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RENDERED: MARCH 26, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000075-MR

BRIAN CURTIS WOODS — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 17-CR-00306

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The circuit court jury convicted Brian C. Woods of Murder and Tampering with Physical Evidence, and the trial court sentenced him to forty-five years' imprisonment.[1] Woods appeals the resulting judgment as a matter of right.[2] For the reasons set forth below, we affirm the judgment.

I. BACKGROUND.

Woods appeared at police headquarters and confessed to killing his fiancée, concealing the body, and cleaning the crime scene. He told police that he and the victim had last argued about a timeshare, that the argument

[1] The jury recommended a sentence of forty years for Murder and five years for Tampering with Physical Evidence, to be served concurrently for a total sentence of forty years. At final sentencing, the trial court ruled that Woods's sentences were to run consecutively, for a total of forty-five years' imprisonment, and the trial court entered judgment accordingly.

[2] Ky. Const. § 110(2)(b).

"turned violent," and that he killed the victim by beating her over the head. Woods stated that he wrapped the victim's body in trash bags, put the body in the garage of the residence the couple cohabited with the victim's four children, and spent two days cleaning the crime scene. After obtaining a search warrant, police found the victim's body in the garage and arrested Woods. The medical examiner testified that the victim's body showed several sharp force, blunt force, and chop injuries to the head and torso.

Woods testified in his own defense and described the events leading up to the murder and his state of mind before, during, and after he killed the victim. He testified that he and the victim, his fiancée, lived in a house with the victim's four children, all of whom were born from her previous relationships with other men, but whom he loved and cared for as his own. The couple had been together, off-and-on, for about six years.

A few weeks before the murder, Woods and the victim became engaged and began to plan their wedding. Soon after, near St. Patrick's Day of that year, the couple did some wedding planning and obtained a timeshare package that they intended to use for their honeymoon, intending to wed later in the year. A few days after getting the timeshare paperwork, the victim informed Woods that she was pregnant by her ex-husband. The couple argued and broke off their engagement, but Woods remained in the home, continued to care for the children, and slept on the couch. He testified that he and the victim barely spoke, and when they did speak, they argued.

About four days before the murder, Woods discovered on the victim's phone text messages she exchanged with her ex-husband regarding her alleged pregnancy. According to Woods, the text messages included, for example, a

picture of a positive pregnancy test with accompanying text that read, "[i]t was positive. Happy Birthday, daddy," and another text sent by the victim stating that she had "been trying for years to have a baby." Woods took pictures of these texts with the intention of showing them to the victim's ex-husband's wife. Woods testified that the victim caught him taking these pictures, and she tased him in the testicles. Over the following days, Woods and the victim communicated very little.

During Woods's interview with detectives, he stated that immediately before the murder, arguments between he and the victim focused on the honeymoon timeshare. Woods testified that the victim approached him while he was folding laundry and asked for the timeshare paperwork. When he ignored her, she began punching him, and he fought back. During the ensuing physical altercation, the victim told Woods that he "wasn't a real man because [he couldn't] have kids." Woods testified that he reacted with rage and beat the victim to death with a fireplace shovel.

Woods told the jury he knew he would not get away with killing the victim, but that he started to clean the crime scene so that he could get the memory of what he had done "out of his mind." He purchased cleaning supplies and spent two days cleaning the crime scene, putting the fireplace shovel and some other items he used to clean in the trash, which was taken away in the regular trash pickup. Claiming he wanted additional time to clean the crime scene before turning himself in, Woods testified that he used the victim's phone to send some text messages, and to log onto her Facebook page and post a statement saying that she would be in California for the next nine months.

II. ANALYSIS.

A. Admissibility of Woods's Proposed Testimony Describing the Victim's Earlier Affair and Pregnancy.

At trial, Woods attempted to offer his own testimony that, about four years before the murder, the victim had an affair that resulted in a pregnancy and the birth of a child. When his defense counsel attempted to question Woods to present this testimony, the Commonwealth objected, prompting a bench conference. At the bench, defense counsel explained the testimony she intended to illicit from Woods. But the trial court ruled that this evidence was not relevant to Woods's EED defense, partly because the jury already knew that the victim had children by other men and that Woods cared for them. The trial court ruled that Woods's testimony should be limited to events that occurred "close in time" to the murder. Defense counsel accepted the trial court's ruling without further argument and resumed her examination of Woods.

i. This issue is preserved for appellate review under the abuse-of-discretion standard.

Woods argues that this issue must be reviewed for the trial court's abuse of discretion because defense counsel preserved it by her unsuccessful attempt to question Woods about the prior affair and pregnancy. The Commonwealth counters that this issue is unpreserved for appellate review because Woods's counsel accepted the trial court's direction at the bench and waived the issue. The Commonwealth insists that because of the waiver the appropriate standard of review is limited to palpable-error review under RCr[3] 10.26.

[3] Kentucky Rules of Criminal Procedure.

The issue presents itself through the colloquy at the bench between the trial court and counsel following the Commonwealth's objection:

> **Trial Court:** Since we're going down the EED pathway here . . . let's make sure we go down that way. If [Woods] is testifying that around St. Patrick's Day. . . the relationship starts to deteriorate . . . case law on that, I think, is if there is an uninterrupted series of events . . . you can testify about that. But [the victim] is not going to be placed on trial and I'm not going to get into did she ever do something bad the years before or something like that. [Defense counsel] restate your question that [the Commonwealth] objected to.
> **Defense Counsel:** The question was "had she gotten pregnant . . . before?" . . . The path that I am going down is that when they were together before [the victim] had gotten pregnant by another man . . . They broke up when the baby was born . . . They got back together, and he raised that baby as his own. So, . . . I'm not putting her on trial. I am just mainly saying . . . It had happened before, he overcame it[,] moved forward and raised those kids like they were his own.
> **Commonwealth:** How is that relevant to . . .
> **Trial Court:** It's not . . .
> **Defense Counsel:** Because it's the second time that it's happened.
> **Trial Court:** It's not relevant in terms of an EED defense . . . [Woods] has already said that these are not his children . . . The jury already knows that [the victim] has children by different men . . . [The jury knows] that he's raising these children, and that [Woods and the victim] had been in a relationship for six years. All of that is out there . . . To start leaning to . . . [the victim] got pregnant by some other man, we already know that. From the EED standpoint, you [have] to stay focused on [events occurring] very close in time . . . . It has to be an uninterrupted period . . . . I think that. . . you get there with the . . . [Wood's testimony that the victim] told [him] that she was pregnant by her ex-husband. Now first of all, the jury is going to decide whether that statement was actually made . . . and then the jury has to decide what impact such a statement had on [Appellant]. All of that is fair game . . . But we need to stay focused on "this is the beginning and the end of the relationship." . . . So around St. Patrick's Day, going to [meet the wedding planner], [then the victim] says she's pregnant by her ex-husband, and they start getting into problems. It has to stay . . . that way.
> **Defense Counsel:** It will.
> **Trial Court:** Because I think you have got in what you need for your argument. That's what I'm getting at. It's already [been] said "they're not my kids and I raised them."
> **Defense Counsel:** Okay.

Trial Court: We just don't want to get into suggesting that there is something immoral about her . . .
Defense Counsel: Okay.
Trial Court: Let's just go from there.

We are satisfied from this colloquy that Woods's proffer sufficiently preserved this issue for appellate review. As we explain in *Holland v. Commonwealth*, KRE[4] 103(a)(2) demands that to preserve an evidentiary ruling for appeal, the offering party must provide to the trial court "'the substance of the excluded testimony' . . . by way of an offer of proof 'adducing what that lawyer expects to be able to prove through a witness's testimony.'"[5] So we review the trial court's evidentiary ruling for abuse of discretion, which prohibits a finding of error unless the "'trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'"[6]

ii. The trial court did not abuse its discretion or violate Woods's constitutional right by the way it limited Woods's presentation of evidence in support of his EED defense.

Woods argues that the trial court erred by not allowing him to testify about an event that occurred four years before the murder when the victim had a relationship with another man, became pregnant, and bore a child. In support of this argument, he essentially claims that his emotional distress began four years before he killed the victim—the time when she first told him she was pregnant by another man. And he argues that the trial court erred

[4] Kentucky Rules of Evidence

[5] 466 S.W.3d 493, 501 (Ky. 2015) (quoting *Henderson v. Commonwealth.*, 438 S.W.3d 335, 339–40 (Ky. 2014)).

[6] *Probus v. Commonwealth*, 578 S.W.3d 339, 347 (Ky. 2019) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

when it failed to consider *Fields v. Commonwealth*[7] in determining whether the challenged testimony was close enough in time to the murder. Woods further argues that the trial court's ruling denied him his constitutional right to present a complete defense.

To be entitled to an EED instruction, a defendant must show that before the charged crime he was presented with a "triggering event" or "adequate provocation" that impelled him to commit the crime while under the influence of "extreme emotional distress," or "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance."[8] While this Court has held that the "triggering event" may be the "'impact of a series of related events' with no specific time frame" between the trigger and the homicide,[9] it is up to the jury to determine whether, from the defendant's point of view, the claimed provocation is "adequate" or reasonable. However, the claimed provocation must still be "sudden and uninterrupted" and there may arise a "'subsidiary inquiry' as to whether there intervened between the provocation and the homicide a cooling-off period sufficient enough to preclude a conclusion that the provocation was adequate."[10]

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[7] 44 S.W.3d 355, 359 (Ky. 2001) (finding that the proposed triggering event may happen months before the actual crime occurred, but that any "cooling off period" between the provocation and the homicide gives rise to a "subsidiary inquiry" as to whether the period is sufficient to render inadequate the alleged provocation).

[8] *McClellan v. Commonwealth*, 715 S.W.2d 464, 468–69 (Ky. 1986).

[9] *Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (Ky. 2008) (quoting Lawson and W. Fortune, *Kentucky Criminal Law* § 8-3(b)(3), at 342).

[10] *Id.* at 782–83.

In many EED cases, reviewing courts have mainly considered whether a trial court erred in ruling that a defendant is or is not entitled to an EED defense jury instruction.[11] But in *Padgett v. Commonwealth*[12] and *Lasure v. Commonwealth,*[13] this Court considered whether a trial court erred in excluding certain evidence offered by a defendant in support of his EED defense theory. In the first line of cases, this Court set out to determine whether the defendant offered sufficient evidence to prove every element of the defense based on how EED has been defined.[14] In contrast, in *Padgett* and

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[11] *See, e.g.*, *Holland v. Commonwealth*, 466 S.W.3d 493, 503 (Ky. 2015) ("Appellant next contends that the trial court erred by denying his request for an instruction on first-degree manslaughter based upon the theory that the jury could have reasonably believed from the evidence that, when he killed Weatherwax, he acted under the compelling influence of an extreme emotional disturbance (EED)."); *Keeling v. Commonwealth*, 381 S.W.3d 248, 264 (Ky. 2012) ("Appellant next argues that the trial court committed reversible error by failing to instruct the jury on the lesser included offense of assault under extreme emotional disturbance (hereinafter "EED") with respect to the assault on Morefield."); *Benjamin,* 266 S.W.3d at 782 ("Appellant next argues that the trial court erred in failing to include an instruction pertaining to extreme emotional disturbance as an element of the jury's murder instructions."); *Fields v. Commonwealth*, 44 S.W.3d 355, 357 (Ky. 2001) ("Appellant asserts there was no proof that she was under the influence of extreme emotional disturbance (EED) when she killed her child; thus, there was no evidentiary basis for her conviction of first-degree manslaughter."); *Springer v. Commonwealth*, 998 S.W.2d 439, 452 (Ky. 1999) ("Springer asserts that she was entitled to instructions on first-degree manslaughter as a lesser included offense of murder and a concomitant instruction on extreme emotional disturbance.").

[12] 312 S.W.3d 336 (Ky. 2010).

[13] 390 S.W.3d 139 (Ky. 2012).

[14] *See McClellan*, 715 S.W.2d at 468–69 ("Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance . . . [for which] there is a reasonable explanation or excuse therefor[] . . . "). *See also Benjamin,* 266 S.W.3d at 782–83 ("Adequate provocation, or a 'triggering event,' [is] a necessary element of EED . . . [P]rovocation adequate to induce an EED analysis must be sudden and uninterrupted, [but] need not be contemporaneous with the triggering event. . . . [A] delayed event may be the 'impact of a series of related events' with no specific time frame between the triggering event and the actual homicide. . . . However, . . . there exists a "subsidiary inquiry" as to whether there intervened between the provocation and the homicide a cooling-off period sufficient enough to preclude a conclusion that the provocation was adequate.") (citations omitted).

Lasure we set out to determine whether the defense theory was undermined, and defendant's rights were violated, by the trial court's decision to exclude a piece of evidence offered in support of the EED defense.

Because the trial court gave proper EED instructions in the present case, this case does not fall within the first line of cases. As such, Woods's reliance on cases like *Fields*, *McClellan*, and *Benjamin*, while understandable, is misguided.[15] As explained in more detail below, the present case is still slightly different than *Padgett* and *Lasure* because Woods chose to testify regardless of whether the challenged evidence would be admitted; nonetheless, those cases still support a finding that the trial court here did not abuse its discretion in limiting the evidence Woods was permitted to present in support of his EED defense, and such limitation did not otherwise violate Woods's constitutional right to present a full defense.

Woods's defense counsel argued that the testimony regarding the event that occurred between him and the victim four years before was relevant to his EED defense. It seems that the trial court assumed, based on Woods's testimony up to that point in the trial and his defense counsel's explanation at the bench conference, that the "triggering event" that allegedly commenced Wood's emotional disturbance was purportedly after the St. Patrick's Day wedding-planning excursion when the victim informed Woods that she was pregnant with her ex-husband's baby, the couple argued and ended their engagement. This event then presumably "festered" in Woods's mind until the

[15] Those cases fall squarely within the first line of cases; therefore, the analysis employed in them does not help us decide whether the trial court in the present case abused its discretion by excluding the challenged evidence.

proposed event came forward to "exact its damage" when the victim "provoked" Woods by saying that he was not a real man because he was not able to father children. Based on this version of events, the trial court ruled that the challenged testimony of the prior affair and pregnancy was not admissible because it was not "close in time" to the murder, and as such it does not satisfy the requirement that EED provocation occur during an "uninterrupted period." Moreover, the trial court ruled that the testimony was not otherwise relevant because the jury already knew that Woods was not the father of any of the victim's children, that Woods and the victim were in a six-year long relationship, and that the victim told Woods a few days before the murder that she was pregnant with her ex-husband's baby. On appeal, Woods argues that the trial court erred in limiting his testimony because the triggering event was the event that occurred four years prior to the murder.[16]

[16] This specific argument is arguably not preserved for appeal. It appears from the video record of the bench conference that Woods did not specifically argue that this was the relevant triggering event, nor did he rely on *Fields* or any other specific case to argue that a four-year period is not so remote as to be rendered ineligible to serve as the triggering event. In fact, defense counsel's statement that the prior pregnancy was relevant for EED "because it's the second time that it happened," seems to suggest that the defense counsel was instead arguing that the prior event was relevant to provide proof that Woods was telling the truth when he claimed that the victim again told him she had an affair and was pregnant, even though the autopsy showed no signs that the victim was ever pregnant during this time. It seems that the trial court, as reflected in statements at the bench, interpreted Woods's arguments in this way given the court's statement that the evidence was not admissible for the purposes of EED because the jury already heard that the victim told Woods that she was pregnant by another man a matter of days before the murder, and the trial court stated that "the jury is going to decide whether that statement was actually made. . . and then the jury has to decide what impact such a statement had on [Woods]." But because we find that under *Padgett* evidence presented in support an EED defense still must be presented from an admissible source, and that the evidence was not improperly excluded under KRE 403, there is no need to determine whether this argument is properly preserved. Whether this type of remote evidence can ever serve as evidence of a "triggering point" for the purposes of an EED defense is not relevant for the purposes of this appeal.

In *Padgett*,[17] Defendant Padgett was convicted of, among other things, criminal attempt to commit first-degree manslaughter arising from an argument with his ex-wife, which began as a result of Padgett's belief that she was improperly supervising their teenage son.[18] At trial, Padgett's theory was that he acted under EED based on his assertion that he was "triggered" by seeing his son cross the street into oncoming traffic.[19] In support of his theory, Padgett wanted to call an expert witness to testify, but the trial court ruled that, unless Padgett testified, the expert witness's testimony was inadmissible because the expert's opinion was based on Padgett's out-of-court statements.[20] The trial court allowed the expert to testify only after Padgett testified about the triggering event giving rise to his EED.[21]

On appeal, Padgett argued that the trial court compelled him to incriminate himself, in violation of the Fifth Amendment right,[22] when it required him to testify in order to receive an instruction on EED.[23] This Court reiterated that an EED defense instruction "must be supported by 'some definite, non-speculative evidence,'"[24] and that "as in every other context, the evidence supporting extreme emotional disturbance must come from some

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[17] 312 S.W.3d 336.

[18] *Id.* at 339–40.

[19] *Id.* at 341.

[20] *Id.*

[21] *Id.*

[22] U.S. Const. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself.").

[23] 312 S.W.3d at 341.

[24] *Id.* (quoting *Holland v. Commonwealth*, 114 S.W.3d 792, 807 (Ky. 2003)).

admissible source."[25] Accordingly, this Court found that the trial court did not abuse its discretion in requiring Padgett to testify in order for the expert witness to testify.[26] The Court reasoned that the trial court made clear that it was not compelling Padgett to testify, but was only excluding the expert witness's testimony because it was inadmissible as an opinion based only on Padgett's out-of-court statements.[27] To allow the expert witness's testimony without Padgett's, this Court explained, "would have been to improperly allow the defendant to testify by proxy."[28] This Court further found that Padgett's right against self-incrimination was not implicated by the trial court's ruling because the trial court did not require Padgett to testify, but instead only required him to present "some admissible evidence" to support the EED instruction.[29]

In *Lasure*,[30] Defendant Lasure was convicted of intentional murder after the jury rejected his EED defense.[31] Before trial, the Commonwealth moved to prevent Lasure from offering the expert testimony of Dr. Shilling, who diagnosed Lasure with PTSD, for the purpose of offering "his expert opinion that persons suffering from PTSD react more explosively to stress or tension."[32] The Commonwealth claimed that Dr. Shilling's testimony was inadmissible

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[25] *Id*. at 342.

[26] *Id*.

[27] *Id*.

[28] *Id*. (relying on *Talbott v. Commonwealth*, 968 S.W.2d 76, 85 (Ky. 1998)).

[29] *Id*. ("The fact that Appellant may have only been able to support this instruction by testifying does not implicate the Fifth Amendment.").

[30] 390 S.W.3d 139.

[31] *Id*. at 140–41.

[32] *Id*. at 142–44.

because it would include out-of-court statements made by Lasure regarding the alleged EED.[33] After the close of the Commonwealth's case, the trial court ruled, in reliance on *Talbott v. Commonwealth*[34] and *Padgett v. Commonwealth*,[35] that because Dr. Shilling's testimony included Lasure's out-of-court statements regarding the EED, the expert could not testify unless Lasure did.[36] Lasure repeatedly stated that he did not wish to testify, but nevertheless testified in order to present Dr. Shilling's testimony.[37]

On appeal, the *Lasure* court found the facts distinguishable from those in *Padgett* and reversed based on the finding that the trial court erred in not allowing Dr. Shilling to testify unless Lasure also testified, finding that the evidence was relevant, and the trial court's ruling otherwise infringed on Lasure's Fifth Amendment rights. Following the Court's discussion of *Talbott* and *Padgett*, it provided the following explanation:

> Turning to the present matter, we believe that the trial court erred in ruling that Lasure's testimony was required in order to admit Dr. Shilling's testimony. . . . [W]hen the issue was revisited after the close of the Commonwealth's case-in-chief, significant evidence of Lasure's alleged EED had been admitted[, including testimony from the detective who interviewed the defendant following the homicide, and testimony offered by the Commonwealth from two expert witnesses who testified as to the defendant's mental state in the days leading up to the shooting].
> . . .

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[33] *Id.* at 142.

[34] 968 S.W.2d at 85 (ruling that "Where the defendant does not testify and there is no other factual basis to support a defense of extreme emotional disturbance, that defense cannot be bootstrapped into the evidence by an expert opinion premised primarily on out-of-court information furnished by the defendant . . .").

[35] 312 S.W.3d at 342 (ruling that "as in every other context, the evidence supporting extreme emotional disturbance must come from some admissible source").

[36] *Lasure*, 390 S.W.3d at 142.

[37] *Id.*

> We recognize that [the victim's] rejection and taunts typically do not constitute adequate provocation to create an EED. *Talbott*, 968 S.W.2d at 85 ("mere hurt or anger" is insufficient to constitute a triggering event). However, a defense of EED requires the jury "to place themselves in the actor's position as he believed it to be at the time of the act." KRS 507.030, Commentary (1974). For this reason, evidence of a defendant's mental condition or illness at the time of the alleged EED is relevant.
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> Accordingly, when the trial court made its ruling, significant evidence supporting a defense of EED had been presented. Therefore, the defense of EED would not have been "bootstrapped into the evidence" by the testimony of Dr. Shilling. [quoting *Talbott*, 968 S.W.2d at 85.] Rather, Lasure was entitled to present evidence of his mental condition, including Dr. Shilling's diagnosis of PTSD and his expert opinion that persons suffering from PTSD react more explosively to stress or tension. . . .
>
> The trial court's ruling in this case was erroneous and compromised Lasure's Fifth Amendment rights. In order to advance his defense of EED and present the testimony of Dr. Shilling, Lasure chose to take the stand. In light of the trial court's ruling, this choice cannot be considered voluntary.

Unlike the defendants in *Padgett* and *Lasure*, Woods voluntarily chose to testify. Accordingly, there is no need to provide the same analysis as the *Padgett* and *Lasure* courts to determine whether Woods's Fifth Amendment right was violated. But Woods was still precluded from presenting testimony he argues is relevant to his EED defense.

Based on these cases, the only questions that we must answer are: (1) whether Woods was entitled to present the challenged testimony under the Kentucky Rules of Evidence; and, if no, (2) whether Woods's constitutional right to present a defense nonetheless entitled him to present the evidence.

Whether or not the trial court was incorrect in finding that the challenged event could not be presented for the purposes of EED, as this Court ruled in *Padgett*, evidence supporting extreme emotional disturbance must

always come from an admissible source.[38] The trial court here excluded the testimony claiming it was not relevant, presumably under KRE 402 and 403.

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." KRE 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by . . . these rules, or by other rules adopted by the Supreme Court of Kentucky. . . ." Finally, KRE 403 provides that "[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."

Based on the trial court's statements that it did not believe that Woods needed to present the challenged testimony because the jury already knew all the facts that the testimony would have purported to prove, we presume that the trial court found that the evidence was not relevant under KRE 403 because it was needlessly cumulative. We agree.

As the defense counsel explained during the bench conference, the challenged testimony would have offered to prove that the victim had been pregnant by another man once before during her relationship with Woods, and that he remained in a relationship with her and raised the resulting child as his own. Just as the trial court found, the jury already knew that Woods and the victim had been in a six-year long relationship, that Woods fathered none

[38] 312 S.W.3d at 342.

of the victim's children, and that he cared for and thought of all the victim's children as if they were his own. Based on this information, the jury could clearly understand that the victim had given birth to another man's child while she was in a relationship with Woods, but Woods nonetheless chose to continue his relationship with her. The additional explanation regarding the specifics of the conversation between Woods and the victim when she informed him that she had an affair was unnecessarily cumulative and arguably unduly prejudicial. Accordingly, the trial court did not abuse its discretion in excluding the evidence under KRE 403.

Since Woods's challenged testimony was properly excluded under KRE 403, we now turn to the issue as to whether Woods's constitutional right to present a defense nonetheless entitled him to present the challenged evidence.

As Woods correctly notes, we have made clear, under standards established by the United States Supreme Court, evidence rules are not to be applied to deprive a defendant of due process,[39] and that due process requires that a defendant be afforded a "fair opportunity to defend against the State's accusations."[40] Woods is also correct that under the Fifth,[41] Sixth[42] and

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[39] *See Montgomery v. Commonwealth.*, 320 S.W.3d 28, 40 (Ky. 2010) (citing, for example, *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986), *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974), and *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973)).

[40] *Chambers*, 410 U.S. at 294, 93 S. Ct. at 1045, 35 L.Ed.2d 297.

[41] U.S. Const. amend. V ("No person shall be. . . deprived of life, liberty, or property, without due process of law. . .").

[42] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right. . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e[]").

Fourteenth[43] Amendments of the United States Constitution, and under Section 11 of the Kentucky Constitution,[44] he has a right to "'meaningful opportunity to present a complete defense.'"[45] But as the Commonwealth asserts, this rule is not absolute. The defendant is still required to comply with the "'established rules of procedure and evidence designed to ensure both fairness and reliability in the ascertainment of both guilt and innocence[,]'"[46] and reversal is only required where the exclusion of the evidence "'significantly undermine[s] fundamental elements of the defendant's defense[.]"[47] For the

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[43] U.S. Const. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

[44] Ky. Const. § 11 ("In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land . . .).

[45] *Montgomery,* 320 S.W.3d at 41 (quoting *Crane*, 476 U.S. at 690, 106 S. Ct. 2142).

[46] *Commonwealth v. Bell*, 400 S.W.3d 278, 284 (Ky. 2013) (quoting *Chambers*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297). *See also Baze v. Parker*, 371 F.3d 310, 323-24 (6th Cir. 2004); *Baze v. Commonwealth*, 965 S.W.2s 817, 820-21 (Ky. 1997) ("The trial judge limited the amount of testimony regarding the family feud. . . because it did not directly involve Baze and the two police officers who were killed. The remainder of the feud evidence was allowed in by avowal. . . . The presentation of evidence and the scope and duration of cross-examination is within the sound discretion of the trial judge . . . . Here the trial judge did not abuse his discretion by limiting the amount of feud evidence presented to the jury. The constitutional rights of the defendant were not violated in any way.") (citations omitted); *Moore v. Commonwealth*, 2010 WL 2471846, No. 2008-000914-MR, *2-4 (Ky. June 17, 2010) (holding that the trial court did not violate defendant's right to present a defense when it limited the evidence of threats made by the victim to the defendant to only those threats which occurred at the time of the "onset of the relevant conflict" because those were the only threats which were relevant).

[47] *Bell*, 400 S.W.3d at 284 (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264, 140 L.Ed.2d 413 (1998) (citing *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711, 97 L.Ed.2d 37 (1987))). *See also*, *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003) ("An exclusion of evidence will almost invariably be declared unconstitutional when it significantly undermine[s] fundamental elements of the defendant's defense.") (internal quotations omitted), *abrogated on other grounds by Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016).

same reasons that we found that the trial court did not err in excluding the challenged testimony as needlessly cumulative, we find that the trial court did not violate Woods's right to present a complete defense.

In *Commonwealth v. Bell*, this Court found that the trial court did not violate Bell's right to present a complete defense.[48] At trial, Bell's defense was that the sexual act giving rise to the sodomy charge was consensual because he and the victim were trading drugs for sexual favors.[49] This Court explained that the trial court allowed Bell "what he needed to present his defense" by allowing him to present evidence that "he and [the victim] had traded sex for drugs the night of the incident and one other time, and that [the victim] tested positive for cocaine the night of the incident."[50] The trial court's exclusion of the additional evidence regarding the victim's "twenty years of drug use and addiction," did not violate his right to present a complete defense even though the evidence "arguably would have further shown Bell's defense."[51]

Similarly, the trial court in the present case gave Woods "what he needed" for his EED defense by allowing him to testify fully about the events that occurred "close in time" to the homicide, and by further allowing him to testify generally about how his and the victim's relationship existed up until the murder. As the Court in *Bell* explained, just because the trial court here did not give Woods "everything he wanted" does not mean that it violated his

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[48] 400 S.W.3d at 284.

[49] *Id.* at 283.

[50] *Id.*

[51] *Id.*

constitutional rights even if the evidence of the earlier affair and pregnancy "arguably would have further shown [Woods's] defense."[52]

In sum, the trial court did not abuse its discretion in limiting the evidence that Woods presented in support of his EED defense, and such limitation did not otherwise violate his right to present a complete defense.

B. Propriety of the Commonwealth's closing argument.

The trial court included Woods's EED theory of defense in instructions to the jury, and the prosecutor attempted in closing argument to negate Woods's EED evidence. In so doing, the prosecutor argued that the EED was not supported by the evidence produced. It was not an "excuse for a bad temper" was a phrase the prosecutor used at least twice during closing arguments. The prosecutor then read from the instructions the definition of EED, being "a temporary state of mind, so engaged, enflamed or disturbed, to overcome one's judgment and causes them to act uncontrollably." The prosecutor also emphasized that there must be a triggering event and a "reasonable explanation for the excuse from the defendant's standpoint" for the EED defense to apply. The prosecutor also reminded the jury of testimony offered by the Commonwealth that Woods told police that he killed the victim because of the argument over the timeshare, not because of the victim's alleged statements about his inability to father children, and that the jury must ask whether "from [Woods's] position, was it reasonable to beat the victim to death

[52] *Id.* at 283–84 ("In essence, the trial court gave Bell what he needed to present his defense under the facts of this precise case, but it did not give him everything he wanted. Such a decision is a clear exercise of a trial court's discretion, and is not an abuse of that discretion. . . . Bell was not barred from presenting the defense he wanted; rather, the trial court limited the evidence of it. That limit was a reasonable one and did not violate Bell's constitutional rights.").

with a shovel over a vacation house?" Finally, the prosecutor concluded the argument by exhorting the jury to "send a message to this defendant that there is no room for excuses in this courtroom." The only time defense counsel objected while the prosecutor made the above statements was when the prosecutor asked the jury to send Woods a message, and that objection the trial court overruled.

Woods contends that the Commonwealth engaged in prosecutorial misconduct during closing arguments, depriving him of his constitutional rights to a fair trial, due process and fair sentencing, by "misstat[ing] the defense of EED." Woods also claims that the misstatements did not allow the jury to give effect to the EED instructions. Woods concedes that this issue is not preserved for appeal.

"It is a fundamental precept that a prosecutor must conduct himself with ". . . due regard to the proprieties of his office and to see that the legal rights of the accused, as well as those of the Commonwealth, are protected."[53] As this Court explained in *Padgett*:

> Counsel has wide latitude during closing arguments. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). . . . This Court recently explained the appropriate standard of review for prosecutorial misconduct during closing arguments, stating that reversal is required "only if the misconduct is 'flagrant' or if each of the following are satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009) (emphasis removed, quoting *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002)). Additionally, this Court "must always consider these closing arguments 'as a whole.'" *Id.* (quoting *Young v. Commonwealth*, 25 S.W.3d 66, 74–75 (Ky. 2000)). . . . Counsel

[53] *Moore v. Commonwealth*, 634 S.W.2d 426, 437 (Ky. 1982) (quoting *Bowling v. Commonwealth*, 279 S.W.2d 23, 24 (1955)).

> may, during closing arguments, discuss the law applicable to the case as instructed by the court. Counsel may not, however, misstate the law or make comments on the law inconsistent with the court's instructions. *East* [*v. Commonwealth*, 249 Ky. 46, 52–53, 60 S.W.2d 137, 140 (Ky. 1933)]. . . . The standard for whether or not prosecutorial misconduct is reversible error in this context is the same . . . as described above and is generally satisfied if the misconduct is flagrant or prejudicial to the defendant.[54]

Because Woods concedes that this issue is not preserved for appeal, we must only determine whether the Commonwealth's challenged conduct was flagrant.[55] In determining whether the challenged conduct was flagrant, we consider the following four factors: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused."[56]

In support of his argument that the Commonwealth engaged in flagrant prosecutorial misconduct by misstating the law of an EED defense during closing arguments, Woods points to the Commonwealth's statements regarding its belief that the he killed the victim because he had a bad temper and by stating that "EED is not an excuse for a bad temper," that the reasonableness prong of EED requires a "reasonable explanation for his behavior," and that the Commonwealth ended its argument by requesting the jury "send a message to this defendant that there is no room for excuses in this courtroom."[57] These

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[54] 312 S.W.3d at 350-51.

[55] *Id. See also Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010).

[56] *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010) (citing *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994)), *superseded on other ground by statute as stated in Commonwealth v. Hasch*, 421 S.W.3d 349 (Ky. 2013).

[57] Woods's trial counsel did object specifically to this last statement by the Commonwealth, but Woods does not acknowledge this objection or otherwise argue that the propriety of this statement is preserved for appeal. Instead, Woods simply

statements, according to Woods, undermined the nature of an EED instruction as an affirmative defense, rending the jury unable to "follow and give effect to the . . . entirety of the court's instructions."

In response, the Commonwealth argues that these statements were not flagrant and did not render the jury unable to give effect to the instruction provided for the affirmative defense of EED, especially considering the entirety of the prosecutor's closing argument. The Commonwealth points to the prosecutor's recitation of the definition of EED as set forth in the jury instructions after it stated that EED was not an excuse for a bad temper. The prosecutor also emphasized that the definition included the requirement that the reasonable explanation must be considered from the defendant's point of view. The Commonwealth further argues that the prosecutor's statement that EED was not an excuse for a bad temper was appropriate because finding EED required more than just establishing that Woods had a bad temper, and that the prosecutor was merely attempting to properly distinguish EED from a bad temper. We agree with the Commonwealth that based on the entirety of the prosecutor's closing argument, the Commonwealth did not misstate the law of the EED defense, and the prosecutor's other statements did not otherwise amount to flagrant misconduct.

concedes that any argument regarding prosecutorial misconduct is not preserved for appeal.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment.

All sitting. Minton, C.J.; Hughes, Lambert, Nickell, VanMeter, and Wright, JJ, concur. Keller, J., concurs in result only.

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