

Commonwealth of Kentucky
Supreme Court
No. 2008-SC-000203-MR

FILED

MAR 19 2009

SUPREME COURT CLERK

WILLIAM R. STAR

APPELLANT

v.

Appeal from Johnson Circuit Court
Hon. John David Preston, Judge
Indictment No. 07-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

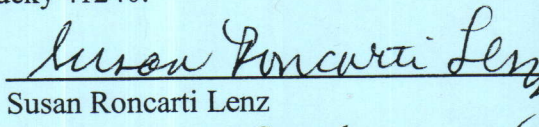
Attorney General of Kentucky

SUSAN RONCARTI LENZ

Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 19th day of March, 2009, to Hon. John David Preston, Judge, Johnson Circuit Court, Judicial Center, Suite 217, 908 3rd Street, Paintsville, Kentucky 41240; via messenger mail to Hon. Emily Holt Rhorer, Assistant Public Advocate, Department of Public Advocacy, Suite 302, 100 Fair Oaks Lane, Frankfort, Kentucky 40601; and via electronic mail to Hon. Anna Deskins Melvin, Commonwealth Attorney, 704 Broadway, Suite B, P.O. Box 596, Paintsville, Kentucky 41240.


Susan Roncarti Lenz
Assistant Attorney General

INTRODUCTION

On February 4, 2008, after a jury trial, a Johnson County jury found William Ray Star guilty but mentally ill, of the following offenses: two counts of murder, one count of kidnaping, and one count of first degree assault. The jury recommended a total sentence of 30 years to serve. Star now directly appeals his convictions and sentence.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 13

I. THE TRIAL COURT PROPERLY REFUSED TO DIRECT A VERDICT ON ALL OFFENSES. 13

Port v. Commonwealth,
906 S.W.2d 327, 330-331 (Ky. 1995) 13

Edwards v. Commonwealth,
554 S.W.2d 380, 383 (Ky. 1977) 13

KRS 504.020. 13

McClellan v. Commonwealth,
715 S.W.2d 464, 468 (Ky. 1986) 15

II. THE TRIAL COURT PROPERLY REFUSED TO FIND KRS 504.150 TO BE UNCONSTITUTIONAL; THE TRIAL COURT’S INSTRUCTION TO THE JURY ACCURATELY REFLECTED THE CONSEQUENCES OF A VERDICT OF GUILTY BUT MENTALLY ILL. 15

Brown v. Commonwealth,
934 S.W.2d 242, 246 (Ky. 1996) 16

KRE 504.150 17

O’Hara v. Wigginton,
24 F.3d 823, 827 (6th Cir. 1994) 17

III. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF. 17

	<u>Brown v. Commonwealth,</u> 934 S.W.2d 242, 247 (Ky. 1996)	17
	<u>Hardin v. Savageau,</u> 906 S.W.2d 356, 358 (Ky. 1995)	17
IV.	DETECTIVE GOBLE NEVER TOLD THE JURY THAT STAR INVOKED EITHER HIS RIGHT TO COUNSEL OR HIS RIGHT TO REMAIN SILENT; THEREFORE, THE TRIAL COURT WAS CORRECT IN REFUSING TO GRANT A MISTRIAL AFTER THE TESTIMONY.	18
V.	ERROR, IF ANY, IN THE TRIAL COURT’S REFUSAL TO ALLOW STAR TO CROSS-EXAMINE GERALDINE LITTON ABOUT A PENDING CRIMINAL CASE, WAS HARMLESS BEYOND A REASONABLE DOUBT.	19
	<u>Chapman v. California,</u> 386 U.S. 18 (1967)	19
	<u>Delaware v. Van Arsdall,</u> 475 U.S. 673, 684 (1986)	19
VI.	STAR’S RIGHT TO CONFRONTATION WAS NOT VIOLATED DUE TO THE COURTROOM CONFIGURATION AND, EVEN IF IT WERE VIOLATED, ANY ALLEGED VIOLATION WAS HARMLESS BEYOND A REASONABLE DOUBT.	20
	<u>Coy v. Iowa,</u> 487 U.S.1012, 1019 (1988)	20
	<u>Sparkman v. Commonwealth,</u> 250 S.W. 3d 667, 670, footnote 9 (Ky. 2008), <i>citing</i> to <u>Delaware v. Van Arsdall</u> , 475 U.S. 673 (1986)	21
	<u>Chapman v. California,</u> 386 U.S. 18 (1967)	21
	<u>Capshaw v. Commonwealth,</u> 253 S.W.3d 557, 567 (Ky. 2008)	21
	CONCLUSION	22
	APPENDIX	

COUNTERSTATEMENT OF THE CASE

On November 2, 2006, a Johnson County grand jury indicted William Ray Star for the following: two counts of murder, one count of kidnaping, one count of attempted murder, and for being a second degree persistent felony offender.¹ The indictment charged, that on September 18, 2006, in Martin County, Kentucky, Star shot and killed Jeffrey Mattox and Billy Proctor; the indictment further charged that Star had kidnaped Geraldine Litton and had attempted to murder Geraldine by shooting her. Transcript of Record, hereinafter, TR I, 1-3. After a jury trial, which began on February 4, 2008, and concluded on February 7, 2008, a Johnson County jury found William Ray Star guilty but mentally ill (GBMI), for the following offenses: two counts of murder, one count of kidnaping, and one count of first degree assault. On February 12, 2008, the trial court entered an order sentencing Star in accordance with the jury's recommendation. TR VI, 721-726.

A review of the record reveals that the jury heard, *inter alia*, the following evidence:

On September 18, 2006, Geraldine Litton was watching television with her boyfriend, Jeffrey Mattox, at their home. VR No. 1: 2/4/09; 1:03:20; 1:01:51. At 10:30 p.m., Jeff answered the door; it was Star. Id., 1:03:20. Geraldine heard a struggle and then a gunshot; everything got quiet and Star came into the living room. Id., 1:04:01. Star pointed the gun at Geraldine and accused she and Jeff of having called him a child abuser and a child molester; he also accused them of poisoning his mind. Id., 1:06:28; 1:22:48. Geraldine did not know where Star had gotten that idea. Id., 1:15:22. Star then shot Geraldine. He was going to shoot her a second time, but she told him he did not need to shoot her again. He said, "all right," but told her she had to go

¹The prosecutor later agreed to dismiss the PFO charge. VR No. 4: 2/7/08; 4:40:50.

with him; he had a gun pointed on her the entire time. Id., 1:07:00.

As they walked through the kitchen, Geraldine saw Jeff laying in the kitchen floor; blood was coming out of his mouth. He looked like he was trying to say something; he was breathing hard. Id., 1:07:57. Star stepped over Jeff and they walked down the road with Star still pointing the gun at Geraldine. Id. When they got to Billy Proctor's house, Star asked Geraldine if she was going to make it. She said, "I reckon," and then passed out. Id., 1:09:00. When Geraldine came to, she saw Billy Proctor laying in the road next to her. She looked around to see if Star was still around, but he was gone; she then crawled to the steps of the Proctor house. Id., 1:09:25.

Geraldine testified that she "died" on the way to the hospital, but the paramedics were able to bring her back. Id., 1:10:15. She went to the hospital at Prestonsburg where she stayed for eight days. Id., 1:10:47. Geraldine testified she still had trouble breathing. A bullet had gone through her lung below her collar bone and out her back, above her shoulder blade. Id., 1:11:28.

Geraldine explained to the jury that Star had come to their house a few weeks before the shooting; Star brought a fifth of liquor and Jeff and Star drank it. Id., 1:12:25. The next night, Star came back with another fifth of liquor. Id., 1:13:13. Geraldine never saw Star again until the evening of the shooting. Id., 1:13:27.

Willie Sparks, the City Commissioner, lived next door to Geraldine and Jeff. Id., 1:27:15. On September 18, 2006, Willie had just returned from a city hall meeting when he heard two shots. Id., 1:25:00; 1:25:13. Willie then saw Star and Geraldine walking down the road. Sparks went back inside the house and called the police; while on the phone, he heard another gunshot. Id., 1:27:40. He went back outside and heard Billy Proctor's girlfriend, Peggy, screaming that Billy had been shot. Id. Willie saw Geraldine laying near the Proctor's front porch step and saw

Proctor laying in the road. Id., 1:29:47.

Willie knew who Star was and was surprised to hear he had been diagnosed with a mental illness. Id., 1:30:35; 1:31:12.

On September 18, 2006, Peggy Anderson was home watching television with her boyfriend, Billy Proctor. Id., 1:33:37. Peggy looked out the window and saw a woman who was laying on the road and a man standing beside her. Id., 1:33:58. Peggy then went to the bathroom; she was gone approximately three minutes. As she returned from the bathroom, she heard a gunshot and noticed that her front door was open. Id., 1:33:58. She looked outside and saw a man walking down the road. Id., 1:35:05. She ran out the back door to go call the police; however, the police were already there because her cousin, Geraldine, and her boyfriend, had been shot. Id., 1:35:05; 1:36:10.

Geraldine had crawled onto Peggy's porch by the time Peggy returned. Geraldine was vomiting and Peggy was trying to help her. When Geraldine leaned up Peggy saw the blood. Id., 1:36:10. After the police left Geraldine's house, they came to Peggy's house; the police took Geraldine to the hospital. Id., 1:37:25.

Peggy testified that she knew Star by name, but did not know he suffered from a mental illness. Id., 1:38:18; 1:38:30.

Sheriff Garmon Preese, testified that he spent the next few days searching for Star. A couple of days after the shooting, Sheriff Preese finally arrested Star at Star's home. Id., 3:47:28. Star surrendered himself to the police and, when asked, informed the police that the gun was inside his house underneath his mattress. Id., 2:16:48-2:18:11.

Detective Mike Goble, with the Kentucky State Police, was the lead detective on the case.

Id., 3:09:50. When he arrived on the scene, Detective Goble found the body of Billy Proctor laying in the road with a large pool of blood around his head. Id., 3:08:08. Billy had been shot through the cheek by a single bullet which had exited out of his neck. Id. Detective Goble found Jeff Mattox, laying on his back in his kitchen, with a single gunshot wound to his chest. Id., 3:11:27; 3:18:25.

Doctor John Hunsaker, the medical examiner, testified that Jeff Mattox was shot in the left part of his chest above his nipple; there was a bullet exit wound on Jeff's back above his shoulder blade. VR No. 2: 2/5/08; 9:38:46. Jeff died as a result of a perforating gunshot wound to the left upper chest. Doctor Hunsaker testified that Billy Proctor had a gunshot entry wound to the back part of his right cheek; the bullet exited on the back lower left side of his neck, after passing through his spinal cord and shattering it. Id., 9:46:50. Billy died as a result of a perforating gunshot wound to his head/face in the posterior right cheek. Id., 9:49:48.

Doctor David Denning treated Geraldine Litton on September 19, 2006, for a gunshot wound to her right chest. Id., 10:22:19-10:35:31. Also see Transcript of Video Deposition of Doctor David Denning. Doctor Denning testified that Geraldine's injury was the type of injury that would lead to a substantial risk of death. Id.

At the close of the Commonwealth's case, trial defense counsel moved for a directed verdict. Id., 11:01:30. The trial court denied the motion. Id., 11:03:15.

Trial defense counsel called a total of 14 witnesses, including William Star. Trial defense counsel called seven of Star's family members, five doctors, and one retired judge.

Peachie Maynard, who was married to a cousin of Star's, testified that Star told her he had been poisoned sometime before the shootings took place; she could not recall if he told her who

poisoned him. Id., 1:03:21; 1:04:24. She testified that Star had a mental problem. Id., 1:10:40.

Peachie's husband, Amos Maynard,² testified that he had known Star since he was a baby and Star was different from the other kids. Id., 1:13:26. Amos testified that, at one time, Star told Amos that Star was the "chosen son." Id., 1:14:20. Amos and Star would drink beer together; Star was always nice to Amos. Id., 1:16:20. Amos had seen Star two days before the shootings and noticed he was troubled and depressed; Amos, however, didn't have time to talk to Star. Id., 1:21:28.

Cora Bowen,³ Star's mother, testified that Star told her he had been poisoned (two weeks before the shooting). Id., 2:30:32. She thought he was just sick. Id., 2:26:58. Star never mentioned the victims to her. Id., 2:28:48.

Star's mother said she thought Star had a mental problem and explained that he was receiving treatment and that he had checked himself into a mental hospital in Louisa, Kentucky, approximately four or five years before. Id., 2:29:45; 2:30:00. Star's mother also told the jury that Star sometimes took off up in the hills and that he always thought someone was after him. Id., 2:34:42. Star told his mother he believed his grandmother had killed his uncle (his uncle had been in a car accident and was paralyzed). Id., 2:37:46. She also told the jury that Star had been present when she shot and killed Star's step-father; Star was 14 at the time and he seemed to change after that event. Id., 2:24:10. She thought he had a mental problem. Id., 2:41:06.

Star's sister, Norma Jean Moore testified that Star had a mental problem. Id., 2:46:47.

²Star's mother was a double first cousin to Amos Maynard. VR No. 2: 2/5/08; 1:17:20.

³Cora's previous husband, Henry Bowen, also testified at the trial. Although Henry testified that Star would sometimes be fine and sometimes not, Henry could not think of any examples to give to the jury. Id., 1:58:13; 1:57:55.

She explained to the jury that Star had a tattoo of a deck of cards on his arm; each card represented a different person in the Bible. Id., 2:48:27. Star told Norma Jean he was like God. Id., 2:47:47. She was aware that Star had checked himself into a hospital and received treatment for his mental problem. Id., 2:49:19.

Star called her at 9:30 on the night of the shootings, but she didn't have time to talk. Id., 2:51:19; 2:57:41. Star told her he had been betrayed like Jesus had been betrayed by Judas. Id., 2:51:19. Norma Jean told Star that he was not Jesus; Star told her he had powers like Jesus. Id. Star further told Norma Jean that he had been poisoned; he did not mention who poisoned him. Id., 2:58:15.

She also testified that when she talked to him that night, she thought he was drunk. Id., 2:59:59; 3:04:59. When asked whether she thought she could have stopped Star from shooting the victims, she stated that she thought he was looking for someone to talk to and that she thought she could have stopped him. Id., 3:06:33; 3:08:06. She further testified that she spoke to Detective Goble after the shootings and told Detective Goble she thought Star might be up in the hills, because that's where he would go when he was in trouble. Id., 2:58:04.

John Sartin, Star's brother, testified he was aware that Star was a paranoid schizophrenic. Id., 3:11:43. Star thought one of his teachers could tell the future. Id., 3:14:00. Star would wear winter clothing in the summer and summer clothing in the winter. Id., 3:14:22. Star would sleep in his jeep and not bathe. Id., 3:14:49. John also testified he had seen Star hold a knife to his (Star's) chest before. John explained that this event coincided with Star's marriage (at age 16), and John did not know if that was part of the problem. Id., 3:18:38. John testified that Star did not operate the way most people did. Id., 3:21:44.

John Sartin's wife, Donna Sue Sartin, testified that Star had a mental problem. Id., 3:27:14. In support of her theory, Donna Sue provided the following examples: she related that Star had said he could hear his parents arguing when he was in his mother's womb. Id., 3:27:37. Star had stated he was just like God or Jesus. Id., 3:28:00. Star also said his late grandfather and uncle would both predict the future and would relay their predictions to him. Id., 3:28:25. Donna Sue was aware that Star had checked himself into a mental hospital in Louisa. She told the jury that Star did not want them to know he was in the hospital. Id., 3:30:17. Star had told her he needed help; he had voices in his head. Donna Sue instructed him to take his medication. Id., 3:32:30. Star thought that people were out to get him or that there was poison in coffee and cigarettes. Id., 3:33:33. Star also thought his mother was putting bug spray in his food and was trying to kill him. Id., 3:37:30. Star was not slow or retarded. Id.

Doctor Walter Butler testified that Star was in a treatment facility from February 1997 through April 1999. Doctor Butler's diagnosis was that Star had a paranoid delusional disorder. VR No. 2: 2/5/08; 1:30:12. Star also had a reported history of alcohol abuse, which made the delusional disorder worse. Id., 1:31:46. Drinking could take Star's self-control away. Id., 1:44:38. Although someone could not be talked out of a delusion, with medication and reality therapy the person could come to the realization that the delusions were false. Id., 1:36:52. Star was taking an anti-psychotic medication while he was in the hospital. Id., 1:37:26. Star was mentally ill from February 1977 through March 1999. Id., 1:42:01. Although certain symptoms were not inconsistent with schizophrenia, Star was not a schizophrenic. Id., 1:31:30; 1:42:29.

Doctor Harold Reynolds was Star's therapist at Mountain Comprehensive Care. VR No. 3: 2/6/08; 9:18:45; 9:15:20. He diagnosed Star as suffering from paranoid type schizophrenia on

July 8, 2004; Star also had an anti-social personality. Id., 9: 25:11; 9:49:25. Star thought he had caused his cousin to die and that, as a result, someone was trying to kill him. Star discussed this with Doctor Reynolds and agreed to check himself into a hospital in Louisa, Kentucky on January 13, 2005. Id., 9:38:58. Doctor Reynolds described several of his meetings with Star through September, 2006. Id., 9:44:15-10:03:35. Doctor Reynolds opined that Star was severely mentally ill on February 22, 2006. Id., 9:53:50. Although Star had reported hearing voices, the voices were not commanding Star to do anything. Id., 10:08:30; 10:15:05.

Doctor Reynold's also testified that Star was very bright and knew his medications helped him; however, Star would choose to stop taking his medications and would drink from time to time. Id., 10:24:48.

Doctor Donald Chaffin, was Star's family physician. VR No. 3: 2/6/08; 9:04:10. Doctor Chaffin testified that Star had an appointment to see him on September 8, 2006. Id., 9:08:34. Star thought that some friends had poisoned him and he wanted the doctor to perform some blood work to determine what he had been poisoned with. Id. Doctor Chaffin testified that Star drank quite a bit and that Star's symptoms were consistent with being hung over. Doctor Chaffin told Star to stop drinking. Id. Star asked Doctor Chaffin if the doctor thought Star should shoot the friends that poisoned him. Doctor Chaffin told Star no and explained that his problem was the result of drinking and Star agreed with him. Id. Doctor Chaffin's testified that Star drank too much. Id., 9:12:57.

Doctor Bob Miller, a psychiatrist, interviewed Star a few days after the shootings, on September 22, 2006. Id., 1:57:22. Doctor Miller testified that, at the time of the shootings, Star could not determine right from wrong and he could not stop or conform his behavior. Id.,

2:00:35. He diagnosed Star as having paranoid schizophrenia with alcohol problems. Id., 2:02:25. The illness could be treated, but not cured. Id., 2:03:27. Doctor Miller acknowledged that Star stated he knew it was wrong and illegal to kill someone and he felt like he was justified in doing so because the victims had poisoned him. Id., 2:06:10. Doctor Miller opined that Star's ability to conform his actions was severely curtailed. Id., 2:07:57. He opined that Star was legally insane. Id., 2:26:20.

Doctor Timothy Allen, the court appointed physician from the Kentucky Correctional Psychiatric Center (KCPC), testified that Star was not retarded and that Star believed he was being poisoned by various people. Id., 10:58:07; 10:53:40. Doctor Allen testified that Star suffered from chronic paranoid schizophrenia and that Star's alcohol use caused him problems. Id., 11:07:47; 11:10:30. Doctor Allen gave several examples regarding Star's thoughts and ultimately opined that Star was criminally insane. Star told Doctor Allen that on the night of the shooting he consumed 12 beers. Id., 11:20:07. Star did not take his medication when he was drinking. Id., 11:19:14. Star took a gun in order to shoot the victims, but told Doctor Allen he did not intend to kill them. Id., 11:20:07. Star told Doctor Allen he asked Jeff why Jeff had poisoned him and Jeff told Star that Star was going to die; Jeff then, allegedly, walked toward a cabinet where Star thought Jeff kept a gun. Star shot Jeff once. Id., 11:22:58. Geraldine walked in and pointed to her shoulder; Star thought that was where she wanted to be shot and, as a result, he shot her there. Star then claimed he walked Geraldine to a restaurant so she could wait for an ambulance. Id. Star said, while he was with Geraldine, someone drove up in a car and talked to Geraldine. Id., 11:28:58. Geraldine told Star that Billy Proctor had tried to kill her. Billy refused to call an ambulance for Geraldine. Id., 11:29:30. Although Geraldine asked Star to wait for the

ambulance with her, she passed out about 30 minutes later. Id., 11:29:30. When Star saw Billy Proctor run to Geraldine, he thought Billy was going to kill her, so he shot Billy. Id., 11:31:14. Star said he told the onlookers to tell the police they could come get him at 9:30 the next morning, as he wanted to get some rest. Id., 11:31:14. Star told the doctor he spent the next few days walking around in the mountains and that after he got back he surrendered peacefully. Id., 11:33:11; 11:34:37. Star also told Doctor Allen that Geraldine had admitted to poisoning Star (and others), and recognized that she was getting what she deserved when he shot her. Id., 11:37:50.

Although Doctor Reynolds stated that Star's thinking was very abnormal, he testified that Star knew he was committing a criminal act when he shot the victims; Star knew shooting someone was illegal. Id., 11:42:50. Doctor Allen also opined, however, that Star was unable to conform his actions to the requirements of the law. Id., 11:43:26.

On cross-examination, Doctor Allen testified he was surprised to learn that Star also thought that his mother and people at the jail were poisoning him. Doctor Allen agreed that the fact Star did not kill any of those people showed a certain amount of ability to control his actions. Id., 11:54:20. Doctor Allen also testified that if the right person had been present at the time of the shootings, it was possible Star could have been stopped from shooting anyone. Id., 12:07:40. Doctor Allen also testified there was no doubt that Star's alcohol consumption affected his actions on the night of the shooting. Id., 12:09:18.

Star also called retired Judge Steve Frazier, who had known Star; he testified he believed Star was suffering from a severe mental illness. Id., 2:19:58. Judge Frazier had not seen Star since 1996. Id.

William Star testified he had been diagnosed with schizophrenia; he took medication in order to help himself think better. VR No. 3: 2/6/08; 1:18:58; 1:19:15. Although some of Star's testimony was very confusing, in general, he told the jury that on September 18, 2006, he went to confront Jeff and Geraldine about poisoning him and, as a result, he shot them. Id., 1:19:52. Star stated that when he asked Jeff about the poisoning, Jeff blamed it on Geraldine and told Star that Star was stupid for coming there. Id., 1:20:34. Jeff allegedly told Star he had to die and moved toward a cabinet where Star thought Jeff kept a gun. Star shot Jeff and then went in and shot Geraldine. Id. Star testified he knew he was going to shoot Geraldine in the shoulder because someone had told him he could shoot her there and not kill her. Id., 1:24:56. After Star shot Geraldine, he asked her if she was going to live and she told him she would live if he would let her. Id., 1:26:08. He said when he went back into the kitchen he saw Billy Proctor in Jeff's kitchen with a knife. Id., 1:26:08. Billy Proctor allegedly, "dived" out the kitchen door and Geraldine came in to protect Star. Id., 1:31:38. Star testified that someone in a car stopped and tried to save Star's life. Id., 1:33:37.

Star testified that he wanted to call the county attorney's office before the shootings and thought that he probably called a doctor. Id., 1:36:50.

Star claimed he shot Billy Proctor while he was defending Geraldine; he said he felt bad about shooting Geraldine. Id., 1:44:20. He said he walked away from the shooting scene because he was looking for an escape route. Id., 1:45:58.

Star conceded he had been convicted of a felony. Id., 1:46:30. Star also told the jury that he had a tattoo of a royal straight flush on his arm. Id., 1:47:08. He explained that one card represented his grandfather, another card represented his mother, another card represented him,

and another card represented the devil. He claimed that the tattoo was about a baptism. Id.

Trial defense counsel, at the close of all of the evidence, again moved for a directed verdict of acquittal, arguing that all of the evidence indicated that Star was not guilty by reason of insanity. VR No. 3: 2/6/08; 3:18:42. The trial court denied the motion. Id., 3:20:36.

During guilt phase closing arguments trial defense counsel argued that the jury should find Star not guilty of any of the charged offenses, by reason of insanity. VR No. 4: 2/7/08; 12:35:21; 12:40:29.

The prosecutor argued that although Star had a mental illness, he was not insane. Id., 12:45:07. The prosecutor pointed out that the fact that Star chose not to shoot Geraldine indicated that he had the ability to control his actions. Id., 12:49:27. The prosecutor also argued that, although Star thought other people were trying to poison him, he did not kill those people; the fact that he did not kill anyone else also showed that he had control over his actions. Id., 12:52:23. The prosecutor asked the jury to return guilty but mentally ill verdicts on two counts of intentional murder, one count of kidnaping, and one count of first degree assault.

As stated above, after hearing all of the evidence, the jury found Star guilty but mentally ill of the following charges: two counts of murder, one count of kidnaping, and one count of first degree assault. On February 12, 2008, the trial court entered an order sentencing Star in accordance with the jury's recommendation. TR VI, 721-726.

Further facts will be developed as necessary.

ARGUMENT

I.

THE TRIAL COURT PROPERLY REFUSED TO DIRECT A VERDICT ON ALL OFFENSES.

Star argues that his motion for a directed verdict on all counts should have been granted because he was insane at the time of the commission of the offenses. Star is wrong. Star had the burden of proving that he was insane; therefore, the question for the jury was whether Star was or was not insane at the time of the shootings. It was not clearly unreasonable for the jury to find Star guilty but mentally ill and not “not guilty by reason of insanity.” The trial court properly denied the motion for directed verdicts. Port v. Commonwealth, 906 S.W.2d 327, 330-331 (Ky. 1995).

As stated, Star had the burden of proving his insanity by a preponderance of the evidence. The burden of proving a defendant sane does not shift to the Commonwealth. Edwards v. Commonwealth, 554 S.W.2d 380, 383 (Ky. 1977). “Where one chooses to rely upon insanity as a defense, the burden rests upon him to prove to the satisfaction of the jury that at the time the offense was committed, as a result of a mental disease or defect, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Id., citing to KRS 504.020. Thus, Star was entitled to an instruction to the jury that the jury could find him not guilty by reason of insanity and thus the issue of insanity was properly a matter for the jury’s determination. Id.

In this case, as conceded by Star, Star shot three people, killing two and seriously injuring one, while allegedly operating under the false thought that they had attempted to poison him.

Doctor Allen, the court appointed psychiatrist, testified that although Star knew the shootings were illegal, Star was unable to conform his actions to the requirement of the law. See Commonwealth's Counterstatement of the Case. However, on cross-examination, Doctor Allen was surprised to learn that Star also thought that other people, including his mother, were poisoning him. Doctor Allen agreed that the fact that Star did not kill any of those people showed an ability to control his actions. Id. Doctor Allen also testified that if the right person had been present at the time of the shootings it was possible Star could have been stopped from shooting anyone. Id. Doctor Allen also agreed that Star's alcohol consumption affected his actions on the night of the shooting.

Doctor Miller, a psychiatrist who interviewed Star a few days after the shootings, testified that Star could not determine right from wrong and that he could not stop or conform his behavior. See Commonwealth's Counterstatement of the Case. However, contradictorily, Doctor Miller also testified that Star knew it was wrong and illegal to kill someone.

In addition, when Star testified, he explained he walked away from the scene of the shooting because he was looking for an escape route. Star also told onlookers at the scene of the crime to tell the police they could come get him the next morning, as he wanted to get some rest before they came. See Commonwealth's Counterstatement of the Case. Testimony also showed that it was believed that Star disappeared into the hills, in order to avoid police, since that's where Star would go when he was in trouble. See Commonwealth's Counterstatement of the Case.

In addition, Geraldine Litton testified that although Star was going to shoot her a second time, when she told him he did not need to do so, he agreed and did not proceed with the

shooting. See Commonwealth's Counterstatement of the Case.

Thus, in addition to the expert opinions that Star was not criminally responsible for the shootings, the record also contains evidence showing that Star appreciated the criminality of his conduct and that he had the ability to conform his conduct to the requirements of the law. Since Star "offered up insanity as a defense to the charge of intentional murder, under the law of this Commonwealth he bears the risk of not persuading the fact-finder that he was in fact insane at the time of the incident." Port, supra, at 330. Given the evidence, it was not clearly unreasonable for a jury to find against Star on the issue of insanity and, therefore, the issue was properly submitted to the jury. Id.

A mental disease which does not in itself result in a lack of capacity to either appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law does not rise to the level of insanity or lack of criminal responsibility. McClellan v. Commonwealth, 715 S.W.2d 464, 468 (Ky. 1986). The issue of insanity was a matter for the jury's determination and the trial court correctly denied Star's motion for directed verdicts.

II.

THE TRIAL COURT PROPERLY REFUSED TO FIND KRS 504.150 TO BE UNCONSTITUTIONAL; THE TRIAL COURT'S INSTRUCTION TO THE JURY ACCURATELY REFLECTED THE CONSEQUENCES OF A VERDICT OF GUILTY BUT MENTALLY ILL.

Star argues that a "verdict" of guilty but mentally ill (GBMI) should have been declared unconstitutional by the trial court; Star further complains that the trial court committed an error because the jury instruction regarding a verdict of guilty but mentally ill did not accurately reflect the consequences of such a verdict. Specifically, Star complains that such a verdict does not

guarantee treatment in prison. Star bases his argument on an affidavit prepared by Paige D. McGuire, the deputy warden and overseer of the Correctional Psychiatric Treatment Unit (CPTU). In that affidavit, the deputy warden states that a verdict of guilty but mentally ill would have no impact on either the classification process or the psychiatric treatment provided to the convict; the Department of Corrections would provide an independent psychiatric evaluation and would also provide appropriate psychiatric care.

First, the Commonwealth does not concede that the *ex parte* affidavit provides proof that a statute is unconstitutional. In addition, as conceded by Star in his brief on page 19, the Kentucky Supreme Court has upheld the constitutionality of the statute. Brown v. Commonwealth, 934 S.W.2d 242, 246 (Ky. 1996). In Brown, the Kentucky Supreme Court noted that the constitutionality of the GBMI statute depends, in part, upon how the jury is instructed regarding such a verdict. In this case, again, as conceded by Star in his brief on page 21, the jury instruction given by the trial court was the same instruction approved by the Kentucky Supreme Court in Brown, *supra*, at 246.

Star argues that the problem with the instruction is that it does not reflect reality because it is not certain that one found guilty but mentally ill will actually receive treatment; he argues if his assumption is true, it should be reflected in the jury instructions. Here, the GBMI jury instruction clearly states that treatment may or may not be given while Star is incarcerated depending on whether or not the state makes funds available to the Department of Corrections and whether or not the correctional mental health professionals determine treatment is necessary at the time he is evaluated at the prison. TR V, 641; Appendix A, this brief. If a mental health professional, employed by the Department of Corrections, determines that psychiatric treatment

is necessary, appropriate psychiatric treatment would be provided. KRE 504.150 requires no more. KRS 504.150 states, in part: "If the defendant is found guilty but mentally ill, treatment shall be provided the defendant until the treating professional determines that the treatment is no longer necessary or until expiration of his sentence, which ever occurs first." There is no indication that prison officials would breach a duty to Star; Star's claim is based on speculation. He would be provided appropriate psychiatric care after a an evaluation. The Kentucky statute provides only that a state must provide treatment, not treatment of a prisoner's choice. O'Hara v. Wigginton, 24 F.3d 823, 827 (6th Cir. 1994). Star's jury was correctly instructed as it relates to a finding of guilty but mentally ill. Star does not carry his burden of proving that the statute is unconstitutional.

III.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF.

Star claims the trial court erred when it refused to instruct the jury that he was required to prove insanity by a preponderance of the evidence. As the Kentucky Supreme Court stated in Brown v. Commonwealth, 934 S.W.2d 242, 247 (Ky. 1996), and as conceded by Star in his brief on page 23, this is a non-issue as counsel was free to argue the preponderance burden to the jury. Id. The Kentucky Supreme Court has also reiterated its dissatisfaction with the use of the word "preponderance" in jury instructions. Id., citing Hardin v. Savageau, 906 S.W.2d 356, 358 (Ky. 1995). The trial court properly declined to instruct the jury that Star was required to prove his insanity by a preponderance of the evidence.

IV.

DETECTIVE GOBLE NEVER TOLD THE JURY THAT STAR INVOKED EITHER HIS RIGHT TO COUNSEL OR HIS RIGHT TO REMAIN SILENT; THEREFORE, THE TRIAL COURT WAS CORRECT IN REFUSING TO GRANT A MISTRIAL AFTER THE TESTIMONY.

Star argues that the trial court erred when it refused to grant a mistrial after Detective Goble told the jury that Star invoked his right to counsel and his right to remain silent. Curiously, Star makes this claim in spite of the fact that he concedes that the record shows that Detective Goble never told the jury that Star invoked his right to counsel or right to remain silent. See Star's brief, page 25; VR No. 1: 2/4/08; 3:49:40. As stated in Star's brief, Detective Goble was explaining to the jury that upon arrest he was trying to make Star comfortable, so he would be compliant. *Id.*, 3:47:48. Detective Goble then went on to say that he "actually rehearsed his Miranda warning to him and that's when he told me he wanted" *Id.*, 3:49:40. Before Detective Goble could complete the sentence, trial defense counsel objected and moved for a mistrial. *Id.*, 3:49:48. Although trial defense counsel argued to the trial court that Detective Goble testified that Star had "invoked" his Miranda rights, the trial court properly found that Detective Goble never finished the statement. *Id.*, 3:49:48. Because Detective Goble never testified to what trial defense counsel argued he had testified to, the trial court did not abuse its discretion in declining to declare a mistrial; Star's rights were not violated.

V.

ERROR, IF ANY, IN THE TRIAL COURT'S REFUSAL TO ALLOW STAR TO CROSS-EXAMINE GERALDINE LITTON ABOUT A PENDING CRIMINAL CASE, WAS HARMLESS BEYOND A REASONABLE DOUBT.

Star argues that his constitutional rights were violated by the trial court's refusal to allow him to cross-examine Geraldine Litton about a pending criminal case. Although Geraldine was a key witness for the Commonwealth in that she was one of the victims of the shooting, her testimony regarding the shootings did not involve a fact in dispute. The record reflects that Star conceded he shot all three victims. As pointed out in Argument I, the only question for the jury was whether Star was criminally responsible for his acts of shooting. Whether he shot the victims was not in dispute; the only issue in dispute was whether Star was insane at the time he committed the shootings.

The alleged improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless error analysis pursuant to Chapman v. California, 386 U.S. 18 (1967). Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Geraldine's testimony was corroborated by that of Star himself, Willie Sparks, Peggy Anderson, and various police officers. See Commonwealth's Counterstatement of the Case. Error, if any was harmless beyond a reasonable doubt.

VI.

STAR'S RIGHT TO CONFRONTATION WAS NOT VIOLATED DUE TO THE COURTROOM CONFIGURATION AND, EVEN IF IT WERE VIOLATED, ANY ALLEGED VIOLATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

Star argues that the trial court violated his right to confront the witnesses against him when it did not fashion a better remedy to allow the testifying witnesses to see him. As conceded by Star in his brief on page 30, the defense team had a television monitor at their table so they could view the witnesses. Star further concedes that, although the trial court offered the defense the option to move about the court room, the defense declined to do so. See Star's brief, at page 30. Star also argues that the witnesses could not see Star due to the courtroom layout, and cites to the testimony of both Geraldine Litton and Willie Sparks. A review of the record reveals that Geraldine Litton stepped out of the witness box in order to identify Star for the record. VR No. 1: 2/4/08; 1:05:30; 1:06:02. The record reveals that Star could be seen if the witnesses stepped out of the box. *Id.* The perception that confrontation is essential to fairness has persisted because it is assumed to be more difficult to tell a lie about a person "to his face" than "behind his back." Coy v. Iowa, 487 U.S.1012, 1019 (1988). The United States Supreme Court concedes that the confrontation clause does not compel the witness to fix his eyes upon the defendant; the Court has acknowledged that a witness may look elsewhere.

Although defense counsel conceded, during trial, that the defense had the advantage of being able to see the witnesses on the television monitor, trial defense counsel still argued Star was denied face-to-face confrontation because the witnesses could not see him. VR No. 3:

2/6/08; 3:21:47. Even if Star were denied face-to-face confrontation, the Kentucky Supreme Court has noted that denial of face-to-face confrontation is subject to harmless-error analysis. Sparkman v. Commonwealth, 250 S.W. 3d 667, 670, footnote 9 (Ky. 2008), *citing to* Delaware v. Van Arsdall, 475 U.S. 673 (1986). In this case, confrontation clause error, if any, was harmless beyond a reasonable doubt under the standard of Chapman v. California, 386 U.S. 18 (1967). Sparkman, *supra*, at 670, footnote 9.

Under the harmless error doctrine, if, upon consideration of the entire case, it does not appear that there is a substantial possibility that the result would have been different, the error, if any, will be held to be non-prejudicial. Capshaw v. Commonwealth, 253 S.W.3d 557, 567 (Ky. 2008). In this case, error, if any, was non-prejudicial. A review of the evidence reveals that the facts of the crimes were not in dispute. Star admitted to shooting each of the victims; the only issue in dispute was whether Star was criminally responsible for his actions when he shot the victims. There is not a substantial possibility that the testimony of the witnesses or the result of the trial regarding the events of September 18, 2006, would have been any different. Error, if any, was harmless beyond a reasonable doubt.

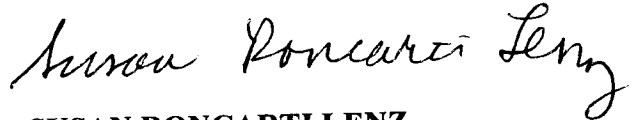
CONCLUSION

For the foregoing reasons, this Court should **affirm** the judgment of the Johnson Circuit

Court.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky



SUSAN RONCARTI LENZ
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342