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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2009-SC-000639

STEPHEN DRIVER **APPELLANT**

v. **APPEAL FROM MARSHALL CIRCUIT COURT**
HON. DENNIS R. FOUST, JUDGE
INDICTMENT NO. 07-CR-00020

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANT, STEPHEN DRIVER

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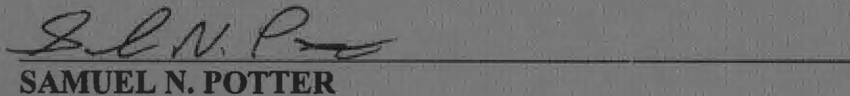
The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Dennis R. Foust, Judge, Marshall Circuit Court, Unit 215, Judicial Bldg., 80 Judicial Drive, Benton, Kentucky 42025; the Hon. Mike Ward, Commonwealth Attorney, P.O. Box 1488, Murray, Kentucky 42071; the Hon. Cirrus E.C.B. Hatfield, Asst. Public Defender, 503 N. 16th Street, Murray, Kentucky 42071; and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on March 31, 2011. The record on appeal has been returned to the Kentucky Supreme Court.



SAMUEL N. POTTER

Introduction

This Court granted Discretionary Review of a divided Court of Appeals opinion that affirmed the Marshall Circuit Court judgment convicting Stephen Driver of one count of first degree assault. Mr. Driver was sentenced to a prison term of 15 years.

Statement Regarding Oral Argument

Mr. Driver welcomes oral argument if the Court determines it would be beneficial in rendering a fair and just decision in his case.

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Statement of the Case

A Marshall County Grand Jury indicted Stephen Driver for one count of criminal attempt to commit murder on February 19, 2007. TR, 1. A two day jury trial was held on July 11-12, 2007. The Commonwealth called two witnesses. Mr. Driver chose not to present any evidence.

Vera Driver, the wife of Stephen Driver, testified that they were having an argument in the late evening of January 6 and early morning of January 7, 2007. VR No. 1: 7/11/07; 11:22:00. The fight began because she was having an affair. VR No. 1: 7/11/07; 1:07:20. Something was thrown at her, so she ran to the bathroom. She was pulled out of the bathroom by her hair. They talked for awhile. Then he became physical again, pulling her hair and choking her. VR No. 1: 7/11/07; 11:22:45. She said Mr. Driver said he was mad and did not know what he was going to do. Ms. Driver ran outside, but was pulled back inside and hit and choked some more.

She said Mr. Driver said he would kill her and himself. VR No. 1: 7/11/07; 11:23:15. She ran outside to her van, but Mr. Driver dragged her back in, saying the law would be there soon. VR No. 1: 7/11/07; 1:24:00. Their two children, ages six and eight, were home but did not see the fight because they were in their room. VR No. 1: 7/11/07; 11:39:00; 1:09:30.

Officer Dan Melone arrived at the Drivers' home in the early morning of January 7, 2007. After knocking for a few minutes, two children answered the door. VR No. 1: 7/11/07; 1:11:30. As he came inside, the children went to get their parents. Mr. Driver came out and said nothing was happening. VR No. 1: 7/11/07; 1:15:00. Officer Melone wanted to speak with Ms. Driver. Mr. Driver said she was in the shower. VR No. 1: 7/11/07; 1:15:45. Ms. Driver was hesitant to talk with him, but eventually wrote a statement that Mr. Driver hit and choked her with his hands and a belt. She made the statement at 3:26 a.m. on January 7, 2007, and it was read for the jury. VR No. 1: 7/11/07; 1:16:05; 1:20:23-1:21:36.

Ms. Driver suffered some injuries. She said quite a bit of hair had been pulled out that caused a large bald spot. VR No. 1: 7/11/07; 11:25:00. She did not black out, but felt like she was going to because she was being choked. She had trouble breathing afterwards. VR No. 1: 7/11/07; 11:25:15. Officer Melone testified he saw red marks and horizontal bruising on her neck and she had a lot of hair missing. VR No. 1: 7/11/07; 1:23:00; 1:26:10. She was taken to the emergency room for treatment, but released that night without being admitted. VR No. 1: 7/11/07; 11:28:20; 1:07:35. On the other hand, Mr. Driver spent the night in intensive care. VR No. 1: 7/11/07; 1:08:00.

Ms. Driver testified that she was mad and upset at Mr. Driver. She wanted to get even with him. To do this, she said she made up the part about

getting choked with a belt. He did not use a belt to choke her. VR No. 1: 7/11/07; 11:26:00. She did not believe Mr. Driver would ever kill her, and she was not scared of him when she testified. VR No. 1: 7/11/07; 11:45:05. At trial, she said some of the bruises on her neck happened when she was doing yard work earlier that day. She fell while pulling weeds in the backyard and scratched her neck on a tree limb. VR No. 1: 7/11/07; 11:28:35; 11:40:15. The rest of the bruises were caused when they were on the floor fighting that evening. VR No. 1: 7/11/07; 11:29:10. She testified at Mr. Driver's preliminary hearing that the bruises were caused by a tree limb that she walked into while mowing the lawn earlier that day. VR No. 1: 7/11/07; 1:24:15.

The jury found Mr. Driver guilty of first degree assault and recommended he serve a 15 year prison sentence. TR, 91; 78. The Marshall Circuit Court entered a final judgment that followed the jury's recommendation. TR, 103-104. The Court of Appeals issued a 2-1 divided opinion affirming Mr. Driver's appeal on September 4, 2009. Mr. Driver sought Discretionary Review with this Court, which was granted on December 9, 2010.

Arguments

I. Reversible error occurred when multiple prior bad acts, including a reference that Mr. Driver served prison time for assaulting his former wife, Linda, in 1995, were admitted to prove that Vera Driver's injury was not caused by accident or mistake or to prove Mr. Driver's intent.

Preservation

This issue was preserved. Mr. Driver filed a motion in limine to exclude the introduction of prior bad acts and made numerous objections during trial. TR, 50-53. VR No. 1: 7/11/07; 11:34:30; 11:42:40; 11:55:15; 1:36:15. VR No. 1: 7/12/07; 9:23:54; 9:32:30.

Facts

As stated in the Statement of the Case above, Ms. Driver's testimony at trial differed from her statement made to Officer Melone on the night of the incident. The Commonwealth sought to introduce evidence of prior bad acts of domestic violence to rebut her testimony. TR, 39-40. A hearing was held the morning of trial, following which the court allowed the prior bad acts to be introduced for the limited purpose of showing the absence of mistake or accident. VR No. 1: 7/11/07; 8:59:40. The court ordered that convictions could be used, but told the Commonwealth not to introduce a detailed account of the prior bad acts. VR No. 1: 7/11/07; 9:01:55. The court admonished the jury that the prior bad acts should not be taken as proof of guilt in this case, but for the issue of whether Ms. Driver's injury was caused by accident or mistake. VR No. 1: 7/11/07; 11:17:10; 11:58:15.

The Commonwealth introduced the following prior bad acts during the guilt phase of Mr. Driver's trial:

- Mr. Driver was convicted of fourth degree assault, terroristic threatening, and wanton endangerment in 2002 for waiving a butcher knife at Ms. Driver, slapping her, and threatening to kill her. VR No. 1: 7/11/07; 11:34:15; 11:35:50.
    - Mr. Driver lodged an objection asking that the details of the bad acts be limited at VR No. 1: 7/11/07; 11:34:30.
- In another situation, Ms. Driver was hit with Mr. Driver's hands, with a stick, with a clothes hanger, kicked with his feet, threatened to have her throat cut with a butcher knife, poked in her leg, had her hair pulled, made to eat dirt, and put in the trunk of their car. VR No. 1: 7/11/07; 11:36:10.
- Ms. Driver knew Mr. Driver had been convicted and served time in the penitentiary for assaulting his ex-wife. VR No. 1: 7/11/07; 11:41:40. He had been convicted of 1st degree assault and wanton endangerment against Linda Driver in 1995 for beating her with a .22 caliber rifle and baseball bat. VR No. 1: 7/11/07; 11:43:45.
    - Mr. Driver asked for a mistrial because of the reference to prison at VR No. 1: 7/11/07; 11:42:00; 1:36:15.
- Ms. Driver was not aware that in 1995, Mr. Driver broke into his former home, attacked his former family, and threatened to burn down their trailer. VR No. 1: 7/11/07; 11:44:15.

The Court of Appeals affirmed the trial court's ruling admitting this evidence. The Court found no error with admitting the prior bad acts related to Vera Driver. The Court found that the trial court did err when it admitted the reference that Mr. Driver served prison time for assaulting his former wife, Linda Driver. However, the Court held the error to be harmless, citing *Greene v. Commonwealth*, 197 S.W.3d 76, 84 (Ky. 2006). Opinion, 5-6.

Argument

The admission of this evidence violated Mr. Driver's right to Due Process. 5th and 14th Amendments, U.S. Constitution. The United States Supreme Court has declared that when a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)(*citing*, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)).

Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982); *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988). Evidence of the commission of crimes other than the one that is the subject of a charge is not admissible to prove that an accused is a person of criminal disposition. *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991); *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1992).

KRE 404(b) states that an exception may exist to the prohibition against other bad acts evidence where it is relevant to and probative of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. KRE 404(b) essentially holds that "evidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative

value on that issue outweighs the unfair prejudice with respect to character." *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). The standard of review for a 404(b) issue is abuse of discretion. *Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1994)(*overruled on other grounds in Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003)).

Because the potential for prejudice associated with this type of evidence is extremely high, "exceptions allowing evidence of collateral criminal acts must be strictly construed." *Billings*, 843 S.W.2d at 893. Consequently, "KRE 404(b) has always been interpreted as exclusionary in nature." *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). *Bell* further explained, "trial courts must apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." *Id.* "The burden is on the Commonwealth to establish a proper basis before admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect." *Daniel v. Commonwealth*, 905 S.W.2d 76, 78 (Ky. 1995). Ultimately, a court must make three inquiries: relevance, probativeness, and prejudice. *Bell* 875 S.W.2d at 889(citing Lawson, The Kentucky Evidence Law Handbook, 3d ed., Sec. 2.25(II) (1993)).

Relevance and probativeness. Evidence is relevant when it has a "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. The prior bad acts introduced by the Commonwealth were not relevant or probative. The three convictions introduced and the reference to serving time in prison did not tend to prove a fact that would make determination of guilt more probable.

It was the nature of the dispute regarding the belt that rendered the prior bad acts irrelevant and of no probative value. Ms. Driver did not deny that she had a fight with her husband. She did not deny that he hit her. She did not deny that he choked her. The only dispute was whether Mr. Driver used a belt to choke her.

None of the prior bad acts involved choking the current Ms. Driver or the former Ms. Driver with a belt. Thus, none of those prior bad acts made it more likely in this case that Ms. Driver was, in fact, choked with a belt. None of those prior bad acts—whether it was making her eat dirt, locking her in a trunk, hitting his ex-wife with a rifle and bat—make it more probable that he choked Ms. Driver with a belt on January 6-7, 2007. They were neither relevant nor probative.

Prejudice. As argued above, Mr. Driver asserts that the prior bad acts were not relevant or probative. If this court disagrees and determines they were relevant and had some probative value, Mr. Driver asserts that

whatever probative value the acts had were substantially outweighed by their undue prejudice. KRE 403.

Prejudice is that which is unnecessary and unreasonable. *Partin v. Commonwealth*, 918 S.W.2d 219, 223 (Ky. 1996). The *Bell* Court acknowledged that it "is very difficult for jurors to sift and separate such damaging information to avoid the natural inclination to view [the admission(s)] as evidence of a defendant's criminal disposition." *Bell*, 875 S.W.2d at 890.

The way in which the Commonwealth used the prior bad acts unduly prejudiced Mr. Driver. The court limited the use of prior bad acts to prove the absence of accident or mistake regarding the injury to Ms. Driver's neck. VR No. 1: 7/11/07; 11:17:10; 11:58:15. The Commonwealth violated the court's ruling and admonition more than once.

After Ms. Driver testified she was not afraid of Mr. Driver and wanted him to come home, the Commonwealth asked her if she saw a pattern in his behavior, referring to the prior bad acts. VR No. 1: 7/11/07; 11:54:35. Mr. Driver lodged another objection because the Commonwealth was using the prior bad acts in violation of the court's admonition, but the objection was overruled. VR No. 1: 7/11/07; 11:55:15.

In its closing, the Commonwealth argued:

> Now if that's not enough, if that's not enough to show what his ***intent*** was, look at ***history***, look at ***prior bad acts***. What did he do? Well, he chased her with a butcher knife. He put her in a trunk one time and made her eat dirt. He took a baseball bat on one occasion and a .22 rifle on another occasion to the body of his former wife. If you have any doubt about what his ***intent*** was and that it was anything but to kill her, look at what he's done and look at what he's said.

VR No. 1: 7/12/07; 9:23:17-9:23:54 (emphasis added). Mr. Driver objected and asked for mistrial or an admonition, but the court denied both. VR No. 1: 7/12/07; 9:23:54; 9:32:30.

The Court of Appeals found admission of this evidence to be harmless error. However, the Court ignored the prejudice that resulted from this evidence. "The relevant inquiry under the harmless error doctrine 'is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Jarvis v. Commonwealth*, 960 S.W.2d 466, 471 (Ky. 1998)(*quoting, Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

The Commonwealth's questioning of Ms. Driver about the pattern of Mr. Driver's behavior and its argument to the jury that the prior bad acts proved intent contributed to the conviction because this evidence was unnecessary and highly prejudicial. Both statements violated the court's ruling and admonition.

The role this erroneously admitted evidence played in securing the conviction precludes a finding of harmlessness. The Commonwealth used the prior bad acts in precisely the way the law prohibits prior bad acts from being used, as substantive evidence of guilt. The Commonwealth literally argued to the jury that because Mr. Driver he had done all these evil and horrendous things in the past, the jury should convict him for his current charges. This violated *Bell*, 875 S.W.2d at 889 and other authorities cited above, which prohibited using prior bad acts "as proof of an accused's propensity to commit a certain type of crime." From the Commonwealth's perspective, the jury had already learned that Mr. Driver had spent time in the penitentiary for assaulting his former wife and the Commonwealth was just telling the jury he needed to go back. The cumulative effect of improperly using the prior bad acts that should not have been admitted unduly prejudiced Mr. Driver.

The Commonwealth's use of this evidence in violation of the circuit court's limitation violated the "fundamental demands of justice and fair play." *Robey v. Commonwealth*, 943 S.W.2d 616, 619 (Ky. 1997). Stephen Driver's rights under the Fifth, Sixth and Fourteenth Amendments and Sections 2, 7, and 11 of the Kentucky Constitution were violated. *Payne*, 501 U.S. 808, 825. Moreover, introduction of this evidence resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law, as defined by the Supreme Court of the United States. *Old Chief v. U.S.*, 519 U.S. 172 (1997). He requests a new trial.

II. The Commonwealth committed prosecutorial misconduct during closing argument by arguing in violation of the trial court's ruling KRE 404(b) evidence and by quoting the children's statements even though they were not introduced into evidence.

Preservation

This issue was preserved by Mr. Driver's objections and requests for mistrials and admonitions. VR No. 1: 7/12/07; 9:23:54; 9:32:30.

Argument

Reversal for prosecutorial misconduct during a closing argument is required when the misconduct is flagrant or three other factors are met: (1) lack of overwhelming evidence of defendant's guilt, (2) objection by defense counsel to the misconduct, and (3) the trial court did not cure the misconduct by sufficiently admonishing the jury. *Barnes v. Commonwealth*, 91 S.W.3d. 564, 568 (Ky. 2002); *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994). Under either standard, Mr. Driver's case deserves to be reversed.

A prosecuting attorney should see that justice is meted out fairly and that the accused is dealt with fairly. It is not a part of the prosecutor's duty to abuse the accused in the hearing of the jury. *Howerton v. Commonwealth*, 129 Ky. 482, 112 S.W. 606 (1908). In their zeal to vindicate the law, prosecuting attorneys should not allow the excitement of the case to lead them beyond the domain of legitimate effort in their arguments to the jury, even when an atrocious crime has been committed. *Stasel v. Commonwealth*, 278 S.W. 2d 727, 729 (Ky. 1955).

Kentucky courts have "repeatedly condemned arguments in which attorneys for the commonwealth have indulged in villification [sic] and abuse of the defendant." *King v. Commonwealth*, 253 Ky 775, 70 S.W.2d 667, 669 (1934). A sound reason exists for this rule. Inflammatory prosecutorial remarks "invoke emotions which may cloud the jury's determination of [the defendant's] guilt." *U.S. v. Payne*, 2 F.3d. 706, 712 (6th Cir. 1993). However, "[s]ome leeway must be accorded each side in arguing the meaning and effect of evidence." *Kinnett v. Commonwealth*, 408 S.W.2d 417, 418 (Ky. 1966)(*cert. denied, Kinnett v. Kentucky*, 387 U.S. 924 (1967)).

The United States Supreme Court articulated the ideal aim and ethic that prosecutors should employ in prosecuting cases three-quarters of a century ago:

> The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935)(*see, Holt v. Commonwealth*, 219 S.W.3d 731, 737 (Ky. 2007). The Commonwealth failed to live up to this standard in Mr. Driver's case.

Prosecutorial misconduct occurred twice during the Commonwealth's closing statements. The first was detailed in Argument I, where the Commonwealth used Mr. Driver's prior bad acts in violation of the court's admonition and ruling by arguing they were substantive evidence of Mr. Driver's guilt. VR No. 1: 7/12/07; 9:23:17-9:23:54. When an objection was lodged, the Commonwealth suggested that defense counsel "hush long enough" for him to finish his statement. VR No. 1: 7/12/07; 9:24:37.

The second incident occurred near the end of the Commonwealth's closing statement:

> Forget Vera Driver for a minute. What about the kids? I asked you, 'Could you think of any other victims?' You said, 'Sure, the children.' They're innocent victims. That little girl was six years old. Krysta was six years old. The little boy was eight. And they answered the door for Dan Melone. And I don't know what they said, but I, I would guess they said something like, 'Are you here to help us? Are you here to help us?' Well, my question to you is, ladies and gentlemen, 'Are you here to help them?' I've done all I can do. Dan's done all he can do.

VR No. 1: 7/12/07; 9:30:15-9:30:55. The Commonwealth went on to argue to the jury that it needed to convict Mr. Driver to protect the children: "And don't you think these kids have a right to never, ever, ever have to answer the door for a police officer again and say something like 'Are you here to help us?" VR No. 1: 7/12/07; 9:31:43. The Commonwealth asked the jury to never let this happen again by convicting Mr. Driver of attempted murder or first degree assault. VR No. 1: 7/12/07; 9:32:00. Mr. Driver's objection was overruled. VR No. 1: 7/12/07; 9:32:30.

This kind of argument resembles a "send a message" type of argument. *Driver v. Commonwealth*, Opinion, 13 (Lambert, J., dissenting). These kinds of improper arguments are designed "to cajole or coerce a jury to reach a verdict that would meet the public favor" and to encourage the jury to "convict on grounds not reasonably inferred from the evidence." *Commonwealth v. Mitchell,* 165 S.W.3d 129, 132 (Ky. 2005).

The children's statement was not in evidence. The Commonwealth sought to introduce it through Officer Melone, but the court sustained Mr. Driver's hearsay objection. VR No. 1: 7/11/07; 1:12:35. Thus, in addition to arguing evidence that should not have been admitted in a manner that contradicted the court's ruling and admonition, the Commonwealth argued facts which were not in evidence as the linchpin argument in favor of guilt. Taking both instances of misconduct in context, the whole closing statement was tainted and undermined the validity of the jury's verdict. *Berger*, 295 U.S. 78. Such arguments run afoul of both tests announced in *Barnes.* 14th Amd., U.S. Const.; § 11. Ky. Const. A new trial is required.

III. The court erred by failing to instruct the jury on assault under extreme emotional disturbance even though Mr. Driver learned the night of the incident that Ms. Driver was having an affair.

Preservation

This issue was preserved. Mr. Driver tendered a jury instruction for assault under extreme emotional disturbance. TR, 64. The court declined to give the instruction. VR No. 1: 7/12/07; 8:47:10.

Argument

The trial court is required to give instructions "applicable to every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony." *Reed v. Commonwealth*, 738 S.W.2d 818, 822 (Ky. 1987); RCr 9.54(1). "[I]t is always the duty of a trial court to instruct a jury on lesser included offenses when it is so requested and it is justified by the evidence. " *Martin v. Commonwealth*, 571 S.W.2d 613, 615 (Ky. 1978). A defendant is entitled to a lesser-included instruction if the jury could have a reasonable doubt as to the willfulness required by the greater offense, but reasonably find that he is guilty of the lesser offense. *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995).

This is the law of not only the Commonwealth, but also the entire United States. The United States Supreme Court stated emphatically that, "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United*

States, 412 U.S. 205, 208 (1973). While the Court has "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

A lesser-included offense is one that includes the same or fewer elements than the primary offense. KRS 505.020(2)(a). Assault under EED is a lesser offense of first degree intentional assault. KRS 508.040. KRS 508.040 provides that a defendant charged with an assault may establish in mitigation that he acted under the influence of extreme emotional disturbance (EED). The purpose of the statute is to "provide the same type of mitigating, degree-reducing factor in the law of assault as exists in the law of homicide." Commentary to KRS 508.040; *Gossage v. Roberts*, 904 S.W.2d 246, 250 (Ky. App. 1995).

The definition of EED, which applies to assault cases as well as homicide cases, was fashioned by this Court in *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-469 (Ky. 1987):

> 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 rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a

> reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as [the] defendant believed them to be.

This Court explained this definition of EED in *Fields v. Commonwealth*, 44 S.W.3d 355 (Ky. 2001). Essential to a finding of EED is the presence of adequate provocation, or a triggering event. *Id.* at 359. However, "the concept of 'adequate provocation' is broad enough to include 'the cumulative impact of a series of related events.'" *Id.* Furthermore, it is not necessary that the provocation have been perpetrated by the victim of the assault or homicide. *Id.* at 358. And, "it is not required [] that the [assault or] homicide occur concurrently with the provocation, or even shortly thereafter, so long as the provocation remains uninterrupted until the [assault or] killing." *Id.* at 359. The reasonableness of the defendant's EED is a subjective determination, to be determined from the defendant's viewpoint, based upon the circumstances as the defendant believed them to be. *Id. See also*, *Creamer v. Commonwealth*, 629 S.W.2d 324, 325 (Ky. App. 1981).

Under the facts of this case, Mr. Driver was entitled to an instruction on assault under extreme emotional disturbance. Ms. Driver testified that the fight began because she was having an affair. VR No. 1: 7/11/07; 1:07:20. Whenever infidelity infiltrates a marriage, feelings will be hurt and tempers will flare. Perhaps the two most painful statements a spouse can ever hear are, "I don't love you anymore," and "I slept with someone else." Hearing

these phrases often evokes uncontrollable emotions within the offended spouse. These passionate emotions could enrage, inflame, or disturb people in Mr. Driver's position to the point where they lose control and act in unacceptable ways.

Any society with a since of morality ought not to tolerate a husband hitting his wife for any reason. Such conduct is despicable. Spousal abuse is rightly punished as a crime. But as with any other crime, whether murder or drug trafficking or theft, the punishment for spousal abuse must be proportional to the culpable conduct. Where the evidence is such that the jury could come to any of several conclusions, the court is required to submit instructions on the various alternatives. *Allen v. Commonwealth,* 245 Ky. 660, 54 S.W.2d 44 (Ky. 1932).

The law in Kentucky trusts the jury to determine the degree of culpability by providing jury instructions on lesser included offenses. In some situations, a jury might determine that a husband hitting his wife ought to be punished as a first degree assault. This might be the case where the husband acts without reason or provocation simply because he is a violent person. In other situations, a jury might determine that a husband hitting his wife ought to be punished as assault under EED. Learning that his wife had an affair is no excuse for a husband to hit her, but a jury could reasonably believe that such

a factor ought to mitigate the culpability of that act. The jury in Mr. Driver's case was not afforded that choice.

Two members of the panel denied Mr. Driver relief on this issue on the unreasonable grounds that he "failed to present any evidence of the state of his emotions at the time of the assault." Opinion, 12. This is unreasonable for several reasons.

First, the trial court must instruct on the whole law of the case, not just on the evidence, or lack thereof, offered by a defendant. *See, Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987)(reversing because testimony from a prosecution witness supported a lesser included offense instruction). This means that if evidence that would support the EED instruction came from either of the witnesses for the prosecution, the instruction should have been given.

Second, Ms. Driver testified that the fight began because she was having an affair. VR No. 1: 7/11/07; 1:07:20. Thus, the evidence introduced by the Commonwealth was that Mr. Driver learned of Ms. Driver's affair and that a fight began following this revelation. What reasonable inference can be drawn from these facts? That Mr. Driver reacted calmly, with a level-head, and evaluated the situation dispassionately. Or, that Mr. Driver lost his

temper and reacted based on raw, negative emotion. The latter inference is more reasonable, and it warrants the EED instruction.

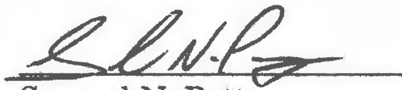
Third, the Court noted that Mr. Driver did not testify in accordance with his Fifth Amendment right. Denying the EED instruction in part based on his exercise of his Fifth Amendment right not to testify even though other evidence supported the instruction is analogous to commenting on his right to remain silent. *Doyle v. Ohio,* 426 U.S. 610, 618 (1976)("it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial").

The jury could have reasonably concluded that Ms. Driver's revelation of her affair created a temporary state of mind that so "enraged, inflamed, or disturbed" Mr. Driver as to overcome his judgment and cause him "to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from some evil or malicious purposes." *McClellan,* 715 S.W.2d at 468-469. A new trial is required where the jury receives an instruction on assault under extreme emotional disturbance. *Keeble*, 412 U.S. 205.

Conclusion

For these reasons, Stephen Driver requests this Court to reverse and remand his case to the Marshall Circuit Court with instructions to grant a new trial that is consistent with arguments raised in this brief. Mr. Driver also respectfully requests any and all other relief this Court determines is appropriate.

Respectfully submitted,



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