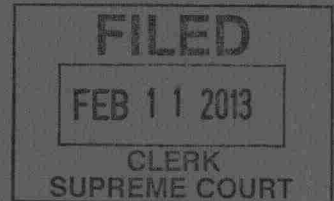


COMMONWEALTH OF KENTUCKY
SUPREME COURT

Case no.: 2012 – SC – 000219



PAMELA BARTLEY

APPELLANT

V.

ON DISCRETIONARY REVIEW
OF KENTUCKY COURT OF APPEALS DECISION IN
CASE NUMBER 2010 – CA – 001640 – MR

APPEAL FROM ROWAN CIRCUIT COURT
HON. JANET COLEMAN, SPECIAL JUDGE
INDICTMENT NUMBER: 2009 – CR – 00117

COMMONWEALTH OF KENTUCKY

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I hereby CERTIFY that a copy of the foregoing Brief for Appellant has been mailed, postage prepaid, to Hon. Keen Johnson, Commonwealth's Attorney, 21st Judicial Circuit, 44 West Main Street, Mount Sterling, KY 40353; Hon. Janet Coleman, Special Judge, Kentucky Administrative Office of the Courts, Senior Status Program Administrator, 100 Millcreek Park, Frankfort, KY 40601; and to Hon. Jack Conway, Attorney General, Criminal Appeals Division, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601 on this 9th day of February 2013 by USPS, First-Class Postage Pre-paid.

I hereby further CERTIFY that the Record on Appeal was not checked out from either the Rowan County Circuit Court Clerk or the Clerk of the Kentucky Court of Appeals.

Derek R. Durbin
Derek R. Durbin

INTRODUCTION

This is an Appeal from a decision of the Kentucky Court of Appeals wherein the panel in a 2-1 decision affirmed the conviction of the Appellant for Manslaughter in the Second Degree.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant believes that oral argument is necessary in this matter as there are issues of law of extreme importance contained within this case, including the right to pre-arrest silence, introduction of a defendant's silence – and commentary thereon – and the mis-introduction of relevant evidence.

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STATEMENT OF THE CASE

On July 31, 2007, Officers Jeremy Hamm and Joe Vendeman of the Kentucky State Police were dispatched to the residence of Pamela and Carl Bartley in Montgomery County. (VR, 12/09/09, 1:34; Hamm). This call was from relatives of Carl Bartley who were present outside the residence. (VR, 12/09/09, 1:36; Hamm). Performing a welfare check at the relatives' insistence, two KSP officers entered the residence, performed a tactical search, cleared the residence and went outside. (VR, 12/09/09, 1:36; Hamm). At this point the family members were persistent that the officers re-enter the house. (VR, 12/09/09, 1:37; Hamm). Based upon what they were told, the Officers checked the garage. (VR, 12/09/09, 1:38; Hamm). Between two vehicles in the garage, there were boxes and quilts piled up - under which lay the body of Carl Bartley. (VR, 12/09/09, 1:38-1:42; Hamm).

After determining that a likely homicide had occurred, the body was received by the KSP Laboratory on July 31, 2007 and an autopsy was performed on August 1, 2007. (VR, 12/09/09, 9:58; Roth). The autopsy revealed a blunt force trauma to the back and a gunshot wound to the head. (VR, 12/09/09, 9:58; Roth). Dr. Roth determined that the bullet entered from the back of the head and passed through the brain until it stopped at the left frontal lobe. (VR, 12/09/09, 10:01 - 10:07; Roth). Dr. Roth was unable to determine the time of death of Carl Bartley due to a plethora of unknown factors, including the temperature of the garage and the temperature during transport. (VR, 12/09/09, 10:15 - 10:17; Roth).

The bullet found in the left frontal lobe was conclusively determined to have been fired from either a .357 or a .38 handgun. (VR, 12/09/09, 11:31; Akers). Ms. Akers

specifically testified that she tested one .9 millimeter handgun and that it was not the weapon used to fire the bullet. (VR, 12/09/09, 1:09; Akers). Ms. Akers further positively identified one of the .9 millimeters that she tested after the Commonwealth showed it to her. (VR, 12/09/09, 1:10; Akers) That handgun was subsequently published to the jury and introduced as Commonwealth's Exhibit #26. Ms. Akers further testified that she examined a second .9 millimeter. (VR, 12/09/09, 1:11; Akers). Again, this gun was conclusively proven to not be the weapon that fired the bullet. (VR, 12/09/09, 1:13; Akers).

The Detective who investigated the case, Detective Larry Bowling, responded to the scene following the finding of the body. (VR, 12/14/09, 3:45; Bowling). He had "drawn" this case, and though he had a conflict on the case, did not seek recusal. (VR, 12/14/09, 3:47; Bowling). Detective Bowling acknowledged that Dalton Bartley - Carl Bartley's grandson - was a witness in the matter, and was his brother's stepson. (VR, 12/14/09, 3:47 -3:48; Bowling). Further, Detective Bowling acknowledged that Dalton Bartley called him "uncle" and that children want to impress people who they like. (VR, 12/15/09, 11:14 - 11:15; Bowling).

When Detective Bowling arrived on the scene on July 31, 2007 several members of Carl Bartley's family were present. (VR, 12/14/09, 3:45 - 3:47; Bowling). Most of the expressed to him, at that time, that Pamela Bartley was the perpetrator. (VR, 12/14/09, 3:50; Bowling), (VR, 12/14/09, 11:09 - 11:10) . Pamela Bartley was not on the scene, as she had gone to stay with her daughter, Carla Haas, in Campbell County, Kentucky on July 30, 2009. (VR, 12/14/09, 3:49-3:51; Bowling). The Commonwealth states that Pamela had never gone to see her daughter overnight before. (Commonwealth's Brief,

Page 5, first incomplete paragraph). However, the question presented at trial was whether both Carl AND Pamela had ever stayed the night there before, and not whether Pamela had ever stayed the night there. (VR, 12/15/09, 4:23:10 – 4:26:30.)

When Ms. Bartley did arrive, in the company of her daughter and son, she was instructed not to approach the house for safety reasons. (VR, 12/14/09, 3:49 - 3:50; Bowling). Detective Bowling approached her, but was told by her son that there would be no questioning without an attorney. (VR, 12/14/09, 3:50 - 3:51; Bowling). In addition, Pamela Bartley also advised that she would not speak to him without an attorney. (VR, 12/14/09, 3:50; Bowling).

Detective Bowling did manage to speak with Pamela Bartley, however. On September 7, 2007, after she knew she was a suspect, Detective Bowling received a call to respond to the Bartley residence. (VR, 12/14/09, 4:07; Bowling). Pamela Bartley had requested assistance following an incident where she said Thomas Lee had chased her and her son, Bradley Bartley. This chase included gun shots and their car window being broken out. (VR, 12/14/09, 4:07; Bowling). Pamela Bartley spoke with her attorney, Ben Shields, prior to her conversation with Detective Bowling. (Commonwealth's Exhibit 38, audio-recording). She acknowledged that she was advised by Shields to only speak of the events of that day. Before Detective Bowling begins to speak with her, he reads her Miranda rights. (Commonwealth's Exhibit 38, audio-recording).

Ms. Bartley describes the events of that day, including the chase. (Commonwealth's Exhibit 38). She further expresses her fear of Thomas Lee. (Commonwealth's Exhibit 38). She states that she is scared Thomas Lee will do to her what he did to her husband. (Commonwealth's Exhibit 38). Detective Bowling then asks

her what she did with her handgun. (Commonwealth's Exhibit 38). She remains silent. Detective Bowling then recites his speculated theory of the case: that he believes Pamela Bartley shot Carl Bartley, but that it was an accident. (Commonwealth's Exhibit 38). Again, Pamela Bartley remains silent. (Commonwealth's Exhibit 38).

Relying on the beliefs of family members and the silence of Pamela, Detective Bowling failed to fully investigate the homicide. There were several witnesses and potential suspects that were either not fully interviewed, not interviewed, or were not known to the Detective. First, Detective Bowling received information from Commonwealth's Attorney Keen Johnson that a Katherine Lee or Thomas Lee may have been involved in the homicide. (VR, 12/15/09, 11:25; Bowling). Katherine Lee was the mistress of Carl Bartley at the time of his death; Thomas Lee was her brother. (VR, 12/15/09, 11:20; Bowling).

Allegations had been made that Katherine Lee was blackmailing Carl Bartley in regard to their affair. (VR, 12/15/09, 11:28; Bowling). It became known to Detective Bowling that there was a cabin where Carl Bartley and Katherine Lee would rendezvous. (VR, 12/15/09, 11:21; Bowling). Detective Bowling did interview Katherine Lee. (VR, 12/14/09, 4:02; Bowling). She denied blackmailing Carl Bartley. (VR, 12/15/09, 11:29; Bowling). Detective Bowling did not search either the house of Katherine Lee or the cabin where the two would meet; (VR, 12/15/09, 11:22; Bowling). Katherine Lee had informed Detective Bowling that she had been at her cousin's house the night before the body was located. (VR, 12/15/09, 11:21; Bowling). However, Detective Bowling did

not interview her cousin in regard to this alibi until much later. (VR, 12/15/09, 11:24 - 11:26; Bowling).

Second, Detective Bowling interviewed Chuck Hart. (VR, 12/14/09, 4:01; Bowling). Carl Bartley had testified against Mr. Hart in a Federal vote-buying prosecution. (VR, 12/14/09, 4:01; Bowling). Mr. Hart was subsequently found guilty of this charge. (VR, 12/15/09, 11:27; Bowling). Mr. Hart had informed Detective Bowling that he was probably at work that night. (VR, 12/15/09, 11:28; Bowling). Detective Bowling took no further steps to corroborate this alibi. (VR, 12/15/09, 11:28 - 11:29; Bowling).

Third, Detective Bowling failed to identify, much less interview, George Hunter. (VR, 12/15/09, 11:26 - 11:27; Bowling). Mr. Hunter was a co-defendant with Carl Bartley in a Trafficking charge. (VR, 12/15/09, 11:26 - 11:27; Bowling). This trial resulted in a conviction for Mr. Hunter, and a misdemeanor for Carl Bartley. (VR, 12/15/09; 11:27; Bowling).

Lastly, Detective Bowling did not interview any of the neighbors who lived in several trailers behind the Bartley residence. (VR, 12/15/09, 11:15 - 11:21 ; Bowling). Detective Bowling did, however, review the reports, including a report from other officers and detectives, including Brian Henderson. (VR, 12/15/09, 11:15; Bowling). In that report, Detective Bowling acknowledged that one such neighbor had "thought he saw someone" around the residence the night before the body was located. (VR, 12/15/09, 11:18 - 11:19; Bowling). However, Detective Bowling did not go interview that witness. (VR, 12/15/09, 11:18 - 11:19; Bowling).

Pamela was subsequently indicted for Murder, and the case proceeded to trial in late 2009. In regard to the audio-tape, the Commonwealth sought to introduce the recording, and the Defense objected. After much debate and deliberation, Special Judge Janet Coleman ruled that the audio-tape could be introduced into evidence. (Court Order of December 7, 2009, Appendix). During the course of the trial, the Commonwealth elicited testimony from Detective Bowling regarding this tape where Ms. Bartley remained silent. (VR, 12/15/09, 11:49 - :11:53). As well, the Commonwealth made statements regarding Pamela's silence during her closing summation. (VR, 12/17/09, 10:56 - 11:06).

Following the conclusion of all evidence, the jury returned a verdict acquitting-by-implication Pamela of Murder, but finding her guilty of the lesser-included charge of Manslaughter in the Second Degree. The jury recommended a sentence of eight (8) years, which the Court followed at her sentencing hearing.

Following the sentencing hearing, Pamela filed a Notice of Appeal. The Opinion of the Court of Appeals was rendered on March 9, 2012, with instructions that it not be published. Pamela subsequently filed a Motion for Discretionary Review with this Court, which was granted on December 12, 2012.

ARGUMENT

I. ISSUES PRESENTED AND STANDARDS OF REVIEW

There are three issues presented to this Court for review.

A) Introduction of the audio recording.

The first issue is whether the Trial Court erred in allowing the Commonwealth to introduce an audio recording in which Pamela Bartley, under advice of counsel, remained silent when questioned about her possible involvement in the death of Carl Bartley; and, whether the Court of Appeals erred in finding that Pamela Bartley had implicitly waived her asserted right to remain silent.

In regard to this error, the issue relates to the introduction of evidence, and must be reviewed using an “abuse of discretion” standard. Love v. Commonwealth, 55 S.W.3d 816 (2001); Anderson v. Commonwealth, 231 S.W.3d 117, 199 (Ky. 2007). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

B) Use of Pamela Bartley’s silence as substantive evidence of guilt.

The second issue for this Court is whether the Trial Court erred in allowing the Commonwealth to use Pamela Bartley’s silence as substantive evidence of her guilt, by both eliciting testimony during trial and mentioning such silence during the closing argument; and, whether the Court of Appeals erred by determining that there was no manifest injustice.

In regard to this error, Ms. Bartley concedes that there was not a contemporaneous objection made when the Commonwealth elicited testimony regarding

her silence, or during the closing argument. Though the issue is unpreserved, Ms. Bartley believes that this was “palpable error,” and should be reviewed as such, pursuant to RCr. 10.26. The test to determine whether there was palpable error is whether “manifest injustice” occurred due to the error. RCR. 10.26. To determine whether there was “manifest injustice,” the Court must consider whether the “defect in the proceeding was shocking or jurisprudentially intolerable.” Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002). Unless there is a substantial possibility that the resulting verdict/conclusion would have been different, the error is not palpable. Brewer v. Commonwealth, 206 S.W.3d 343 (Ky. 2006).

C) Introduction of the unrelated firearms.

The last issue for this Court to decide is whether the Court of Appeals erred when it determined that the introduction of non-relevant firearms was “harmless error.” The Court of Appeals held that the introduction of the firearms was an abuse of discretion, but determined that there was “harmless error.” Because the Court of Appeals made a determination that there existed enough evidence to support the conviction, the ultimate issue is whether the Court of Appeals erred in making that factual finding.

II. MS. BARTLEY WAS DENIED A FAIR TRIAL DUE TO THE INTRODUCTION OF EVIDENCE AND TESTIMONY REGARDING HER PRE-ARREST SILENCE.

A) Relevant Facts

On September 7, 2007, Pamela Bartley, while in the company of her son, Bradley Bartley, called emergency services after having been chased and shot at by Thomas Lee. Law enforcement, including Detective Bowling, arrived at the scene. Shortly after, Detective Bowling transported Pamela Bartley in order to speak with her. This occurred

after Ms. Bartley had spoken with her attorney, Ben Shields. Before the recitation of her rights, while on the phone, she asks “is it okay if I talk to him about *this* incident.” VR 12/14/09; 9:36.

Following the recitation of her rights, Ms. Bartley makes clear that she does want to talk about “what happened today.” VR 12/14/09; 9:37. During the taped recording, Ms. Bartley is extremely emotional and distraught, her voice broken by long periods of sobbing and crying. She very clearly explains what happened to her and who the perpetrator was – Thomas Lee. Ms. Bartley further expands on her fear of the perpetrator by describing that she is concerned he will do the same thing to her as he did to her husband.

Taking advantage of Pamela’s obviously frail state, Bowling then blatantly directs the conversation to the homicide by asking Pamela where her gun was located. He then goes on to recite to an already-distraught Pamela his personal, and unsupported, theory of the case – that it was she who shot Carl Bartley, but that she probably did it by accident. During these questions, and during Detective Bowling’s theoretical account, Ms. Bartley, *acting upon the advice of counsel*, remains absolutely silent.

Ms. Bartley sought to have this recording suppressed as it would violate her 5th and 14th Amendments right against self-incrimination. After lengthy hearings, the Court reluctantly disagreed and allowed the Commonwealth the ability to play the tape in front of the jury. The Commonwealth took full advantage of this erroneous ruling, and let the jury hear not only Bowling’s “hunch,” but also the attorney-directed silence of Pamela.

B. Argument

The introduction of the tape and the elicitation of testimony regarding Ms. Bartley's silence were clear errors in violation of her rights pursuant to the 5th and 14th Amendments to the United States Constitution and Section 11 of the Kentucky Constitution. Ms. Bartley's explanation as to the reason behind her fear of Thomas Lee was not a waiver of this right.

1. Pamela Bartley possessed a right to remain silent, validly invoked her right to remain silent, and appropriately exercised her right to remain silent.

The 5th Amendment to the United States Constitution guarantees an accused the right against self-incrimination. The 14th Amendment to the United States Constitution makes this binding upon Commonwealth of Kentucky. Malloy v. Hogan, 378 U.S. 1 (1964). Section 11 of the Kentucky Constitution grants the same right, though the language is broader. Section 11 states, in pertinent part, that: [the Defendant] cannot be compelled to give *evidence* against himself.

The right to protect ones self against self-incrimination is commonly thought to apply in custodial situations. Miranda v. Arizona, 384 U.S. 436 (1966). However, this right against self-incrimination also applies in pre-arrest, non-custodial situations. Combs v. Coyle, 205 F.3d 269 (6th Cir., 2000). The Court of Appeals in this case acknowledges that there is a right to remain silent in pre-arrest, non-custodial situations as well, though prior to the trial and appellate decision, no published Kentucky case has stated such. Bartley v. Commonwealth, No. 2010-CA-001640-MR, @10. Since the appellate court's ruling though, there has appeared published case law here in the Commonwealth to address this issue.

In Baumia v. Commonwealth, this Court held that custody is not the determining factor in regard to the right to remain silent. 2011-SC-000279-MR, November 21, 2012. (To Be Published). In Baumia, this Court clearly stated that under the Constitution of the Commonwealth of Kentucky, Section 11, the issue is not custody, but whether there exists “official compulsion.” Id. at page 7. In Baumia, a lady who was at a hospital and not in custody was asked by an officer to submit to a breath test. She, effectively but not graciously, invoked her right to remain silent. During the trial, the officers commented on the fact that she invoked her right to remain silent. This Court found that the invocation was made in response to “official compulsion,” and the fact that she invoked her right to remain silent should not have been introduced.

Under the holding in Baumia, this Court must determine whether Pamela’s silence as evidenced on the tape was a product of “official compulsion.” As well, under the United States Constitution, the 6th Circuit made clear that the appropriate standard is where “it is clear that a potential defendant’s comments could provide damaging evidence that might be used in a criminal prosecution ... the privilege should thus apply.” Combs v. Coyle, 205 F.3d 269 (6th Cir., 2000). Under both the federal and the Commonwealth standard, Pamela had a right to remain silent. Pamela *invoked* that right as is evident from the tape. Before the recitation of her *Miranda* warnings, Pamela can be heard on the phone with her attorney, asking whether she could talk specifically about the events of that day. After the call, Pamela makes clear that she is only going to talk to Bowling about what happened on that day. Pamela was directly asked – after she had invoked her right to remain silent – where her gun was. In response to that, Pamela

exercised her right to remain silent. An accusatory question by a police officer is clearly within the purview of an “official compulsion.”

In the present case, it is very evident that Ms. Bartley was a suspect and *knew* she was a suspect in the homicide investigation. Ms. Bartley had hired counsel and had, in fact, spoken to counsel before the interview. Further, Detective Bowling states that he knew she had an attorney and, very clearly, advises Ms. Bartley that she had the *right to remain silent* before talking with her. However, he also advised Ms. Bartley that she could talk to him if she so desired. It is more than obvious that on the day of the interview, she was a suspect in the homicide and was questioned in regard to it. Thus, this case falls within the Baumia and Combs analyses.

2. Pamela never “waived” her right to remain silent.

The Court of Appeals, finding that Pamela had invoked her right to pre-arrest silence, also determined that she implicitly waived that right. The Court of Appeals based their holding on Ragland v. Commonwealth, 191 S.W.3d 569 (Ky. 2006). Appellant does not take issue with the holding in Ragland that a suspect can implicitly waive their rights. However, the Court of Appeals’ reliance on this case, is clearly erroneous. In Ragland, the suspect, after being informed of his rights, “voluntarily answered the questions asked by his interrogators.” As well, the very next sentence in Ragland states that “[w]hen a suspect has been advised of his rights, acknowledges an understanding of those rights, and voluntarily **responds** to police questioning, he may be deemed to have waived those rights.” *Id.* at 586. Likewise, Ragland uses as precedent Gorham v. Franzen, 760 F.2d 786 (7th Cir. 1985) and United States v. Ogden, 572 F.2d 501 (5th Cir. 1978). In both of those cases, the suspect made statements when asked a

question by the officer. Implicit waivers can be made of the right to remain silent, but the case law relied upon by the Court of Appeals makes clear that an accused must “respond” to a question. Such is not the case here, at all.

In this case, Pamela requested police assistance after being assaulted by Thomas Lee, a person she believed responsible for the murder of her husband. During the tape, she is clearly distraught, and often breaks down into hysterical crying fits. The Court of Appeals is correct in stating that Pamela did make statements implicating Thomas Lee as Carl’s murderer. Between her broken sobs, she states that she is afraid that Lee will do to her what he did to Carl that were not in response to any question of the detective.

The Commonwealth, in their brief, relied on United States v. Bonner, 302 F.3d 776 (7th Cir. 2002) for the proposition that any exculpatory comment and then selective silence can act as a waiver of the right to remain silent. The Court of Appeals, by implication, is making the same holding. However, that is not the law in this jurisdiction.

In United States v. Williams, 665 F.3d 107 (6th Cir. 1981), the 6th Circuit held that commenting on selective silence violated a person’s right against self-incrimination. In Williams, the defendant did answer some questions of an FBI agent, but refused to answer detailed questions regarding the purchase location and price for a vehicle. The court held that by questioning the agent regarding that silence, the defendant’s rights were violated. By implication then, selective silence is not effective to waive a validly-invoked right to remain silent.

Other Federal Circuits follow this line of reasoning as well. The Federal Court of Appeals for the Ninth Circuit, has held that the introduction of an audio tape where the defendant repeatedly states “no comment” to only certain questions is a violation of the

right to remain silent. Arnold v. Runnels, 421 F.3d 859 (9th Cir. 2005). In Arnold, the defendant had agreed to make non-recorded statements, but was allowed to “selectively invoke” his right to remain silent. Id. at 864. Also see, Bruni v. Lewis, 847 F.2d 561 (9th Cir. 1988).

The Federal Court of Appeals for the First Circuit agrees. In U.S. v. Eaton, the Court specifically held that a defendant may “selectively waive” their right to remain silent, and can answer some questions while refusing others. 890 F.2d 511 (1st Cir. 1989).

3. The use of Pamela’s silence was not for purpose of impeachment.

Nor can the Commonwealth argue that by giving exculpatory statements, the introduction of the tape was for the purpose of impeachment. At trial, the prosecutor did argue – circuitously – that the entire tape must be played so that Ms. Bartley would not get to express her opinion that Thomas Lee was the shooter without her silence impeaching her. The problem with this most circular of logic is the fact that the Commonwealth decided to use Ms. Bartley’s statement that she was terrified of Thomas Lee, so that *they* could introduce *her* silence. It is of the utmost importance to note that Ms. Bartley did not seek the introduction of this tape as substantive evidence or in lieu of her testimony. The *real* solution to this quandary (created by the Commonwealth) would be to *not play the tape* – an idea which apparently eluded the prosecution. The Trial Court’s decision to allow the Commonwealth to use this tape, over Ms. Bartley’s objection, was both clear and palpable error resulting in Ms. Bartley being denied a fair trial.

III. PAMELA BARTLEY WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF TESTIMONY REGARDING HER SILENCE AND BY THE PROSECUTOR'S REFERENCES TO THAT SILENCE DURING CLOSING

In its zeal to obtain a conviction, not only did the prosecution introduce and play the audio recording, they also made a point to elicit testimony regarding Pamela's silence as substantive evidence against her.

During the redirect examination of Detective Bowling, the "interview" is again referenced. The following colloquy takes places between the prosecutor and Detective Bowling:

Commonwealth: And when you asked her questions that only she could answer, like where's her gun, what did she do?

Bowling: She refused to answer.

Commonwealth: And, I believe, that her lawyer Mr. Lowery said that you never got an admission from her, did you.

Bowling: Nuh-uh. (No.)

Commonwealth: You never got a denial either, did you?

Bowling: No, I didn't.

Commonwealth: Did you get any help at all?

Bowling: From?

Commonwealth: From the Defendant regarding the death of her husband.

Bowling: No, ma'am, I didn't.

(VR, 12/15/09, 11:49 - 11:53; Bowling).

As well, during the Commonwealth's closing argument, Ms. Bartley's *silence* is again addressed. In her closing, the prosecutor says:

Pam, where's your gun? Pam's where's your gun? Pam what time did you go to Carla's? Detective Bowling said they were simple questions. It don't (sic) get much simpler. What time did you go to your daughters? Where's your gun? ...

Remember when the Detective said, 'You haven't cooperated with me a bit.' She didn't. Not one iota. ...

The Commonwealth has proved their case beyond a reasonable doubt. And we did it with no help from his wife, his daughter or her husband. ...

I will stand by Detective Bowling and his investigation. HE did everything he could with no help from most of Carl's immediate family. No help at all. Even the son-in-law when they get there the day the body is found, first thing he tells Detective Bowling is 'she's not talking to you without a lawyer.'

(VR, 12/17/09, 10:56 - 11:06; Commonwealth's Closing).

This is a clear and blatant violation of Ms. Bartley's right to avoid self-incrimination under the Fifth Amendment of the United States Constitution. The Commonwealth clearly used Ms. Bartley's non-custodial, pre-arrest, silence as *substantive* evidence against her. The Trial Court's decision to allow the Commonwealth to remark on her silence was both clear and palpable error resulting in Ms. Bartley being denied a fair trial.

It is well settled that a person has a right to not incriminate ones self. That right is so sacred that as recently as 2012, this Court has re-iterated the rule's sanctity. "[I]t is fundamental that a prosecutor may not comment upon a defendant's exercise of his right to remain silent." Slone v. Commonwealth, 382 S.W.3d 851 (Ky. 2012). Baumia, as discussed above, further makes this rule applicable – as it should be – to situations of pre-arrest silence. In Baumia, this Court clearly holds "[t]he fact that she was not in custody ... is irrelevant.... Because Appellant ... asserted her right to remain silent, her silence should not have been introduced against her.

This finely-settle point of law extends beyond the bounds of the Commonwealth, and is entrenched into our national jurisprudence. In Griffin v. California, the Supreme Court held that “the Fifth Amendment ... and in its bearing on the States by the Fourteenth Amendment, forbids ... comment by the prosecution on the accused’s silence....” 380 U.S. 609, 615 (1965). Allowing the prosecutor to comment on such is a relic of an “inquisitorial system.” Id. at 614.

As the dissenting Judge stated in the Court of Appeals on this case:

“the overarching error is the patent violation of the right of the accused to exercise her Fifth Amendment privilege against self-incrimination by remain silent. This case must be reversed on this palpable error alone – other errors notwithstanding. It cannot be finessed away – and should not be.”

IV. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE INTRODUCTION OF IRRELEVANT HANDGUNS WAS HARMLESS ERROR.

The Court of Appeals appropriately determined that the guns were irrelevant and should not have been introduced. The Court of Appeals made this holding pursuant to Major v. Commonwealth, 177 S.W.3d 700 (Ky. 2006) and Gerlaugh v. Commonwealth, 156 S.W.3d 747 (Ky. 2005). However, the Court of Appeals then found that there was harmless error, and refused to reverse the conviction. Based upon the standard elucidated in Matthews v. Commonwealth, 163 S.W.3d 11 (Ky. 2005), the Court found there was “significant evidence” of her guilt and no substantial possibility of a different result.

The decision of the Court of Appeals though fails to expound on what significant evidence existed. There was no physical evidence presented, except for the irrelevant guns. The Court of Appeals also says that there was evidence of Pamela’s “motive and opportunity.” What the Court of Appeals fails to address is the fact that the investigation

into this murder – performed by a detective with a familial stake in its outcome – was closed based upon the detective’s hunch almost as soon as it was opened.

A review of the investigation and the actual evidence against Pamela does not support the Court of Appeals finding that the result would not have been different but for the introduction of the handguns. Kentucky Rule of Criminal Procedure 9.24 prohibits reversal of or vacating a judgment unless the denial of such relief would be inconsistent with substantial justice. “If upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial.” Gosser v. Commonwealth, 31 S.W.3d 897, 903 (Ky. 2000). As “[t]he relevant inquiry is whether there is a reasonable probability that evidence complained of might have contributed to the conviction,” Burchett v. Commonwealth, 314 S.W.3d 756 (Ky. Ct. App. 2010), this Court should review the evidence provided against Ms. Bartley – *excluding* her silence and the irrelevant, inflammatory handguns – to determine whether there is a “substantial possibility that the result would have been any different.” Commonwealth v. McIntosh, 646 S.W.2d 43 (Ky. 1983).

In this case, there was *not* substantial evidence of Ms. Bartley’s guilt; further, there was substantial evidence that the investigation was far from thorough, and that the Detective had jumped to an early conclusion and pursued it without due regard to other possibilities.

The details of the homicide were never fully revealed to the jury in this case. Though the cause of death was ruled by the coroner as the gunshot wound to Carl Bartley’s head, the Commonwealth could not show any proof as to when the homicide

occurred. There was no conclusive proof that Carl Bartley was even murdered in his garage, where the body was found; in fact, Detective Bowling acknowledged that Carl Bartley could have been shot elsewhere. The prosecution seemed more intent on presenting cumulative evidence that Carl Bartley normally parked his car outside the garage – a fact of little to no relevance. Lastly, the Commonwealth was unable to provide any murder weapon during the trial, instead opting to focus on introducing weapons that were conclusively **not** the murder weapon.

Detective Bowling admitted that he had heard that Carl Bartley had a mistress, and that there were allegations of her blackmailing him. Indeed, one of these “tips” came from the Commonwealth’s Attorney himself. Detective Bowling admitted that he was aware that Carl Bartley would meet his mistress, Katherine Lee, at a cabin in the woods.

Despite the Detective knowing this information, he interviewed Katherine Lee once, and never asked for her consent to search the cabin for evidence of the crime, including photographs that could have potentially been related to a blackmail scheme. Carl Bartley was found wrapped in sheets and a comforter which were not identified. Detective Bowling never asked for consent to search the cabin for a matching sheet. An investigation into that cabin may very well have shed some light on these particular issues. .

Further, Detective Bowling, during cross-examination, admitted that he did not talk to the people who lived in the trailers behind the Bartley residence. Detective Bowling failed to interview any of the people on the road where the Bartley residence was located. He did not ask them whether they heard any gunshots, and – if they did – when. Though Katherine Lee had said she had an alibi, Detective Bowling did not

interview the potential alibi witness. Instead of fully investigating this case, including the possibility that either Katherine or Thomas Lee had culpability, Detective Bowling had already concluded *in his gut* that Pamela Bartley was guilty, and ignored all other possibilities.

Further, the Detective failed to fully investigate other potential perpetrators who had motive to murder Carl Bartley. This would include George Hunter, who Carl had testified against in a Trafficking charge. The Detective admitted that he did not only fail to talk to Mr. Hunter, he did not know that Carl Bartley had been involved as a witness in a trafficking of a controlled substance case. As well, Detective Bowling acknowledged that he had talked to Chuck Hart, gotten his alibi, but did not confirm the veracity of the alibi. This, even though it was clear that Carl Bartley had testified against Hart in a Federal jury-tampering charge stemming from the Federal vote-buying trial of former Bath County Attorney Donald "Champ" Maze.

Though hindsight is said to be 20/20, by not thoroughly investigating this case the Detective failed to either uncover any conclusive proof against Ms. Bartley or adequately exclude any other possible perpetrators. There simply does not exist any substantive evidence of Ms. Bartley's guilt. Without the Commonwealth's ability to use Ms. Bartley's silence as substantive proof against her, and without the Commonwealth's ability to introduce irrelevant and inflammatory evidence, there is a substantial likelihood that the jury would have found Ms. Bartley not-guilty. The jury would have been able to focus on all of the other possible suspects who the Detective failed to investigate.

The errors above are not harmless.

IV. CONCLUSION

The Court of Appeals committed error when it affirmed the Trial Court's decision to allow the Commonwealth to introduce the audio recording of Pamela Bartley. The introduction of this tape denied Pamela Bartley her right to a fair trial. The audio tape contained no relevant evidence to the investigation or the charge, and was only used to show that Pamela was exercising her right to remain silent. This silence was used as substantive evidence against her in violation of her constitutional rights. This was reversible error.

The Court of Appeals also committed error when it affirmed the Trial Court's decision to allow the Commonwealth to elicit testimony from Detective Bowling. The Commonwealth, through his testimony, presented to the jury the fact that Pamela failed to deny his speculated – and poorly researched – theory of the case, despite the fact that she had been advised by counsel not to speak in regard to the homicide, and made it clear to the Detective that she would not. This testimony was a clear comment by the Commonwealth on Pamela's right to remain silent, and was used substantively against her. This was palpable and reversible error.

The Court of Appeals also erred in affirming the Trial Court's allowance of the Commonwealth to address Pamela's silence during their closing argument. The commentary during the closing was clearly telling the jury that they should use that silence against Pamela in a substantive manner. This was palpable and reversible error.

Lastly, the Court of Appeals erred when it found that the wrongful introduction of the irrelevant firearms was harmless error. The Court of Appeals erred in finding that there was substantial evidence of Pamela's guilt.

None of these errors are harmless. There is a substantial likelihood that this evidence of both Pamela's silence and the firearms inflamed the jury and invited them to speculate into the truth of the case. There exists a substantial likelihood that the jury was able to ignore the glaring deficiencies in the Commonwealth's case due to their distraction with the erroneous evidence that was introduced.

WHEREFORE, Pamela Bartley requests this Court issue an ORDER directing that the Trial Court dismiss the indictment against her, or for other appropriate relief.

Respectfully Submitted,

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