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APPELLEE'S BRIEF

Supreme Court of Kentucky

Case No. 2021-SC-0441-MR
Electronically filed

RICO LAMONT CAVANAUGH — *Appellant*

v.

On Appeal From
Trigg Circuit Court
No. 19-CR-57

COMMONWEALTH OF KENTUCKY — *Appellee*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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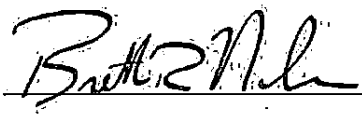
Certificate of Service

I certify that a copy of this brief was served by U.S. mail on July 11, 2022, upon Robert C. Yang, Department of Public Advocacy, 5 Mill Creek Park, Suite 102, Frankfort, Kentucky 40601; Michael L. Thompson, 15744 Fort Campbell Blvd., Oak Grove, Kentucky 42262; Hon. C.A. Woodall III, Lyon County Judicial Center, P.O. Box 790, Eddyville, Kentucky 42038; Hon. Carrie Ovey-Wiggins, 248 Commerce Street, P.O. Box 679, Eddyville, Kentucky 42038. I further certify that the record was returned on the same date.



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INTRODUCTION

A jury convicted Rico Cavanaugh of assault in the first degree for stabbing his wife 26 times with a kitchen knife. This is a direct appeal that raises issues about how to apply the recent constitutional amendment known as Marsy's Law.

STATEMENT CONCERNING ORAL ARGUMENT

To the Commonwealth's knowledge, this is the first appeal raising substantive questions about how to apply Marsy's Law in a criminal trial. Because these issues touch on criminal proceedings throughout the state, the Commonwealth respectfully requests oral argument to address any questions the Court might have.

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STATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE[1]

Rico Cavanaugh is a persistent felony offender who stabbed his wife 26 times with a kitchen knife, piercing almost every major organ in her body. VR, 8/9/21, 1:23:03–1:23:20; TR 141 (Judgement & Sentence). At trial, he did not dispute the details of his brutal crime. And so a jury convicted him of assault in the first degree before sentencing him to 34 years in prison. TR 125–27 (Order & Jury Verdict); TR 141–45 (Judgment & Sentence).

The crime.

The facts of this crime are horrific. In June of 2019, Cavanaugh traveled to Trigg County with his then-wife, Missy Cain. VR, 8/9/21 at 1:18:00–1:18:34. They had lunch and then went to Cavanaugh's mother's house, where they relaxed in a back bedroom and watched television. *Id.* at 1:18:35–1:19:05. Then, out of nowhere, Cavanaugh attacked Missy. *Id.* at 1:19:06.

First, he rolled on top of her and started choking her. *Id.* at 1:19:08–1:19:15. Cavanaugh eventually let go and acted as though nothing had happened. *Id.* at 1:19:15. He headed outside to smoke and asked Missy if she wanted to join him. *Id.* at 1:19:16–1:19:24.

But on their way out, Cavanaugh picked up a knife from the kitchen and locked the door. *Id.* at 1:19:25–1:19:30. He told Missy that he had heard she was

[1] The Commonwealth does not accept Cavanaugh's statement of the case.

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having an affair. *Id.* at 1:19:30–1:19:35. Missy tried to persuade him that this was not true, but it fell on deaf ears. *Id.* at 1:19:35–1:19:40. Cavanaugh told Missy there was no sense in screaming because no one would hear her—and then he stabbed her 26 times, piercing every major organ in her body other than her heart (which he missed by less than two inches). *Id.* at 1:19:41–1:19:48; 1:23:03–1:23:20.

Remarkably, Missy survived. But her testimony was haunting. She recalled screaming, begging for him to stop. *Id.* at 1:20:13–1:20:30. Eventually he did stop attacking her with the knife, only to start punching her in the abdomen, breaking eight ribs. *Id.* at 1:20:30–1:20:35. When he finished, Cavanaugh told Missy to lay down on the floor and "bleed to death, bitch." *Id.* at 1:20:42–1:20:49. She laid down and felt the blood pooling around her. *Id.* at 1:20:49–1:21:05. She kept telling herself to stay awake, fearing she would die if she passed out, while begging Cavanaugh to call the police. *Id.* at 1:21:06–1:21:42.

Cavanaugh eventually called 911. *Id.* at 1:21:42–1:22:15. The police arrived and arrested him. Missy was taken to Trigg County Hospital before being transported to Vanderbilt for critical care. *Id.* at 1:22:22–1:23:07. She was in surgery (her first of many) for several hours, during which they performed 14 different procedures. *Id.* at 1:23:30–1:23:55. Multiple surgeries followed as she spent weeks in the hospital—including almost two weeks on a ventilator. *Id.* at 1:23:56–1:25:38; 1:26:52–1:28:00; 1:28:25–1:29:16.

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Nor did her suffering stop with her initial treatment. Two months later, Missy developed an infection that required airlifting her back to Vanderbilt where she stayed for two more weeks. *Id.* at 1:28:46–1:29:15. She had a colostomy bag for over a year and a half because of injuries to her intestines. *Id.* at 1:26:04–1:26:45. She had surgery again several months later for more life-threatening issues that required another stay in the hospital for over a week. *Id.* at 1:25:39–1:26:04. The list of Missy's injuries, surgeries, and life-threatening battles she faced after the attack goes on and on. *See id.* at 1:23:56–1:29:15; 1:31:54–1:33:00.

The trial.

Cavanaugh's trial lasted only one day. That is in part because Cavanaugh did not deny any of the relevant facts. In his opening statement, Cavanaugh's counsel explained that he was "not going to tell [the jury] that Mr. Cavanaugh didn't stab his wife. He did." *Id.* at 11:11:38–11:11:33. Instead, Cavanaugh's sole argument in defense was that this was not assault in the first degree because he was overcome by emotion when he stabbed Missy. *See id.* at 11:11:21–11:16:08.

But Cavanaugh presented no evidence to support his theory that he acted out of a violent rage caused by an emotionally disturbing event. He did not introduce any evidence about discovering the alleged affair. He did not present any evidence showing that he lost control over his conduct even though he had calmly walked from the bedroom to the kitchen in between choking and stabbing Missy. He did not introduce any evidence about his state of mind whatsoever,

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instead relying only on speculation that he "snapped" for some unknown reason. *See id.* at 11:13:48–11:14:14.

And so the circuit court declined to instruct the jury on extreme emotional disturbance or assault in the second degree. *See* VR 8/9/21 at 3:07:11–3:08:15; 3:22:01–51. The jury then convicted Cavanaugh of assault in the first degree and sentenced him to a term of 34 years after also finding him to be a persistent felony offender. TR 125–27 (Order & Jury Verdict); TR 141–45 (Judgment & Sentence). This appeal followed.

ARGUMENT

Cavanaugh raises four alleged errors as grounds for reversal. Two of those relate to how the circuit court applied Marsy's Law in this case. And the other two are alleged errors in declining to instruct the jury on lesser-included offenses. But the circuit court did not err in any respect. So this Court should affirm.

I. The circuit court properly applied Marsy's Law.

Cavanaugh argues that the circuit court misapplied Marsy's Law in two ways. First, he contends that the court improperly allowed Missy—the undisputed victim of the crime—to attend the entire trial, even though she testified as a witness. Second, Cavanaugh argues that the court violated his presumption of innocence by referring to Missy as the "victim" in front of the jury. Both arguments are wrong.

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A. The circuit court did not err by allowing the victim to attend trial even though she was a testifying witness.

By way of background, Marsy's Law is a constitutional amendment related to crime victims' rights that the Kentucky voters ratified in the fall of 2020. Codified at Section 26A of the Kentucky Constitution, Marsy's Law ensures that crime victims have a "meaningful role throughout the criminal and juvenile justice systems." Ky. Const. § 26A. To that end, Marsy's Law establishes several specific, enumerated rights for crime victims that must "be respected and protected by law in a manner no less vigorous than the protections afforded to the accused." *Id.*

1. This case is primarily about one of those rights—the "right to be present at the trial . . . on the same basis as the accused." *Id.* "Criminal defendants are guaranteed the right to be present at 'critical stages' of the trial." *Bowling v. Commonwealth*, 168 S.W.3d 2, 12 (Ky. 2004) (quoting RCr. 8.28(1)). While it is not always clear what counts as a "critical stage," there is no question that the presentation of evidence in front of the jury fits the bill. *See Commonwealth v. McGorman*, 489 S.W.3d 731, 738 (Ky. 2016). And so under the "express language of [Marsy's Law]," *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019), the victim of a crime is entitled to attend trial whenever the parties are presenting evidence to the jury—including, of course, witness testimony.

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Thus, the circuit court did not err when it allowed Missy to remain in the courtroom during the testimony of other witnesses. No one disputes that Missy is the victim of the crime charged in this case. *See* KRS 421.500(1)(a). And so she has the constitutional "right to be present at the trial . . . on the same basis as" Cavanaugh himself. *See* Ky. Const. § 26A. That includes the right to observe the testimony of other witnesses, just as a criminal defendant can do before he or she decides whether to take the stand. *See McGorman*, 489 S.W.3d at 738. The "express language" of Section 26A leaves room for no other conclusion. *See Westerfield*, 599 S.W.3d at 747.

2. In arguing otherwise, Cavanaugh relies on Kentucky Rule of Evidence 615—the rule requiring separation of witnesses during trial. But Rule 615 is a rule of evidence, not a rule of constitutional law. *See McAbee v. Chapman*, 504 S.W.3d 18, 31 (Ky. 2016) (explaining that a violation of Rule 615 is a "non-constitutional error[]").[2] The rules of evidence cannot trump (or even diminish) the

[2] Cavanaugh does not argue that Rule 615 is constitutionally compelled by either the Kentucky Constitution or its federal counterpart. For good reason: Historically, "victims were entitled to attend criminal trials." Beloof & Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 484 (2005). Courts began excluding victims from the courtroom in certain circumstances in the late nineteenth and early twentieth centuries—with Kentucky being one of the first states to do so. *See id.* at 484–94; *Salisbury v. Commonwealth*, 79 Ky. 425, 432 (Ky. 1881). But Kentucky was an exception to the general rule in the nineteenth century, *see* Beloof & Cassell at 491 (citing Wigmore, *Sequestration of Witnesses*, 14 Harv. L. Rev. 475, 491 (1901)), and there was no hint in *Salisbury* that sequestering victims was constitutionally required. In fact,

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constitutional rights of an individual. So to the extent that Rule 615 conflicts with the "express language" of any portion of the Kentucky Constitution, the Constitution prevails.

That conclusion is no different than what the U.S. Supreme Court held in its landmark decision on the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004). There, of course, the U.S. Supreme Court rejected the notion that the rights guaranteed by the Confrontation Clause could be subject to exceptions based on "the law of evidence." *Id.* 50–51 (citing 3 J. Wigmore, Evidence § 1397, at 101). In doing so, the Supreme Court held that the Sixth Amendment prohibits the admission of most out-of-court testimonial statements even if the statement "falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." *Id.* at 43, 68–69 (quotation omitted). And so the rules of evidence governing hearsay must yield to the rights guaranteed by the U.S. Constitution.

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the General Assembly "overruled Salisbury by legislation in 1895, specifically exempting parties [including victims] from sequestration orders," *Id.* (citing Ky. C.Cr.P. 1895 §§ 62, 63). The modern federal rule requiring separating witnesses (of which KRE 615 is based) was not enacted until 1975. *Id.* at 498. And far from being considered a constitutional requirement, many jurisdictions have since moved back toward protecting the "right of crime victim to attend trial." *Id.* at 504–06; *id.* at 527 ("[M]ost cases agree that sequestration of victims presents no federal constitutional question."); *see also Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988) (Posner, J.) (explaining that separating witnesses "is a long-established and well-recognized measure designed to increase the likelihood that testimony will be candid" but that it is not a requirement of due process).

The same is true here. Section 26A guarantees crime victims an unqualified right to attend trial on the same terms as the accused. No one would argue that the federal Constitution or the Kentucky Constitution would allow excluding a criminal defendant from trial if he or she intends to testify as a witness. And so under Section 26A, that same right must be given to the victim of a crime as well.

One last point on this issue. It is helpful to contrast Section 26A with the text of other statutes and constitutional amendments enacted in other states. As explained above, Section 26A does not qualify the victim's right to attend trial, instead stating that the right extends on the same terms as that of the accused. Not every state has taken that approach. Illinois, for example, provides victims with "[t]he right to be present at the trial and all other court proceedings on the same basis as the accused, *unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.*" Ill. Const., art. I, § 8.1(a)(10) (emphasis added). But Section 26A contains no such qualification.

Instead, Section 26A looks more like the law in states like Alaska. *See* Alaska Const. art. I, § 24. Like Section 26A, Alaska's constitution provides that victims have the right "to be present at all criminal or juvenile proceedings where the accused has the right to be present." Alaska Const. art. 1 § 24. And Alaska's courts have rejected challenges like the one here, holding that victims may be

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allowed to testify after observing trial *even if* there was evidence that the witness had "tailor[ed] her testimony to corroborate the testimony of a previous witness." *See Proctor v. State*, 236 P.3d 375, 379 (Alaska Ct. App. 2010). This Court should do the same.

3. Cavanaugh suggests in passing that the trial court could have simply required the prosecution to present Missy's testimony first so as to "remove[] any hint of influences from other witnesses." Appellant Br. at 7. The Court should reject that argument for two reasons.

First, Cavanaugh waived any such request. Although Cavanaugh objected to exempting Missy from Rule 615, he never requested a ruling from the circuit court requiring that Missy testify first. "RCr 9.22 imposes upon a party the duty to make known to the court the action he desires the court to take or his objection to the action of the court." *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (cleaned up) (quoting RCr 9.22)). So if Cavanaugh wanted the circuit court to order that Missy testify before the Commonwealth's other witnesses, he needed to "make known to the court" such a request. *See id.* Simply objecting to the trial court's decision exempting Missy from Rule 615 was not enough to preserve his further argument that the court should have ordered the Commonwealth to present her testimony first.[3]

[3] Unpreserved claims of errors are reviewed for palpable error only. RCr 10.26; *Brewer v. Commonwealth*, 206 S.W.3d 343, 348–49 (Ky. 2006). Given that this Court

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Second, Section 26A would not permit the circuit court to condition Missy's right to attend the trial on the order in which she testified for the Commonwealth. Marsy's Law requires that the victim of a crime be given the same right to appear at trial as that of the accused. Criminal defendants are permitted to observe the testimony of every witness—starting with the Commonwealth's case-in-chief and ending with every witness the defense chooses to put on first—even if the witness intends to testify at the end of the defense's case. That is, a defendant's right to attend trial is in no way contingent on his or her trial strategy or the order of proof that his or her counsel intends to present. And so if the accused is allowed to testify last while still attending trial, the "express language" of Section 26A requires granting that same right to the victim of a crime. *Westerfield*, 599 S.W.3d at 747. The circuit court thus cannot order the Commonwealth to present the testimony of a victim first, just as it could not order the defendant—if he or she intends to testify—to testify first.

4. Even still, if the circuit court palpably erred, it would be harmless. A "non-constitutional error[]" is harmless when "the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error."

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has never addressed the interplay between Marsy's Law and Rule 615, there is no colorable argument that the alleged error here was "easily perceptible, plain, obvious and readily noticeable" so as to satisfy the standard for palpable error. *See Brewer*, 206 S.W.3d at 349 (cleaned up).

McAbee, 504 S.W.3d at 31 (quotation omitted). Cavanaugh makes no effort to explain how allowing Missy in the courtroom swayed the judgment—much less, substantially so.

This is not a case in which any of the evidence is really in dispute. Cavanaugh admitted to stabbing Missy 26 times. *See* VR 8/9/21 at 11:11:28–11:30:33 ("I'm not going to tell you Mr. Cavanaugh didn't stab his wife. He did."). The Commonwealth did not present multiple witnesses who needed to corroborate each other's stories. Cavanaugh never argued that Missy altered her testimony, making it inconsistent with prior statements or other evidence. And so there is no basis to conclude that Missy's testimony would have been different had she not been able to observe the testimony of the witnesses who testified before her. If it was error to allow Missy in the courtroom during the testimony of other witnesses, it was textbook harmless error that cannot justify reversal.

B. The circuit court did not err by referring to the victim as a "victim" in front of the jury.

Cavanaugh also argues that the circuit court violated the presumption of innocence by referring to Missy as a "victim" in front of the jury. According to Cavanaugh, the circuit court effectively told the jury that "Ms. Cain was someone harmed by a crime," which is "the ultimate fact the jury was supposed to determine" and a violation of the presumption of innocence. Appellant Br. at 7. He is wrong.

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To start, this issue is not preserved. The circuit court made one reference to Missy as the "victim" when it explained to the jury that she could come and go during the proceedings. The court stated that, under Marsy's Law, "the victim of the crime does have a right to be present." VR 8/9/22 11:17:38–11:17:47. But Cavanaugh did not object to the court using the word "victim," *see Brewer*, 206 S.W.3d at 348–49, nor did he ask the court to admonish the jury not to construe the label as implying Cavanaugh's guilt, *see Lanham v. Commonwealth*, 171 S.W.3d 14, 28 (Ky. 2005) (holding that the failure to ask for an admonition to cure an error amounts to a waiver of the issue). Not only did Cavanaugh fail to object, his own counsel referred to Missy as "the victim" in front of the jury less than 30 minutes later. *See* VR 8/9/21 at 11:44:59–11:45:03 ("When you arrived, was the victim still there?"). So Cavanaugh waived any alleged error by failing to object or ask for an admonition.[4]

But there was no error. This Court has already held that it is not error to refer to the victim of a crime as a "victim" in front of the jury. *Whaley v. Commonwealth*, 567 S.W.3d 576, 590 (Ky. 2019). In *Whaley*, the Court held that referring to victims as "victims" is no less prejudicial "than the reading of the indictment listing the charges against [the defendant]." *Id.* That was true even though the

[4] The circuit court did instruct the jury on the presumption of innocence after the close of evidence. TR 100 (Jury Instruction No. 1).

defendant in *Whaley*, unlike here, had not admitted to harming the victims in that case. *Id.* The Court explained that "[i]dentifying [the victims] in this manner in no way constituted a judgment as to the identity of the perpetrator of these crimes" and thus did not constitute error. *Id.* ("Referring to the accusers as 'alleged victims' during the course of the trial would be cumbersome and untenable.").

That is even truer here. Cavanaugh admitted to harming Missy and argued only about what kind of victim she might be (a victim of first-degree assault or some other crime). If using the term "victim" was not prejudicial in *Whaley*—a case in which the defendant denied committing the harmful conduct—it certainly could not be prejudicial here, where Cavanaugh admits he stabbed Missy 26 times with a kitchen knife.

II. The circuit court did not abuse its discretion in denying instructions on EED or second-degree assault.

Cavanaugh next argues the trial court erred by refusing to instruct the jury on the lesser-included offenses of assault under an extreme emotional disturbance (EED) and assault in the second degree. Appellant Br. at 8–13. But neither of those offenses was "deducible from or supported to any extent by the testimony." *See Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005) (citation omitted). Thus, the trial court did not abuse its discretion.

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"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). But an instruction on "[a] lesser-included offense . . . is not proper simply because a defendant requests it." *Swan v. Commonwealth*, 384 S.W.3d 77, 99 (Ky. 2012). Rather, such an instruction "is required *only if*, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Id.* (quotation omitted). This means "[t]he trial court has no duty to instruct on theories of the case that are unsupported by the evidence." *Driver v. Commonwealth*, 361 S.W.3d 877, 888 (Ky. 2012) (citation omitted). And this Court reviews those decisions only "for abuse of discretion." *Commonwealth v. Caudill*, 540 S.W.3d 364, 367 (Ky. 2018).

A. Cavanaugh was not entitled to an EED instruction.

Cavanaugh argues that he was entitled to an EED instruction because a jury could reasonably believe that he "snapped" in light of his belief that Missy had been "cheating on him with someone close to him." Appellant Br. at 11. But the evidence did not support such a theory.

An EED instruction is appropriate only when there is "evidence that the defendant suffered a temporary state of mind so enraged, inflamed, or disturbed

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as to overcome one's judgment, and to cause one to act uncontrollably from an impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *Greene v. Commonwealth*, 197 S.W.3d 76, 81 (Ky. 2006) (cleaned up). Importantly, there must be an "event" that "triggers the explosion of violence" that is "sudden and uninterrupted." *Id.* (quotation omitted). And any evidence to support an EED instruction must be "definite" and "non-speculative." *Driver*, 361 S.W.3d at 888 (citation omitted).

The circuit court correctly held that no such evidence exists here. The critical point is that there is no evidence of a sudden, uninterrupted, triggering event that caused Cavanaugh to explode. *See Driver*, 361 S.W.3d at 887 (quoting *Greene*, 197 S.W.3d at 81–82). Cavanaugh argues that he snapped because he believed Missy was having an affair. Appellant Br. at 11. But there is no evidence that "[Cavanaugh] *first* learned of [the alleged] affair immediately preceding the [assault], or even on the same day as the assault." *See Driver*, 361 S.W.3d at 888. This is not a case in which Cavanaugh walked into a room and caught someone in the act of adultery. Rather, the testimony indicates that Cavanaugh learned about the alleged affair sometime earlier, from a third party who was not there on the day in question.

In fact, Missy testified that Cavanaugh mentioned her alleged affair only *after* he first choked her. Then Cavanaugh calmed down and asked if she wanted to go outside and smoke. On their way out, Cavanaugh picked up a knife and

prevented Missy from leaving the house. VR, 8/09/21 at 1:19:25–1:19:30. Cavanaugh then informed Missy that he had heard that she was "cheating on [him] with somebody close to [him]. *Id.* at 1:19:30–1:19:35. And at that point, *after* Cavanaugh had calmly spent the morning with her on the bed watching television, and *after* he had suddenly choked her and then calmed down again, Cavanaugh stabbed Missy 26 times. *Id.* at 1:23:03–1:23:20. There was no "sudden and uninterrupted" event that triggered an "explosion." *See Driver*, 361 S.W.3d at 888. And there was no evidence that Cavanaugh was "overcome" by "a temporary state of mind so enraged, inflamed or disturbed" that he could not control his actions. *Id.* (quoting *Greene*, 197 S.W.3d at 81–82).

Rather, the evidence demonstrates that Cavanaugh acted out of "evil or malicious purposes," *see id.*, motivated by an "intent[] [to] cause serious physical injury to [Missy]." *See* KRS 508.010(1)(a). Cavanaugh's "evil or malicious purposes" are underscored by his response to Missy after she tried to convince him that there was no affair. At that point he threatened her: "[T]here's no other way, Missy . . . And there's no sense in screaming because can't nobody hear you." VR, 8/9/21 at 1:19:40–1:19:48. And despite Missy subsequently imploring Cavanaugh to stop, he persisted, stabbing her 26 times (cutting into every organ of Missy's body except her heart) before moving on to breaking eight of her ribs by punching her. *Id.* at 1:23:03–1:23:20; 1:20:30–1:20:35. Then, as Missy stood

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bleeding, Cavanaugh ordered her to "lay in front of the washer and dryer and bleed to death, bitch." *Id.* at 1:20:43–1:20:49.

Nor was any of this testimony disputed. Cavanaugh did not even try to undermine the details of Missy's account, instead focusing only on whether she said he "snapped" at the hospital. But whether Missy said he "snapped" is immaterial. There is *no evidence* that Cavanaugh learned about the alleged affair the moment he attacked Missy. *See Greene*, 197 S.W.3d at 81–82. And there is *no evidence* that he was so enraged that he could not control his own conduct after he calmed down and walked into the kitchen with her. And so any request for an EED instruction was based on nothing more than speculation.

B. Cavanaugh was not entitled to an instruction on assault in the second degree.

Cavanaugh next argues the trial court erred when it failed to instruct the jury on assault in the second degree because a jury could have reasonably found that Cavanaugh acted "wantonly" under KRS 508.020(1)(c). Appellant Br. at 12. But the evidence did not support such an instruction.

As explained above, "[a] lesser-included offense instruction . . . is not proper simply because a defendant requests it." *Swan*, 384 S.W.3d at 99. Such an instruction is required "*only if*, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the

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lesser offense." *Id.* (quotation omitted). That is not the case here. Rather, this is a case in which "the evidence presents an all-or-nothing proposition, allowing only a single account of the degree of the offense *or* demanding an acquittal." *Id.* (citation omitted). And that's because there is no way a jury could have believed that Cavanaugh assaulted Missy *without* believing he committed assault in the first degree.

Start with the relevant language in each statute. Cavanaugh was convicted of violating KRS 508.010(1) (assault in the first degree), which the Commonwealth could prove in one or two ways. A defendant is guilty of first-degree assault if "[h]e intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 508.010(1)(a). Alternatively, a defendant is guilty of first-degree assault if, "[u]nder circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person." The circuit court instructed only on the first theory: intentional assault in the first degree. *See* TR 105 (Jury Instruction No. 6).

By contrast, the charge that Cavanaugh wanted an instruction on under KRS 508.020(1)(c) requires proving "he wantonly cause[d] serious physical injury to another person by means of a deadly weapon or a dangerous instrument."

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According to Cavanaugh, the jury could have believed that he merely acted wantonly (rather than intentionally) when he stabbed her 26 times. He is wrong.

As a point of clarification, Cavanaugh focuses on the wrong theory of assault in the first degree. He points out that both first- and second-degree assault have an element of wantonness, citing KRS 508.010(1)(b) for support. *See* Appellant Br. at 12. But the court did not instruct the jury on a theory of wanton first-degree assault. Rather, the court instructed the jury only on intentional assault, declining to instruct the jury on *either* wanton first-degree assault or wanton second-degree assault.

This was not error. That's because the evidence here was so overwhelming and one-sided, leaving no doubt that Cavanaugh "intentionally cause[d] serious physical injury to [Missy] by means of a deadly weapon or a dangerous instrument." *See* KRS 508.010(1)(a). Cavanaugh admitted that he stabbed Missy *26 separate times*, piercing every major organ in her body except her heart. If a jury believed that Cavanaugh assaulted her, it must have believed he "*intentionally* caused serious physical injury" with a deadly weapon. *See id.* (emphasis added). There is no middle ground in which the jury could have believed he committed an assault but not believed the assault satisfied the elements of intentional assault in the first degree.

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This was not a case, for example, in which a defendant attempted to shoot a warning shot near the victim but mistakenly shot her in the lungs. In that case, a jury might believe that the defendant did not "intentionally cause[] serious physical injury." Here, if the jury believed beyond a reasonable doubt that Cavanaugh stabbed Missy 26 times in her abdomen—which Cavanaugh did not dispute—it is *impossible* for the jury not to believe he committed assault in the first degree. It is a classic example of the "all-or-nothing proposition" in which the jury could only convict on the crime charged or acquit. *Swan*, 384 S.W.3d at 99. Nothing else would have been reasonable.

The decisions from this Court bear out this distinction. Take for example *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977). There, the defendants were convicted for attempted murder after they shot a police officer. They argued on appeal that the circuit court should have instructed on assault in the second degree as a lesser-included offense. *Id.* at 77. This Court agreed. It explained that a second-degree instruction was warranted because "a reasonable juror could conclude that [the] defendants fired at [the officer] not intending to kill him but intending only to injure him to the extent necessary to effect their escape."[5] *Id.* at 78. But here, there is no reasonable argument that Cavanaugh only wantonly

[5] The Court also held that because the officer was not "seriously injured," the evidence could not support a conviction of [first-degree assault]." *Id.* at 79.

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caused "serious physical injury to [Missy] by means of a deadly weapon or a dangerous instrument"—no one stabs another person 26 different times for a purpose other than causing serious physical injury. That is, there is no theory of this case in which Cavanaugh committed the acts at issue but did not satisfy the elements of assault in the first degree.

Similarly, in *Swan* this Court reversed a circuit court for failing to provide a second-degree instruction because the proof did "not establish such an all-or-nothing proposition." *Swan*, 384 S.W.3d at 100. The problem in *Swan* was that the evidence could have supported a finding of either an ordinary physical injury *or* a serious physical injury. As this Court explained, the nature of the evidence was still "far from compelling" to support "a finding of serious physical injury as required to avoid giving the lesser-included offense instruction." *Id.* And so the prosecutor had failed to show an "all-or-nothing proposition" that the defendant had committed *only* assault in the first degree or no crime at all. *Id.* at 100–01. In other words, because the victims' "injuries . . . fell somewhere in the gray area between mere physical injury and serious physical injury," a jury could have reasonably convicted the defendant of assault in the first degree, while just as reasonably convicting the defendant of assault in the second degree. *Id.* at 101.

Here, Cavanaugh does not dispute that Missy incurred serious physical injuries, which caused her to "almost die[]" and have led to her "long-term health

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issues." Appellant Br. at 1. Cavanaugh does not deny causing those life-threatening physical injuries when he stabbed her 26 times. *Id.* at 1–2. And as explained above, there is no reasonable argument that Cavanaugh's decision to stab Missy 26 times was wanton, rather than intentional—particularly given that after he stabbed her, he told her to "bleed to death, bitch." VR 8/9/21, 1:20:42–1:20:49. So unlike in *Swan*, the Commonwealth here demonstrated an all-or-nothing proposition in which Cavanaugh was guilty of assault in the first degree or nothing at all.

Nor is Cavanaugh helped by focusing on wanton first-degree assault (a theory the jury was not instructed on). That theory requires proving that "[u]nder circumstances manifesting extreme indifference to the value of human life he wantonly engage[d] in conduct which create[d] a grave risk of death to another and thereby cause[d] serious physical injury to another person." KRS 508.010(1)(b). Although the proof in this case overwhelmingly establishes intentional conduct, the same problem discussed above arises if the court had instructed on wanton first-degree assault. That is, it is impossible for the jury to believe that Cavanaugh committed second-degree assault by "wantonly caus[ing] serious physical injury to another person by means of a deadly weapon" without also believing that he "manifest[ed] extreme indifference to the value of human life" and "wantonly engaged in conduct" that "create[d] a grave risk of death to

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another" causing "serious physical injury." *See* KRS 508.010(1). Whichever theory it is, there is no possible way a jury could have had reasonable doubt about first-degree assault while also convicting Cavanaugh of second-degree assault.

This Court should therefore affirm.

III. There is no basis for cumulative error.

Cavanaugh last argues that the Court should reverse on cumulative error. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). This Court has "found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Id.* (citation omitted). No such errors exist here.

As explained above, none of the alleged errors that Cavanaugh relies on were actually errors. And even if that's wrong, there is no way to conclude that they "individually or cumulatively[] render[ed] the trial unfair." *Id.* The testimony in this case was as unequivocal as it was overwhelming. Cavanaugh stabbed Missy 26 times, piercing every major organ in her body except the heart. It is a miracle that Missy even survived the attack. And Cavanaugh does not dispute any of this. So even if Cavanaugh had identified actual errors in his trial, those errors cannot be said to have rendered his trial fundamentally unfair. *See id.*

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CONCLUSION

The Court should affirm the circuit court's judgment.

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