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Supreme Court of Kentucky

2018-SC-000073-MR

BRANDON L. OLDHAM

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DARRYL S. LAVERY, JUDGE
NO. 15-CR-001647-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

2018-SC-000074-MR

JUAN T. LLOYD

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DARRYL S. LAVERY, JUDGE
NO. 15-CR-001647-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jefferson County Grand Jury indicted Appellants, Brandon L. Oldham and Juan T. Lloyd, for murder, first-degree robbery, and tampering with physical evidence. At a joint trial, the jury found Oldham guilty of murder, criminal facilitation to first-degree robbery, and tampering with physical evidence. The trial court sentenced Oldham to fifty years for murder, five years

for criminal facilitation to robbery, and five years for tampering with physical evidence. The court ordered Oldham's sentences to be served consecutively for a total of sixty years' imprisonment. The jury found Lloyd guilty of first-degree robbery, criminal facilitation to murder, and tampering with physical evidence. The trial court sentenced Lloyd to twenty years for first-degree robbery, five years for criminal facilitation to murder, and five years for tampering with physical evidence. The court ordered Lloyd's sentences to be served consecutively for a total of thirty years' imprisonment. Oldham and Lloyd appeal to this Court as a matter of right, Ky. Const. §110(2)(b).

Both Appellants raise issues concerning improper jury selection in violation of *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), and claim the trial court erred in the admission of certain evidence. Lloyd separately asserts that the trial court erred in denying him his right to confront a witness, denying directed verdict motions, failing to correct discovery violations, prohibiting impeachment evidence, and improperly instructing the jury in a manner that lead to a non-unanimous verdict. After careful review, we affirm the trial court.

I. BACKGROUND

Eddie Vinson died from a combination of burns covering seventy-five percent of his body and injuries sustained from a beating to his head and torso. Noah Oldham identified his brother, Brandon Oldham, and his cousin, Juan Lloyd, as Vinson's killers.

During the murder investigation, the Louisville Metro Police located a Bureau of Alcohol, Tobacco, and Firearms (ATF) surveillance camera recording which included critical footage for the time before, during, and after Vinson's murder.

In addition to the video, the police collected other evidence, developed forensic lab work, conducted an arson investigation, and interviewed several neighborhood residents. Specifically, Louisville Metro Police Department Homicide Detective Dan Miracle interviewed Noah Oldham and his girlfriend Ashley Greene.

Detective Miracle recorded Noah and Ashley's interview at the police station. During that interview, while watching the grainy ATF video from the night Vinson died, Noah explained what he was seeing on the video and identified four individuals: Vinson, Oldham, Lloyd, and himself. While Ashley lacked any direct knowledge regarding the video's contents, she continually encouraged Noah to tell the detective everything he knew. Following Ashley and Noah's recorded joint interview, officers arrested Oldham and Lloyd for Vinson's murder.

During the investigation, police recovered a pair of pants with a belt from a garbage can several houses down from where Vinson's body was found (and outside the ATF camera range). Forensic examination and DNA testing matched one blood spot on the pants to Vinson.

Following Appellants' separate indictments, the trial court joined the cases, ordered discovery, held pretrial conferences and hearings, and conducted a joint trial. During voir dire, the Commonwealth exercised four of its nine peremptory strikes to remove African-American potential jurors. Oldham and Lloyd moved to strike the jury based on *Batson*, 106 S. Ct. 1712. The trial court overruled the motion finding the overall circumstances insufficient to meet the defense's required prima facie burden.

Once the jury was seated, the case proceeded to trial. While testifying, Ashley and Noah had difficulty remembering the factual details from the joint interview with Detective Miracle at the police station. Noah and Ashley were both impeached with written transcripts from the recorded interview. Noah's testimony was further impeached with recordings from the joint interview.

Six days after the trial began, the Commonwealth produced previously-undisclosed arson investigation materials including 135 photographs taken by the Louisville Metro Police Arson Squad and a full police report for a burglary at Noah and Ashley's apartment. The original discovery the Commonwealth turned over to the defense mentioned the burglary, but failed to include the names of two uncharged suspects contained in the full police report.

The trial court heard Appellants' motions seeking discovery sanctions outside the presence of the jury. The court denied Appellants' motions to dismiss, continue, or declare a mistrial. The court found that the Commonwealth had committed discovery violations, but also found that these

violations were not the product of bad faith. The trial court fashioned a remedy which allowed Appellants to use the materials as they saw fit and excluded the Commonwealth from using the materials altogether—even in the event that Appellants would have ordinarily been considered to have opened the door to the evidence. The trial court also limited Appellants’ questioning of Detective Miracle regarding his failure to secure and place the materials in the homicide files.

At the conclusion of trial, Appellants were convicted and sentenced as previously noted. This appeal followed. Further background information will be developed as needed in our analysis.

II. ANALYSIS

A. *Batson*

Oldham and Lloyd first challenge the trial court’s denial of their motions to strike the jury panel pursuant to *Batson*, 106 S. Ct. 1712. Appellants assert that the Commonwealth’s use of more than 40% of its allotted peremptory strikes to remove African-American potential jurors was improper. Appellants also objected based on juror questioning and disparate use of strikes for similarly-situated jurors; however, the focal point of the motions and objections boiled down to the numbers. Oldham’s counsel stated to the trial court, “the numbers speak for themselves.” When asked by the court for a response to the numbers issue raised by the defense, the attorney for the Commonwealth

replied he had never been “*Batson*-ed” before and had not computed the numbers.

The United States Supreme Court set out a three-step process in *Batson* for determining if a violation occurred with the prosecution’s strikes. Kentucky has repeatedly used this procedure and did so recently in *Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015). The initial burden is on the challenging party to make a prima facie case that a peremptory strike was based on race. *Id.* at 826. Once the judge finds that a prima facie case is made, then the prosecutor must offer a race-neutral basis for striking the juror in question. *Id.* Finally, the judge must decide if the defendant has shown purposeful discrimination. *Id.* at 826-27.

In analyzing this issue, the trial court reviewed the strike sheets, *Batson*’s case requirements, and the Commonwealth’s juror questioning and double-checked the math. After including the two alternates, the trial court calculated that the Commonwealth used forty-four percent of available strikes to remove African-American jurors. Of fourteen jurors selected to hear the case (including the two alternates), six were African-American and eight were white. In fact, the jury hearing the case had a higher percentage of African-American jurors than what comprised the jury pool from which it was selected. The trial court found that the Commonwealth’s questions were evenly distributed between white and African-American jurors. After completing a review of the

circumstances and evidence, the trial court ruled the defense had not met its burden to establish a prima facie case under the first prong of *Batson*.

During the pendency of this case, the United States Supreme Court decided *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). The Court reviewed that case's long history of racially-tainted juror strikes under the 13th and 14th Amendments to the United States Constitution. *Id.* at 2238-41. The Court reiterated the *Batson* requirements, including the necessity of establishing a prima facie case of racially impermissible use of strikes before proceeding to the remaining prongs of the three-part analysis. *Id.* at 2243.

The *Flowers* Court reviewed the prima facie evidence in the record and noted that in each of the six trials that had taken place in that case, the prosecution struck as many African American jurors as it could—and in the sixth trial (the trial upon which that appeal was based) struck five out of six possible African American jurors. *Id.* at 2245. The record of the sixth trial reflected 145 questions asked of 5 black jurors and only 12 questions asked of 11 white jurors. *Id.* at 2246-2247. All six trials were handled by the same lead prosecutor. *Id.* at 2234. The selection process in the case before this court does not approach the *Flowers* record.

Here, there is no allegation of the prosecutor having a history of racially-motivated strikes. The prosecutor's reaction to the defense's *Batson* motion is telling: he indicated he had never "been *Batson*-ed." A review of the prosecution's jury questioning confirms the trial court's conclusion that

questions were spread among all the panel members regardless of race. As the prosecutor moved from one side of the courtroom to the other asking questions, he included the entire panel. The prosecutor asked follow-up questions based on juror responses.

The most questions asked to a single juror were posed to an African-American female juror. The Commonwealth asked this juror (who had a work history as an attorney for the Securities and Exchange Commission and white-collar criminal defense law firms) several questions about assessing credibility. Credibility was a major theme in the Commonwealth's case, and it would have been logical to ask any juror with a background in prosecution and criminal defense questions of this kind.

In his brief, Lloyd points to a single African-American juror struck after answering no questions, while a white juror was not struck after also answering no questions. Striking or not striking any juror for not answering questions, absent other indications of bias, does not rise to the level of racially improper disparate treatment of similarly-situated jurors. Non-verbal cues such as body language and facial expressions cannot be discounted as valid reasons for using peremptory strikes on particular jurors.

The trial court determined that the numbers were insufficient to make the prima facie *Batson* case in conjunction with the weak or absent evidence of the other factors. This is consistent with previous decisions. Kentucky cases have held that while numbers are important, math alone will not make the

prima facie case. For example, in *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989), we stated “*Batson* requires more than merely stating that the prosecutor struck a certain number of blacks from the jury panel.” *Id.* at 920-921. The fact that the final jury had a higher percentage of African-American jurors than the original pool was a factor the trial court weighed heavily in ruling on the motions. See *Chesher v. Commonwealth*, 485 S.W. 3d 347, 350 (Ky. 2016).

Trial judges are in the best position to evaluate *Batson* claims and they are vested with considerable discretion. *Tunstall v. Commonwealth*, 337 S.W. 3d 576, 585 (Ky. 2011). We have held, “[t]he trial court’s ultimate decision on a *Batson* challenge is like a finding of fact that must be given great deference by an appellate court.” *Commonwealth v. Coker*, 241 S.W.3d 305, 308 (Ky. 2007). Therefore, a trial court’s ruling on a *Batson* challenge will not be disturbed unless clearly erroneous. *Ross v. Commonwealth*, 455 S.W.3d 899, 906 (Ky. 2015); *Chestnut v Commonwealth*, 250 S.W.3d 288 (Ky. 2008). We will not disturb the trial court’s findings here, as we hold the trial court’s ruling that Appellants failed to make a prima facie case in their *Batson* challenge was not clearly erroneous.

B. Recorded Statement

Appellants both argue that the trial court erred in admitting Noah and Ashley’s recorded joint statement, as it violated the rules governing hearsay evidence. Lloyd also individually claims he was denied the right to confront his

accusers. Issues arising from the three separate ways the Commonwealth made use of the joint statement, in whole or in part, form the basis of Appellants' main arguments. We will begin with a description of the three ways in which the Commonwealth admitted the interview—through either the transcript or the recording itself.

1. Introduction of Statement

a. Noah Oldham's portion of the joint statement

Noah and Ashley met with Detective Miracle and gave a joint interview, which was recorded and later transcribed. Noah was impeached during his direct testimony with a portion of the transcript, and with portions of the recorded statement.

During his testimony, Noah stated he had participated in the recorded interview. He knew where the interview took place, who was present, and when it happened. Noah was asked a variety of questions regarding the interview during his direct testimony. Noah answered some of the questions, stated that he did not recall the answers to others, and recalled some information only after being prompted by the transcript. To refresh his recollection, the trial court permitted Noah to watch the entire unredacted video interview outside the jury's presence. Noah said watching the video refreshed his memory. After watching the recording, Noah's memory improved for some subjects, but his memory pertaining to Oldham and Lloyd's involvement in Vinson's death remained unaltered—Noah testified that he did not recall who beat Vinson or set him on fire.

The Commonwealth impeached Noah with prior inconsistent statements from the joint interview. The transcript and video served as the Commonwealth's explanation as to how Oldham and Lloyd ended Vinson's life.

Appellants' trial counsel extensively cross-examined Noah. During both direct and cross-examination, Noah claimed he lied to the detective during the joint interview due to anger over money from an automobile wreck settlement that had gone missing from Ashley's apartment.

b. Ashley Greene's portion of the joint statement

Ashley Greene was not an eyewitness to Vinson's death. Her testimony explained why she and Noah gave the joint statement and clarified her role in helping Noah answer Detective Miracle's questions. She was also asked about Noah's state of mind during the interview.

At trial, Ashley testified that she had participated in the interview and knew when and where it occurred and who was present. However, Ashley had great difficulty remembering what she said during the interview with Detective Miracle. Ashley claimed she could not recall the details concerning the interview because she had put it all out of her mind. To refresh her memory, Ashley was provided with a written transcript from the joint statement. Even with the transcript, Ashley could not remember what she said to Detective Miracle, but did not deny the transcript's accuracy.

Testimony from Ashley followed a pattern. First, the Commonwealth would ask a question, and Ashley would respond, "don't remember." Next, the

prosecutor would locate the same question and the answer Ashley gave during the interview in the transcript. Then, Ashley would read that portion of the transcript silently to herself. After denying that it helped her remember, Ashley listened as the prosecutor read the question and answer from the transcript aloud to the jury. Finally, Ashley would acknowledge the transcript's accuracy.

During Ashley's testimony, the Commonwealth played a brief clip showing Noah wiping his eyes or face to impeach her answers regarding Noah's state of mind during the joint interview. This was the only part of the recording the Commonwealth played during Ashley's testimony. As opposed to the tact taken during Noah's testimony (in which large portions of the interview were played), the Commonwealth played no video of questions and answers from the joint statement during her testimony.

Ashley admitted during cross-examination she could not recall the details from the police station interview, she had no personal knowledge about what happened to Vinson the night he died, and—most significantly—that Noah provided her with all the information she had about that night.

c. Detective Miracle's testimony and the long version of the statement

During Detective Miracle's testimony, the Commonwealth played a redacted fifty-five-minute version of the recorded joint statement. Included in it were the prior inconsistent statements from transcripts already presented during Noah and Ashley's testimony, previously shown video from Noah's testimony, video from Ashley's testimony showing Noah wiping his eyes or face,

and portions not previously asked about or shown during Noah's or Ashley's testimony.

Appellants' trial counsel challenged the long version of the interview, asserting it failed to meet necessary foundation requirements. The trial court ruled the necessary foundation requirements for admission (including acknowledging the prior statement was made, who was present, when it occurred, and where it was made, as required by KRE 613) were met during Noah, Ashley, and Detective Miracle's testimonies. The trial court noted the opportunity for cross examining the three witnesses.

2. Noah's impeachment with the transcript and short recording

Noah Oldham was a key witness for the Commonwealth. As events unfolded the night of Vinson's murder, Noah was on the street and witnessed the circumstances leading to Vinson's death and what occurred afterwards. Noah clarified the grainy ATF video, and—most significantly—identified Oldham and Lloyd as Vinson's killers.

Appellants concede some of the questions and answers in the short interview version played when Noah testified were proper, but Oldham describes it as laced with inadmissible hearsay. Further challenging the shorter video version, Appellants assert the questions and answers failed to provide the necessary foundation required under KRE 613.

However, the applicable rules of evidence and caselaw lead us to a different conclusion than that asserted by Appellants. Kentucky Rules of Evidence (KRE) 801A states in pertinent part:

(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;

KRE 613 states in part:

(a) Examining witnesses concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, 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 an opportunity to explain it.

Kentucky caselaw further clarifies the rules. For example, our predecessor Court in *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969), allowed prior inconsistent statements due to faulty memory to trigger the rules for impeachment. "A statement is inconsistent for purposes of KRE 801A(a)(1) whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it." *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997). Furthermore, prior inconsistent statements may be introduced as an impeachment device and substantive evidence. *Jett*, 436 S.W.2d at 792.

Noah acknowledged the statement, where it was made, who was present, and when it was given. Noah did not recall what he said at the interview. The trial court ruled the foundation requirements were met under KRE 613, and we agree.

This case is analogous to *McAtee v. Commonwealth*, 413 S.W.3d 608 (Ky. 2013). In that case, after police obtained eyewitness statements, the defendant was charged with murder. At trial, the two main witnesses could not remember the event. *Id.* at 615. Both witnesses were impeached with notes from the detective's interviews as well as their statements on video. *Id.* The defendant was convicted and on appeal challenged the use of the statements. This Court affirmed the use of the prior inconsistent statements.

In the present case, Noah, like the witnesses in *McAtee*, participated in a recorded statement. At trial, Noah, much like the witnesses in *McAtee*, was unable to remember what he said. The Commonwealth impeached Noah using a transcript and a twenty-two-minute video from that original interview. The jury learned through the impeachment what Noah did and saw the night of the murder.

This Court has long held that "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d

941, 945 (Ky. 1999). Applying this standard, the trial court did not abuse its discretion in allowing the Commonwealth to refer to the transcript when Noah failed to recollect answers to questions posed by the Commonwealth, and then play the video of those questions and answers when Noah's recollection was not refreshed by the transcript. This is straightforward impeachment with a prior inconsistent statement.

As to the questions and responses in the short video, the Commonwealth had not asked Noah about before the recording was played, we look to *White v. Commonwealth*, 2014-SC-000069-MR, 2015 WL 1544230 (Ky. Apr. 2, 2015). In *White*, the witness made clear he could not recall even giving the statement to the police. "It was abundantly clear that nothing more could have been gained by questioning Mayfield as to the specifics of his interview with police." *Id.* at *5. In the present case, Noah repeatedly said the long passage of time resulted in his not being able to recall his prior answers. He could not recall his answers despite watching the entire video interview and being prompted with the transcript of his answers from that interview. The point of futility described in *White* had been reached.

Allowing the Commonwealth to use the short video version with this witness is consistent with prior caselaw. The trial court did not abuse its discretion in allowing this impeachment.

3. Ashley's impeachment with the transcript

Ashley's testimony and impeachment with the written transcript from the joint statement clearly falls under *Jett*, 436 S.W.2d 788, and *Brock*, 947 S.W.2d at 27. Ashley did not remember what she said in the joint statement, although she remembered making the statement. When asked questions about where it was done, who was there, and the time it occurred as required by KRE 613, Ashley recalled those details and answered those questions. Although it did not help her memory, Ashley was also shown a written transcript, never denying the accuracy of the transcript. Ashley was not impeached with video of prior inconsistent statements.

Ashley was cross-examined, and her memory issues were put before the jury. Impeachment of Ashley using the transcript she acknowledged as accurate, was conducted under established case authority, and we hold the trial court did not abuse its discretion.

4. Noah's impeachment with the long recording

During Detective Miracle's testimony, the Commonwealth introduced a fifty-five-minute long recording of the joint interview to impeach Noah's testimony. The long version was created after a lengthy hearing on the Appellants' motions to exclude various portions from the joint interview. The Commonwealth's stated goal for playing the long version was to impeach Noah Oldham's direct testimony about his state of mind when he participated in the joint statement.

In his testimony, Noah described his state of mind at the time he spoke to Detective Miracle as calm and nothing out of the ordinary. The following exchange occurred between the Commonwealth and Noah:

Commonwealth: What was your emotional state at the time? Scared? Upset? Angry?

Noah: None of that, sir.

Commonwealth: You don't remember having some sort of emotional reaction to being in that conversation?

Noah: No, sir.

Commonwealth: In the days preceding that conversation, you have any trouble sleeping or keeping up with routine activities like bathing or eating?

Noah: I can't recall, sir.

Commonwealth: Can't recall feeling any emotional duress any one way or another?

Noah: I can't recall—been so long ago.

Commonwealth: You don't recall an emotional state about the death of someone you considered a friend?

Noah: I wouldn't say I considered him a friend. He was just someone who always—know what I am saying?

Commonwealth: He was a good guy?

Noah: Yes.

Commonwealth: He was a really good guy?

Answer: Yes, sir.

Later during direct examination, Noah clarified the effect Vinson's death and how he died, had on him. When the Commonwealth asked, "His death,

that didn't bother you?," Noah responded, "Didn't bother me—death is bothersome to everyone."

The Commonwealth sought to play the long version of the redacted statement in response to this exchange to impeach Noah's testimony regarding his state of mind.

Noah's state of mind during the joint statement was vastly different from what he portrayed on the witness stand. In The Kentucky Evidence Law Handbook, Professor Robert G. Lawson describes the need for state of mind evidence as well as the challenges involved: "States of mind (such as intent, love, hate, malice, knowledge, fear, etc.) are no more observable than pain and internal bodily conditions, are no less difficult to prove, and regularly surface as crucial if not determinative issues in litigation." §8.50 [2] [a] at 647 (Fifth ed. 2013). Dealing with these difficulties described by Professor Lawson, the Commonwealth sought to allow the jury to evaluate Noah's testimony's believability with the long version of the recorded statement.

Noah's anguish over Vinson's death—and the role his brother and cousin had in causing that death—was clearly visible on the long version of the recording. The trial court determined it was critical for the jury to see Noah's mental state at the time of the original statement. Ashley's response to Noah's feelings including repeatedly encouraging and cajoling him to keep talking was also clear. Ashley acknowledged Noah's contradictory emotions and stood by

him as he made the difficult choice to talk to the police about his family members' involvement in a gruesome crime.

Noah's state of mind inside the police interview room just days after Vinson's murder was clear on the long version of the recording. The trial court did not err when it allowed the Commonwealth to use the recording to impeach Noah's state of mind testimony.

The trial court acknowledged the concerns Appellants' trial counsel raised over the long recording, including the fact that Ashley had no personal knowledge about what happened and that Ashley had not been questioned regarding all of her statements on the recording. Addressing those concerns, the trial court crafted an admonition to read to the jury prior to the video being played. In that admonition, the jury was instructed to disregard Ashley's fact statements because she was not present during the crime, and to consider what Ashley said only as it bore on Noah's state of mind. By the time the trial court stopped playing the long version, it had given three admonitions, which will be addressed in detail below.

In order to fit within the hearsay exception, KRE 803(3) requires the subject state of mind be that of present sense—how one feels at that time. It cannot be how one felt earlier or later. “The rule first requires that the out-of-court statement must express the declarant's *present* mental, emotional, or physical condition. The state-of-mind exception is limited to a statement about

a then-existing mental state or condition.” *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 197–98 (Ky. 2017).

The requirement that the statement reflect Noah’s present mental state is met in this case. The joint interview was conducted within days of Vinson’s death. Ashley told Detective Miracle that Noah couldn’t eat or sleep and hadn’t bathed since the night of Vinson’s death. Noah’s state of mind when he gave the statement showed anger, remorse, sadness, loss, and hurt. Raw, emotional pain was visible in the recording—and noticeably absent when Noah testified at trial.

Even if a statement is admissible under KRE 803(3), it can be excluded under other rules of evidence. “This evidence was admissible only if it were within the scope of KRE 803(3), the state-of-mind exception to the hearsay rule; and even if it were within the scope of that exception, it was still inadmissible if so rendered by other provisions of the Kentucky Rules of Evidence.” *Crowe v. Commonwealth*, 38 S.W.3d 379, 382–83 (Ky. 2001).

In this case, the trial court held a hearing on specific written objections filed by Appellants to the long version of the recording. In ruling on these motions, the trial court sustained many of the objections, and the Commonwealth conceded that other portions of the video should be redacted. Despite the trial court ordering two statements be redacted before the recording was played to the jury, they remained in the final video version played to the

jury. The trial court provided two more admonitions when these portions of the video were played.

As noted, the trial court has broad discretion in evidentiary matters and we will not overturn its rulings on those issues absent an abuse of discretion. We hold there was no such abuse here. However, even if we were to hold otherwise, any error in the admission of the long version of the recording would have been harmless.

RCr 9.24 reads:

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

In seeking to apply that rule, we note standard set out in *Dunlap*:

As noted in *Brown v. Commonwealth*, “preserved evidentiary and other non-constitutional errors will be deemed harmless under RCr 9.24 and *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), if we can say with fair assurance that the judgment was not substantially swayed by the error.” 313 S.W.3d 577, 595 (Ky. 2010). “Our inquiry is not simply ‘whether there [is] 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*, 328 U.S. at 765, 66 S. Ct. 1239).

Dunlap v. Commonwealth, 435 S.W.3d 537, 553 (Ky. 2013).

When the long version of the recording was played for the jury, significant other physical evidence (including the pants with the DNA match and photographic evidence consisting of the ATF video and numerous photos) was already before the jury. Numerous witnesses including lab personnel, police officers, evidence technicians, and lay witnesses had already testified. Noah's testimony (including the twenty-two-minute video from the joint statement), was the most critical evidence against Appellants. That recording answered the questions of who, what, where and why for the jury. The long recording's addition to the other evidence did not constitute so substantial an influence on the result that grave doubts exist as to whether the verdict can stand. *Id.* at 553. Ashley's identification of Lloyd on the long version was immediately preceded by Noah's identification. Ashley's words echoed what Noah said and added nothing new.

In summary, we hold the trial court did not abuse its discretion in allowing the admission of the long version of the recording for impeachment purposes; however, even assuming the trial court had erred, any error in playing the long version of the recording would have been harmless.

5. Confrontation Clause

In addition to the issues outlined above regarding the playing of the long version of the interview, Lloyd also raises a confrontation clause argument. While on the witness stand, Ashley was not asked about every question and answer contained in the long version of the interview played during Detective

Miracle's testimony. At trial, Lloyd challenged those omissions as a denial of his right to confront his accusers. Lloyd's brief refers to Ashley identifying a person on the ATF video as Lloyd. This identification, seen on the long version, occurred when Noah, Ashley, and Detective Miracle were reviewing the ATF video and discussing one of the two men walking away from Vinson's body with something in his hands. Ashley was not questioned about this identification while on the witness stand.

Lloyd's identification by Ashley had been ordered excluded by the trial court from the long version, but inexplicably remained in the version shown to the jury. The trial court and the parties, attempting to save time, did not review the final edited long version after the exclusion hearing and before it was shown to the jury. When Ashley's identification was played, following an objection, the trial court admonished the jury to not consider Ashley's statement identifying Lloyd as fact, because she was not present and had no basis for that statement.

It was conceded by Lloyd's trial counsel that Noah made the same identification immediately preceding Ashley doing so. Even though the identification was ordered excluded by the judge, Ashley's identification was not a new or startling piece of information. In retrospect, a few minutes spent reviewing the video before the jury saw it, would have been the better practice.

Confrontation issues with witnesses suffering from memory loss have been resolved by this Court. No confrontation violation was found in *McAtee*

where “we h[e]ld that the Confrontation Clause is not implicated by a witness claiming memory loss if he or she takes the stand at trial and is subject to cross-examination.” 413 S.W.3d at 619. In this case, while on the witness stand, Ashley stated she did not recall what happened around the time of Vinson’s death or the details of the statement to Detective Miracle. The transcript provided no direct assistance to improving Ashley’s memory. Notwithstanding the many gaps in her memory, Ashley was cross-examined.

The United States Supreme Court addressed the confrontation issue declaring, “[m]eaningful cross-examination within the Rule’s intent is not destroyed by the witness’ assertion of memory loss, which is often the very result sought to be produced by cross-examination, and which can be effective in destroying the force of the prior statement.” *United States v. Owens*, 108 S. Ct. 838, 840 (1988).

The Court made clear:

It is sufficient that the defendant has the opportunity to bring out such matters as the witness’ bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931–932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.”

Id. at 842.

Cross-examination may not prove as effective as defense counsel might want it to be. This may be especially true with witnesses suffering from memory loss. “The weapons available to impugn the witness’ statement when memory loss is asserted will of course not always achieve success, but

successful cross-examination is not the constitutional guarantee.” *Id.* at 843. Memory loss does not change the fact that when a witness appeared, took the stand, and answered questions, the opportunity for cross examination occurred. *See McIntosh v. Commonwealth*, 2006-SC-000421-MR, 2008 WL 2167894, at *4 (Ky. May 22, 2008).

The opportunity for cross-examination occurred, and the court gave a corrective admonition for Lloyd’s identification that despite court order remained on the video. Indisputably, the jury had an opportunity to evaluate Ashley’s credibility when she took the stand, testified, and was cross-examined. We find no abuse of discretion in the trial court’s denial of confrontation claims.

C. Admonitions

As previously discussed, one admonition was given to the jury prior to the Commonwealth playing the long version of the recording during Detective Miracle’s testimony. The second and third admonitions resulted from portions of the long version ordered redacted by the trial court remaining on the video and being played for the jury. After the third admonition, the trial court stopped the video.

All three admonitions dealt with Ashley’s statements made in the long version of the recording. Appellant Lloyd claims the “piling up” of admonitions did not cure the errors in the long version of the joint statement. We begin our analysis with the wording of each admonition.

In the first admonition, the trial court stated:

Ladies and gentlemen, this video you're going to see, much like the previous video, has been edited in order to be consistent with the court's rulings. I want to read to you another statement that the court has prepared for you to consider, prior to watching this video. "You are going to see a video of Ashley Greene speaking with Sergeant Miracle and Noah Oldham. You are reminded that Ashley Greene testified that she was not present on or about the scene where Mr. Vinson's body was discovered in the early morning hours of June 7, 2015. Rather, Ashley Greene's statements regarding the events that evening were based on what Noah Oldham told her, and not on her own personal observations. As such, you should not consider statements—you should not consider her statements—as evidence as to what occurred in the early morning hours of June 7, 2015. You may, however, consider her statements as context for her testimony and the testimony of Noah Oldham before this court. You may consider her statements as evidence of her own personal observations in matters of which she has personal knowledge."

Lloyd's counsel immediately objected when a portion of the recording was played which the court had ordered removed. In that segment of the video, Ashley identified Lloyd on the surveillance video. Upon defense counsel's objection, the court admonished the jury as follows:

Ladies and gentlemen, you are—I'm going to give you another admonition—you are instructed to disregard any statements by Ashley Greene regarding her observations of what and who she sees on the video. She wasn't present, and you shall not consider it as evidence as far as what she sees or claims to see on the video, because she was not there.

When another portion of the recording the trial court had ordered removed was played for the jury, Oldham's counsel objected. The trial court stopped the recording from being played any further, and admonished the jury, to wit:

Ladies and Gentlemen, you are instructed to disregard statements by Ashley Green regarding her commentary regarding Brandon Oldham's demeanor and attitude because there is no evidence that Ashley Green had any contact with Brandon Oldham between June 7, 2015 and their interview with Sergeant Miracle.

In reviewing the trial court's three admonitions, we note that there is a strong presumption a jury will follow the instructions it is given. As this Court has held:

The trial court's admonition put this issue to rest. A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. *Mills v. Commonwealth, Ky.*, 996 S.W.2d 473, 485 (1999) (holding that "there is nothing for us to review" when trial court cured the Commonwealth's reference to defendant's prior incarceration for an unspecified crime and the defendant failed to "present any argument to rebut the presumption that the trial court's admonition cured the error."). See also *Maxie v. Commonwealth, Ky.*, 82 S.W.3d 860, 863 (2002); *Alexander v. Commonwealth, Ky.*, 862 S.W.2d 856, 859 (1993), *overruled on other grounds by Stringer v. Commonwealth, Ky.*, 956 S.W.2d 883 (1997).

Johnson v. Commonweath, 105 S.W.3d 430, 441 (Ky. 2003).

Johnson also made clear there were limited occasions when the presumption in favor of admonitions would not be sustained:

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, *Alexander, supra*, at 859; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial." *Derossett v. Commonwealth, Ky.*, 867 S.W.2d 195, 198 (1993); *Bowler v. Commonwealth, Ky.*, 558 S.W.2d 169, 171 (1977).

Johnson, 105 S.W.3d at 441.

The first two admonitions let jurors know that Ashley was not an eyewitness and her statements were not to be treated the same way as ones made by an eyewitness. The third admonition unequivocally directed the jury to disregard what she said in that segment of the recording. The wording was unambiguous and the path on how to proceed set out in the admonitions was clearly marked for the jury. The trial court's admonitions carried a high probability that the jury would follow the instructions they were given.

In applying *Johnson*, nothing in the long version of the recording qualifies as devastating. Before the long version was played, the jury already heard the most important details from Noah, buttressed by the other witnesses and exhibits. Noah's description of the crime and his identification of Appellants in the ATF video were brought out during his direct testimony and were far more important and substantial than anything Ashley said. Lloyd's identification by Ashley did not alter the course of the case. The admonitions were clear and the jury is presumed to have followed them. The admonitions utilized by the trial court cured any error that the admission of the evidence would have otherwise caused.

D. Directed Verdict Motions

Lloyd seeks to reverse his convictions for tampering with physical evidence and first-degree robbery claiming a directed verdict should have been granted. These issues were preserved by Lloyd's specific motions for directed

verdict at the close of the Commonwealth's case and renewed at the close of all evidence.

When reviewing a challenge to a trial court's denial of a motion for directed verdict, this Court construes all evidence in the light most favorable to the Commonwealth. *Jones*, 283 S.W.3d at 668. In doing so, we must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "It should be remembered that the trial court is certainly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. Obviously, there must be evidence of substance." *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). "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.*

1. Tampering with Physical Evidence

Lloyd asserts the trial court erred in denying his motion for a directed verdict as to his tampering with physical evidence charge. As relevant herein, KRS 524.100 provides:

A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

- (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent

to impair its verity or availability in the official proceeding;

The Commonwealth contends three items encompass the evidence that Lloyd tampered with and concealed: the pants recovered from a trashcan outside the ATF camera range and down the street from the body's location, a pair of tennis shoes recovered from a vacant lot across the street from the body, and a lighter fluid bottle never recovered by the police. Witnesses described a bottle of lighter fluid close to the burning body. However, the witnesses who called 911 described an unidentified male on a bicycle returning to the scene and removing the lighter fluid bottle. Police did not recover the bottle.

At trial, the Commonwealth argued that, viewing the evidence in the light most favorable to the Commonwealth, Lloyd was seen on the ATF video walking away from Vinson's body with a pair of pants in his hand. Pants were found the next day in a trashcan, which the Commonwealth asserted was evidence of an effort to conceal or destroy the pants. By placing the pants in the trash, they were not only removed from the scene in an effort to prevent their availability as evidence of the crime, but they could have easily been destroyed if the trash were picked up before recovered by officers. Furthermore, the blood found on the pants matched Vinson's DNA.

The Commonwealth also argued a reasonable jury could decide the unidentified male vaguely described by the two witnesses retrieving the lighter fluid bottle was Lloyd.

Lloyd responded to the Commonwealth's argument by asserting that no evidence was before the trial court showing when the pants were placed in the trashcan; rather, the only evidence showed when the pants were recovered. He also asserted that no evidence consistent with struggle, assault, or burning was found on the pants (even though the victim's blood was found on them). Furthermore, Lloyd argued there was no proof of ownership or possession of the pants—leaving those questions unresolved.

Lloyd responded to the Commonwealth's argument regarding the lighter fluid bottle by insisting that the description given by the witnesses did not match him—and until that point in the trial, he had not been the focus of the Commonwealth's arguments concerning who retrieved the lighter fluid bottle.

Neither side argued about the tennis shoes at trial.

Applicable cases make clear that merely leaving a crime scene in possession of evidence does not necessarily complete the crime of tampering with physical evidence. "We note, tampering does not arise by the mere act of hiding property on one's person to avoid detection of shoplifting."

Commonwealth v. Henderson, 85 S.W.3d 618, 620 (Ky. 2002). Likewise, an appellant's walking away from the scene of a crime with a gun is not enough to support a tampering charge without evidence of some additional act demonstrating an intent to conceal. *Mullins v. Commonwealth*, 350 S.W.3d 434, 442 (Ky. 2011).

In this case, the act of removing a pair of pants from the body's location and placing them in a trashcan some distance from the body created a reasonable inference that the objective was to conceal or destroy the evidence of a crime. As noted, if the trash had been picked up by the urban government's trash collection, the pants would have been lost to any official investigation.

Looking for guidance in previous cases, we again review the facts from *McAtee*, 413 S.W.3d 608, where the defendant walked away from the scene of a crime with a gun which was never found. This Court looked for evidence of an additional act relating to the gun but found none in the record. "Without such evidence it was unreasonable for the jury to find the Appellant guilty of tampering with physical evidence." *Id.* at 617. Distinguishing this case from *McAtee*, we note there was evidence in the record concerning a separate act apart from the removal from the scene. Specifically, here, the pants were placed in a trashcan.

As we've held regarding directed verdicts:

When presented with a motion for a directed verdict, "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth," and "[i]f 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). The court "must assume that the evidence for the Commonwealth is true," *id.*, regardless of whether the evidence, usually testimony, has been attacked or impeached. The trial court is required to "reserv[e] to the jury questions as to the credibility and weight to be given to ... testimony." *Id.* On appellate review, the standard is deferential: a directed-verdict decision will be

reversed only “if under the evidence as a whole, it would be *clearly* unreasonable for a jury to find guilt.” *Id.* (emphasis added). This clearly-unreasonable standard requires “some deference” to the trial court’s appraisal of the proof. *McCleery v. Commonwealth*, 410 S.W.3d 597, 601 (Ky. 2013).

Southworth v. Commonwealth, 435 S.W.3d 32, 42 (Ky. 2014).

In this case, viewing the evidence in the light most favorable to the Commonwealth, a person on the ATF video, identified as Lloyd, carried what was described as a pair of pants away from Vinson’s burning body. A pair of pants was found in a trashcan down the street from Vinson’s body, with a blood spot linked to Vinson by DNA testing. It would not be clearly unreasonable for a jury to conclude the pants were evidence, and in conjunction with the placement in a trashcan, an effort had been made to conceal or destroy them. Therefore, it would not be clearly unreasonable for a jury to find the appellant guilty of tampering with physical evidence under these facts. The trial court did not err in denying the motion. Having so found, there is no need to further address the bottle of lighter fluid or the tennis shoes at this juncture.

2. Directed Verdict—First-Degree Robbery

Lloyd also argues the trial court erred in denying his motion for a directed verdict as to the first-degree robbery charge. He raises two issues supporting this argument: (a) no force was used with the intent to accomplish the theft, and (b) there was no evidence presented that Vinson owned the pants that were purportedly the subject of the robbery. These issues were preserved.

We begin by examining the relevant statutes. KRS 515.020 provides, in pertinent part,

(1) 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

Turning next to the statute regarding theft, those elements are set out in KRS 514.030:

(1) Except as otherwise provided in KRS 217.181, a person is guilty of theft by unlawful taking or disposition when he unlawfully:
(a) Takes or exercises control over movable property of another with intent to deprive him thereof

a. Use of Force

As to Lloyd’s argument regarding the use of force to accomplish the theft, his brief cites Texas authority for the proposition that intent to commit the theft and the force used to commit it must be concurrent. Kentucky and Texas differ on this requirement. In *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997) *overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011), this court held that the requisite force can be applied at any time during the criminal episode. “The offense of first degree robbery is committed even when the robber decides to steal the property after he kills the victim, so long as the theft and the murder are part of the same criminal episode.” *Id.*

As noted, in deciding a directed verdict motion, the trial court is required to consider the evidence in the light most favorable to the Commonwealth.

Here, the evidence showed Vinson was beaten and burned to death. According to the Commonwealth, while Vinson's body was still burning—and with no way to determine if he was deceased at that point in time—Vinson's pants were taken by someone. It is reasonable to infer that the person who removed his pants was involved in his death. These acts were part of the same criminal episode. Therefore, if the robbery was otherwise proven by the evidence, a reasonable juror could have found force was used in the taking of the pants. We hold the trial court did not err in denying Lloyd's motion on this ground.

b. Owner of pants

Lloyd also argues that the directed verdict motion should have been granted due to the absence of any ownership link between Vinson and the pants. In making motions for directed verdict, Lloyd's trial counsel noted that no evidence or testimony proved Vinson wore the pants, owned the pants, or possessed the pants that day. Lloyd also pointed out that in the crime scene photographs, Vinson was wearing a belted pair of shorts. Lloyd points out that the pants were not burned, distressed, or showing any effects of the assault.

The Commonwealth responded that the ATF video "depicts the person identified as Juan Lloyd walking down the street holding what appears to be an object or a pair of pants." The Commonwealth argued the video evidence "coupled with the discovery of those pants the following day" and "confirmation of a DNA match" of a spot of blood on the pants to Vinson, was sufficient that "a reasonable juror could conclude that those pants were taken by the

defendants during the course of the murder and disposed of in the trashcan where they were found.”

During the Commonwealth’s presentation of evidence, Detective Miracle had testified and given a commentary regarding the ATF video. Relevant to the pants, Miracle said “the individual behind him, you can see what I believe to be his legs, and if you go through the frames, it looks like something . . . that this individual right here was holding.” He continued testifying about the video he said he had watched numerous times during the course of his investigation: “I was pointing [an item carried by an individual identified as Lloyd] as it hung, or slung, from his side.” Miracle stated, “[w]hen it went out to the side, you could see with the contrast of the video there was . . . an object that was slung around.”

The Commonwealth then asked why it was important to test the pants for DNA, and Miracle went on to say:

The jeans . . . we . . . found them discarded, lying in the trashcan . . . and then in connection with also reviewing the video, and the individual in the back was holding the pants . . . and then it was in the same path . . . where these jeans were found. I believe it was connected and [Vinson] . . . *throughout my investigation I found that he was missing pants* and that’s why I had the pants tested for DNA.

(emphasis added). The Commonwealth then asked Miracle to whom he suspected the pants belonged and Miracle responded “I suspected them to be [Vinson’s].”

Based on the arguments presented during the hearing on the directed verdict motion and the evidence presented at trial, the trial court determined a reasonable inference of Vinson's ownership of the pants could be drawn from the totality of the circumstances and denied the motion for directed verdict on the robbery charge.

As previously discussed, the pants were "evidence" required for the jury to find tampering with physical evidence. It is reasonable to infer due to the DNA match that the pants were more than a random pair of pants discarded in a trashcan on a street where a murder took place. Both the trial court and this Court are tasked with viewing the evidence in the light most favorable to the Commonwealth. Here, a person on the ATF video, identified as Lloyd, carried what was described as a pair of pants away from Vinson's burning body. A pair of pants was found in a trashcan down the street from Vinson's body, with a blood spot matching Vinson's DNA. Detective Miracle testified that during his investigation, he believed that Vinson was missing a pair of pants. The Detective was not questioned further regarding the pants by the Commonwealth or the defense.¹

¹ While it is true that the arson investigator indicated that one of the crime scene photographs of Vinson's body showed he was wearing a belt and a pair of short pants, the weight of evidence and credibility of witnesses is a matter for the jury to determine. We will not take a case away from a jury when the Commonwealth has produced "more than a mere scintilla of evidence." *Sawhill*, 660 S.W.2d at 5.

Given the evidence presented by the Commonwealth, it would not be clearly unreasonable for a jury to find Lloyd guilty of first-degree robbery under these facts. The trial court did not err in denying the motion.

E. Discovery Violations

Lloyd next appeals the trial court's handling of discovery violations. Six days into trial, the Commonwealth produced arson materials including 135 photos and a burglary report for Noah and Ashley's apartment. The trial court conducted a hearing on Appellants' motions requesting dismissal, continuance, and mistrial. Lloyd withdrew his requests for continuance and mistrial but continued to seek dismissal.

The trial court determined dismissal was too extreme a remedy for violations not resulting from bad faith. The trial court fashioned a remedy allowing the defense to use the materials, denied the Commonwealth any use of the materials and limited Appellant's questions about the detective's failure to retrieve the materials. We hold the trial court acted within permitted authority in fashioning this remedy.

RCr. 7.24 grants the trial judge considerable authority to deal with issues. Specifically, that rule reads, in pertinent part:

(10) If subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule, that party shall promptly notify the

other party or the other party's attorney, or the court, of the existence thereof.

(11) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

Testimony at the hearing revealed the lead Arson Squad Detective retired during the pendency of the investigation, and the subsequent lack of an actual “report” caused the communication issues resulting in the delay providing arson squad photos and materials to defense counsel. The trial court determined that in the discovery materials provided prior to trial, a burglary of Noah and Ashley’s apartment had been referenced, but the actual police report including the names of two suspects had not been collected by the homicide detectives.

For a discovery violation to result in the level of sanctions sought by Lloyd, that violation must be such that if the material had been timely disclosed, he would have proceeded in a different manner or the jury would have arrived at a different result. As we have held:

A discovery violation justifies setting aside a conviction “only where there exists a ‘reasonable probability’ that had the evidence been disclosed the result at trial would have been different.” *Wood v. Bartholomew*, . . . 116 S. Ct. 7, 10, 133 L.Ed.2d. 1 (1995); *Kyles v. Whitley*, 514 U.S. 419, 432-36, 115 S. Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985).

Weaver v. Commonwealth, 955 S.W.2d 722, 725-726 (Ky. 1997).

Furthermore, the violations' impact must be such that the defendant would have chosen a different defense strategy.

In *Akers v. Commonwealth*, 172 S.W.3d 414, 417-418 (Ky. 2005), this Court held that the Commonwealth's RCr 7.24 discovery violation mandated reversal as it prejudiced the appellant's ability to properly prepare a defense. This Court noted that if the Commonwealth had provided the withheld evidence, it is doubtful "defense counsel would have proceeded in the same manner or the jury would have reached the same result."

Chestnut, 250 S.W.3d at 298.

In this case, the untimely arson materials do not reach this level of violation. At the hearing, the parties and the court reviewed the 135 photographs and determined some were duplicates taken at the same time other officers took investigative photos which *were* provided in a timely manner. One photo was of an automobile license plate; however, that vehicle belonged to a person who lived close to where Vinson's body was found.

Prior to receiving the materials, Appellants' defense was that someone else killed Vinson. Appellants argued the jurors should not believe the self-serving statements made by Noah and Ashley to Detective Miracle. The defense claimed Noah, a convicted felon worried about being blamed for Vinson's death, sought to shift the police investigation focus away from himself, and that Ashley was trying to protect Noah and her kids. It is highly unlikely Lloyd's defense would have changed based on anything revealed in the arson

materials. The ATF video, made clear by Noah's narration, foreclosed that possibility.

In analyzing the revelation of a possible "firebug" mentioned in the arson materials, the same conclusion is reached. Significant speculation is required to conclude that if timely provided, the defense would have successfully identified the potential firebug as a viable alternate suspect for Vinson's murder. This firebug, if he or she existed, was someone the police never identified, located or charged with any crimes.

In *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007), this Court examined a case in which the Commonwealth failed to turn over nine police reports to the defense. This significant evidence could have had substantial effects on the formulation of a defense. "In its order granting Bussell a new trial, the circuit court found that the undisclosed police reports would have suggested the possibility of an alternate suspect in Mrs. Lail's death." *Id.* at 100. The undisclosed reports included references to other individuals seen at the victim's house at or near the time of her death, other vehicles seen parked at the house, tire track imprints, and a report from a confidential informant about two other named suspects. *Id.* at 100-101. After reviewing the reports, the trial court in *Bussell* concluded timely disclosure could have led to actual suspects or alternate perpetrators that would have significantly altered the defense strategy. By comparison, the arson materials in this case (with

reference to a possible, unidentified, and unknown “firebug”) lack a realistic or perhaps even possible impact on the defense.

A review of the actual burglary report listing two named suspects also leads to the conclusion that timely providing the report would not have changed Appellant Lloyd’s defense. As noted above, the Commonwealth did provide information about the burglary in discovery, but not the actual report. The significant difference between what was timely provided and what was not, is the report listed two named suspects never charged in connection to the burglary.

Any meaningful assistance from the names in the burglary report proved illusory. Detective Miracle testified he provided the suspects’ names to the burglary investigators. The two men were known drug dealers and subjects of the original ATF investigation that led to the placement of the ATF video camera on the street where Vinson was killed. Detective Miracle further testified he had no proof connecting the two named individuals with Vinson’s death or a burglary of Noah and Ashley’s apartment. The officers investigating the burglary could determine for themselves if the two named individuals had any connections to the burglary case. The record revealed no connections were found or made by the police.

The defense did use the burglary materials to argue an alternate perpetrator to the jury. According to the defense, by relying exclusively on Noah and Ashley, two possible suspects were not seriously investigated. Due

to the remedy fashioned by the court, the Commonwealth could do little to rebut that argument. Even under those circumstances, two uncharged suspects named in an apartment burglary investigation do not readily translate into viable alternative suspects for a murder. Compared to the police reports with fact information relating directly to the crime reviewed by the trial court in *Bussell*, the information in this case is too speculative to conclude that timely providing the report to the defense would have significantly altered Lloyd's trial strategy.

The trial court exercised its authority granting a remedy largely sought by the defense. The Commonwealth was prevented from using materials that might have been advantageous, and the defense was able to present the police investigation as incomplete and inadequate. The trial court had the authority to grant this remedy and it did not abuse its discretion in so doing.

F. Denial of impeachment with Section 8 housing application

Lloyd argues the trial court erred in preventing him from impeaching Ashley with the Section 8 housing application she filed after the burglary of her apartment. During her testimony, Ashley admitted Noah stayed at the apartment with her and her kids. Ashley would have been denied Section 8 housing if she included Noah, a convicted drug dealer and a convicted felon, on the lease application. Noah testified he avoided breaking the law concerning the lease by staying with his mother. The defense sought to impeach Ashley with the application omitting Noah.

The right to cross examination is fundamental to a fair trial. However, it is not without limits. This Court has held:

Witness credibility is always at issue and relevant evidence which affects credibility should not be excluded. *Parsley v. Commonwealth*, Ky., 306 S.W.2d 284 (1957). In R. Lawson, *The Kentucky Evidence Law Handbook*, § 4.15(II) (3rd ed. 1993), the relevancy requirement was described as including “any proof that tends to expose a motivation to slant testimony one way or another The range of possibilities is unlimited” *Id.* at 183. However, it should also be noted that trial courts retain broad discretion to regulate cross-examination. “Defendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.” *U.S. v. Boylan*, 898 F.2d 230, 254 (1st Cir.1990).

Commonwealth v. Maddox, 955 S.W.2d 718, 720–21 (Ky. 1997).

We have held the trial court has significant authority to control the course of cross examination:

The defendant's right to cross-examine a witness is not without limits. This Court has recognized that there is no constitutional guarantee to engage in cross-examination in whatever manner and extent that the defense so desires. *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005). Trial courts retain “wide latitude” in imposing “reasonable limitations” on cross-examinations, and act well within their purview in limiting examinations that are harassing, confusing, repetitive, or only marginally relevant. *Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010).

Goncalves v. Commonwealth, 404 S.W.3d 180, 203 (Ky. 2013).

We review a trial court’s decision to limit cross examination for an abuse of discretion. *Id.* at 204. The trial court did not abuse that discretion here.

At trial, Appellants sought to admit Ashley's application for Section 8 housing under KRE 608(b), which allows impeachment by a specific instance of conduct. The trial court ruled after a hearing that Ashley could be asked about living with Noah but not about Section 8 housing or the application. The trial court found this line of cross-examination far afield of the issues at trial. In determining the scope of cross-examination on collateral issues, the trial court must first determine if the proposed cross-examination is relevant pursuant to KRE 402. *Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky. 2005).

The Section Eight Housing application omitting Noah was simply not relevant to Ashley's motives in giving a statement to the police or encouraging Noah to give one. The burglary of her apartment and the need to move locations was the motivation for filing the new application. The burglary occurred after the statement to police was made, and her omitting Noah on the application was properly excluded by the trial court.

The relationship with Noah, which Ashley said began when she was fifteen, was disclosed to the jury. Ashley and Noah admitted during their testimony that on the night of Vinson's death, they were staying together. Ashley's motivation to protect Noah and her kids led her to participate in the original joint statement, and that motivation was a centerpiece of cross-examination.

Ashley's loyalty and interest in Noah was fair game for cross-examination and no indication exists that the defense was otherwise limited in

pursuing that potential bias. “The trial court was acting within its discretion in an attempt to keep from confusing issues presented to the jury.” *Nunn v. Commonwealth*, 896 S.W.2d 911, 914 (Ky. 1995). The trial court has wide latitude in setting reasonable boundaries and we find the setting of this boundary reasonable. *See Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010). The trial court did not abuse its discretion in limiting the cross-examination Lloyd sought.

G. Unanimous verdicts

Finally, Lloyd asserts that the jury instructions for first-degree robbery and tampering with physical evidence lead to a non-unanimous verdict. This issue is unpreserved. Lloyd asserts that the instructions fail to specify what property was the subject of the tampering and robbery charges. We note that neither appellant tendered instructions setting out the specific items of property.

We observe: “When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.” *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

Further:

Under RCr 10.26, an unpreserved error may generally be noticed on appeal *if* the error is “palpable” and *if* it

“affects the substantial rights of a party.” Even then, relief is appropriate only “upon a determination that manifest injustice resulted from the error.” RCr 10.26. “For an error to rise to the level of palpable, ‘it must be easily perceptible, plain, obvious and readily noticeable.’” *Doneghy v. Commonwealth*, 410 S.W.3d 95, No. 2011–SC–000590–MR, 2013 WL 3121911, at *6 (Ky. 2013) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). Generally, a palpable error affects the substantial rights of the party “only if it is more likely than ordinary error to have affected the judgment.” *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005).

Martin v. Commonwealth, 409 S.W.3d 340, 344 (Ky. 2013).

“[J]uror unanimity means that jurors must agree upon the specific instance of criminal behavior committed by the defendant but they need not agree upon his means or method of committing the act or causing the prohibited result.” *King v. Commonwealth*, 554 S.W.3d 343, 352 (Ky. 2018). Essentially, unanimity “mandates the jurors end up in the same place.” *Johnson v. Commonwealth*, 405 S.W.3d 439, 455 (Ky. 2013).

Here, the jurors all agreed Lloyd tampered with physical evidence. They need not have agreed upon the “method of committing the act or causing the prohibited result.” *King*, 554 S.W.3d at 352. Further, we find this unanimous verdict issue resolved with the following authority:

Identification of the exact property the jury believed Brown was complicit in taking is the kind of “possible set[] of underlying brute facts mak[ing] up a particular element” that the U.S. Supreme Court stated the “jury need not always decide unanimously.” The jury instructions forced the jury to unanimous agreement on the fact that *movable property* was taken, simply identifying three pieces of movable property that the jury could have found to be taken. Because the jury instructions forced the jury to agree unanimously that *movable property*, i.e. the “factual element[] . . .

listed in the statute that defines the crime,” was taken, no unanimity error occurred in the identification of three specific pieces of movable property.

Brown v. Commonwealth, 553 S.W.3d 826, 840 (Ky. 2018).

This is not a case of the Commonwealth seeking multiple convictions for each item allegedly tampered with or robbed by Lloyd. To find guilt, the jury did not have to unanimously agree which or if all the items were the subject of the tampering or robbery. As such, the trial court did not deny Lloyd his right to a unanimous jury.

III. CONCLUSION

For the aforementioned reasons, we affirm Appellants’ convictions and corresponding sentences.

All sitting. All concur.

COUNSEL FOR APPELLANT BRANDON L. OLDHAM:

Cicely Jaracz Lambert
Chief Appellate Defender
Louisville Metro Public Defender's Office

Daniel T. Goyette
Louisville Metro Public Defender's Office

Joshua Michael Reho
Louisville Metro Public Defender's Office

COUNSEL FOR APPELLANT JUAN T. LLOYD:

Steven Goens
Department of Public Advocacy

Molly Mattingly
Assistant Public Advocate

COUNSEL FOR COMMONWEALTH OF KENTUCKY:

Andy Beshear
Attorney General of Kentucky

Thomas Allen Van De Rostyne
Assistant Attorney General