

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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

# Supreme Court of Kentucky

2018-SC-000383-MR

JOSEPH NESTOR

APPELLANT

V. ON APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE PAUL KENTON WINCHESTER, JUDGE  
NO. 15-CR-000240

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING IN PART/REVERSING AND REMANDING IN PART

In April 2018, a jury convicted Joseph Nestor of Murder, Tampering with Physical Evidence, and Possession of a Controlled Substance in the First Degree. He was sentenced to life in prison with possibility of parole for the murder, and a concurrent sentence of one year on the possession conviction. The trial court also sentenced him to a term of five years' imprisonment for the tampering charge to run consecutively with the life term. Nestor appeals as a matter of right<sup>1</sup> and raises five claims of error: (1) the trial court erred by not granting a directed verdict on the murder charge; (2) reversible error occurred when the Commonwealth's Attorney improperly shifted the burden of proof to

---

<sup>1</sup> Ky. Const. § 110(2)(b).

Nestor during the Commonwealth's closing argument; (3) the Commonwealth's repeated implied references to the uncharged crime of felon in possession constituted reversible error; (4) the trial court erred by ordering Nestor to pay a \$450 partial public defender fee; and (5) the trial court erred when it ordered Nestor to serve a five-year sentence consecutive with a life term. We find no error in the trial court's denial of Nestor's motion for directed verdict, and no palpable error in the unpreserved arguments. However, we reverse and remand on the final two claims of error because the public defender fee was imposed without conducting the requisite hearing to determine Nestor's ability to pay a partial public defender fee, and because no sentence can be ordered to run consecutively with a life sentence in the same case.

### **I. Factual and Procedural Background.**

In early September 2015, Amber Decker and Joseph Nestor lived together in Nestor's trailer in Laurel County. Nestor and Decker had a rocky relationship, and a few weeks prior to her death Decker told her mother that Nestor had threatened to "blow [her] g\*\* d\*\*\* head off." On September 3, Decker also told her mother that Nestor threatened to kick her out of the trailer they shared.

Sometime between September 6 and September 7, Nestor's trailer burned down. When a welfare check was conducted by the Kentucky State Police ("KSP") on September 8, the residence was completely burned down. Later on September 8, Nestor showed up at his friend Kenneth Philpot's home and asked him to hold onto a .38-caliber Smith and Wesson revolver while Nestor

met with a fire marshal regarding his house fire. Philpot testified that he had safekept guns for Nestor on prior occasions, but this was the first time that the gun was unloaded during these exchanges.

On September 9, Det. Brian Lewis executed a search warrant at Nestor's residence searching for any signs of human remains in the ashes of the burned residence. No remains were found, but Nestor arrived while Det. Lewis was at the residence. When questioned by Det. Lewis, Nestor stated that he had last seen Decker on September 3 but had been communicating with her via text message over the weekend. Later on September 9, Nestor gave a recorded statement where he stated that he had been at a yard sale up the road from his residence most of the last week and had been unable to enter his residence because he did not have a key.

The following day, September 10, Nestor returned to Philpot's. He told Philpot that earlier in the week he had returned home to find Decker's body with a fatal gunshot wound to her head and .38-caliber revolver lying next to her. Philpot testified that Nestor also claimed to have sex with Decker's corpse. Nestor then told Philpot that he noticed the trailer was covered in gasoline, the oven was set to self-clean at 600 degrees with a pan of grease inside, and that there were firework wires hooked into a timer on the wall. Nestor claimed to have removed the wires, and then put Decker's body into a plastic tote, taped it with duct tape, and moved it into the woods behind his house using a dolly. Instead of contacting authorities, Nestor had decided to run but needed to dispose of the body first. Nestor asked Philpot to help him dispose of the body

and threatened to kill him if Philpot talked to the police. Philpot initially agreed, but instead contacted the authorities soon after Nestor left. Philpot met with police and provided them with the .38-caliber handgun Nestor had given him. He also led police to the location Nestor had told Philpot he placed the body, about 150 yards behind Nestor's trailer. Det. Justin Oliver discovered the body in that location.

Once the body was located, the KSP re-interviewed Nestor. Nestor claimed to have received two notes from Decker indicating she had committed suicide— neither of which was ever located. Nestor also stated that he believed Ray Towery was responsible for Decker's death, as Towery was Decker's drug supplier and occasionally got her to work as a prostitute when Decker could not afford the drugs. Nestor also repeated his story regarding the state of his trailer upon finding Decker's body, but no timers were ever recovered from the ruins of the trailer. Finally, Nestor stated that he was at a yard sale during the fire but was close enough to hear firetrucks respond to the trailer fire. Nestor was released once he completed his statement.

Nestor was officially arrested on September 11, at a hotel in London, Kentucky where he was staying due to the trailer fire. Upon searching the hotel room, KSP detectives found crystal methamphetamine, a black iPhone, a black Logic cellphone, a white iPhone, and a Glock model 27 .40-caliber pistol. Nestor admitted that the white iPhone was Decker's and that he had been texting himself from it over the weekend pretending to be Decker. After his arrest, Nestor was indicted on murder, tampering with physical evidence,

possession of a controlled substance in the first degree, and abuse of a corpse. After a jury trial, Nestor was convicted of the first three counts but acquitted of the abuse of a corpse charge. The jury recommended a total of life imprisonment plus five years, which the trial court. This appeal followed.

## **II. Standards of Review.**

On appeal, Nestor asks for review of his denied directed verdict motions, two alleged unpreserved trial errors, and two alleged sentencing errors. 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.2d 186, 187 (Ky. 1991)).

Nestor requests that we review his two unpreserved arguments for palpable error under RCr<sup>2</sup> 10.26. In *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009), this Court discussed palpable error review under RCr 10.26, and summarized that relief is not available unless the error was (1) clear or plain under existing law, (2) was more likely than ordinary error to have affected the judgment, and (3) resulted in manifest injustice. Manifest injustice occurs when “the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially

---

<sup>2</sup> Kentucky Rules of Criminal Procedure.

intolerable.” *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

Lastly, “the imposition of an unauthorized sentence is an error correctable by appeal[.]” *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011) (quoting *Myers v. Commonwealth*, 42 S.W.3d 594, 596 (Ky. 2001), *overruled on other grounds by McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010)). “[A]ppellate review of a sentencing issue is not waived by the failure to object at the trial court level.” *Jones*, 382 S.W.3d at 27. Therefore, “nothing is required to preserve the issue for appellate review,” as “an appellate court is not bound to affirm an illegal sentence just because the issue of the illegality was not presented to the trial court.” *Id.* We will discuss any further issues regarding the standard of review of individual claims in the analysis below.

### **III. Analysis.**

#### **1. Directed Verdict Motions.**

Nestor moved for a directed verdict at the conclusion of the Commonwealth’s case-in-chief, as well as at the end of trial. The trial court denied both motions. Nestor argues on appeal that the Commonwealth failed to prove beyond a reasonable doubt that he actually shot and killed Decker, instead of merely finding her dead inside his trailer and then disposing of her body.

At trial, Nestor admitted to finding Decker’s body. He also admitted to dumping Decker’s body into a plastic tote, placing the tote on a dolly, and

burying it in the woods behind his home. His explanation was that he wanted time to go find Ray Towery, who Nestor believed had killed Decker. The Commonwealth's evidence at trial showed a much different picture. The Commonwealth's case-in-chief introduced evidence showing that Nestor and Decker had a unstable relationship, that Nestor had threatened to "blow [her] g\*\*d\*\*\* head off" just weeks prior to Decker's death, and that the last time Decker talked to her mother she told her that Nestor was kicking her out of the trailer. Further, in his initial statements to police Nestor lied about knowing Decker's whereabouts, offered an almost unbelievable description of his trailer upon finding Decker's body, and changed his story about how he got into the trailer (first through the window, then after the body was discovered Nestor admitted to walking through the front door). Nestor also admitted that his alibi—being at a yard sale for days before and after finding Decker's body—allowed him to be able to see firetrucks come to his home, which would have placed him very close to the scene of the crime. After the fire, Nestor never called police, but instead called an insurance adjuster. The evidence also showed that Nestor had initially lied to police about taking Decker's cellphone off her body and texting his phone from her cellphone pretending to be Decker after she was already dead. Further, Nestor attempted to destroy her phone before police arrested him. Lastly, Nestor stated that when he picked up the .38-caliber Smith & Wesson the casings fell out of the gun, but the

Commonwealth's weapons expert at trial testified that in that model of gun the casings must be removed manually.<sup>3</sup>

Therefore, taking the evidence together, the Commonwealth's evidence showed that: (1) Nestor and Decker had a strained relationship, (2) he had threatened to kill her before, (3) he had the opportunity to kill her, (4) he was the last one to see her alive and first to find her dead, (5) he put his dead girlfriend's body in a tote, duck taped it shut, and buried it beneath sticks and leaves in the woods, (6) he gave a gun matching the caliber of the murder weapon to his friend for safekeeping, (7) he lied to police several times, (8) he texted himself from Decker's phone after she was dead in an effort to alter the timeline of when Decker died, and (9) he was contradicted by a weapons expert as to how the casings in the murder weapon came out of the gun.

A defendant is guilty of murder when he intentionally causes the death of another person. KRS<sup>4</sup> 507.020(1)(a). Even when no direct evidence exists, circumstantial evidence can be enough to support a criminal conviction. *Baker v. Commonwealth*, 860 S.W.2d 760, 761 (Ky. 1993). Circumstantial evidence "is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt." *Commonwealth v. Gross*, 428 S.W.3d 619, 626 (Ky. 2014) (quoting *Bussell v.*

---

<sup>3</sup> No casings were ever found at the crime scene. The Commonwealth also tested a .22-caliber gun owned by Ray Towery and the .27-caliber handgun found in Nestor's possession upon his arrest. The expert determined that neither of those two guns could have been the murder weapon, but the .38-caliber handgun matched the characteristics of the murder weapon.

<sup>4</sup> Kentucky Revised Statutes.

*Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994)). Based on the above evidence, the jury finding Nestor guilty of murder was not clearly unreasonable, and we affirm the trial court's denial of Nestor's directed verdict motions.

## 2. Prosecutorial Misconduct.

Nestor argues that reversible error occurred when the Commonwealth improperly shifted the burden of proof during closing argument. While discussing Nestor's testimony at trial, the Commonwealth's Attorney stated:

Now we also ask jurors, every time they come before us, to weigh[] not only the evidence, which I submit to you is overwhelming, but we also ask you to weigh[] the credibility of the individuals who come in and provide you testimony. You are the finders of fact. The court is the body that instructs you on the law. Now, I submit to you that what we just heard this morning from this man was a continued failure to take responsibility for what he has done. He also wants you to believe that the other witnesses that you heard from were in some way biased, untruthful, piling it on poor Mr. Nestor. Now I submit to you that's just not true, and here's why.

You heard at the beginning of this trial that the defendant does not have to provide evidence of his innocence. **I have the burden.** It's my job to prove someone's guilt. **And that's true, unless you decide that you are going to try to prove your innocence. At that point, you are held to the same standard that I am. You are held to that same standard because that is what the law requires.** Which means if you want to say that Ray Towery is who killed Amber Decker, you need to subpoena Ray Towery, you need to have him come and testify in your case-in-chief and you need to ask him whether or not he, in fact, killed Amber Decker.

"When reviewing alleged prosecutorial misconduct during closing arguments, we will reverse only when the misconduct is "flagrant," or when all of the following elements are satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Goncalves v. Commonwealth*, 404

S.W.3d 180, 194 (Ky. 2013) (citation omitted). Furthermore, “[t]he Court reviews the argument as a whole, while respecting the ‘wide latitude’ granted to parties in closing arguments.” *Id.* (quoting *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009)). Nestor did not object during the alleged error and asks this Court to conduct palpable error review. RCr 10.26. In the context of palpable error review, the alleged prosecutorial misconduct must be flagrant to warrant reversal and must further have resulted in a manifest injustice.

“We consider four factors in making this determination: (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.” *Bowling v. Commonwealth*, 553 S.W.3d 231, 243 (Ky. 2018) (citation and quotation omitted). Nestor argues that the Commonwealth’s statement improperly shifted the burden of proof from the Commonwealth and essentially required Nestor to prove his theory of innocence beyond a reasonable doubt. KRS 500.070. In response, the Commonwealth argues that the misstatement was an isolated, passing statement, and that the statement was not technically incorrect because Nestor had the burden of production<sup>5</sup> when testifying about his theory that Ray Towery killed Amber Decker.

---

<sup>5</sup> We must point out that the burden of production argument put forth by the Commonwealth does not comport with our precedent. The burden of production regarding an alternative perpetrator argument is an argument the Commonwealth must make before allowing a defendant to complete his testimony at trial. The proper method for the Commonwealth to make this argument would have been through a motion in limine prior to trial or an objection during Nestor’s testimony, not for the first time during closing argument or on appeal. Further, the Commonwealth’s

“Great leeway is allowed to *both* counsel in a closing argument. It is just that—an *argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.” *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). However, here, the remarks by the Commonwealth were a definite misstatement of the law regarding the burden of proof. No statute in the Commonwealth holds a criminal defendant to the same burden of proof as the Commonwealth. Therefore, in reviewing the first *Bowling* factor, the jury was undoubtedly misled by the Commonwealth’s remarks during closing argument. The second *Bowling* factor, whether the misstatement was isolated or extensive, is a close call. However, the comment appears isolated, roughly thirty seconds stuck inside a lengthy closing argument at the end of a three-day trial. Under the third *Bowling* factor, the Commonwealth’s comments appear to have been deliberately placed before the jury. The Commonwealth’s Attorney paused between, “[a]nd that’s true,” and “unless you decide that you are going to try and prove your innocence,” making the crescendo of his argument center on the misstatement of law regarding Nestor’s burden.

Yet, under the *Bowling* factors, we also must review the strength of the evidence against the accused. The evidence against Nestor was strong.

---

Attorney was most certainly referring to the burden of proof during the above statement because if he was not then he misstated the law when he stated, “[a]t that point, you are held to the same standard that I am.” If the Commonwealth’s Attorney had been referring to the burden of production during this section of his argument, he would have been arguing that the Commonwealth merely has a burden of production to secure a conviction, which of course is patently untrue.

Although no direct evidence existed to prove that Nestor actually shot and killed Decker, the circumstantial evidence was immense. Accordingly, although two out of four *Bowling* factors weigh in favor of a “flagrant” misstatement of law, the evidence against Nestor in the trial effectively negated any prejudicial effect that the misstatement may have had.

Additionally, even though the Commonwealth’s comments were in error, we will not reverse on an unpreserved error unless the error resulted in manifest injustice, i.e., whether “the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Miller*, 283 S.W.3d at 695 (quoting *Martin*, 207 S.W.3d at 4). The error here does not rise to the level of manifest injustice. Prior to closing arguments, the trial court read the beyond a reasonable doubt standard from the jury instructions, and after closing arguments the jury was instructed on the proper burden of proof to review during deliberations. “[A] jury is presumed to follow a trial court’s instructions[.]” *Dunlap v. Commonwealth*, 435 S.W.3d 537, 567 (Ky. 2013) (quoting *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008)). Granted, this presumption may not cure every instance of prosecutorial misconduct when a prosecutor erroneously misstates the burden of proof. In reviewing the specific facts of this case, however, the fact that the proper standard was included in the jury instructions, read to the jury, and taken into deliberations, coupled with the overwhelming evidence against Nestor, warrant finding that no manifest injustice and thus, no reversible error occurred.

3. KRE<sup>6</sup> 404(b).

Nestor argues that reversible error occurred when the Commonwealth continuously inferred throughout his cross-examination that Nestor was a felon in possession of a firearm, even though he was not charged with that crime in violation of KRE 404(b). KRE 404(b) states that, save for certain exceptions, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” This error is unpreserved, and Nestor asks for palpable error review. RCr 10.26. On cross-examination, the Commonwealth asked Nestor whether he was a felon and whether he was supposed to have a gun. Nestor confirmed that he was not supposed to have a gun. The Commonwealth then explained that Nestor could not have a gun because he was a felon, to which Nestor agreed. The Commonwealth repeated this statement with a second gun that Nestor had in his possession and reiterated during its closing argument that Nestor was not supposed to have guns. Nestor never objected to any of these statements. While the questions posed, and statements made by the Commonwealth may have been a non-constitutional evidentiary error, the error was harmless under RCr 9.24 as “we can say with fair assurance that the judgment was not substantially swayed by the error.” *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010); *see also* *McDaniel v. Commonwealth*, 415 S.W.3d 643, 657 (Ky. 2013) (regarding the same line of

---

<sup>6</sup> Kentucky Rules of Evidence.

questions and statements by the Commonwealth on cross-examination; “[w]e do not find that the Commonwealth’s added step of drawing attention to the illegality of Appellant’s firearm possession created a substantial possibility the result in the case would have been different absent the question[.]”). “Our inquiry is not simply ‘whether there was 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.’” *Brown*, 313 S.W.3d at 595 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946)).

First, the Commonwealth can elicit testimony from a witness regarding their status as a felon. KRE 609. Consequently, the jury knew that Nestor was a felon during the entire cross-examination. The inference by the Commonwealth that Nestor was a felon in possession of guns would not have “substantially swayed” the decision of the jury to convict Nestor of murder as it did not establish any link between his illicit possession of guns and Decker’s death.

#### 4. Public Defender’s Fee.

During sentencing, the trial court ordered Nestor to pay a \$450 partial public defender fee and \$155 in court costs. Nestor argues that he should not be required to pay the public defender fee because the trial court did not hold a nonadversarial hearing in conformance with KRS 31.211(1). He does not challenge the imposition of court costs. KRS 31.211(1) provides:

At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public

defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter. This partial fee determination shall be made at each stage of the proceedings.

The Commonwealth's brief states that it does not "concede . . . but relies on the discretion of the Court as to whether remand is appropriate for the purposes of conducting a non-adversarial hearing." No nonadversarial hearing appears to have taken place and Nestor was represented by a public defender from the outset of these criminal proceedings. Accordingly, we reverse and remand the trial court's decision to impose a partial public defender fee upon Nestor. On remand, the trial court should conduct a proper nonadversarial hearing to determine whether Nestor has the ability to pay a partial public defender fee in accordance with KRS 31.211(1).

#### 5. Consecutive Sentences.

Nestor contends, and the Commonwealth agrees, that his final judgment and sentence erroneously runs his five-year sentence for tampering with physical evidence consecutively with his life sentence for murder. "[P]ursuant to the sentencing statutes, KRS 532.110 and KRS 532.080, 'no sentence can be ordered to run consecutively with a life sentence in any case.'" *Goben v. Commonwealth*, 503 S.W.3d 890, 923 (Ky. 2016) (quoting *Mabe v. Commonwealth*, 884 S.W.2d 668, 673 (Ky. 1994)). Accordingly, we reverse the portion of Nestor's judgment imposing a term of years sentence consecutively

with his life sentence, and remand to the trial court to correct Nestor's judgment in accordance with this opinion.

#### **IV. Conclusion.**

We remand this case to the trial court to conduct a nonadversarial hearing to determine whether Nestor can pay a partial public defender fee, and correct Nestor's judgment in conformance with this opinion. In all other respects, we affirm Nestor's convictions.

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

HUGHES, J., CONCURRING: I concur but the prosecutor's statement in closing argument deserves further condemnation in my view. This gross misstatement of the law defies understanding and comes perilously close to justifying reversal of the conviction in this difficult case.

Keller, J., joins.

#### **COUNSEL FOR APPELLANT:**

Steven Jared Buck  
Assistant Public Advocate  
Department of Public Advocacy

#### **COUNSEL FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

James Patrick Judge  
Assistant Attorney General