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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 29, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000267-MR

MARK D. MURRAY — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NO. 15-CR-002155

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Mark Murray appeals as a matter of right[1] from the Jefferson Circuit Court judgment sentencing him to life imprisonment for the murder of Loren Kerns and ten years' imprisonment for tampering with physical evidence, to be run concurrently. After extensive review of this case, we hold that (1) Murray was not entitled to an instruction on first-degree manslaughter, (2) the trial court did not improperly admit KRE[2] 404(b) evidence, and (3) Murray was not entitled to a directed verdict on the tampering with physical evidence charge. Thus, we affirm.

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[1] Ky. Const. § 110(2)(b).

[2] Kentucky Rules of Evidence.

I. Factual and Procedural Background.

On the afternoon of August 3, 2015, Murray called 911 from his apartment in Louisville, Kentucky claiming that his friend, Kerns, had been beat up — "jumped or something" — and had stumbled to his apartment. He told the operator that he could not tell whether Kerns was breathing. The operator talked Murray through performing CPR until EMS arrived.

When EMS arrived, Kerns was in cardiac arrest. Medical personnel revived him multiple times before Kerns was pronounced dead later that evening. The medical examiner who performed the postmortem examination of Kerns, Dr. Amy Burrows-Beckham, opined that the cause of death was multiple inflicted injuries sustained in an assault. To illustrate the extent of Kerns's injuries, Dr. Burrows-Beckham's written report consisted of approximately four pages, single spaced, and the only surface on Kerns's body without an inflicted injury was his external genitalia.

Louisville Metro Police Department ("LMPD") Officer Mike Faulkner responded to the scene of the crime shortly after Murray's 911 call and spoke with Murray outside the apartment. Murray told him that Kerns had been hit by a car and stumbled from nearby Jackson Street to his apartment. Murray said Kerns had been walking on the same side of the street as his apartment, and that he had helped Kerns through the front door once he saw him. Off. Faulker noticed that Murray kept his hand behind him when talking, but that, when visible, his knuckles were swollen. He further observed that Murray had blood on one of his shoes.

Thereafter, Off. Faulkner canvassed Murray's street and sidewalks, both sides, as well as nearby Jackson Street, north and south, looking for a trail of blood. He found none. He testified that as bloody as Kerns was, no way could he have wandered up the street and not left a trail. Furthermore, no blood was found outside Murray's exterior front door.

Detective Jason Vance conducted and documented interviews with some of Murray's neighbors at the scene, specifically Robert Miller, Ergenia Booker and Frances Brown. Murray's next-door neighbor, Miller, stated that through the shared wall he had heard Murray and Kerns arguing frequently, and had heard Murray assault Kerns "quite often." Booker told Det. Vance that Kerns was extremely scared of Murray. Brown informed Det. Vance that about three weeks prior to the incident, Kerns told her that Murray had been arrested and had not been in the home. Kerns was happy about Murray's absence and had another male living in the residence. Brown stated that when Murray returned home and learned of the other male being in the home he gave Kerns a black eye.

The crime scene technician who responded to the scene testified that blood spatter was on the walls and surfaces of Murray's kitchen. She opined the attack had occurred in that room. Inside the apartment was a box cutter with possible blood on top of the kitchen stove, multiple pieces of broken wood and metal poles with possible blood located in the kitchen garbage can, a stone with possible blood in the living room, and a piece of cloth with possible blood on the bathroom sink. In the trash can outside Murray's apartment was a

broken piece of wood with possible blood, a pair of shorts with possible blood, and a sock with possible blood. Dr. Burrows-Beckham testified at trial that the attacker could have used a box cutter to inflict Kerns's stab wounds and used a metal pole, and possibly also a stone, to inflict some of Kerns's other injuries.

After EMS took Kerns away, Murray went to the police station where he waived his *Miranda*[3] rights and engaged in a recorded discussion with police. That recorded discussion was played for the jury at trial. Murray told police that he had known Kerns about five months, that Kerns was homeless, and that he would occasionally let Kerns stay with him. Murray stated that he and Kerns got along very well and had never had a physical altercation. That day, Murray said that he had gone outside to bum a cigarette from his neighbor when he saw Kerns walking down the street looking "pummeled". Murray dragged Kerns inside his apartment, hit him, and told him to get up. Murray then wiped up blood on the front entrance with a sheet.

To explain the lack of blood anywhere outside the apartment, Murray told police that Kerns only began bleeding heavily after he was brought inside. To explain why he was wearing different clothes at the time of his police interview, Murray said that he was shirtless when he brought Kerns inside and that he had changed out of his shorts before EMS arrived. To justify why he placed the bloody items in his trash can, Murray said that he had been using some boards and other things to fix a broken door and fan, and that he threw

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966)

those items away to make room for Kerns on his kitchen floor. Murray said he had tried to get all the blood up. Thereafter, police arrested him for murder and tampering with physical evidence.

Pre-trial, the Commonwealth gave KRE 404(c) notice of its intent to elicit testimony from Booker and Brown under KRE 404(b) to show absence of mistake, state of mind, identity and motive. The Commonwealth's notice stated its intention to introduce testimony from Booker that she told Det. Vance that Kerns was extremely scared of Murray. And from Brown that she told Det. Vance that about three weeks prior to the incident, Kerns told her that Murray had been arrested and had not been in the home. Kerns was happy about Murray's absence and had another male living in the residence. Brown stated that when Murray got out of jail and learned of the other male being in the home he gave Kerns a black eye. Ultimately, the Commonwealth did not elicit this testimony from either Brown or Booker at trial. Brown only testified that she had seen Kerns and Murray coming and going from Murray's apartment for several months. On the morning of August 3, 2015, Brown observed Murray step outside to use the phone, and while the door was open, she could see the leg of someone else inside. Brown testified that she did not see anyone get hit by a car or stumble along the sidewalk that day, but the night before she had seen Kerns using a shopping cart to move down the street and was leaning on it, looking like he didn't feel good or something had happened.

Over Murray's objection, Miller testified that through the common wall he shared with Murray, he heard Murray and Kerns arguing constantly, and

heard Murray physically assault Kerns quite often. Miller never witnessed any physical assault but had observed Kerns with bruises. On August 3, 2015, about two hours before EMS arrived, Miller heard Murray tell Kerns to "get up, get up." Miller stated that he had not seen Kerns in the two or three days preceding Kerns's death.

At the close of the evidence, the jury convicted Murray of murder, tampering with physical evidence, and being a first-degree persistent felony offender. The trial court imposed the jury's recommended sentence of life in prison for the murder charge, and ten-years' imprisonment for the tampering with physical evidence charge, to be run concurrently. This appeal followed.

II. Analysis.

A. Murray was not entitled to a first-degree manslaughter instruction.

Murray argues that the trial court abused its discretion by refusing his request for the jury to be instructed on first-degree manslaughter under KRS[4] 507.030(1)(a), *i.e.*, unintentional homicide committed with the intent to cause serious physical injury but not death. Instead, the trial court instructed the jury to find Murray guilty of murder if it believed "(1) He caused the death of Loren Kerns intentionally; OR (2) He was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Loren Kerns under circumstances manifesting an extreme indifference to human life."

[4] Kentucky Revised Statutes.

The Commonwealth maintains the trial court's instruction was correct, and that the evidence did not support an instruction on first-degree manslaughter.

The trial court is "to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Swan v. Commonwealth*, 384 S.W.3d 77, 99 (Ky. 2012) (quoting *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999)). RCr[5] 9.54(1) provides: "It shall be the duty of the court to instruct the jury in writing on the law of the case . . . ." "Under this rule, '[a] defendant is entitled to an instruction on any lawful defense which he has. Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge.'" *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006) (quoting *Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997)). In other words, an instruction on a lesser-included offense is required when "considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Swan*, 384 S.W.3d at 99 (quoting *Caudill v. Commonwealth*, 120 S.W.3d 635, 668 (Ky. 2003)).

"A lesser-included offense instruction, however, is not proper simply because a defendant requests it." *Swan*, 384 S.W.3d at 99; *see also Houston v.*

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[5] Kentucky Rules of Criminal Procedure.

Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998) (holding a lesser-included offense instruction is not required where no evidence supports the instruction). On appeal, we review a trial court's instructions to the jury under a "reasonable juror" analysis: "Considering the evidence favorably to the proponent of the instruction, we ask . . . whether a reasonable juror could acquit of the greater charge but convict of the lesser." *Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011).

This Court has held that a trial court "correctly declined to give lesser-included offense instructions because the evidence presented by [defendant] was a complete denial. If the jury had believed that defense, he would have been exonerated." *Parker v. Commonwealth*, 952 S.W.2d 209, 211 (Ky. 1997) (defendant not entitled to instructions on second-degree manslaughter and reckless homicide in intentional murder prosecution because defense was alibi and no evidence was presented to counter Commonwealth's evidence that conduct was intended). "Although the defense of alibi does not preclude an instruction on mitigation or justification if the evidence supports an inference of the requisite circumstances therefor, there must be some evidence in the record to support such an inference before a trial court is required to instruct on a defense or lesser-included offense." *Ratliff*, 194 S.W.3d at 274 (citations omitted). Here, Murray did not present a defense that his intent was to only seriously injury Kerns; his defense was complete denial of the assault. He told police that he had been home alone all morning, watching TV, before Kerns showed up.

Meanwhile, the evidence presented by the Commonwealth left no reasonable doubt that Murray intended to kill Kerns. The evidence presented supported two inferences: Murray waited approximately two hours to call EMS after beating Kerns, and Murray knew that Kerns was in dire medical need at the time he called 911. Indeed, Murray told the 911 operator that he could not discern whether Kerns was breathing and that he appeared unresponsive. Kerns's injuries were so extensive that a reasonable person would know that he needed medical attention. Instead, Murray took time to conceal the evidence of his crime and change his shorts before EMS arrived.

In addition, Dr. Burrows-Beckham testified about the extent and nature of the horrific injuries Kerns suffered, beginning with his head and covering his entire body. The undisputed evidence showed that Kerns was beaten and stabbed to the point where he lost so much blood, internally and externally, that his oxygen supply was cut off and his organs shut down. Dr. Burrows-Beckham testified that by the time EMS arrived, Kerns was in cardiac arrest and essentially dead.

Kerns did not suffer one blow, or two, or three. Rather, he was beaten and stabbed countless times on almost every surface of his body. Dr. Burrows-Beckham's testimony established that the infliction of his injuries likely occurred over the course of several hours or days. "Proof of intent . . . may be inferred from the character and extent of the victim's injuries." *Ratliff*, 194 S.W.3d at 275 (defendant not entitled to lesser-included instruction when uncontroverted medical testimony showed victim's asphyxiation and other

severe injuries were inflicted intentionally and not accidentally); *see also Allen*, 338 S.W.3d at 257 (no first-degree manslaughter instruction warranted because defendant's act of furiously snatching up the child by the leg and shaking the child so violently that it broke several of the child's bones, caused his eyes to roll back in his head, and stopped his breathing so clearly posed a grave risk of killing the child that no reasonably juror could have acquitted defendant of wanton murder and convicted him of first-degree manslaughter instead); *Caudill*, 120 S.W.3d at 668 (defendant not entitled to first-degree manslaughter instruction when postmortem examination revealed victim suffered at least fifteen blows to the head, ranging from lacerations to those that fractured the skull, evidence that defendant intended to kill, as oppose to merely injure, victim); *Parker*, 952 S.W.2d at 212 (instruction on lesser-included offense to intentional murder not merited when evidence supported the singular finding that defendant acted with the specific intent to cause the child's death).

The uncontroverted medical testimony showed that the nature of Kerns's injuries was extensive and severe, the combined effect of which led to his death. Evidence further showed that Murray was aware of the severity of Kerns's injuries when he called 911. Based on the evidence presented, no reasonable possibility exists that a jury could have believed that Murray only intended to cause Kerns serious physical injury and not death. Thus, the trial court properly denied Murray's request for an instruction on first-degree manslaughter.

B. The trial court did not improperly admit KRE 404(b) evidence.

Murray claims that the trial court should not have allowed Miller to testify that through their shared wall, he heard Murray and Kerns argue constantly and heard Murray physically assault Kerns quite often. Murray argues that the Commonwealth's failure to give KRE 404(c) notice of its intent to introduce evidence of prior assaults through the testimony of Miller denied Murray the opportunity to file a motion in limine to challenge the admissibility of such evidence under KRE 404(b).

KRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

With respect to giving notice of intent to introduce KRE 404(b) evidence, KRE 404(c) requires:

> In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

The record shows that Commonwealth did not give KRE 404(c) notice of its intent to elicit prior assault testimony from Miller but did give KRE 404(c) notice of its intent to introduce such testimony from Booker and Brown. Shortly after giving this KRE 404(c) notice, the Commonwealth turned over to defense counsel the recorded interviews Det. Vance conducted with Booker, Brown, and Miller. Det. Vance's investigative report documenting his interviews with Booker, Brown, and Miller had already been turned over to defense counsel in discovery and contained their statements about Murray's prior assaults of Kerns.

In response to the Commonwealth's notice, Murray filed a general two-page motion in limine pursuant to KRE 403 and KRE 404 requesting exclusion of any evidence regarding "any reference to any statement by any witness which has not been turned over." His motion in limine did not specifically identify the evidence to which he objected, state any legal reasoning or factual basis for his objection, and apparently was never ruled on by the trial court as the record shows Murray's tendered order was never signed by the court.

Immediately before Miller testified at trial, Murray objected, and the trial court heard the parties' arguments with respect to whether Miller should be permitted to testify about hearing Murray previously assault Kerns, and about the historically argumentative nature of their relationship. From the bench, the trial court ruled that Miller's testimony of prior assaults was relevant. The court found that while the testimony may concern a prior bad act, it showed a

pattern of conduct, regardless of whether the assaults occurred the night before or the week before. Therefore, the court permitted Miller to testify.

On appeal, we review a trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). An abuse of discretion occurs if the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

i. KRE 404(c) notice.

Murray asserts that the Commonwealth providing Det. Vance's documented interview of Miller in discovery was not adequate notice under KRE 404(c) of its intent to introduce Miller's specific KRE 404(b) evidence at trial. In support, Murray relies on *Daniel v. Commonwealth*, 905 S.W.2d 76, 77 (Ky. 1995), a first-degree rape case in which this Court held that a police report alone did not provide reasonable pretrial notice pursuant to KRE 404(c). In *Daniel*, the defendant objected to the Commonwealth's questioning of his cousin that she personally observed prior sexual activity between the defendant and the victim, and that she had been subjected to sexual intercourse by the defendant. On appeal, we held that the trial court should not have admitted this evidence since Daniel did not receive adequate KRE 404(c) notice of the Commonwealth's intention to elicit this testimony. Unlike the present case, however, the defendant in *Daniel* was only provided with a police report identifying third-party witnesses who had been interviewed; Daniel apparently did not have access to the content of the interviews prior to trial and thus was

unable to prepare for examining those witnesses. *See also Burgher v. Commonwealth*, No. 2007-SC-000910-MR, 2009 WL 2707177, at *6 (Ky. Aug. 27, 2009) ("Although receiving the police report in discovery would not be sufficient on its own to satisfy the reasonable notice requirement of KRE 404(c), Appellant's motion *in limine* shows he had actual notice as well as the opportunity to challenge the admissibility of the evidence, and therefore, no error occurred in the admission of this evidence[]"); *Southern v. Commonwealth*, No. 2004-SC-000489-TG, 2006 WL 141608, at *6 (Ky. Jan. 19, 2006) (when defendant did not object to admission of evidence, a signed statement of witness that was taken by police officer and contained in discovery materials was sufficient KRE 404(c) notice).

Murray further argues that the timing of the "notice" — immediately preceding Miller's testimony — was not reasonable. This Court has held that the purpose of KRE 404(c)'s notice requirement is "to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice problems at trial." *Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky. 1997) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.25 (3rd Ed.1993)), *overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011). Whether reasonable pre-trial notice has been given is decided on a case-by-case basis. Lawson, *The Kentucky Evidence Law Handbook* § 2.25.

Here, though notice of Miller's contested testimony was not provided until trial, Murray received notice of the Commonwealth's intent to introduce

KRE 404(b) evidence of prior bad acts through the testimony of Brown and Booker. Furthermore, during discovery Murray had received Det. Vance's investigative report detailing his conversations with Brown, Booker, and Miller. Despite knowing of the intended presentation of this KRE 404(b) evidence, Murray failed to identify in his motion in limine the exact testimony to which he objected, did not identify any witness by name, and provided no legal authority or basis for his objection. Had Murray received more specific notice of the Commonwealth's intent to elicit Miller's testimony about Murray's prior assaults of Kerns, the record creates doubt whether Murray would have briefed that issue any more thoroughly than he had for Booker and Brown, or that any order resolving his motion in limine would have even been entered. Moreover, Murray had the opportunity to challenge the admissibility of Miller's testimony at the bench hearing during trial, an opportunity KRE 404(c) seeks to protect. While the Commonwealth's game-time decision to produce this testimony from Miller was not ideal in terms of notice, the Commonwealth justified why it wished to introduce Miller's testimony at that point: to show a pattern of conduct between Murray and Kerns and to demonstrate that Kerns's prior injuries could have also been inflicted by Murray. Lastly, the record contained the specific statements by Miller to Det. Vance, as set forth in the investigative report also documenting statements by Booker and Brown. In this instance, we believe the spirit of KRE 404(c) was complied with, Murray was on notice of the Commonwealth's intent to introduce evidence of his prior assaults of Kerns,

and thus Miller's testimony did not require exclusion on the basis of lack of notice alone.

ii. Admissibility of evidence under KRE 404(b).

In determining the admissibility of other crimes evidence, this Court has adopted a "three-part inquiry into relevance, probativeness, and prejudice." *Jenkins v. Commonwealth*, 496 S.W.3d 435, 457 (Ky. 2016) (citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994)); *see also* KRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence[]"). Under KRE 404(b),

> The Commonwealth may not offer evidence of other crimes or bad acts for the purpose of proving the defendant's character or propensity for criminal activity. However, the Commonwealth may introduce such evidence for another purpose, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or if the uncharged bad act is "inextricably intertwined" with the evidence of the charged crimes. . . . The Commonwealth may well be able to demonstrate that the evidence is admissible because it is being offered for a proper reason, but it bears the burden of making that showing.

Hoff v. Commonwealth, 394 S.W.3d 368, 381 (Ky. 2011) (citations omitted). In *Hoff*, we held that other bad acts evidence had been erroneously admitted because the Commonwealth failed to provide any pretrial notice of its intent to introduce KRE 404(b) evidence and did not make any showing of why the evidence was admissible. *Id.*

In *Jenkins*, this Court observed

> Evidence of similar acts perpetrated against the same victim, we have noted many times, is "almost always admissible," under KRE 404(b), because it will almost always be significantly probative of a material issue aside from the defendant's character. *Noel v. Commonwealth,* 76 S.W.3d 923, 931 (Ky. 2002). *See also, e.g., Harp v. Commonwealth,* 266 S.W.3d 813 (Ky. 2008); *Driver v. Commonwealth,* 361 S.W.3d 877 (Ky. 2012); *Lopez v. Commonwealth,* 459 S.W.3d 867 (Ky. 2015). That does not mean, of course, that evidence of prior acts against the same victim is automatically admissible—relevance to a material issue and probativeness must be shown, and the possibility of undue prejudice must still be considered—but our experience with these cases has taught that in most of them the *Bell* inquiry leads to admission.

496 S.W.3d at 458.

In *Jenkins*, we held that the trial court properly admitted the victim's testimony that the defendant had committed sex crimes against her on prior occasions. *See id.* at 456–58. In so ruling, we noted, "'same victim' testimony served not as propensity evidence tending to show merely that [defendant] had a propensity for this type of crime; it related rather to this particular crime by tending to show that [defendant] had a motive involving this particular victim." *Id.* at 458; *see also Benjamin v. Commonwealth,* 266 S.W.3d 775, 791 (Ky. 2008) ("Appellant's prior conviction for assaulting his wife lends plausibility to the notion that Appellant intentionally murdered his wife, had a motive to do so, and that the killing was not a mistake."). *Cf. Bell,* 875 S.W.2d at 890–91 (where defendant was charged with sodomy against his girlfriend's child, testimony by the alleged victim's older sibling to the effect that the defendant had also perpetrated two acts of sodomy against him was inadmissible. The alleged acts as to the older child did not bear a close enough resemblance to

the acts allegedly perpetrated against the victim to suggest much more than that the defendant was disposed to commit that class of crime, the exact type of character-based insinuation KRE 404 is designed to exclude).

Here, the Commonwealth states that it decided to elicit this testimony from Miller after hearing Murray's opening statement referring to the upcoming medical examiner's testimony that Kerns did not sustain all of his injuries on the day he died and to rebut Brown's testimony that she had seen Kerns the night before his death leaning on a shopping car outside the apartment looking unwell. The Commonwealth posits that by attempting to show that Kerns had sustained injuries prior to the day in question, Murray "opened the door" to the admission of Miller's statements and that evidence of the prior assaults became relevant as a pattern of prior injurious conduct by Murray towards Kerns.

In response, Murray contends that by questioning Brown about her observation of Kerns the night before his death, Murray was simply responding to the Commonwealth's opening statement that Kerns had been tortured over a period of days. Thus, Murray asserts that if anyone "opened the door" the Commonwealth did, not he. In addition, Murray argues that Miller's testimony was not relevant and therefore inadmissible since it failed to provide specific details as to when Murray allegedly assaulted Kerns: the day before, the week before, the month before. Murray hypothesizes that perhaps Kerns was the aggressor of the prior alleged assaults, and questions why Miller did not hear the alleged assault on the day in question if he had heard previous fights. Accordingly, Murray claims that Miller's testimony was inadmissible under

KRE 404(b) because it did not show motive, intent, purpose or planning, or pattern of behavior.

As an initial matter, Murray's speculations on appeal concerning Miller's testimony, and why he heard some assaults and not others, are matters that should have been addressed during cross-examination. That said, Miller's testimony about the prior assaults went to the same conduct perpetrated by the same actor against the same victim within the span of five months during which Kerns intermittently lived with Murray. Thus, the time frame of the prior conduct was sufficiently specific and proximate to the assault at issue, the location of the prior assaults also occurred in Murray's home, and the physically abusive conduct was sufficiently similar so as to establish Murray's opportunity, intent and motive. With respect to Murray's claim that even if relevant, Miller's testimony lacked probative value because no corroborating evidence was presented, "the probative link between evidence of prior bad acts and a particular defendant does not have to be established by direct evidence." *Parker*, 952 S.W.2d at 213; *see also Smith v. Commonwealth*, 904 S.W.2d 220, 224 (Ky. 1995) (no abuse of discretion in admitting prior unwitnessed acts of abuse by defendant toward victim where evidence permitted an inference by the jury that defendant committed acts and some relationship to the charged crime is shown). Thus, corroborating evidence was not necessary.

Even so, the Commonwealth presented additional evidence from which the jury could have reasonably inferred that Murray was the perpetrator of Kerns's prior injuries: Kerns had older bruises on his body, Kerns resided with

Murray so there existed opportunity, and Brown testified that she observed Kerns the night before his death looking unwell. Miller's testimony could have helped explain why Kerns appeared the way he did the night before his death: Murray might have assaulted him. A jury could have reasonably made this inference.

Moreover, no evidence supported Murray's story that on the day in question Kerns had arrived at his home injured and Murray dragged him inside. No trail of blood spatter led to Murray's residence; most of the blood splatter was found on the walls and floor of Murray's kitchen and the tools he disposed of. Given Murray's defense of complete denial and his claim that Kerns had arrived at the home injured on the day of his death, Miller's testimony was probative to provide a clearer picture of their relationship, and to show Murray's intent, motive, and pattern of behavior. *See Davis v. Commonwealth*, 147 S.W.3d 709, 724 (Ky. 2004) ("A factor to consider in determining whether evidence is admissible to prove motive depends on whether the issue of motive is in actual dispute[]").

While the trial court's analysis of the three-factor balancing test was cursory, its ruling reflects that it considered the relevance and probative value of Miller's testimony, and implicitly concluded those factors outweighed any prejudicial effect.[6] "[P]rior acts committed against the same victim, similar to the conduct on trial, will often if not usually, have relevance other than merely

[6] Notably, Murray did not argue before the trial court that the court's *Bell* analysis was inadequate.

establishing a propensity to commit the crime charged, thus falling within the KRE 404(b) exception." *Gullett v. Commonwealth*, 514 S.W.3d 518, 530 (Ky. 2017) (citing *Driver v. Commonwealth*, 361 S.W.3d 877, 884 (Ky. 2012)). Obviously, evidence of Murray's prior physical violence towards Kerns was prejudicial, but its admission was not unduly prejudicial. *Jenkins*, 496 S.W.3d at 458. In sum, Murray has failed to persuade this Court that admitting Miller's testimony constituted an abuse of the trial court's discretion.

C. Murray was not entitled to a directed verdict on the tampering with physical evidence charge.

Murray asserts that insufficient evidence existed to support his tampering with physical evidence conviction and thus the trial court should have granted his motion for a directed verdict on this charge. We disagree.

The denial of a directed verdict motion is reviewed to determine whether "'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.'" *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017) (quoting *Commonwealth v. Benham*, 816 S.W.3d 186, 187 (Ky. 1991)).

KRS 524.100(1) provides that a person tampers 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; or

(b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

"[O]ne who has committed a criminal act and then conceals or removes the evidence of his crime does so in contemplation that the evidence would be used in an official proceeding which might be instituted against him." *Phillips v. Commonwealth*, 17 S.W.3d 870, 876 (Ky. 2000) (quotation omitted).

Here, the jury instructions read as follows:

> You will find the defendant, Mark Murray, guilty of Tampering with Physical Evidence under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Jefferson County on or about the 3rd day of August 2015, the Defendant removed and/or concealed blood evidence and/or his clothing and/or three metal pipes and/or four pieces of wood, which he believed was about to be used or produced in a criminal prosecution. AND
>
> B. That he did so with the intent to impair its availability or accuracy in the criminal prosecution.

Here, Murray admitted to police that he wiped up Kerns's blood and put various items in the trash can, and his statement was played for the jury at trial:

> As I had the phone, I'm trying to clean up this blood. I go back there in my room, grabbed some rags, trying to clean up some of this blood and shit, and I had some stuff I was working on in the kitchen. I picked that up and threw it in the trash, threw that shit in the trash.

Based on this evidence alone, a jury could have reasonably believed Murray intended to wipe away blood from the scene to avoid criminal liability. *See Clark v. Commonwealth*, 567 S.W.3d 565, 570 (Ky. 2019) (trial court

properly denied defendant's motion for directed verdict on tampering with physical evidence charge where evidence showed defendant removed some of the blood from the floor with rags and altered the condition of the crime scene). The jury instructions allowed the jury to find in the alternative that Murray removed or concealed one of four categories of evidence: blood evidence, clothing, three metal pipes, OR wood. A finding under any of those categories was sufficient to convict. Because the evidence was sufficient for a jury to convict Murray solely on wiping up the blood evidence, we need not reach the issue of whether the evidence sufficed with respect to the other three categories — clothing, metal pipes or wood.

III. Conclusion.

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

All sitting. Minton, C.J.; Buckingham, Lambert and VanMeter, JJ., concur. Hughes, J., concurs in result only. Keller, J., concurs by separate opinion in which Hughes and Wright, JJ., join.

KELLER, J., CONCURRING: I write separately to express my view that providing a witness statement in discovery, without more, is not adequate KRE 404(c) notice of the prosecution's intention to offer the evidence at trial. In this case, however, the trial court did not abuse its discretion in admitting the testimony of Miller, as KRE 404(c) allows a trial court to excuse the failure to give notice for good cause shown.

Hughes and Wright, JJ., join.

COUNSEL FOR APPELLANT:

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

Adam Braunbeck
Assistant Appellant Defender
Louisville Metro Public Defender's Office

Daniel T. Goyette
Assistant Appellant Defender
Louisville Metro Public Defender's Office

Leo Gerard Smith
Assistant Appellant Defender
Louisville Metro Public Defender's Office

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Christopher Henry
Assistant Attorney General