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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2018-SC-000617-MR

COREY COMMODORE

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NOS. 17-CR-001149 AND 17-CR-003149

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

A Jefferson County jury found Corey Commodore guilty of one count of first-degree assault, two counts of first-degree robbery, and one count of being a Persistent Felony Offender in the First Degree (PFO I). He was sentenced to prison for a total of forty years. Commodore appeals, claiming the trial court committed five errors. He alleges the trial court erred by: denying a directed verdict on the first-degree assault charge; improperly admitting opinion evidence about his tattoos; improperly admitting irrelevant testimony about his unremorseful demeanor; denying a continuance of the penalty phase; and failing to suppress evidence resulting from an invalid consent to search. For the reasons set forth below, we conclude that the first argument establishes reversible error, and therefore we reverse Commodore's first-degree assault

conviction. We affirm the remainder of the judgment and remand for further proceedings consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Tommy's Place, a neighborhood shop in Louisville selling cigarettes, produce, and flowers, and then owned by Tommy Smith, was the scene of a robbery on April 13, 2017. The business's surveillance camera recorded the robbery. At the time the robber, now known to be Commodore, entered the store, Smith's wife, Freda, and Douglas Jeffries, a cashier, were in the store behind the counter. Smith was outside.

When Jeffries left the counter to offer help, Commodore pushed Jeffries back behind the counter and demanded that Jeffries open the cash register. Jeffries believed Commodore was holding a gun to his back. Freda beat on a window to alert Smith that there was a problem. When Smith arrived inside, Freda screamed, "Guy's robbing us!" Smith ran at Commodore as Commodore was heading toward the door, at which point Commodore stabbed Smith in the neck. Smith pursued Commodore outside the store. Commodore put the knife to Smith's stomach and told him to back off. Smith did so, and Commodore left.

Jeffries called 911. Officer Chenault responded to the scene and his body camera recorded Smith sitting in a chair, wearing a bloody shirt, and holding his neck to control the bleeding. EMS arrived shortly afterward, and Smith was transported to the University of Louisville Hospital trauma unit.

Tommy's Place surveillance video captured images of the robber. Still photos were made of a black male, who had a tattoo on his neck and a tattoo sleeve on his left arm. The robber was wearing a black ball hat with a sticker on top of the bill and a t-shirt that read "My Kicks Get Chicks."

Using the surveillance video from Tommy's Place and the neighboring store, the police identified a vehicle suspected of transporting Commodore to and from the scene. A police unit spotted the truck the next day. Armond Stafford, the driver, was taken into custody. He admitted taking Commodore, known to him as "C," to Tommy's Place on the day of the robbery, initially picking him up at an apartment complex in the 1000 block of 29th Street. Stafford thought Commodore intended to buy cigarettes. Stafford waited in the truck and Commodore returned in about ten minutes, behaving in a normal manner. Stafford drove Commodore back to the apartment complex and dropped him off.

The police searched 1020 South 29th Street, Apartment #1, on April 14, 2017, and found evidence incriminating Commodore, including a "My Kicks Get Chicks" t-shirt and documents with his name on them. The facts surrounding the search are discussed in more detail below. Also, the police interviewed Commodore on April 19, 2017. During the interview Commodore admitted to robbing Tommy's Place and stabbing Smith.

A Jefferson County Grand Jury indicted Commodore, charging him with one count of attempted murder, one count of first-degree assault, and three

counts of first-degree robbery. The grand jury returned a separate indictment later, charging Commodore with one count of being a PFO I.

At trial, the jury found Commodore guilty of one count of first-degree assault, two counts of first-degree robbery, and one count of being a PFO I. The jury recommended enhanced prison sentences of forty years on the first-degree assault conviction, thirty years on one of the first-degree robbery convictions, and twenty years on the other first-degree robbery conviction. The jury recommended the sentences run concurrently for a combined sentence of forty years in prison. The trial court entered its final judgment, sentencing Commodore as recommended by the jury.

Commodore now brings this appeal, alleging the trial court committed five errors. Additional facts are presented *infra* as necessary to address these claims.

ANALYSIS

I. Commodore was entitled to a directed verdict on the first-degree assault charge.

The trial evidence established the following. Smith was stabbed in the neck and Smith's shirt was bloody from the stabbing; pictures of the bloody shirt were entered into evidence. When the responding officer arrived at the scene, Smith was sitting in a chair, holding his neck, and applying pressure. When the EMS arrived shortly afterward, the officer informed the responder that he thought the bleeding was controlled. The EMS responder testified that the cut was near Smith's left external jugular vein and because internal damage and bleeding cannot be seen, the EMS transported Smith to the

hospital for treatment of the laceration, a potentially life-threatening injury. Smith's neck wound was treated and closed at bedside.

According to medical records, Smith had no active bleeding on arrival at the emergency room; Smith did not suffer a vascular or esophageal injury; Smith's wound was a supple, trachea midline, 2 cm penetrating wound; Smith's wound was a superficial stab wound;¹ and Smith was kept at the hospital overnight for further care and close monitoring. The medical records contain the following entry:

75 yo gentlemen s/p stab to L neck while being robbed. Pt denies any hoarseness, trouble swallowing & doesn't have an expanding hematoma. [N]o active bleeding from wound. [O]nly real medical problem is diabetes, not on a blood thinner. [N]o other problems or stab wounds.

Smith testified that he thought he was hospitalized for several days after the stabbing. Smith suffered pain from the wound, and his neck is scarred.

Commodore moved for a directed verdict on the assault in the first-degree charge, emphasizing that Smith's injury did not create a substantial risk of death because the bleeding was controlled. The trial court denied the motion.

In order for a defendant to be found guilty of first-degree assault, the Commonwealth must prove 1) the defendant "intentionally *cause[d] serious physical injury* to another person by means of a deadly weapon or a dangerous instrument;" or 2) "[u]nder circumstances manifesting extreme indifference to

¹ Smith's medical discharge records read: "Primary final diagnosis: Superficial stab wound to the left neck."

the value of human life [the defendant] wantonly engage[d] in conduct which creates a grave risk of death to another and thereby *cause[d] serious physical injury* to another person.” KRS² 508.010(1) (emphasis added). “Serious physical injury” “means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” KRS 500.080(15).

On appeal, Commodore claims that the evidence at trial failed to establish that he created a substantial risk of death for Smith or that he created a serious and prolonged disfigurement of Smith, and therefore, the trial court erred by denying his motion for a directed verdict on the first-degree assault charge for stabbing Smith in the neck.³ When reviewing a motion for a directed verdict,

the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

² Kentucky Revised Statute

³ Commodore also argues that he did not create a physical injury which caused a prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ. The Commonwealth concedes this point, limiting the question to whether evidence was sufficient to prove that when Commodore injured Smith, he created a substantial risk of death or a serious and prolonged disfigurement.

Commodore cites *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011), for the premise that when considering Smith’s injuries, “the question is not what *could* have happened, but rather what *did* happen.” In *Anderson*, this Court found the proof insufficient to show that the victim’s bleeding, one-inch deep razor cut to his jaw line was a serious physical injury. At the hospital, the victim’s elevated heart rate, attributed to adrenaline, was treated with IV medication, his cut was sutured, and he was sent home. *Id.* at 582. Afterward the victim was off work for a while and occasionally he had sharp neck pains. *Id.* There was no proof of any subsequent medical treatment related to the laceration. *Id.* Furthermore, the existence of a scar from the laceration, while a disfigurement, was not a serious and prolonged disfigurement. *Id.*

Commodore points out that at the time of the stabbing and emergency treatment, the severity of the stabbing and exact injury were unknown, but the medical records dispelled the notion that the stabbing caused serious blood loss or other internal damage creating a substantial risk of death. Commodore further argues that Smith’s resulting scar, like in *Anderson*, is not a serious and prolonged disfigurement.

The Commonwealth views this case more like *Brooks v. Commonwealth*, 114 S.W.3d 818 (Ky. 2003), in which this Court upheld a circuit court’s finding of serious physical injury. In *Brooks*, the victim suffered serious physical injury from two long crossing slashes on his neck, stab wounds on the right side of his face and neck, and multiple defensive wounds on both upper extremities. *Id.* at 824. The Commonwealth emphasizes that like in this case,

the *Brooks* victim suffered the loss of a large amount of blood and the victim was kept overnight in a hospital for close observation, and that was sufficient evidence to establish a substantial risk of death. *Id.* Furthermore, the inflicted neck wounds caused serious and prolonged disfigurement. *Id.*

The dissent views *Cooper v. Commonwealth's*, 569 S.W.2d 668 (Ky. 1978), and *Mullins v. Commonwealth's*, 2011-SC-000634-MR, 2012 WL 6649199, at *2 (Ky. Dec. 20, 2012) (quoting *Cooper*), analysis as persuasive that under all the circumstances in this case, it would not be clearly unreasonable for the jury to find that the neck wound created a substantial risk of death for Smith. While *Cooper's* principle that the determination of substantial risk of death must be based upon the totality of the evidence is not in dispute, the victim's circumstances in *Cooper* and *Mullins* are distinguishable from the current case, the *Cooper* and *Mullins* victims having underlying conditions which factored into the risk of death. In *Cooper*, a physician testified that the fear/psychological response of the seventy-four-year-old rape victim with heart trouble and chronic lung disease was sufficient to cause a risk of death. 569 S.W.2d at 670. In *Mullins*, unpublished, an eight-month pregnant woman was stabbed in the left thigh three times and as compared to other assault scenes, a detective characterized the assault scene as having "more [blood] than normal." 2012 WL 6649199, at *1-2.

Bell v. Commonwealth also reminds us,

Whether a defendant's act . . . creates "a substantial risk of death or serious physical injury" will, of course, "turn [] on the unique circumstances of an individual case."³⁰ [*Cooper v.*

Commonwealth, 569 S.W.2d 668, 671 (Ky. 1978)]. Generally speaking, however, we would observe that a *substantial* risk is a risk that is “[a]mple,” “[c]onsiderable in . . . degree . . . or extent,” and “[t]rue or real; not imaginary.” Accordingly, it is clear that not all risks are substantial—hence the phrase “low risk”—and not every hypothetical scenario of “what might have happened” represents a substantial risk. In any trial, the issue of whether a defendant’s conduct creates a substantial risk of death or serious physical injury “depends upon proof” and reasonable inferences that can be drawn from the evidence.

122 S.W.3d 490, 497 (Ky. 2003) (other internal citations omitted).

The dissent carefully reviews the medical treatment that Smith received, including numerous tests and diagnostic procedures, however, in the final analysis, he suffered no life-threatening injury. He had a superficial stab wound to his neck but no vascular or esophageal injury, no damage to any vital organ and had no active bleeding on arrival at the hospital. The first-degree assault statute does not contemplate “close calls” or “what could have happened” but rather “serious physical injury” creating a “substantial risk of death.”

Thus, we agree with Commodore that like in *Anderson*, the evidence presented in his case was not sufficient to show he *caused* a serious physical injury. Although Smith’s shirt served as evidence of a degree of blood loss which could cause concern, unlike in *Brooks*, there was no evidence from the scene or medical treatment that the blood loss or the associated non-vascular injury created a substantial risk of death. In *Brooks*, the severity of blood loss was the victim’s most immediate risk; the victim was found with a large amount of blood in his lap and before he bled to death. 114 S.W.3d at 824.

The evidence presented, viewed in the light most favorable to the Commonwealth, fails to reflect that Smith did in fact sustain a serious physical injury from the stabbing, either in terms of creating a substantial risk of death or causing serious and prolonged disfigurement. Consequently, we conclude the trial court erred by not granting a directed verdict, and the first-degree assault conviction must be reversed. Because the jury was instructed on the lesser-included offense of second-degree assault, this case is remanded for retrial on the charge of second-degree assault. *Yates v. Commonwealth*, 430 S.W.3d 883, 895 (Ky. 2014).

II. The admission of the detective's opinion testimony was harmless error.

During the investigation of the robbery and assault, Detective Mason viewed the surveillance footage from Tommy's Place and created still photos of the robber. During trial, the detective compared the arrest photos of Commodore showing his left sleeve tattoo and a tattoo on his neck to still images taken from the surveillance video showing the assailant's tattoos. The photo exhibits for the sleeve and neck tattoos were arranged so that the still video photos were easily compared to the arrest photos showing the tattoos. Prior to examining the detective about the photos, at the Commonwealth's request, Commodore stood in front of the jury and displayed the sleeve tattoo on his left forearm and the tattoo on his right neck.

When initially describing the exhibits showing the photos, the detective stated:⁴

[The sleeve tattoo exhibit,] it's three photos. The two on top are photos from the Tommy Place surveillance video, the stills that I had created showing the sleeve, the distinctive sleeve, with the distinctive kind of mark right here at the forearm. The picture below it is the sleeve tattoos of Mr. Commodore at the time of his arrest which also show a distinctive tattoo at the elbow.

[The neck tattoo exhibit,] it's a series of four photographs. The first one on the left is from a surveillance video showing the right side of Mr., of the suspect's neck. There does appear to be some kind of loop tattoo on the right side of his neck. The day of his arrest we were able to photograph Mr. Commodore who had the loop tattoo, what appeared to be the same loop tattoo on the side of his right neck.

The trial court admitted the photos and granted publication to the jury without objection. When the neck tattoo exhibit was displayed on the projection screen, the detective described it again, stating: "On here, this is faded a little bit, right here, it's pretty distinctive that you can see a loop on the right side of the defendant's neck that is consistent with the loop on the right side of the defendant's neck."

Defense counsel objected at this point, arguing the detective effectively testified that the tattoo matched, which was a question to be decided by the jury. The trial court overruled the objection, concluding that the term "consistent" was properly used by the detective to compare the photos. The

⁴ Pause fillers such as "uh" are removed from the transcription of the detective's testimony.

detective then again described the surveillance photo depicting the loop tattoo on the neck as being consistent with the post-arrest photo.

When describing the sleeve tattoo exhibit published on the screen, the detective stated:

This is the surveillance video at Tommy Place. Pretty distinctive, obviously sleeve tattoo, but that we mentioned yesterday. Pretty distinctive tattoo right here at the forearm, at the bend of the forearm. And then moving down to, this is the post-arrest, this is consistent, similar looking tattoo on the left forearm.

Commodore now argues that under KRE⁵ 701 and KRE 602, the trial judge erred by allowing the detective to opine, based upon photographs, that certain features of Commodore's tattoos were consistent with the tattoos of the person who robbed Tommy's Place. A trial court's evidentiary ruling is reviewed for an abuse of discretion. *Ward v. Commonwealth*, 587 S.W.3d 312, 332 (Ky. 2019).

Generally, a lay witness testifies only to the facts because it is the jury's province to draw the appropriate inferences arising from the facts. See KRE 701; *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 287 (Ky. 2014); *Martin v. Commonwealth*, 13 S.W.3d 232, 235 (Ky. 1999). However, a lay witness is permitted to give opinion testimony about a matter when the witness's opinion is based on knowledge not available to the jury and would be helpful to the jury in reaching its own opinion. See KRE 701; KRE 602; *Gabbard v. Commonwealth*, 297 S.W.3d 844, 855 (Ky. 2009).

KRE 701 states:

⁵ Kentucky Rule of Evidence

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.⁶

KRE 602 limits KRE 701 opinion testimony. *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009). Pursuant to KRE 602, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

Both Commodore and the Commonwealth view *Morgan v. Commonwealth*, 421 S.W.3d 388 (Ky. 2014), and *Boyd v. Commonwealth*, 439 S.W.3d 126 (Ky. 2014), as guidance which should result in a decision in their favor here. In *Morgan*, the defendant claimed the trial court improperly allowed three witnesses, who were not at the robbery, to opine that the defendant was the person on the store surveillance video and in the still photos. 421 S.W.3d

⁶ KRE 701, although not verbatim, is like Federal Rule of Evidence (FRE) 701. FRE 701 states:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

at 391. This Court concluded that there was no error because the testimony of the three witnesses, acquaintances of the defendant familiar with his appearance at the time of the robbery, was rationally based on their personal knowledge from prior exposure to the defendant's physical appearance. *Id.* at 391-92.

In *Boyd*, the defendant complained that the trial court impermissibly allowed a witness to identify him as the assailant on home security video footage. The witness, Boyd's ex-girlfriend, hid in the home while the victim was assaulted. Having personal knowledge of Boyd, the witness identified him because of the way he stood and by the jacket he was wearing. 439 S.W.3d at 132. This Court concluded that the trial court did not err by allowing the testimony because the witness was in a unique position to identify Boyd, having knowledge of the defendant which the jurors did not have. *Id.*

Commodore argues that there are key differences between the detective and the witnesses in *Morgan* and *Boyd* who had personal knowledge of the defendant. Here, the detective did not personally observe the robbery, did not have prior exposure to Commodore, and did not have personal knowledge of Commodore that placed the detective in a better position than the jury to draw any conclusions from the surveillance video. Commodore further contends that the jury was just as capable as the detective of examining the video and Commodore's photo and drawing its own conclusion as to whether features of Commodore's tattoos were consistent with the robber's tattoos. The Commonwealth on the other hand, argues that under *Morgan* and *Boyd*, the

detective had personal knowledge of Commodore's tattoos because he was present when the crime scene unit photographed Commodore's tattoos, and the detective's testimony relating his perception of the consistency in Commodore's tattoos and the robber's tattoos was helpful to the jury by calling attention to particular details of the tattoos.

Although Commodore argues that the detective's testimony meets neither the first nor second requirement of KRE 701, we address the second requirement first, whether the testimony was helpful to the jury. "Lay opinion testimony that aids in the identification of suspects 'is particularly valuable where . . . the lay witnesses are able to make the challenged identifications based on their familiarity with characteristics of the defendant not immediately observable by the jury at trial.'" *United States v. Fulton*, 837 F.3d 281, 297 (3d Cir. 2016) (quoting *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986)). However, because KRE 701 requires that the testimony be helpful to the jury, even when a witness is familiar with a defendant, the witness's testimony is not admissible if the jury would not be aided by the witness in making the identification.

In *Boyd* and *Morgan*, we found the rule reaffirmed in *United States v. White*, 639 F.3d 331, 336 (7th Cir. 2011), instructive. That rule states: "Generally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph 'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'" *Id.* at 336 (quoting *United States v. Towns*, 913 F.2d 434,

445 (7th Cir. 1990), and *United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984)). Under this rule then “when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification,” lay witness testimony is admissible. *United States v. Jackman*, 48 F.3d 1, 4–5 (1st Cir. 1995) (citing *Farnsworth*). Thus, when surveillance videos, still photos, or other visual or photographic images before the jury are not particularly clear, *e.g.*, the images are of poor quality and the subject is not clearly presented, the witness’s familiarity with the defendant may be helpful to the jury.

Here, the focus was on one aspect of Commodore’s physical appearance, his tattoos, aiding in the identification of him as the assailant. Although tattoos age and fade over time, it was only a matter of days between the robber’s image being recorded on the surveillance video and Commodore’s arrest photo being taken, and there was no evidence that the appearance of Commodore’s tattoos changed prior to trial. With the appearance of the tattoos not changing, the ability of the jury to compare the still surveillance photos to the arrest photo and decide if Commodore was the robber was dependent on the quality of the photos presented. The Commonwealth does not assert that the detective’s opinion testimony was necessary because the photographs

lacked clarity.⁷ Thus, while we do not foreclose the possibility that an officer's familiarity with a suspect's tattoos may help the jury in identifying the perpetrator, the circumstances in this case are such that the officer's opinion testimony was not warranted. Nothing suggests that the detective was in a better position than the jurors, or that the jury would be any less able than the detective, to determine whether the tattoos depicted in the photos and on Commodore were consistent.

While we agree with Commodore that the trial court erred in admitting the detective's testimony regarding the comparative appearance of the robber's tattoos on the surveillance footage and Commodore's tattoos post-arrest, we agree with the Commonwealth that the error was harmless. The jury heard (1) Commodore admit that he robbed and stabbed Smith; (2) Smith identify Commodore as the person who robbed and stabbed him; (3) Stafford identify Commodore as the person to whom he gave a ride; and (4) that the police discovered clothing in an apartment closet that fit the description of the robber's attire, items found with papers that had Commodore's name on them. In light of this, we "can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)); see also RCr⁸ 9.24.

⁷ Upon review, it appears that the detective once refers to a degraded image. That occurred when the neck tattoo was presented on the projection screen and he described it a second time stating, "this is faded a little bit."

⁸ Kentucky Rule of Criminal Procedure.

III. The admission of the detective's testimony regarding Commodore's lack of remorse was harmless error.

Detectives Mason and Smith jointly interviewed Commodore after his arrest and part of the recorded interview was played for the jury. During the interview, after Detective Mason stated that Smith was lucky given the brutality of the attack, Commodore responded that he really did not put anything into it, he was just trying to back Smith up, he was not trying to kill him, and he was trying to scare him. When Detective Mason described the eventuality of Commodore meeting Smith face-to-face and asked Commodore what he would say to the victim if he were in front him, Commodore stated he did not know what he would say; he was apologetic; if he could take it back he would; he thanked God Smith made it through; and he reiterated that he could not rehearse an apology.

Detectives Smith and Mason both testified at trial, with Smith testifying first. The Commonwealth questioned Detective Smith about the interrogation strategy used in that part of the interview, and he described giving Commodore a chance to apologize, and stated, "but I don't think Mr. Commodore felt any remorse at all." Defense counsel objected, arguing the testimony regarding Commodore's remorse was irrelevant to his guilt and was likely to inflame the jury. The Commonwealth countered that the detective could provide lay opinion testimony as to whether someone displays emotion.

The trial court ruled the detective could testify to his observations of Commodore but could not testify as to what Commodore was feeling. Detective Smith then testified he did not observe any remorse at all. Detective Mason

also testified later that he did not observe any remorse from Commodore during Commodore's statement. Defense counsel did not object to Detective Mason's testimony. Commodore requests RCr 10.26 palpable error review of Detective Mason's testimony if the error was not properly preserved by his previous objection, during Detective Smith's testimony.

Commodore argues that the trial court erred by allowing the detectives' testimony because it did not comply with KRE 402; it was not relevant to proving Commodore's guilt as to any of the charges related to Smith (attempted murder, first-degree assault, first-degree robbery) or Jeffries (first-degree robbery). Relevant evidence is "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." KRE 401. Although not fully presented at trial as grounds for allowing the detectives' testimony, the Commonwealth argues, citing *Garland v. Commonwealth*, 127 S.W.3d 529, 542 (Ky. 2003), *overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), that Commodore's demeanor during the interview was relevant to show that for the charged "intent" crimes, his use of physical force was intentional, rather than accidental. The Commonwealth suggests that since Commodore admitted to harming Smith but failed to show remorse, the jury could infer he intended to harm Smith.

In *Garland*, the defendant was convicted of three murders. The detective who interviewed Garland shortly after the bodies were discovered testified that

he “‘was very calm and collective [sic]. Didn’t seem to be worried about anything.’ When the prosecutor then asked if Garland showed any emotion, the detective said, ‘No, he didn’t.’” 127 S.W.3d at 542. Garland claimed the trial court erred by admitting improper demeanor evidence. This Court stated, “It is settled law in Kentucky that evidence regarding the accused’s demeanor, appearance, and behavior during the period of time that he committed the crime and shortly thereafter is relevant evidence in the determination of guilt.” *Id.* Accordingly, the Commonwealth asserts Detective Smith’s testimony was probative of Commodore’s demeanor as the detective directly observed Commodore during the interview and close in time to the criminal act.

“[A] person is presumed to intend the logical and probable consequences of his conduct and ‘a person’s state of mind may be inferred from actions preceding and following the charged offense.’” *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997).

In assessing evidence as to sufficient proof of intent in criminal cases, the requisite intent may be determined from surrounding circumstances. All elements of a crime, including intent, can be proven by circumstantial evidence. Hardly is the Commonwealth ever fortunate enough to present direct proof as to the thought process in a defendant’s mind.

Commonwealth v. O’Conner, 372 S.W.3d 855, 857 (Ky. 2012) (internal citations omitted).

Dealing with a KRE 701 challenge, *Garland* explains circumstances relevant to intent may include a defendant’s demeanor, appearance, and behavior, but they are limited to the time of the crime and shortly afterward.

Demeanor, appearance, and behavior indicative of remorse, defined as “a gnawing distress arising from a sense of guilt for past wrongs,”⁹ may be relevant to inferring intent, just as words used may be relevant, but we need not decide whether they are in this case.¹⁰ The Commonwealth’s focus on Commodore’s demeanor is limited to pointing out conduct at the scene of the crime that demonstrates lack of remorse and that may properly be considered as circumstances of the crime. *Garland*, 127 S.W.3d at 542. Here, the detectives’ interview with Commodore occurred six days after the crime. The detectives were questioned whether they observed demeanor indicative of Commodore’s remorse at the time of the police interview, not at the time of the crime nor shortly thereafter. Because the detectives’ “lack of remorse” testimony was based on Commodore’s demeanor at an irrelevant time, we must conclude the trial court abused its discretion by allowing the detectives to testify about their observations.

We assume the error in admitting Detective Mason’s testimony was preserved and conclude the errors in admitting both Detectives Smith’s and Mason’s testimony were harmless. Like with the improper identification testimony, because the jury heard Commodore admit that he robbed the store and stabbed Smith, heard Smith identify Commodore as the person who robbed the store and stabbed him, and furthermore heard Commodore’s

⁹ *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/remorse>.

¹⁰ Undoubtedly, remorse may be shown for intentional acts of harm, just as it may be shown for harm resulting from reckless, negligent, or unintentional behavior.

statement of remorse during the recorded interrogation interview, we can say with fair assurance that the judgment was not substantially swayed by the errors. *Winstead*, 283 S.W.3d at 689.

IV. The trial court did not err by denying a continuance of the penalty phase.

The jury began deliberating Commodore's guilt mid-morning on the third day of trial. While the jury deliberated, the parties discussed penalty phase issues with the trial court. Defense counsel stated he wished to call Commodore's mother to testify in mitigation, but that he believed she would not be available to do so that afternoon because of unexpected family medical issues. Defense counsel did not submit an affidavit with his request to delay the penalty phase. The trial court ruled that it would not delay the trial for the witness. When the jury returned with its verdict in the early afternoon, defense counsel proffered what he expected Commodore's mother's testimony might be.

Commodore argues that the trial court abused its discretion when it refused to continue the penalty phase for one day in order for his mother to appear and testify on his behalf. He presents the factors delineated in *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534, 542 (Ky. 2001), to guide a trial court's decision to grant or deny a continuance and contends an analysis of these factors weighed in favor of granting defense counsel's request for a continuance. However, the trial court may not weigh these factors unless

an RCr 9.04 motion is properly brought. *See Jeter v. Commonwealth*, 531 S.W.3d 488, 495-97 (Ky. 2017).

RCr 9.04 pertinently states:

The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. *A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it.* If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

(Emphasis added.)

Although Commodore believes that his proffer and argument provided the trial court with the information necessary to consider and conclude the requested continuance was merited, *Jeter* makes clear that when trial postponement is based on the absence of evidence, a trial court may not grant a continuance without an RCr 9.04 compliant affidavit.

The affidavit rule serves to assure the court and the Commonwealth that the continuance rule's substantive requirements—delay only for the sake of material evidence that due diligence could not have obtained sooner—are being respected and are evident from facts that defense counsel is able and willing formally to declare in writing.

Jeter, 531 S.W.3d at 497.

In *Jeter*, we concluded the trial court did not abuse its discretion when denying a continuance when the affidavit accompanying the signed motion was not formally executed, being neither signed by the affiant nor certified by an authorized person. *Id.* Here, defense counsel also did not comply with RCr

9.04's requirements. Consequently, we must conclude the trial court did not abuse its discretion when denying Commodore's motion.

V. The trial court did not err by denying the motion to suppress.

Commodore was suspected of committing the assault and robberies at Tommy's Place by the following day. A search of the apartment in which he had been staying led to inculpatory evidence: a black baseball cap with a sticker on it, a t-shirt that read "My Kicks Get Chicks," and documents bearing Commodore's name. Commodore moved to have the evidence suppressed, but the trial court denied the motion after conducting an evidentiary hearing. Detective Smith testified regarding the search.

Law enforcement's investigation led them to an apartment where neighbors indicated Commodore had been staying. Detectives Smith and Rhudy went to the apartment and met Keith Gill. Gill told the officers he lived in the apartment with his partner,¹¹ that he knew Commodore, and that he called him "C." Gill confirmed Commodore had been staying in the apartment, but it was only a temporary stay. Gill indicated he was the lessee of the apartment and told Detective Smith he had been living there for a couple of years. Detective Smith did not review a copy of the lease and Gill did not present any identification or documentation that he lived there. Detective Smith did not recall speaking to Gill's partner, who mainly stayed in the front room. Detective Smith had no doubt that Gill had control and dominion over

¹¹ Detective Smith could not recall whether the co-habitant was Gill's wife or girlfriend.

the apartment. Gill signed the consent to search form and pointed out the room containing some of Commodore's belongings. The officers found evidence incriminating Commodore in that room.

Commodore's counsel argued that Gill's consent to search was invalid because the detectives had not confirmed that the person who consented to the search was Keith Gill and that he was the person in authority or in control of that home. Based upon the evidence presented, the trial court concluded the detectives had a good faith reason to believe Gill controlled the apartment. The trial court's last statement when ruling on the motion was: "There was no indication that Mr. Gill did not have, that [he] was not the lessee of this apartment, nor did, is there an indication that he didn't have authority to give consent, so the motion to suppress is denied based on a failure of proof in that regard."¹² Based on this statement, Commodore now argues that the trial court's ruling erroneously placed the burden on him to demonstrate that the police had not conducted a valid consent search. The court's factual findings are not in dispute and we discern no clear error in those facts. Given that, our next task is to perform a de novo review of the trial court's conclusions of law. *Davis v. Commonwealth*, 484 S.W.3d 288, 290 (Ky. 2016).

Indisputably, the Commonwealth carries the burden of demonstrating that a warrantless search falls within an exception to the warrant requirement. *Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003). Although

¹² Pause fillers removed.

Commodore complains that the trial court misplaced the burden of proof,¹³ the question for our review is whether when applying the laws to the facts, the trial court's decision to deny the motion to suppress was proper. *Buster v. Commonwealth*, 364 S.W.3d 157, 162 (Ky. 2012). In this case, the particular question is whether detectives had a good faith reason, *i.e.*, was it objectively reasonable, to believe Gill controlled the apartment, thus rendering Gill's consent and the subsequent search valid.

Under the Fourth Amendment, searches conducted without a warrant are unreasonable, unless they fall within a "few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One exception to the warrant requirement is a search conducted pursuant to proper consent. *Id.* With regard to premises, permission to search may be obtained from one "who possess[es] common authority over or other sufficient relationship to the premises" *United States v. Matlock*, 415 U.S. 164, 171 (1974).

The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right

¹³ We consider the argument as presented, but also note that it is possible to understand the trial court's statement as making the point that there was no evidence, no matter the source, which indicated Gill was something other than the occupant/lessee who had authority to give consent.

Id. n.7. With the Fourth Amendment basis being reasonableness, the test for determining whether one has authority to consent to the search of a residence has become: based on the facts available to the officers at the time of the search, was it objectively reasonable for the officers to believe that the person giving consent had common authority over the residence. *Commonwealth v. Nourse*, 177 S.W.3d 691, 696, 697, 698 (Ky. 2005); *see also Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

Here, the trial court concluded that in addition to Gill's affirmative statements, considering Gill's ability to access the property, his girlfriend being present, and information obtained from the neighbors indicating Gill lived in the apartment, the officers acted on good faith reliance regarding Gill's control of the apartment. Upon review, we agree that the trial court's findings of fact support the conclusion that it was objectively reasonable for the officers to believe Gill had common authority over the apartment. Consequently, Gill's consent rendered the subsequent search valid. The trial court did not err by denying Commodore's motion to suppress.

CONCLUSION

For the foregoing reasons, we affirm Commodore's robbery and PFO I convictions, but reverse the first-degree assault conviction. This case is remanded for further proceedings consistent with this Opinion.

Minton, C.J.; Hughes, Lambert, and VanMeter, JJ., concur. Keller, J., files a separate opinion concurring in part and dissenting in part in which Nickell and Wright, JJ., join.

KELLER, J., CONCURRING IN PART AND DISSENTING IN PART:

I dissent from the Majority's holding that the trial court erred in denying Commodore's motion for a directed verdict on the first-degree assault charge. For the reasons set forth below, I believe that there was sufficient evidence of a serious physical injury to warrant an instruction on first-degree assault.

We previously stated in *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013),

When presented with a motion for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187–88 (Ky. 1991). The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; if the evidence is more than a scintilla and it would be reasonable for the jury to return a verdict of guilty based on it, then the motion should be denied. *Id.* On appellate review, the standard is slightly more deferential; the trial court should be reversed only if "it would be *clearly unreasonable* for a jury to find guilt." *Id.* (emphasis added).

A directed-verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011).

Thus, this Court is required to examine the evidence introduced at trial concerning whether Commodore committed first-degree assault and to compare that proof to the statutory elements of the offense, but to do so within the standard of review outlined above.

As correctly noted by the Majority, under Kentucky Revised Statute ("KRS") 508.010, the Commonwealth must prove that Commodore caused a serious physical injury to the 75-year-old victim Tommy Smith. KRS

500.080(15) defines serious physical injury as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” Physical injury, in turn, “means substantial physical pain or any impairment of physical condition.” KRS 500.080(13). Contrary to the Majority, I believe that there was sufficient evidence that the stab wound inflicted on Smith created a substantial risk of death.

I believe that, if we “consider the evidence as a whole, presume the Commonwealth’s proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury,” *Acosta*, 391 S.W.3d at 816 (citing *Benham*, 816 S.W.2d at 187–88), then there was sufficient evidence that the stab wound was a serious physical injury.

The paramedic who responded to the scene of the stabbing testified at trial. She treated Smith on the scene and transported him to the hospital. She testified that when she arrived, Smith was applying pressure to his neck wound and had blood on both the back and front of his shirt. She testified that Smith was transported to the hospital with lights and sirens because a laceration to the neck carries with it a high likelihood of damage to the arteries. A laceration to the neck, she testified, could be life threatening, as there are many arteries and veins in the neck and there can be internal bleeding that cannot be seen from the outside. The stab wound was near Smith’s left external jugular which is the vein that allows the blood to circulate from the

head down to the lungs. If that had been cut, the paramedic testified that he could have died. Smith was brought to the trauma room, as that is where victims who have potentially life-threatening injuries are brought. Although she did not know what happened once Smith was admitted to the hospital, the paramedic testified that if he had not received medical treatment, he could have died.

Tommy Smith himself testified about the severity of his injury. He testified that he was stabbed in both the back and the neck, and that Commodore motioned as if he were going to stab Smith in the stomach, but Smith then backed away. Smith testified that he had no doubt the knife was “plunged” into his neck and “went deep.” He stated that he held a rag to his neck to help control the bleeding. At the time, he did not realize how much he was bleeding, but he eventually saw that his shirt was completely covered in blood. Smith testified that he was brought to the hospital by an ambulance and believed he stayed in the hospital for four days. Without objection, Smith testified that the doctor told him that the knife wound was “about an inch” from killing him and that if it had hit his vein, he would have died. He testified that the doctors at the hospital told him that the knife penetrated the muscles of his neck. Finally, Smith testified that the doctors made it very clear to him that this was a very serious injury and he was a lucky man. Mr. Smith was so traumatized by this incident that he only stayed in the business for a month afterwards, despite loving his store and loving working. He testified the store

was his livelihood and that he wanted to continue working there but that he was afraid to go back to running the store.

During Smith's testimony, his medical records from the hospital were admitted into evidence. Smith was not asked to explain the significance of the records, nor did the Commonwealth call an expert to explain the information contained in the medical records. Our review of the medical records reveals the following.

Smith was admitted to the University of Louisville Hospital trauma service from the emergency department with the diagnosis of a penetrating injury to the left neck. When he arrived at the hospital, he had a pressure bandage on the wound and a C-collar in place. An additional stab wound to the back was noted. His history and physical revealed that he was diabetic. He was admitted to the TCU, a telemetry unit, for testing, frequent vital sign checks, and close observation to rule out any potentially life-threatening vascular or esophageal injuries. An IV was started for pain control and hydration. His stab wound, which penetrated below the platysma,¹⁴ was closed at the bedside.

A CT of the neck with contrast was performed to rule out any hematoma or arterial damage. A chest x-ray was performed to rule out pneumothorax. A CR esophagram was performed to rule out any damage or leaks to the esophagus. Once the results of the esophagram were obtained, Smith was

¹⁴ The platysma is "a subcutaneous neck muscle extending from the neck to the clavicle; it acts to wrinkle the skin of the neck and to depress the jaw." BENJAMIN F. MILLER, M.D., ET AL., ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING AND ALLIED HEALTH 793-94 (2d ed. 1978).

started on a clear liquid diet with slow advancement, to monitor his progress to move towards discharge.

Smith was discharged the next day¹⁵ with narcotic pain medication, instructions for wound care, a prohibition against driving, and a weight-lifting limit of 15 pounds. His discharge diagnosis was: stab wound. He was instructed to return to the clinic in one week for follow up, and that he could return to work when he was off of his pain medication.

It is unclear why the Commonwealth failed to call an expert to better explain to the jury the contents of the medical records, however they were admitted in whole and available for the jury's review. Additionally, "although medical testimony may be the preferred method of proving the serious physical injury requirement," *Brooks v. Commonwealth*, 114 S.W.3d 818, 824 (Ky. 2003), "the victim was competent to testify about his own injuries." *Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993).

Both the Majority opinion and the parties in this case focused much of their analyses of this issue debating whether the facts in *Anderson v. Commonwealth*, 352 S.W.3d 577 (Ky. 2011) or the facts in *Brooks v. Commonwealth*, 114 S.W.3d 818 are more similar to the facts in this case. Actually, the facts of this case fall somewhere in between those two cases, and we must keep in mind our standard of review on a motion for a directed verdict. We must "consider the evidence as a whole, presume the

¹⁵ The medical records conflict with Smith's testimony that he was hospitalized for four days.

Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury," *Acosta*, 391 S.W.3d at 816 (citing *Benham*, 816 S.W.2d at 187–88). Then we must determine if "it would be clearly unreasonable for a jury to find guilt." *Benham*, 816 S.W.2d at 187. Precisely because the facts of this case present a close call, we must not take the decision from the jury, as it would not be **clearly unreasonable** for the jury to find that the neck wound created a substantial risk of death for Mr. Smith.

I am further persuaded by this Court's analysis in *Cooper v. Commonwealth*, 569 S.W.2d 668 (Ky. 1978) and the unpublished case of *Mullins v. Commonwealth*, 2011-SC-000634-MR, 2012 WL 6649199 (Ky. Dec. 20, 2012). In both of those cases, this Court made clear that whether an injury created a substantial risk of death "turns on the unique circumstances of an individual case." *Cooper*, 569 S.W.2d at 671. The determination must be made "on a case-by-case basis, considering the 'totality of the evidence' in each case." *Mullins*, 2012 WL 6649199, at *2 (quoting *Cooper*, 569 S.W.2d at 671).

In *Cooper*, a 74-year-old woman was brutally raped. At the time of the rape, she was in poor health and suffered from a chronic pulmonary condition. 569 S.W.2d at 671. "Preceding and during the rape, she was choked and extensively bruised. The mental trauma was such that her mind retreated from the horror of what was happening to her, and she blacked out." *Id.* The Court relayed the victim's treating physician's testimony, in pertinent part, as follows.

The doctor was asked if the injuries [the victim] received created a substantial risk of death. His response was, “She’s a 74-year-old woman with heart trouble and chronic lung disease . . . I don't they (sic) they would cause death but I think Her fear was a pretty nice risk.” (Emphasis added). On being asked if he considered the injuries to create a substantial risk of death, he said, “No, I think the risk of death was more just from fear than it was from any bruises. The woman was scared to death.”

Id. at 670. The Court then held:

Considering the totality of the evidence and the circumstances of this case, the physical injuries sustained were sufficient to support a conclusion that a substantial risk of death had been created. Because [the victim] didn't die on that occasion did not nor could it erase the fact of “substantial risk of death.”

Id. at 671.

In *Mullins*, a woman in her eighth month of pregnancy was stabbed in the thigh three times. 2012 WL 6649199, at *1. A police officer testified that when he arrived on the scene, he observed a “more than normal” amount of blood on the victim and observed third party witnesses applying pressure to the wounds in an attempt to control the bleeding. *Id.*, at *3. The victim was brought to a local hospital but then transported by helicopter to the University of Kentucky Hospital in Lexington, Kentucky over concerns with her unborn child’s fluctuating heart rate. *Id.*, at *2. “At the University of Kentucky Hospital, [the victim] was given fifteen sutures to treat three 1-2 centimeter stab wounds on her left thigh. She was monitored for twenty-four hours by medical staff and released the following day.” *Id.*, at *1. No medical testimony was admitted at trial, and it was unclear if the victim’s medical records were considered by the jury. *Id.*, at *2-3.

The Court relied on *Cooper* and ultimately held, “[t]he testimony regarding the amount of blood at the scene and [the victim’s] subsequent medical treatment, while not extensive, was sufficient for a reasonable juror to conclude that Mullins inflicted a serious physical injury on [the victim], subjecting her to a substantial risk of death.” *Id.*, at *3. The Court stated, “the fact that [the victim’s] injuries were not *more* serious than they actually were does not mean there was not a substantial risk of death created by Mullins’s aggressive attack.” *Id.*

The same is true here. Smith was a 75-year-old man when he was stabbed in the back and neck as he attempted to stop Commodore’s robbery of his flower and produce store. Commodore also threatened to stab him in the stomach, stopping only when Smith backed away. This was a violent altercation in which Commodore targeted Smith’s back, neck, and stomach as Smith was attempting to intervene in the robbery of his business. Though much of our jurisprudence on first-degree assault and the “serious physical injury” requirement focuses on the end result—the injury itself— and the causation of that injury, I feel compelled to point out that Commodore certainly exhibited an *intent* to cause a serious physical injury to Smith.

When the paramedics first arrived on scene, Smith was holding a cloth to his neck, and his shirt was covered in blood. He was brought to the hospital in an ambulance with lights and sirens and was admitted to the trauma unit. He underwent several significant diagnostic tests that were not only expensive but carried risks themselves. Further, Smith was closely monitored overnight in the

hospital with a limited diet. He was released with narcotic pain medication and instructed to receive follow up care in one week. As we stated in *Mullins*, “the fact that [the victim’s] injuries were not *more* serious than they actually were does not mean there was not a substantial risk of death created by [the defendant’s] attack.” *Id.*

Furthermore, blood loss alone is not determinative as to whether a serious physical injury occurred in this case. I note that Commodore focused his directed verdict argument on the fact that Smith’s bleeding was controlled when police arrived on scene and when he arrived at the hospital. In turn, the Majority’s analysis relies heavily on the amount of blood Smith lost. Outward bleeding, however, is only one sign of disruption of homeostasis and severity of injury. Here, medical treatment providers were extremely concerned that the wound caused serious internal damage that they could not see, as evidenced by both the paramedic’s testimony and the diagnostic tests performed on Smith. Other examples of injuries that would not necessarily create a substantial amount of outward blood loss but could certainly create a substantial risk of death are a closed-head injury, which can kill one instantly with very little bleeding, or an internal injury to the spleen or liver, which can cause no outward bleeding but can be quickly fatal.

Accordingly, when considering the evidence in the light most favorable to the Commonwealth, I cannot say that it would be “clearly unreasonable” for a jury to conclude that the stab wound to Smith’s neck created a substantial risk

of death. Therefore, I would affirm the trial court's denial of Commodore's motion for a directed verdict on the charge of assault in the first degree.

While I concur with the remainder of the Majority's opinion, the trial court's failure to provide a reason for denying Commodore's motion to continue the sentencing phase of his trial is concerning. Commodore was found guilty of three Class B felonies, each carrying a penalty range of ten to twenty years before the persistent felony offender enhancement. After the jury found Commodore guilty of being a persistent felony offender, Commodore faced up to life in prison on each of those charges.

Commodore's attorney informed the trial court that Commodore's mother was his only witness in mitigation of punishment. He further informed the trial court that Commodore's mother could not be present on the day the jury was expected to return its guilt phase verdict and requested that the penalty phase be continued until the next morning. As the Majority correctly notes, he did not submit an affidavit with his request in order to comply with Rule of Criminal Procedure ("RCr") 9.04. The trial court denied the motion without providing a reason, merely stating:

The jury will dictate when we start whatever next phase we start. If they come back in ten minutes, we are going to start in twenty. If they come back in four hours, we are going to start in four hours and a half. The court is not going to hold up a trial for any witness. We are at the mercy of the jury. We have known that all along. If your witnesses can't get here, they can't, and I'm sorry. I will not delay the trial for that reason.

After the guilt phase verdict was returned but before the penalty phase began, the request for a continuance was discussed again, and defense counsel

made an oral proffer on the record of the facts to which he expected Commodore's mother to testify. In again denying his request for a continuance, the trial court stated, "This has been known. I asked these jurors to be available Friday. We would probably finish Thursday. I told you all to have your people here. So, it is said what has been said, but I am not concerned by it." Defense counsel then stated that Commodore's mother could not be present that day because her husband was having an emergency surgery. The trial court responded "okay" and then proceeded to discuss penalty phase jury instructions.

In neither of the discussions did the trial court provide a reason for denying Commodore's motion to continue the penalty phase other than that she had told the parties "to have your people here" and she would not "hold up the trial for any witness." She made no reference to either RCr 9.04 or the *Snodgrass*¹⁶ factors. The failure to provide any justification for denying Commodore's motion to continue in the circumstances that were present – where the defendant was facing life in prison, the requested continuance was less than twenty-four hours, and the reason the witness was unavailable was because her husband was having emergency, and thus presumably unexpected and unscheduled, surgery – is concerning to this writer. While we review a trial court's denial of a motion to continue under an abuse of discretion standard,

¹⁶ *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534, 542 (Ky. 2001).

id., I am unable to determine the basis for the exercise of the trial court's discretion in order to properly review it.

Despite my concerns regarding the basis of the trial court's exercise of its discretion, the Majority correctly holds that under our precedent, including *Jeter v. Commonwealth*, 531 S.W.3d 488 (Ky. 2017), no abuse of discretion occurred in this case as defense counsel failed to comply with RCr 9.04. It should be noted, however, that RCr 9.04, by its very terms, treats the Commonwealth and the defendant unequally. The defendant is required to accompany his motion for a continuance with an affidavit, but the rule imposes no such requirement on the Commonwealth. This allows the denial of a defendant's motion for a continuance to be upheld on appeal for reasons that elevate form over substance.

In sum, I dissent from the Majority's holding that the trial court erred in denying Commodore's motion for a directed verdict on the first-degree assault charge. Although I harbor concerns over the trial court's denial of Commodore's motion for a continuance of the penalty phase, I concur with the remainder of the Majority's opinion. Accordingly, I would affirm the trial court's judgment in full.

Nickell and Wright, JJ., join.

COUNSEL FOR APPELLANT:

Leo Gerard Smith
Joshua Michael Reho
Louisville Metro Public Defender

COUNSEL FOR APPELLEE:

Daniel Jay Cameron
Attorney General of Kentucky

Micah Brandon Roberts
Assistant Attorney General

