

**NTBP**

# Supreme Court of Kentucky

2018-SC-000044-MR

DUWAN MASON

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A. C. MCKAY CHAUVIN, JUDGE  
NO. 15-CR-001328-003

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Duwan Mason, appeals as a matter of right, Ky. Const. § 110(2)(b), from a judgment of the Jefferson Circuit Court convicting him of murder, first-degree assault, and first-degree wanton endangerment. He was sentenced to thirty-five years for these crimes. On appeal, Mason argues the trial court erred in: (1) allowing a witness to testify that he had been shot in relation to this case; (2) allowing the Commonwealth to present evidence that one of his co-defendants had been shot in the months leading up to the murder; (3) disallowing Mason from cross-examining a witness about marijuana use; (4) allowing evidence of a rivalry between neighborhoods; (5) denying a directed verdict motion as to a particular wanton endangerment charge; and (6) denying a motion for directed verdict as to all charges. For the following reasons, we affirm the trial court.

## **I. BACKGROUND**

On August 27, 2014, Destin “Blair” Lindsay was shot on Saint Louis Avenue. According to Michael Dunn, an acquaintance of Lindsay, and one of Mason’s original codefendants, an ongoing “beef” between St. Louis and Market Street led to Lindsay’s shooting.

There are many varying accounts of the events which took place after Lindsay’s shooting. Dunn said he met up with Mason and three other men at the park on St. Louis and the five men decided to retaliate for Lindsay’s shooting. He testified some of the men said they knew who had shot Lindsay. Dunn indicated they walked to 37th Street and approached a house and the other four opened fire. According to Dunn, he pulled the trigger on his own gun several times, but it did not fire.

Trey Anderson, one of the other men Dunn said he met up with in the park, provided a different version of events. According to Anderson, when he arrived at the St. Louis Park after Lindsay had been shot, Dunn was already there. Anderson said he drove down 37th Street with Dunn and Mason and parked. A second car parked behind him. Anderson said he remained with the vehicles while the others got out. According to Anderson, he did not know the identity of the individuals in the other car. Dunn and Mason returned to Anderson’s car shortly after he heard gunshots.

According to Cierra Twyman, she was sitting on the porch with her boyfriend, William Miller, the couple's daughter, Ne'Riah,<sup>1</sup> and William's brothers when she saw a group of men approach. She heard them talking to one another and then heard gunshots. Twyman was shot, as was her sixteen-month-old daughter, Ne'Riah. Ne'Riah did not survive the gunshot wound to the torso she sustained.

On September 6 Cedric Weaver was cited for trafficking. During his discussion with police, Weaver indicated he had seen the shooting that led to Ne'Riah Miller's death on August 27. He said that on the day of Ne'Riah's shooting, he had been sitting on a nearby porch. He stated he saw a group of people walk down Market Street and ask people if they were "from Market." When someone responded in the affirmative, the men pulled out their guns and started shooting. According to Weaver, he saw them shooting at people "a couple houses down from Ne'Riah home."

Eventually, five men, including Mason, were indicted for one count of murder, one count of first-degree assault, ten counts of attempted murder, and nine counts of first-degree wanton endangerment. Anderson and Dunn both entered plea agreements with the Commonwealth that required them to "testify truthfully in any proceeding related to his co-defendants." Mason and two co-

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<sup>1</sup> The parties use two different spellings of the victim's name in their briefs to this Court. The Commonwealth spells the name "Ne'Riah" in its brief and this is the spelling we use throughout this opinion.

defendants proceeded to trial and all three were convicted of murder, first-degree assault, and four counts of first-degree wanton endangerment.

Demarkus Tramber, one of Mason's co-defendants, waived his right to directly appeal and was sentenced separately. Mason and his other co-defendant were each sentenced to thirty-five years' imprisonment. This case involves Mason's appeal from those convictions.

## **II. ANALYSIS**

### **A. Cedric Weaver's Shooting**

Mason first argues that the trial court erred in failing to declare a mistrial when Cedric Weaver, one of the Commonwealth's witnesses, testified that he had been shot after cooperating in this case. What Mason failed to mention to the Court in his brief, however, is that testimony about Weaver being shot because of this case initially came in during his cross-examination by one of Mason's co-defendants. During that cross-examination, Weaver actually mentioned the shooting *twice* and Mason failed to object.

During cross-examination, one of Mason's co-defendants impeached Weaver using statements he made in two audio recorded interviews with a Department of Public Advocacy investigator. In direct contradiction of his statement to police and his direct testimony (both of which indicated he had witnessed the shooting), Weaver told the investigator that he had not actually seen the shooting, but had only been told about it. The Commonwealth sought

to rehabilitate Weaver on re-direct examination by asking him questions first about whether his answers to the investigator were truthful (he answered that they were not) and then his reason for lying to the investigator.

That was the posture of the case nearly an hour after Weaver's first and second mentions of the shooting when the Commonwealth asked Weaver a question during re-direct examination regarding why he did not want to speak with the investigator about this case. When Weaver answered, "I had got shot about this case,"—the *third* time he mentioned being shot in relation to this case—Mason's co-defendant moved for a mistrial. The co-defendant's counsel argued his client was in custody when Weaver was shot and there was no evidence that the shooting was connected to this case. Mason joined in the mistrial motion. The trial court denied the mistrial motion, but told counsel during a bench conference that he would admonish the jury that:

the limited purpose of that testimony is, to the extent they think it helps to explain his reticence to talk to anybody about the case, but you should not infer, and may not infer, that the defendants had anything to do with it. Because, in fact, they were all in custody at the time it happened.

The trial court crafted this admonition in response to Mason's co-defendant's complaint that he was in custody at the time of Weaver's shooting. While neither the moving co-defendant nor Mason believed this admonition was enough to "unring the bell," and still sought a mistrial, neither complained of the admonition's content.

It was not until more than fifteen minutes after the trial court gave the jury an admonition closely mirroring what it informed counsel it would tell the jury in the above quote that Mason renewed his motion for a mistrial, this time based upon the content of the admonition. In his motion, Mason noted that the trial court told the jury in the admonition that the three co-defendants were in custody at the time Weaver was shot—and this may lead them to speculate as to the crime for which they were incarcerated and whether they were repeat offenders. The trial court denied this motion as well but told counsel it would admonish the jury not to consider the defendants' incarceration in its deliberations. The jury had already gone home for the day, but the trial judge did later give such an admonition when it was instructing the jury.

In addition to the fact that Mason did not object to Weaver's first two statements regarding being shot in relation to this case, his counsel also reminded the jury that "you heard Cedric Weaver say, 'I got shot over this thing,'" during his closing argument. Mason's trial counsel reminded the jury of Weaver's shooting in order to justify Mason's move to Nashville following the shooting. Mason's counsel argued that since Weaver had gotten shot after talking about the case Mason "getting out of town was understandable."

Even if we were to agree with Mason that Weaver's statement regarding being shot in relation to this case was inadmissible, we have held that it is not enough to warrant a mistrial in a case where it was admitted first without

objection. In *Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009), this Court held that a comment regarding a witness's fear of retribution was admitted in error. However, the trial court in that case admonished the jury. After discussing the narrow exceptions to the presumption that admonitions are curative, we stated:

But this case does not fall within those exceptions because the improper testimony was relatively brief in nature given the lengthy trial. *And defense counsel did not object when Wright first mentioned fearing retribution and, in fact, raised that issue himself during cross-examination.* Also, although not mentioned by the parties, the record reflects that at one point, [the witness] testified without objection that he did not want to “turn against” Parker because he feared for his safety. In short, we believe the trial court’s admonition was a sufficient curative measure, rendering a mistrial unnecessary.

*Id.* (emphasis added). Just as in *Parker*, Weaver’s statement about being shot was not objected to the first (or even second) time it was mentioned.

Furthermore, Mason’s own counsel later reminded the jury of the statement in his closing argument, much as Parker’s counsel raised the issue on cross-examination.

In *Parker*, we held that “[j]ury verdicts must be based upon admissible evidence, not jurors’ fear of the allegedly vengeful nature of a defendant.” *Id.* (emphasis added). However, unlike the witness in *Parker*, Weaver did not point to Mason or either of his co-defendants as the reason he feared for his safety. Rather, Weaver indicated that he lied to the investigator because he did not want *his friends* to know he was talking to anyone about the case. He



explained on redirect, “people down there don’t play that. They don’t. People get killed over stuff like that.” When the Commonwealth asked what he meant by “down there,” Weaver responded, “on Market.” The Commonwealth’s theory at trial was based on an ongoing dispute between residents of Market Street and those of St. Louis Street. The only fear Weaver testified about related to other “Market” people. He never indicated that Mason shot him or that he feared Mason’s retribution for speaking to the police about this case.

In *McDaniel v. Commonwealth*, 415 S.W.3d 643, 651 (Ky. 2013), we looked at our holding in *Parker* and distinguished that case “because, in *Parker*, the Commonwealth did not argue that the retaliation-referencing testimony was admissible for any other valid purpose. . . . Here, the Commonwealth points us to the trial judge’s explanation that [the witness’s] testimony was admissible to explain his prior inconsistent statements.” The same is true here. Weaver’s testimony about being shot was admissible to explain his prior inconsistent statements to the DPA investigator. He indicated he did not want his friends to know he was talking to anyone about the case and explained his reticence to speak with the investigator because of his belief that he had already been shot for speaking with police about the case. We held in *McDaniel* “that threat evidence may be admitted if it serves to aid the jury in resolving a witness credibility issue.” *Id.* That is exactly what happened here. The trial court allowed the Commonwealth to rehabilitate Weaver due to the

prior inconsistent statements brought out on cross-examination with the fact that he had been shot. This is in line with our precedent.

Mason argues that even if Weaver's shooting was otherwise admissible, it must still be excluded because its probative value was substantially outweighed by its risk of prejudice pursuant to KRE 403. We disagree. As noted, the evidence was admitted twice without objection and then used by Mason's counsel in his closing statement. This belies the argument of its prejudicial effect. We also reiterate that Weaver did not point to Mason as the individual who shot him. He spoke only of people "on Market" not "play[ing] that" and getting killed for things like talking to the police about crimes. This did not amount to undue prejudice toward Mason.

Mason further contends that the first admonition compounded the error by telling the jury that he had been in custody at the time of Weaver's shooting. He insists that this "told the jury that . . . Mason and his co-defendants had been incarcerated for an extended period of time." However, this is not the case. The trial judge did not tell the jury that Mason had been incarcerated for any particular amount of time—or even that he still was in custody. Rather, in response to Mason's co-defendant's counsel's motion for mistrial (which Mason joined) and his argument that his client was in custody at the time Weaver was shot, the trial court only informed the jury not to "attribute his having been shot to anything directly with these defendants. In fact, these defendants were

in custody during the time that he was injured.” Therefore, the trial court said nothing of the length or continuing nature of Mason’s custody. Rather, only that, for at least the brief moment during which Weaver was shot, Mason was in custody. We do not agree with Mason’s contention that this brief statement by the trial judge is tantamount to a defendant appearing before the jury in prison garb.

It is also important that Mason’s counsel did not contemporaneously object to the content of the trial court’s admonition. The trial court explained in detail what it intended to tell the jury in its admonition. Neither Mason’s counsel nor his two co-defendants’ counsel objected to the content of the admonition. Rather, their only complaint was that it did not go far enough to cure the alleged error. It was not until more than fifteen minutes after the admonition, at the end of Weaver’s testimony that Mason’s counsel objected to the content of the admonition. Had he lodged a contemporaneous objection concerning the content of the admonition, the trial court would have had the opportunity to consider the objection and potentially alter its language. However, it was not given that opportunity.

Furthermore, even if the trial court erred in telling the jury that Mason was in custody at the time of Weaver’s shooting, as previously noted, it gave a second admonition to the jury not to consider the defendants’ incarceration in its deliberations.

We noted in *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), “[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error.” We went on in that case to enumerate exceptions to that general rule:

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; or (2) when the question was asked without a factual basis and was “inflammatory” or “highly prejudicial.”

*Id.* (internal citations omitted). Neither of those circumstances exists here. The evidence that Weaver had been shot would not have been devastating to Mason and the question was not asked without a factual basis. Therefore, we presume that the jury followed the trial court’s admonitions.

#### **B. Demarkus Tramber’s shooting**

Mason asserts that the trial court erred in allowing the admission of evidence that Demarkus Tramber, one of his co-defendants, had been shot three months prior to the date of the shooting herein. He argues that the evidence was not relevant, or, in the alternative, that its probative value was outweighed by its undue prejudice. He also argues Tramber’s shooting was not inextricably intertwined with the events of the present case.

We begin our analysis of this issue by examining this Court’s evidentiary rules. Kentucky Rules of Evidence (KRE) 401 defines relevant evidence as

“evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Further, KRE 402 provides that

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible.

Finally, KRE 403 deals with the exclusion of relevant evidence, and reads, “[a]lthough 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.”

The bar for evidence to meet to be considered relevant is low. *Blair v. Commonwealth*, 144 S.W.3d 801, 808 (Ky. 2004) (“To show that evidence is relevant, only a slight increase in probability must be shown.”). Mason argues that Tramber’s shooting was irrelevant as to his case, as he did not live in the St. Louis or Market neighborhoods, he was not close friends with any of his co-defendants, and there was no evidence that he was aware of Tramber being shot. Here, the Commonwealth’s case was based on a back-and-forth between people affiliated with the two neighborhoods. Anderson and Dunn both testified that Mason was amongst the individuals responsible for the shooting that killed Ne’Riah Miller. The Commonwealth proving this back-and-forth

rivalry was certainly relevant to the case—and part of that “bad blood” involved Tramber, one of the co-defendants, being shot. Therefore, the low relevancy bar was met for the admission of evidence of the shooting.

Mason also argues that, even if relevant, the admission of evidence of Tramber’s shooting fails the KRE 403 balancing test. He insists the probative value of the evidence was substantially outweighed by the danger of undue prejudice.

We have held:

A proper balancing under KRE 403 requires that a trial court consider three factors: the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth. *Barnett v. Commonwealth*, 979 S.W.2d 98, 100 (Ky.1998). Thus, if the possibility of undue prejudice outweighs the probative worth of the evidence presented, it should be excluded.

*Yates v. Commonwealth*, 430 S.W.3d 883, 897 (Ky. 2014). Furthermore:

What is contemplated as “unfairly” or “unduly” prejudicial is evidence that is harmful beyond its natural probative force: “Evidence is unfairly prejudicial only if . . . it ‘appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish,’ or otherwise ‘may cause a jury to base its decision on something other than the established propositions in the case.’”

Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.10[4][b] (4th ed. 2003) (internal citations omitted).

On appellate review, we will not overturn a trial court’s evidentiary rulings absent an abuse of discretion. *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). Further, "in reviewing the trial judge's balancing under KRE 403, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Major v. Commonwealth*, 177 S.W.3d 700, 707 (Ky. 2005).

In line with this precedent, we examine the probative value of the evidence taken in a light most favorable to the Commonwealth. "The 'probative value' or 'probative worth' of evidence is a measure of how much the evidence tends to make the fact it is introduced to prove more or less probable." *Hall v. Commonwealth*, 468 S.W.3d 814, 823 (Ky. 2015). The evidence in question concerned the shooting of Tramber (one of Mason's co-defendants) three months prior to the shooting in the present case. In admitting the evidence, the trial court found that "the res gestae of this particular case may stretch back to [Tramber's shooting] because that's where the . . . bad blood if you believe the Commonwealth's version of events may have first . . . gone bad and the roots of whatever happened [in this case] . . . can be traced back to" Tramber's shooting. The trial court also indicated that "[i]t also goes to motive. . . . It's highly probative for sure."

The Commonwealth sought to prove that the motive for Mason and his co-defendants to perpetrate the charged crimes was to get revenge for another shooting that happened that day—and that the two shootings on August 27 were not an isolated incident. The Commonwealth called Louisville Metro Police Detective Chad Johnson to the stand. Johnson testified that he had investigated Tramber’s shooting on May 29. Tramber told Johnson that the shooters were “a group of black males” he believed to be from Market Street. The Commonwealth’s case centered on its belief that the shootings were related to bad blood between the St. Louis and Market Street neighborhoods. The trial court found that Tramber’s shooting in May provided evidence of *res gestae* and motive.

We have held “where evidence is needed to provide a full presentation of the offense, or to complete the story of the crime . . . there is no reason to fragment the event by suppressing parts of the *res gestae*.” *Webb v. Commonwealth*, 387 S.W.3d 319, 326 (Ky. 2012) (internal citation omitted). Further, we have stated that the Kentucky Rules of Evidence are “intended to be flexible enough to permit the prosecution to present a complete, un-fragmented, un-artificial picture of the crime committed by the defendant, including necessary context, background and perspective.” *Major*, 177 S.W.3d at 708. Because “proof of motive and opportunity is certainly probative enough for admission under KRE 403,” *Gray v. Commonwealth*, 480 S.W.3d 253, 267



(Ky. 2016), we will not disturb the trial court's ruling that Tramber's shooting amounted to probative evidence in this case. That court did not abuse its discretion in so finding.

Mason insists that the Commonwealth failed to produce any evidence from either of his testifying co-defendants that Tramber's shooting served as a motive in this case. However, Dunn testified regarding the ongoing problems between the neighborhoods, stating that he supposed "whatever ongoing beef there was led to" the shooting of Destin Lindsay, and then the retaliatory shooting that led to Ne'Riah Miller's death a few hours later.

In determining the probative value of the evidence we also look to the remoteness of Tramber's shooting. In *Robey v. Commonwealth*, 943 S.W.2d 616, 618 (Ky. 1997), this Court held, "[t]he requirement that the prior act be 'not too remote' is integral to determining the probative value of the evidence. Thus, an independent act too remote in time will fail the balancing test required by KRE 403." Here, Tramber's shooting was three months before the crime in question. In *Robey*, we went on to state, "[t]he prosecution is not privileged to show unconnected and isolated unlawful conduct that had no bearing upon the crime under scrutiny. The evidence of a single sixteen-year-old conviction, although the crimes had similar aspects, was simply too remote." *Id.* Here, the Commonwealth asserted that the shootings were not the type of "unconnected and isolated" events at issue in *Robey*. Rather,

according to the Commonwealth, one acted as motive for the next. We hold the two shootings were not “too remote” for consideration herein.

Having held that the evidence of Tramber’s shooting was probative, we move on to determine “the probability that the evidence will cause undue prejudice.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Here, there was no assertion that Mason was involved in Tramber’s shooting in any way. Rather, the evidence was admitted in support of the Commonwealth’s theory that the St. Louis and Market Street neighborhoods had an ongoing conflict and that Tramber’s shooting was part of the conflict that provided motive for the shooting that ended Ne’Riah Miller’s life.

It is unclear to this Court how the fact that Tramber was shot in the past prejudiced Mason in any way. No evidence was presented that Mason was involved in the Tramber shooting—just that the shooting played a role in his and his co-defendants’ motive for the shooting that killed Ne’Riah Miller.

Mason also argues that the evidence of Tramber’s shooting was not inextricably intertwined with the present case. However, as explained at length above, the Commonwealth’s presentation of the entire case was as a back-and-forth between the neighborhoods. Therefore, this argument is without merit.

Viewing “the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value,” *Major*, 177 S.W.3d at 707, we hold the trial court

did not abuse its discretion in allowing the admission of evidence that Tramber had previously been shot.

**C. Cross-examination about witness's marijuana use**

Mason next argues that he was denied his right to confront witnesses against him when the trial court denied cross examination about William Miller's marijuana use. Mason's counsel started his cross examination of Miller (Ne'Riah's father) by asking him what he was doing on the porch at the time of the shooting. Miller responded that he was "smoking blacks—reefer." After a follow-up question, Miller confirmed that he was smoking marijuana. Mason's counsel then asked, "Is that something you regularly did?" The Commonwealth objected and requested to approach. The trial court, apparently seeing no reason to conference on the question, sustained the objection and instructed the jury to disregard "that question." Mason's counsel then requested to approach the bench and the trial court denied his request.

Mason now argues that the trial court's ruling prohibited him from "inquiring into the effects of marijuana." This allegation is simply not born out by the trial video. The trial judge prohibited Mason's counsel from asking Miller about his typical marijuana use—not the effects of the drug on his ability to observe and recall events.

The Sixth Amendment to the United States Constitution (which was made applicable to the states via the Fourteenth Amendment) provides, in

pertinent part, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” However, the right to cross-examination is not unlimited. In *Delaware v. Van Arsdall*, the Supreme Court of the United States held “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” 475 U.S. 673, 679 (1986). This Court has quoted the First Circuit with approval in stating “[s]o 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.”

*Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997), (quoting *U.S. v. Boylan*, 898 F.2d 230, 254 (1st Cir.1990)).

Here, Mason was not prevented from cross-examining Miller about a relevant matter (i.e. the impact of marijuana on his observations and recollection). Rather, the trial court exercised its authority acknowledged by the United States Supreme Court “to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Van Arsdall*, 475 U.S. at 679. This ruling was not in error.

#### **D. Street Rivalry**

Mason next argues that the evidence of a rivalry between Market Street and St. Louis Street was unduly prejudicial—particularly since he did not live in either area. However, the Commonwealth points out that

While the jury was presented with testimony that the rivalry involved Market Street and the St. Louis neighborhood, this was a sanitized version of the rivalry. The real rivalry was between the Market Street gang, which is affiliated with the Bloods, and the Young N Ruthless (YNR) gang, which is affiliated with the Cripps. The fact that he lived outside the St. Louis neighborhood is irrelevant.

The reference to neighborhoods rather than gang affiliation was in response to pre-trial motions in limine by the co-defendants to exclude evidence of gang loyalty. Throughout the trial, the trial court reminded witnesses outside the presence of the jury that they could refer to Market or St. Louis, but not to gang affiliation. Mason now attempts to use the fact that the trial court allowed only this sanitized version of events in order to decrease prejudice to Mason and his co-defendants to his advantage, claiming that he did not live in the area.

Mason argues there was insufficient evidence linking him to the rivalry. However, Michael Dunn, one of the original co-defendants who took a plea deal and testified as a witness for the Commonwealth, testified that all four shooters were there to retaliate for a shooting on St. Louis earlier in the day. He

specifically said that Mason wanted to retaliate and stated that he knew Mason through the St. Louis neighborhood.

Furthermore, both William Miller and Cedric Weaver testified that just before the shooting, the shooters asked people in front of a home nearby to the site of Ne'Riah Miller's shooting if they were "Market." When the residents responded in the affirmative, the men opened fire.

One of the investigating officers testified that within twenty-four hours of the Miller shooting, he learned that it was in retaliation for the prior shooting on St. Louis. He also testified that there was a connection between the areas.

Mason claims that "[e]xtraneous evidence about gang or street affiliation was irrelevant and unduly prejudicial." We disagree. As aforementioned, the Commonwealth was not required to present its case in a vacuum. It was permitted "to present a complete, un-fragmented, un-artificial picture of the crime committed by the defendant, including necessary context, background and perspective." *Major*, 177 S.W.3d at 708. Part of its doing so was to present the history of back-and-forth, ongoing issues between the neighborhoods. The trial court did not err in allowing it to do so.

**E. Withdrawn argument regarding wanton endangerment**

Mason next argued that the trial court erred in failing to grant his motion for directed verdict on a wanton endangerment charge. However, the Commonwealth points out in its brief that Mason was found not guilty of the

complained-of charge. Therefore, Mason withdrew his argument on this issue in his reply brief and we will not address it.

**F. Directed verdict on all charges**

Mason’s final argument is that the trial court erred in denying his motion for a directed verdict on all charges, as there was insufficient evidence he participated in the shooting. He argues that only two witnesses placed Mason at the scene of the crime—his former co-defendants who testified for the Commonwealth in exchange for deals, Michael Dunn and Trey Anderson. He complains that Dunn and Anderson gave different accounts of the shooting, specifically, the two were at odds as to the car in which Mason rode to the scene. Mason asserts that no witnesses saw him participate in the shooting and there was not substantial evidence of his guilt.

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. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). 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.*

Both Dunn’s and Anderson’s testimony put Mason at the scene of the crime. According to Anderson, it was Mason and Dunn who directed him to drive toward Market Street, but he claimed he did not know why at the time. Anderson testified that he saw the butt of a pistol in Mason’s waistband as he exited the vehicle prior to the shooting. Anderson did not testify as to the details of the shooting, however, as he said he remained in his vehicle. After hearing shots, Anderson claimed Mason ran back and got in his car. According to Anderson, Mason and Dunn bragged about the shooting on the drive back to the St. Louis neighborhood.

According to Dunn, Mason rode with him to retaliate for the earlier shooting on St. Louis. He said that Mason was armed with a semi-automatic pistol. He said all three of his accomplices (naming each of them, including Mason) started shooting when they approached the house. When asked how he knew they were shooting, he answered, “I seen them.” Approximately a minute later, when describing where the various co-defendants stood during the shooting, Dunn said that he thought Mason had walked out of his line of sight to the left. After the shooting, Dunn testified he returned to the St. Louis neighborhood and dropped Mason off.



Weaver also testified that he could see all of the assailants and that all were firing guns during the shooting. William Miller testified someone with shoulder-length dreadlocks ran across the front yard during the shooting. William's brother Earnest Miller and Weaver both testified that someone with shoulder-length dreads came up to the porch steps and fired a gun. Another witness, Judy Hughes, a neighbor to the Millers, testified that she observed a man with dreadlocks in the Millers' driveway. Anderson testified that Mason had shoulder-length dreadlocks at the time of the shooting.

Considering the evidence in this case, it would not be "clearly unreasonable for a jury to find guilt." *Sawhill*, 660 S.W.2d at 5. Mason is correct that Anderson and Dunn did provide contradictory testimony concerning the vehicle in which Mason rode to the crime scene. However, this was not determinative of the case. The jury did not have to agree as to how Mason got there—only that he participated in the shooting that claimed sixteen-month-old Ne'Riah Miller's life. Furthermore, "[t]he credibility and the weight to be given the testimony are questions for the jury exclusively." *Sawhill*, 660 S.W.2d at 5. The trial court did not err in leaving those matters to the jury and denying Mason's motion for a directed verdict.

### **III. CONCLUSION**

For the foregoing reasons, we affirm Mason's convictions and corresponding sentences.

All sitting. All concur.

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