of the matter asserted. Rather, like the police interrogation admitted and upheld in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), the statements provided context for the interview in that the detective's statements were made in an attempt to get Beard to speak by confronting him with the potential evidence against him. We do not find the Commonwealth's argument persuasive.

Although the United States Supreme Court's guidance for distinguishing between "testimonial" and "nontestimonial" statements is currently limited, the *Crawford* Court explained that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." 541 U.S. at 52. Furthermore, in *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Court explained that statements "are testimonial when the circumstances objectively indicate that [the statements were not made in the course of a police interrogation primarily conducted to meet an ongoing emergency, but rather] the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

These standards support Beard's argument that the four witness identifications of him as the shooter, information provided to the detective during his investigation of the crime, are testimonial. Nevertheless, we conclude palpable error relief is not warranted.

RCr 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be

granted upon a determination that manifest injustice has resulted from the error.

Under RCr 10.26, relief may be granted when the error is easily perceptible, plain, obvious and readily noticeable, and the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error, or the error is so fundamental as to threaten a defendant's entitlement to due process of law. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations and quotation marks omitted); *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). In context with all the evidence, which includes three other witnesses testifying Beard shot the victim, we cannot conclude that references to Chenault's statement during the detective's interrogation of Beard caused the prejudice necessary for RCr 10.26 relief. Beard argues that Chenault's eyewitness identification of him can never be simply cumulative evidence, but we disagree given the circumstances of this case. No palpable error occurred.

II. The Trial Court Did Not Err by Refusing to Instruct The Jury on Lesser-Included Offenses.

As noted, Beard was convicted of first-degree burglary. The trial court denied Beard's request to instruct the jury on the offenses of second-degree burglary and first-degree criminal trespass as lesser-included offenses of first-degree burglary. Beard claims this denial was error.

"Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015) (citation omitted). "When the prosecution adduces evidence

warranting an inference of a finding of a lesser degree of the charged offense, the court should instruct on the lesser degree . . . ." *Trimble v. Commonwealth*, 447 S.W.2d 348, 350 (Ky. 1969). "An instruction on a lesser included offense is appropriate if, and only if, on the given evidence a reasonable juror could entertain a reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Osborne v. Commonwealth*, 43 S.W.3d 234, 244 (Ky. 2001) (citations omitted).

Upon review, we likewise consider whether the trial court erred by refusing to give a lesser-included offense instruction under the "reasonable juror standard." *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013). The proponent is entitled to the instruction, if, viewing the evidence in his favor, the evidence would permit a reasonable juror to make the finding the instruction authorizes. *Id.* at 594. "Fundamentally, the prosecution is required to prove beyond a reasonable doubt the commission of the crime charged, and when its evidence warrants a jury finding of a lesser degree of the main offense, the instructions should be so framed as to include it." *Trimble*, 447 S.W.2d at 350.

KRS 511.020(1) provides:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
> (a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or
(c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

In comparison to first-degree burglary, a person is guilty of second-degree burglary when "with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling," KRS 511.030, and a person is guilty of first-degree criminal trespass "when he knowingly enters or remains unlawfully in a dwelling," KRS 511.060.

By its plain language KRS 511.020, in addition to the intrusion elements within section (1), requires one of three aggravating factors listed in subsections (a), (b) and (c) in order for a defendant to be found guilty of first-degree burglary. In this case, although the jury heard testimony that Beard shot the victim, the Commonwealth elected to not include KRS 511.020(1)(b) or (c) as a basis for the jury finding Beard guilty of first-degree burglary. The Commonwealth requested the trial court to limit the first-degree burglary instruction to a finding of guilt based upon Beard being armed with a deadly weapon. Without objection from Beard, the trial court instructed the jury on first-degree burglary as follows.

> You will find the Defendant, Anthony Beard Jr., guilty of First-Degree Burglary under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about August 21, 2016, and before the finding of the Indictment herein, he entered or remained in a building owned by Fayola Chenault without the permission of Fayola Chenault or any other person authorized to give such permission;
> B. That in so doing, he knew he did not have such permission;

C. That he did so with the intention of committing a crime therein; AND
D. That when in effecting entry or while in the building or in immediate flight therefrom the Defendant was armed with a handgun.

Beard emphasizes that in his closing argument, he focused on the differences in the witnesses' testimony to show a possibility that James Chenault was the person who came down the hallway and shot the victim, and that the family immediately conspired to pin the blame on him. He points out that the Commonwealth did not offer proof concerning where Beard would have obtained the firearm in question, where the firearm was placed after the events, or even that Beard shot the gun given that a gunshot residue test was not performed.

Beard contends that when considering his closing argument and the inferences which could be drawn from a lack of evidence, a reasonable juror could have found him guilty of the lesser-included offenses. He further argues the Commonwealth failed to prove beyond a reasonable doubt that he was the victim's shooter because the Commonwealth relied entirely on eyewitness testimony to prove Beard shot the victim. Beard's position is that the jury could have found him guilty of second-degree burglary if it believed he went into the house to commit a crime, but that James Chenault actually shot the victim. Or, the jury could have found him guilty of first-degree criminal trespass if it believed he knowingly and unlawfully entered the house, but that he did not shoot the victim. However, because the trial court's instruction was limited to a finding of guilt under KRS 511.020(1)(a), the argument that the

Commonwealth failed to prove Beard was the victim's shooter is misplaced. Our review is constrained to whether the lesser-included offense instructions were warranted given the proof established Beard was armed with a gun.

Although Beard argued at trial that the lesser-included offense instructions should be given because the jury may decide not to punish him for the handgun, as explained above, the trial court's standard for instructing on a lesser-included offense is: unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser-included offense, the lesser-included instruction should not be given. The jury here was not presented with any evidence that Beard was not armed with a gun when entering or while in Fayola Chenault's home. Although Beard argues otherwise, it is of no consequence here that the Commonwealth did not offer proof concerning where Beard would have obtained the firearm in question or where the firearm was placed after the events.

Furthermore, this case is distinguishable from *Martin v. Commonwealth*, 571 S.W.2d 613, 614 (Ky. 1978), and *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986), which Beard cites to support his argument. In those cases, the defendant successfully appealed the trial court's refusal to instruct the jury on criminal trespass as a lesser-included offense of first-degree burglary because evidence was admitted supporting the defendant's defense that he had no intent to commit a crime when he entered the dwelling. Here, the facts and reasonable conclusions were not ambiguous. Based on the evidence, a

reasonable juror could not doubt that Beard was armed with a gun when entering or while in the Chenault home. An instruction on first-degree burglary was the only warranted instruction. Consequently, the trial court did not err when denying instructions on second-degree burglary and first-degree criminal trespass.

III. The Trial Court Did Not Err by Responding to the Jury's Question.

Beard's last alleged guilt-phase error is that the trial court violated his Due Process rights when it amended the jury instructions after the case had gone to the jury. Specifically, during its deliberations, the jury sent a question to the trial court about the first-degree burglary instruction. It read: "We all agree [Beard] was told not to enter the house both that morning and the second time. We don't know what constitutes him 'knowing' he wasn't given permission to enter. Any help on this issue?"

Because "knowing" was not defined in the instructions, the trial court noted a response beyond the standard "refer to the instructions" could be appropriate. Beard objected to providing the KRS 501.020(2) definition of "knowingly," and advocated leaving the instructions as written and letting the jury figure it out. Subsequently, he objected to this answer by the trial court: "Please refer to your instructions. Unless otherwise defined, the instructions and language are used in their plain, ordinary meaning."

Beard argues that the trial court erred by giving an answer to the jury's question, essentially amending the instructions and adding confusion to the central issue of whether Beard legally knew he was barred from the property.

We review the trial court's response to the jury's question for an abuse of discretion. *Muncy v. Commonwealth*, 132 S.W.3d 845, 848 (Ky. 2004) (no abuse of discretion when trial court answered a question of law and defined the term "quantity"). A trial court abuses its discretion when it decides an issue arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Here, in response to a question of law, the trial court decided not to give the legal definition of "knowingly." Although the trial court may not have exactly used the standard approach to most jury deliberation questions, *see Stokes v. Commonwealth*, 275 S.W.3d 185, 192 (Ky. 2008), the trial court provided no information beyond that already present in the jury instructions. The trial court instructed the jury to do that which it would be required to do if the trial court had responded that it could not answer the question and for the jury to refer to the instructions. We cannot find this to be an abuse of discretion and note, perhaps not in form, but in substance, Beard received exactly what he asked for – the jury was allowed to figure out whether Beard "knew" he didn't have permission to enter the home. *See also Lynem v. Commonwealth*, 565 S.W.2d 141, 144 (Ky. 1978) (defendant cannot ask for further relief on appeal when he received the relief he requested).

IV. Palpable Error Occurred When the Commonwealth Gave the Jury Incorrect Parole Eligibility Information.

During the penalty phase, the Commonwealth incorrectly described to the jury the parole eligibility guidelines for Beard's first-degree burglary conviction. Beard did not object, and he received the maximum sentence. He now seeks palpable error review. Citing *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005), he argues that his sentence, based upon incorrect parole eligibility information, is a manifest injustice.[2] Manifest injustice occurs when "the error so seriously affect[s] the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

The Commonwealth did not call a probation and parole officer to testify, but explained how Beard's parole eligibility would be calculated. The Commonwealth stated the first-degree burglary charge, for which the jury could recommend he serve ten to twenty years, was a non-violent offense, making Beard eligible for parole after serving twenty percent of his sentence on that crime. The Commonwealth also stated that Beard would be eligible for parole after serving twenty percent of his sentence for a second-degree assault conviction, the eligible sentence ranging between five to ten years. To make this argument, the Commonwealth relied on the Kentucky Department of

[2] This Court allowed Beard to file a supplemental brief raising this claim. The Commonwealth did not object or move to file a response.

Corrections' parole eligibility guidelines, which it offered, and the trial court admitted, as an exhibit. The exhibit highlighted the twenty percent parole eligibility calculation for five, ten, and twenty-year sentence lengths.

In its closing argument, the Commonwealth urged the jury to recommend the maximum sentence for each crime and that the sentences be served consecutively for a total of thirty years. The Commonwealth emphasized that if given a thirty-year sentence, under the twenty percent parole eligibility guideline, Beard would be eligible for parole after just six years. The jury recommended the maximum thirty-year sentence, which the trial court imposed.

The Commonwealth's statement to the jury that first-degree burglary is a non-violent offense and that Beard would be eligible for parole after serving twenty percent of his sentence was incorrect. Under KRS 439.3401(1)(l), a person is a "violent offender" if he has been convicted of or pled guilty to the commission of first-degree burglary accompanied by the commission or attempted commission of second-degree assault.[3] A violent offender who has been convicted of a capital, Class A, or Class B felony is ineligible for parole until he has served eighty-five percent of the sentence imposed. KRS

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[3] KRS 439.3401(1)(l) states in full:

> As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of: . . . Burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010 [(assault in the first degree)], 508.020 [(assault in the second degree)], 508.032 [(assault of family member or member of an unmarried couple)], or 508.060 [(wanton endangerment in the first degree)].

439.3401(3). Beard is therefore ineligible for parole on his Class B felony conviction, first-degree burglary, until he has served eighty-five percent of his sentence. Consequently, as sentenced, he is only eligible for parole after serving seventeen years, not six years as stated by the Commonwealth.

In *Robinson*, a probation and parole officer provided incorrect information regarding parole eligibility during the sentencing phase. 181 S.W.3d at 38. The prosecutor repeated the incorrect information during closing argument. *Id.* Concluding that palpable error occurred and reversing the defendant's sentence, this Court stated:

> The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material. *Napue v. Illinois*, 360 U.S. 264, 269, 272, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This is true irrespective of the good faith or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–1197, 10 L.Ed.2d 215 (1963). When the prosecution knows or should have known that the testimony is false, the test for materiality is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).

Id.

Prior to *Robinson* this court decided *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988), a case with facts similar to the instant case. *Ruppee* addressed the preserved issue of whether the Commonwealth's non-testimonial misstatements concerning parole eligibility during the penalty phase constituted reversible error. The Court considered the materiality of the misstatement, stating,

> The jury was left with the impression that if it imposed a life sentence the appellant would not serve longer than 7½ years and that, in his case, a life sentence would constitute no greater punishment than did a sentence of 20 years.
>
> As a practical matter, if this conviction were to be affirmed, the appellant might be paroled at the end of 7½ years. This is not necessarily so, however . . . .

Id. at 853. Based on its consideration of whether there was a reasonable likelihood that the false statements could have affected the judgment of the jury, the Court reached a conclusion similar to *Robinson*, stating "a jury should not be misadvised by the Commonwealth's Attorney as to the legal effect of its verdict, nor should a verdict based upon such a misstatement of the law be allowed to stand." *Id.* The *Ruppee* Court reversed the appellant's sentence and ordered a new penalty phase.

In the instant case, we also find the Commonwealth's erroneous statements to be material. The jury was left with the erroneous impression that if it imposed a thirty-year sentence, Beard would be eligible for parole in six years, when in fact he is not eligible for parole for seventeen years. This Court cannot know whether, absent this error, the jury would have given Beard the maximum sentence. Nevertheless, given the substantial difference between the incorrect parole information (eligible in six years) and the correct parole information (eligible in seventeen years) on the maximum thirty-year sentence Beard received, we believe the false parole eligibility information had a reasonable likelihood of influencing the jury's decision regarding Beard's

sentence. Accordingly, we reverse solely as to the sentence and remand this matter back to the trial court for a new penalty phase of the trial.[4]

V. Penalty Mitigation Evidence on Remand Can Include Beard's Explanation for Why He Shot the Victim.

Beard testified during the penalty phase. Initially, he compliantly answered questions about his background. However, Beard then began hurriedly and confusingly describing a jumbled stream of events, including the manner in which he gained knowledge of his daughter's allegations against Grm'yko, the steps he took afterward, and even background and sexual allegations related to other family members. Over his counsel's objection, the trial court admonished Beard to refrain from testifying about unsubstantiated allegations that the victim sexually abused Beard's daughter, but to tell the jury about his own life and answer his counsel's questions. Shortly afterward, Beard refused to limit his testimony as instructed. He continued to talk over the trial court as the court again admonished him. When Beard told the jurors that they were not given all the evidence, the trial court instructed Beard to return to his counsel's table. Beard complied without objection. He now argues that the trial court abused its discretion by limiting his testimony and committed palpable error by removing him from the witness stand. Because

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[4] *Boone v. Commonwealth*, 821 S.W.2d 813, 814-15 (Ky. 1992), outlines a practical course for trial courts to follow in such circumstances, including the preparation of a carefully-drafted stipulation of the relevant facts to be read to the jury. Other cases providing similar guidance include *Jacobsen v. Commonwealth*, 376 S.W.3d 600, 612 (Ky. 2012), and *St. Clair v. Commonwealth*, 319 S.W.3d 300, 311-312 (Ky. 2010).

we are reversing and remanding this case for a new penalty phase, we address the preserved issue in light of the fact it may reoccur.

KRS 532.055(2)(b) states simply that a defendant may "introduce evidence in mitigation or in support of leniency" during the penalty phase.[5] Beard contends that since he was convinced that the victim touched his daughter and the justice system had failed, his state of mind explained the offense, reduced his culpability, and is therefore proper mitigation evidence.

"Kentucky's Truth-in-Sentencing statute is geared toward providing the jury with information relevant to arriving at an appropriate sentence for the particular offender." *Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky. 1991). The question here is whether Beard's testimony concerning his daughter's allegations against Grm'yko is relevant mitigating evidence.

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[5] Citing *Neal v. Commonwealth*, 95 S.W.3d 843, 853 (Ky. 2003), a murder case, Beard argues that in a case where the death penalty is not an option, mitigation evidence is limited to that which pertains to the 1) defendant's character, 2) prior record, or 3) the circumstances of his offense (referred to here as "the *Lockett* factors"). We note that *Wood v. Commonwealth*, 432 S.W.3d 726, 728 (Ky. App. 2014), citing *Neal*, states, "In non-capital cases, the mitigation evidence is limited to that which pertains to 'the defendant's character, prior record, or the circumstances of his offense.'" We conclude KRS 532.055(2)(b), rather than *Neal*, provides the correct standard for analyzing Beard's claim.

In *Neal*, the defendant maintained that he should have been allowed to introduce the plea offers made by the Commonwealth as mitigating evidence. *Id.* at 852. Recognizing that the United States Supreme Court determined in *Lockett v. Ohio*, 438 U.S. 586 (1978), that a jury considering the death penalty should not be precluded from considering any aspect of the three aforementioned mitigating factors, *Neal* used the three *Lockett* factors as guidance to determine whether a plea offer is relevant mitigating evidence, and concluded it was not. Although the *Lockett* factors may broadly cover readily evident considerations weighing on personal culpability, currently KRS 532.055(2)(b) is the proper authority for analyzing mitigation evidence in noncapital cases. "[I]n noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Lockett*, 438 U.S. at 604–05.

Without citing any authority, the Commonwealth argues that this testimony was properly excluded because it was not relevant to the circumstances of the offense and because Beard did not pursue an extreme emotional disturbance defense (EED). The Commonwealth particularly argues that since Beard's defense was that he did not shoot the victim, his penalty phase testimony that he shot the victim because of his daughter's sexual abuse allegations cannot be considered relevant. We disagree.

First, because the daughter's allegations serve as a motive for Beard's commission of the crimes, particularly the assault crime, they are relevant to mitigation and leniency. Furthermore, the Commonwealth itself introduced testimony in the guilt phase regarding the allegations that Grm'yko abused Beard's daughter. Second, despite Beard denying shooting the victim, once the jury found him guilty of the crimes, hopes of leniency from the jury were tied to reasons he committed the crime; Beard's continued denial of committing the crimes would not have provided any basis for mitigation or leniency.

Although the Commonwealth provides no authority for the argument that a defendant cannot offer mitigation incongruent with his guilt-phase defense, *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003), provides further guidance. In *Caudill*, pertinently, the defendant was convicted of murder and was sentenced to death. This Court recognized that although the evidence of extreme emotional disturbance (EED) may be insufficient to warrant an EED

guilt-phase jury instruction, KRS 532.025(2)(b)(2)[6] provides that evidence can still be sufficient to warrant an instruction on EED as a mitigating circumstance. *Id.* at 673. *See also Smith v. Commonwealth*, 845 S.W.2d 534, 538-40 (Ky. 1993).

Under KRS 532.025(2)(b)(2), EED is a mitigating circumstance when "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime." "In promulgating KRS 532.025(2) the legislators of Kentucky recognized the dire necessity of having jurors consider mitigating circumstances when the death penalty might be imposed." *Id.* at 539. Although KRS 532.025(2)(b)(2) applies to death penalty cases, its reasoning is not necessarily proscribed in noncapital cases. For many years, society has recognized "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

We conclude that Beard may introduce relevant penalty-phase mitigation testimony concerning his motive for committing the crimes. However, as the

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[6] Unlike KRS 532.055(2)(b), KRS 532.025(2)(b) provides a list of statutory mitigating circumstances which the jury may consider in a death penalty case.

trial court expressed during his initial trial, Beard may not interject irrelevant statements, including allegations that other family members were sexually abused or committed sexual abuse. As always, the trial judge "shall exercise reasonable control over the mode and order of interrogating witnesses . . . ." Kentucky Rule of Evidence 611(a).

CONCLUSION

For the foregoing reasons we affirm Beard's convictions, but reverse and remand for a new penalty phase to be conducted consistent with this Opinion.

All sitting. All concur.

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