Commonwealth of Kentucky
Supreme Court

File No. 2009-SC-000639

STEPHEN DRIVER **APPELLANT**

v.

Appeal from Marshall Circuit Court
Hon. Dennis R. Faust, Judge
Indictment No. 2007-CR-00020

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 21st day of July, 2011, to: Hon. Dennis R. Faust, Judge, Marshall Circuit Court, Unit 215, Judicial Building, 80 Judicial Drive, Benton, Ky. 42025; via state delivered messenger mail to: Hon. Samuel N. Potter, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, Counsel for Appellant. Sent via electronic Mail to: Hon. Mike Ward, Commonwealth's Attorney, P. O. Box 1488, Murray, Ky. 42071.

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INTRODUCTION

The Appellant was found guilty of one (1) count of First Degree Assault, and sentenced to fifteen (15) years imprisonment. He now appeals that conviction and sentence.

STATEMENT OF ORAL ARGUMENT

Oral argument is not necessary in this case since the issues may be fairly decided based on the briefs of the parties.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellant was indicted by a Marshall County grand jury on one (1) count of Criminal Attempt to Commit Murder on February 19, 2007. (TR, 1). Appellant appeared for trial on July 11, 2007 and was found guilty of First Degree Assault and sentenced to fifteen (15) years imprisonment. (Id. at 78, 91). The Marshall Circuit Court entered final judgment following the jury's recommendation. (Id. at 103-104). The events that gave rise to this indictment and conviction occurred on the night of January 6, 2007. (VR I: 7/11/07; 11:22:00).

At trial the Commonwealth called Vera Driver, the Appellant's wife to testify. Ms. Driver stated that on the night of January 6, 2007 she and the Appellant were having an argument. (Id.). Ms. Driver stated that she and the Appellant were arguing because she was having an affair. She stated that the Appellant threw a bottle of window cleaner at her and she ran to the bathroom. She stated that the Appellant then drug her from the bathroom by her hair. (Id. at 11:22:22-11:22:55). Ms. Driver testified that the argument did not end there. She stated that the Appellant then became physically violent again and began pulling her hair out and choking her with his hands. She stated that the Appellant said that he was very mad and did not know what he was going to do. Ms. Driver stated that she got up and ran out of the house, but that the Appellant came outside and pulled her back into the house. (Id. at 11:23:00-11:23:37). She stated that the Appellant then began choking and hitting her again. Ms. Driver stated that the Appellant told her that he was just going to end it all by killing her and then killing himself. She stated that she attempted to run away and got into her van, but the Appellant heard the van start and came outside. She stated that the Appellant told her to come back inside, but she

did not want to. She stated that the Appellant then grabbed her and pulled her back inside the house, telling her that the police would soon arrive because the neighbors would have called 911 by then. (Id. at 11:23:40-11:24:30). Ms. Driver testified that the Appellant then told her again that he was going to kill her and then kill himself. (Id. at 11:24:30-11:24:36). Ms. Driver stated that she was being loud and yelling, because her hair was being pulled out and she was being beat. She stated that she had a "very good" bald spot on her head. She stated that she was afraid that she would be hurt and that she felt like she was going to black out, because the Appellant was choking her. (Id. at 11:24:40-11:25:44). Ms. Driver testified that she told the police that the Appellant choked her with a belt, because she was angry with him and wanted to hurt him. She stated that she lied to the police about the Appellant using a belt to choke her. (Id. at 11:26:00-11:27:04).

The Commonwealth showed Ms. Driver photos of her injuries, which she identified. (Id. at 11:27:44). Ms. Driver testified that she went to the emergency room the night the Appellant assaulted her. She stated that she had marks on her neck on a spot on her head where hair had been pulled out. She testified that some of the marks on her neck were from doing yard work earlier in the day as well as from the Appellant choking her with his hands. Ms. Driver stated that she does not remember if the Appellant had any injuries. (Id. at 11:28:16-11:29:55). Ms. Driver admitted that she was telling a different story about her injuries for the third time. She stated that she did not want the Appellant to go to jail and that she visits him on a regular basis and wanted him home. (Id. at 11:30:05-11:30:56). Ms. Driver stated that she had never brought charges against the Appellant, but then stated that she had charged him with abuse. (Id. at 11:32:10-11:32:50). Ms. Driver

stated that she had lied that day. As well as previously to the police. Ms. Driver then was shown several pictures of the marks on her neck and stated again that the Appellant did not choke her with a belt, but used his hands. (Id. at 11:32:55-11:34:00).

Ms. Driver stated that in 2002 she brought charges against the Appellant and he was convicted of Fourth Degree Assault, Terroristic Threatening, and Wanton Endangerment for waiving a butcher knife at Ms. Driver, slapping her, and threatening to kill her. (Id. at 11:34:15, 11:35:50). She also stated that in October of 2002 Appellant hit her with his hands, kicked her with his feet, threatened to cut her throat with a butcher knife, poked her in her leg, pulled out her hair, made her eat dirt, and forced her into the trunk of her car. (Id. at 11:36:10). Ms. Driver then testified again that she had lied about the belt on multiple occasions previously. (Id. at 11:38:00). Ms. Driver stated that her children who were six (6) and eight (8) at the time, were at home at the time that the Appellant assaulted her. Ms. Driver testified that the Appellant's assaults on her effects her children. (Id. at 11:39:00-11:40:10). Ms. Driver stated that the marks on her neck came from when she fell doing yard work and scratched her neck on the limbs of a tree. (Id. at 11:40:16). Ms. Driver stated that she was aware that the Appellant had been convicted and served time in the penitentiary time for assaulting his ex-wife. (Id. at 11:41:40). Ms. Driver also stated that she knew that the Appellant had been convicted of First Degree Assault and Wanton Endangerment, for seriously causing physical injury to his ex-wife by beating her with a rifle and a baseball bat. (Id. at 11:43:45). Ms. Driver stated that she was not aware that in 1995 the Appellant broke into his ex-wife's home, attacked his former

family (including his ex-wife's son), and threatened to burn down their trailer. (Id. at 11:44:15).

Ms. Driver stated that she went to the emergency room where the doctors checked her neck and bald spot on her head. She stated that she was having trouble breathing from being choked. (Id. at 11:46:00). Ms. Driver stated that she did not come to the door when the police showed-up because she did not want the Appellant to go to jail. She stated that wrapped a towel around her head because she had just gotten a shower and she didn't want the officer to see her bald spot where the Appellant had pulled her hair out. (Id. at 11:54:00). Ms. Driver testified that she did not recall telling the victim's advocate that she was afraid that if she testified against the Appellant and he got out of jail, that he would kill her. (Id. at 11:57:32). Ms. Driver finally testified that she believed at the time that the Appellant would eventually stop beating her and not kill her. (Id. at 1:10:40).

Officer Dan Melone, a detective with the Marshall County Sheriff's Office testified next. (Id. at 1:11:40). Officer Melone arrived at the Appellant's home in the early morning of January 7, 2007. He stated that he knocked for several minutes before two small children came to the door. (Id. at 1:11:50-1:12:40). Officer Melone stated that he entered the Appellant's home with the two children and the children went to get their parents. Appellant came to meet the officer and told him that nothing was wrong. The Appellant told Officer Melone that he and his wife had been arguing, but nothing was wrong. Officer Melone stated that Ms. Driver came to speak with him, but appeared hesitant to do so. (Id. at 1:15:00). Officer Melone stated that Ms. Driver eventually wrote a statement that the Appellant had hit her and choked her with his hands and a belt. Officer

Melone stated that Ms. Driver told him that she thought that she was going to be killed, and that she took him to the belt that she stated the Appellant used to choke her. (1:16:05, 1:17:45, 1:20:23-1:21:46). Officer Melone read Ms. Driver's statement to the court. (Id. at 1:20:23-1:21:46). Officer Melone also testified that Ms. Driver had red marks and horizontal bruising on her neck and that she had a lot of hair missing. (Id. at 1:23:00, 1:26:10).

The Appellant appealed this conviction and sentence to the Kentucky Court of Appeals, who affirmed the conviction and sentence on September 4, 2009. Driver v. Commonwealth, 2007-CA-001996-MR, 2009 WL 2832249. Appellant then moved for discretionary review, which this Court granted. Other facts will be discussed below as needed.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PRIOR CHARGED ACTS PURSUANT TO KRE 404(B).

The Appellant's first argument on discretionary review concerns the trial court's admission of certain prior bad acts committed by the Appellant for the purpose of showing absence of mistake or accident. (Aplt. Br., 4-11). As noted below, the evidence was admitted for a relevant reason, was probative, and not overly prejudicial. Further, a limiting admonition was given to the jury. (TR 93-94; VR I, 7/11/07; 11:17:10, 11:58:15). That admonition informed the jury fully of the limited purpose of the evidence and the jury is presumed to have followed the admonition. The Kentucky Court of Appeals also addressed this claim and found:

> The Commonwealth sought to prove attempted murder by establishing the severity of the assault and Driver's threats to Vera. Driver countered by attempting to minimize the effect of his threats to kill Vera during the assault. He relied in part on Vera's own testimony, in which she presented a version of events portraying him as less culpable than the statement she made to the responding officer on the actual night of the assault. Sticking with her testimony from the preliminary hearing, Vera denied that Driver had used the belt to choke her and attributed some of the bruising on her neck to an earlier fall in the yard. She told the jury she did not believe Driver would ever kill her and that she was not afraid of him at the time of the trial. In her opening statement, Driver's trial counsel told the jury that the assault began as a mutual argument that spiraled into a physical altercation. She further stated that murdering his wife was never on her client's mind.
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> The Kentucky Supreme Court previously determined that evidence of a defendant's prior abuse of a murder victim

> was admissible under KRE 404(b)(1) to show absence of mistake when he later killed her. Moseley v. Commonwealth, 960 S.W.2d 460, 461 (Ky.1997). Thus, the purpose for which the Commonwealth sought to introduce the evidence of Driver's prior acts of abuse against Vera was proper under the rule. While Driver is correct that evidence of his assaults against his former wife was not admissible to prove either intent or absence of mistake with regard to his assault on Vera, we find the admission of this evidence to be harmless error. *See* Greene v. Commonwealth, 197 S.W.3d 76, 84 (Ky.2006)(defining harmless error as one in which "the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred").

(Slip Op. at 4-5).

The trial court ultimately decided prior to trial on July 11, 2007, that the evidence could be presented to prove absence of mistake or accident. (VR I, 7/11/07; 8:59:40). However, the court also stated in its Order Denying the Appellant's Motion for Judgment of Acquittal or Judgment of Not Guilty Notwithstanding the Verdict or Alternative Motion for a New Trial, that it could have also allowed the evidence to be introduced to prove a common scheme, plan or system on the part of the Appellant. (TR, 100-101).

The evidence, of which the Appellant complains, consists of his prior charges of domestic violence brought both by Ms. Driver, as well as his previous wife. *See* Counterstatement of the Case *supra*.

Evidence of other crimes or wrongs is generally inadmissible, but can be admitted if it is "for some other purpose such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." KRE 404(b)(1). The list of

permissible uses under the rule is not an exhaustive list, and other valid reasons may exits. As noted below, absence of mistake or accident and common scheme or plan, are just two of the reasons to allow prior bad acts to be admissible at trial. A three (3) part test is used to determine the admissibility of evidence under KRE 404(b): 1) relevance, 2) probativeness, and 3) prejudice. Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994).

According to Bell, bad acts evidence must be relevant for some purpose other than to prove the Appellant's criminal disposition. 875 S.W.2d at 889. In this case, it clearly was relevant. The evidence of the Appellant's subsequent actions bore a striking similarity to the crime for which he stood indicted. It should also be noted that the many of the incidents involved Ms. Driver. The common elements were 1) physically violent toward the Appellant's wife, 2) striking, 3) the locality in which the crimes occurred was very similar. Thus, as argued by the Commonwealth, the prior crimes served to show common scheme or plan. (VR I: 7/11/07; 11:54:35). Thus, by showing those traits, the evidence became relevant for a valid reason, and not for simply showing the Appellant's criminal propensity. *See* Commonwealth v. Buford, 197 S.W.3d 66, 70 (Ky. 2006), *quoting* Commonwealth v. English, 993 S.W.2d 941, 945 (Ky.1999).

> Stated another way, it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi. Although it is not required that the facts be identical in all respects, "evidence of other acts of sexual deviance ... must be so similar to the crime on trial as to constitute a so-called signature crime."

Buford, 197 S.W.3d at 70, *quoting* Dickerson v. Commonwealth, 174 S.W.3d 451, 469 (Ky. 2005). Appellant's prior acts could be admissible under a number of the reasons enumerated in KRE 404(b). These prior acts also showed that there was no mistake that

the Appellant was physically violent with his wives and that it was not an accident that he used extreme force with Ms. Driver during his assault on her. Ms. Driver herself gave conflicting statements concerning her husband's violent nature, *See* Counterstatment *supra*. These prior acts showed that Ms. Driver's original statement to the police was the most correct statement that she had given, because it proved that there was no mistake that the Appellant was capable of extreme physical violence with weapons beyond his own hands. The jury would have been free after admonishment to accept whatever version of the events that they chose to believe. The admission of evidence and the determination of relevance is within the discretion of the trial court. Partin v. Commonwealth, 918 S.W.2d. 219 (Ky. 1996). Here the commonality between the charged and uncharged acts committed by the Appellant, is unmistakable. The evidence of the prior crimes was certainly relevant, and the first prong of the Bell test is satisfied.

Next, Bell calls for a determination of whether the evidence is probative on the permitted issue. 875 S.W.2d at 890. Appellant argues that the evidence of these acts was not probative, because none of the prior acts involved a belt. (Aplt. Br. at 7-8). However, as discussed above these two sets of events are nearly identical. Seemingly the only difference is the fact that the Appellant used a belt to harm Ms. Driver in the current altercation and not a rifle or baseball bat. The similarity in these separate events as well as the need to show that the Appellant was engaging in a common scheme or plan of events was probative enough for the entry of the 404(b) evidence. Therefore, the second prong of the Bell test is satisfied.

Finally, the Bell analysis requires that probativeness be weighed against prejudicial value. Appellant requested a limiting admonition be given to the jury concerning the KRE 404(b) evidence, and such was in fact given. TR, 93; (VR I: 7/11/07; 11:58:20); *See also* KRE 105. Appellant's arguments of unfair prejudice must come to naught, since it is presumed that juries generally follow admonitions. Grundy v. Commonwealth, 25 S.W.3d 76, 82-83 (Ky. 2000). *See also* Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003); Carpenter v. Commonwealth, 256 S.W.2d 509 (Ky. 1953); Neeley v. Commonwealth, 591 S.W.2d 366 (Ky. 1979); Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky. App. 1993).

Furthermore, the simple probative value of the evidence of the nearly identical acts committed against the same woman and a previous wife, outweigh the prejudicial value, in light of the admonition. Appellant's prior crimes most certainly had a standard *modus operandi* and showed a common scheme or plan. Certainly the evidence was prejudicial, as all evidence against the accused must necessarily be. However, the test is whether that prejudice outweighs it's probative value. In this case it does not. The third prong of the Bell test is satisfied in favor of the decision to admit the evidence.

The trial court did not abuse its discretion in admitting evidence of Appellant's prior charges of domestic violence, under KRE 404(b). The evidence was relevant for several reasons including absence of mistake and common scheme or plan. The probative value outweighed the prejudicial effect, especially in light of the limiting admonition given by the court to the jury. There is no error.

A. **Any Error by the Trial Court Regarding the Admissibility of Evidence was Harmless.**

Even if the admission of the Appellant's prior crimes is found to be error, it is purely harmless error. RCr 9.24. The error did not serve to work substantial injustice on the Appellant. Greene v. Commonwealth, 197 S.W.3d 76, 83 (Ky. 2006). As the Greene Court held:

> An error is harmless where, considering the entire case, the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred.

Id. *citing* Scott v. Commonwealth, 495 S.W.2d 800, 801-02 (Ky. 1972), *cert. denied*, 414 U.S. 1073, 94 S.Ct. 587, 38 L.Ed.2d 479 (1973). Here, the evidence of Appellant's guilt was established outside of the complained of testimony. As discussed above Ms. Driver's testimony provided sufficient evidence to convict the Appellant of the charged crimes.

As such, there was overwhelming evidence of the Appellant's guilt. It should also be noted that the jury did not convict the Appellant of attempted murder, rather the Appellant was convicted of the lesser included offense of first-degree assault. (TR 91). This fact shows that the jury followed the admonition and was not influenced by the admission of the prior offenses. Accordingly, the substantial rights of Appellant were not affected and there was no likely possibility that the result of the trial would have been different had the alleged error not occurred.

II.

THERE WAS NO PROSECUTORIAL MISCONDUCT AS TO DENY THE APPELLANT A FAIR TRIAL

The Appellant asserts that comments made by the Commonwealth during its closing argument were improper. (Aplt. Br. at 10; 12-15). Two (2) distinct areas of alleged prejudicial comments can be found in the Appellant's Brief, and will be addressed in turn below.

A. Standard of Review

When reviewing claims of error in closing argument, "the required analysis, by an appellate court, must focus on the overall fairness of the trial and not the culpability of the prosecutor... a prosecutor may comment on the tactics, may comment on the evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, 744 S.W.2d 407, 411-412 (Ky. 1987). Reversal based on misconduct of the prosecutor is only warranted if the misconduct is so severe as to render the entire trial fundamentally unfair. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

B. The prosecutor committed no misconduct that served to deny the Appellant a fair trial.

The Appellant first alleges that the Commonwealth used the evidence introduced of prior crimes in violation of KRE 404(b). (Aplt. Br. at 10). Specifically, the Appellant takes issue with the Commonwealth asking the jurors to look at the Appellant's history to find his common scheme, motive, *modus operandi*, and that there was no mistake. However, this is exactly what prior acts admitted under KRE 404(b) provide for.

There was no prosecutorial misconduct in this case, and the Commonwealth's statement to the jury to reflect on the Appellant's history of violence did not serve as an inference that the jury should convict him of this crime for the previous crimes that he committed. Rather, the Commonwealth was asking the jury to see that the Appellant, did indeed, have a common scheme or plan, that his *modus operandi* involved threatening and attempting to kill his wives, and that there was no mistake that he was a violent person who would use more than his hands to hurt someone.

The Kentucky Court of Appeals also addressed this claim and held:

> Driver's argument does not satisfy the first element of the Matheney [v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006)] test. The evidence of Driver's guilt included Vera's account of the attack, as well as photographs of the injuries she sustained. Even on appeal, Driver does not argue that Vera's assault was committed by anoyone other than himself. There is overwhelming proof supporting Driver's conviction for assaulting Vera.
>
> Additionally, we disagree with Driver's contention that mention of his prior acts of violence against his wife was flagrant misconduct in the context in which it occurred. "Some 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)(citation omitted). We do not believe the language used by the Commonwealth in closing argument indicates an improper motive such as urging the jury to find guilt on the present charge due to prior offenses. More directly, proof of prior bad acts is admissible to prove intent. KRE 404(b)(1).

(Slip Op. at 6-7).

Appellant next argues that the Commonwealth asked the jury to convict the Appellant in order to protect Ms. Driver's children. (Aplt. Br. at 14-15). However, at no point does the Commonwealth specifically ask the jury for a conviction to protect the

children, rather he asked the jurors to help the Appellant's children. (VR I: 7/12/07; 9:30:15). In fact the complained of statements made during closing arguments regarding the Appellant's children were simply made in an effort to combat Ms. Driver's statements at trial that the Appellant would not hurt the children, and to show that the children while not physically injured had been emotionally injured. These comments do not rise to the level of prosecutorial misconduct. (VR I: 7/11/07; 11:38:50-11:40:15). Also the Appellant complains that his children's statement to the police, "Are you here to help us?" was never entered into evidence, but was argued by the Commonwealth in its closing argument. (Aplt. Br. at 14-15). However, during closing argument the Commonwealth stated that he did not know what the children said, but that he would guess that it was something like, "Are you here to help us?" (VR I: 7/12/07; 9:30:00). In reviewing claims of misconduct this Court "must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right to a fair trial." Slaughter v. Commonwealth, 744, S.W.2d 407, 411 (Ky. 1987). In so doing, however, this Court "must focus on the overall fairness of the trial, and not the culpability of the prosecutor." Id., at 411-412; Maxie v. Commonwealth, 82 S.W.3d 860, 866 (Ky. 2002). To warrant reversal, prosecutorial misconduct must be "so serious as to render the entire trial fundamentally unfair." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

Courts will only reverse for prosecutorial misconduct in a closing argument if the misconduct is "flagrant" or if each of the following three conditions is 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 a sufficient admonishment to the jury.

Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky.2002).

Complained of comments made by the Commonwealth were made in the passion of the closing argument, and reflected no intentional bad faith on the behalf of the Commonwealth. Indeed a settled maxim is relevant here: "[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that - *an argument*." Slaughter, 744 S.W.2d at 412 (emphasis in original). The evidence of Appellant's guilt in this case was overwhelming. Appellant was not denied a fair trial as the result of comments made by the Commonwealth's Attorney. Reversal is not required. Irrespective of the comments of either party, the jury is able to recall the testimony and is the ultimate trier of fact. These innocuous comments concerning the Appellant's children and the Appellant's prior violent history made by the Commonwealth did not serve to destroy the overall fairness of the trial.

The Kentucky Court of Appeals also addressed this claim and held:

> Driver claims that the children's unsubstantiated statements, to which he objected, were the linchpin of the Commonwealth's argument proving his guilt. Clearly, the Commonwealth should not have offered to the jury, as a reason for conviction, that it would protect the children from the need to allow the police through the door to rescue their mother. "When prosecutorial misconduct is claimed, the relevant inquiry on appeal should always center around [sic] the overall fairness of the trial, bot the culpability of the prosecutor." Maxie v. Commonwealth, 82 S.W.3d 860, 866 (Ky. 2002). Thus, given the strength of the evidence against Driver and the overall fairness of the trial, we hold that the Commonwealth's improper but brief comments did not affect the outcome of the trial.

(Slip Op. at 8).

Taking the case as a whole, it is impossible to conclude that any actions by

the Commonwealth rose to intentional misconduct. If indeed this Court considers the comments of the Commonwealth to have been errors, those errors neither alone or in concert with one another rise to a level requiring reversal.

III.

THE CIRCUIT COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON ASSAULT UNDER EXTREME EMOTIONAL DISTURBANCE AS A LESSER INCLUDED OFFENSE OF BURGLARY.

Prior to the second day of trial and closing arguments, the circuit judge heard arguments and discussion regarding jury instructions. The trial refused to give an Assault Under Extreme Emotional Disturbance instruction. (VR I: 7/12/07; 8:47:10).

The trial court properly determined that under the evidence introduced at trial the Appellant was not entitled to an Assault Under Extreme Emotional Disturbance instruction as it related to the charge of Criminal Attempt to Commit Murder and Assault.

Appellant claims that it was error for the trial court to refuse to give an instruction on Assault Under Extreme Emotional Disturbance as a lesser included offense of the offense of Assault. (Aplt. Br. at 16-21). While Appellant did in fact request such an instruction, the trial court was correct when it ruled that the instruction was not warranted.

In general, when the Commonwealth adduces evidence warranting an inference of a lesser degree of a charged offense, the trial court should instruct on the lesser degree/lesser charged offense. Wombles v. Commonwealth, 831 S.W.2d 172, 175 (Ky. 1992); Commonwealth v. Collins, 821 S.W.2d 488, 491 (Ky. 1991). *See* Luttrell v.

Commonwealth, 554 S.W.2d 75, 78 (Ky. 1977). There must be some evidence to support the giving of a lesser included offense instruction; an instruction on a lesser included offense should not be given unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser included offense. Commonwealth v. Collins, 821 S.W.2d at 491; Luttrell v. Commonwealth, 554 S.W.2d at 78.

A trial court is required to give instructions applicable to every state of the case covered by the indictment and deducible or supported to any extent by the testimony. Commonwealth v. Collins, 821 S.W.2d at 491. A determination of what issues to submit to the jury should be made based upon the totality of the evidence. *Id.*

The circuit court correctly ruled that an instruction on Assault Under Extreme Emotional Disturbance was inappropriate as a lesser included in the case at bar, as evidence was not presented which would warrant the giving of an Assault Under Extreme Emotional Disturbance instruction.

While Assault Under Extreme Emotional Disturbance may be a lesser included offense of Assault, no evidence was introduced that would show that the Appellant warranted the instruction. What offense to charge a defendant with is a decision left solely to the discretion of the Commonwealth. Commonwealth v. McKinney, 594 S.W.2d 884 (Ky. 1979); Commonwealth v. Self, *supra*.

The trial court gives instructions based on the totality of the evidence and "applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." Lee v. Commonwealth, 329 S.W.2d 57, 60

(Ky. 1959); *see also* Reed v. Commonwealth, 738 S.W.2d 818 (Ky. 1987); Rice v. Commonwealth, 472 S.W.2d 512 (Ky. 1971). "Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, ... that duty does not require an instruction on a theory with no evidentiary foundation." Gabow v. Commonwealth, 34 S.W.3d 63, 72 (Ky. 2001), *quoting* Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998); *see also* Thompkins v. Commonwealth, 54 S.W.3d 147, 151 (Ky. 2001).

A lesser included offense is one that is established by proof of the same or less than all of the facts required to prove the primary offense. KRS 505.020(2)(a); Roark v. Commonwealth, 90 S.W.3d 24, 38 (Ky. 2002); Commonwealth v. Day, 983 S.W.2d 505, 509 (Ky. 1999). Lesser-included offenses are "appropriate only when the state of the evidence is such that a juror might entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond reasonable doubt that the defendant is guilty of the lesser offense." Jacobs v. Commonwealth, 58 S.W.3d 435, 446 (Ky. 2001), *quoting* Billings v. Commonwealth, 843 S.W.2d 890, 894 (Ky. 1992). *See also* Parker v. Commonwealth, 952 S.W.2d 209, 211-212 (Ky. 1997) ("Lesser-included offense instructions are proper if the jury could consider a doubt as to the greater offense and also find guilt beyond a reasonable doubt on the lesser offense." Id.); Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993). "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999).

"Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble v. United States, 412 U.S. 205, 212- 213, 93 S.Ct. 1993, 1998, 36 L.Ed.2d 844, 850 (1973).

Here, as the trial court correctly found, Appellant introduced no evidence that he was under Extreme Emotional Disturbance at the time that he assaulted his wife. Rather, only the introduction of evidence that he spent time at the hospital that night, and that Ms. Driver had informed him that she was having an affair would support an EED instruction. *See* Counterstatement *supra*. However, this evidence does not, by itself, lay any foundation, or create a *prima facia* case for an EED instruction. No evidence was introduced as to the Appellant's state of mind or his exact medical condition. Also the Appellant himself did not introduce any evidence. The Kentucky Court of Appeals also addressed this claim of error and found that "[t]he mere fact of marital infidelity, without any evidence of its effect on Driver's emotions at the time of his attack on Vera, is insufficient justification for a mitigating instruction." (Slip Op. at 11). A reasonable person could not find that the Appellant was acting under an extreme emotional disturbance, given the great amount of uncontroverted evidence presented, as well as his history of prior incredibly similar violent offenses. The trial court fulfilled its duty to instruct on the whole law of the case as required. Johnson v. Commonwealth, 721 S.W .2d 721, 722 (Ky. App. 1986). The court correctly provided the jury with instructions on all offenses supported by the evidence. Cheser v. Commonwealth, 904 S.W.2d 239, 243 (Ky. App. 1994); Northeast Health Management Inc. v. Colton, 56 S.W.3d 440, 450 (Ky.

App. 2001). There is no reversible error in the instructions given, or the jury's determination.

Given the great weight of evidence against the Appellant, there was no error in the instructions presented to the jury and any error in the instructions was not prejudicial and was harmless. Therefore, no error occurred in this case. Appellant's argument to the contrary lacks merit.

CONCLUSION

For the above stated reasons, the decisions of the Marshall Circuit Court and the Kentucky Court of Appeals, should be affirmed.

Respectfully submitted,

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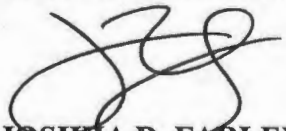

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