COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2021-SC-0441-MR

RICO LAMONT CAVANAUGH — **APPELLANT**

v. — **APPEAL FROM TRIGG CIRCUIT COURT**
HON. C.A. WOODALL III, JUDGE
INDICTMENT NO. 19-CR-00057

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT, RICO LAMONT CAVANAUGH

Submitted by:

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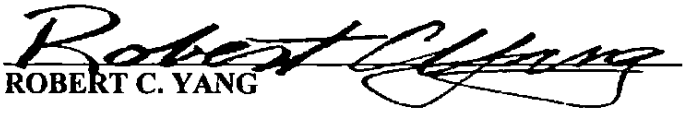
CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to Hon. C.A. Woodall III, Chief Circuit Judge, Lyon County Judicial Center, P.O. Box 790, Eddyville, KY 42038-0790; Hon. Carrie Ovey-Wiggins, Commonwealth's Attorney, 248 Commerce Street, P.O. Box 679, Eddyville, KY 42038; to Hon. Michael L. Thompson, 15744 Fort Campbell Blvd, Oak Grove, KY 42262; and to be served by state messenger mail to Hon. Daniel Jay Cameron, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on March 11, 2022. The record on appeal has been returned to the Clerk of this Court on this date.



ROBERT C. YANG

INTRODUCTION

Appellant, Rico Cavanaugh, was convicted by a jury of first-degree assault and being a first-degree persistent felony offender and given a 34-year sentence. Mr. Cavanaugh raises two issues on appeal: the trial court misapplied Marsy's Law and erred in not giving lesser-included instructions.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Cavanaugh requests oral argument to answer any questions this Court may have to render a fair and just opinion in this case.

STATEMENT CONCERNING CITATION TO THE RECORD

The one-volume transcript of record will be cited as "TR" with the page number directly following (e.g., TR 1). The court proceedings, contained on 15 compact discs, will be cited in conformance with CR 98(4)(a).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The two issues on this direct appeal are the trial court improperly applying Marsy's Law and failing to give lesser-included instructions.

Appellant, Rico Cavanaugh, stabbed his then-wife, Missy Cain, 26 times with a kitchen knife. (VR: 8/9/21; 1:14:55, 1:23:02, 1:19:20). She almost died and has long-term health issues. (VR: 8/9/21; 3:00:57, 3:01:36).

At the beginning of the jury trial, the trial court explained that witnesses would be separated from the courtroom to keep them from hearing one another. (VR: 8/9/21; 11:16:07). Then, the prosecutor asked for Ms. Cain to be allowed to be in the courtroom as much as she wanted and the trial court agreed to do so, over defense counsel objection. (VR: 8/9/21; 11:16:55, *et seq.*). The judge then explained to the jury the Marsy's Law exception to the separation of witnesses rule:

> And the other exception is that the victim of a crime does have a right to be present under a relatively new statute and constitutional amendment, and so, she may come and go in the courtroom as she sees fit.

(VR: 8/9/21; 11:17:40).

Ms. Cain, the next to last witness for the Commonwealth, testified to the events of June 8, 2019. (VR: 8/9/21; 1:16:48). Around 10 AM, she and Mr. Cavanaugh went to his mother's house in Trigg County to wait for her to return from work. (VR: 8/9/21; 1:17:38, 1:18:02). They were all going to visit his cousin, who had recently lost her son. (VR: 8/9/21; 1:17:27). Ms. Cain and Mr.

Cavanaugh were in the back bedroom watching television, with Ms. Cain also looking through Facebook on her phone. (VR: 8/9/21; 1:18:50).

Suddenly, Mr. Cavanaugh rolled on top of her and started choking her. (VR: 8/9/21; 1:19:05). Then, he got up and asked her if she wanted to go outside and smoke. (VR: 8/9/21; 1:19:10). She followed him into the kitchen, where he picked up a knife, locked the front door, turned around, and told her, "Somebody told me you were cheating on me with somebody close to me." (VR: 8/9/21; 1:19:20). She tried to convince him that it was not true, but he just responded, "There is no other way, Missy. And there's no sense in screaming because can't nobody hear you." (VR: 8/9/21; 1:19:34).

As she stood between a freezer and table in the kitchen, he started stabbing her. (VR: 8/9/21; 1:19:45). As she stood screaming and pleading, he continued stabbing her, then stopped and started punching her left side, resulting in eight broken ribs. (VR: 8/9/21; 1:20:10). She complied when he told her, "Go over and lay in front of the washer and dryer and bleed to death, bitch." (VR: 8/9/21; 1:20:40). As she lay on the floor, she started begging him to call 911, and he eventually did. (VR: 8/9/21; 11:20:57).

While she did not remember this, Ms. Cain told police officers at the hospital later that day, "He's always accusing me of cheating," "He just snapped," and that Mr. Cavanaugh had told her, "He was sorry," and "He loved me." (VR: 8/9/21; 1:41:52, 1:53:40). Ms. Cain detailed the injuries she

sustained, the medical services she received, and her recovery efforts. (VR: 8/9/21; 1:22:20, *et seq.*).

At the close of evidence, defense counsel asked the trial court to instruct on assault under extreme emotional disturbance and second-degree wanton assault. (VR: 8/9/21; 3:03:57, 3:20:42). The trial court refused. (VR: 8/9/21; 3:04:09).

The jury found Mr. Cavanaugh guilty of first-degree assault, then guilty of being a first-degree persistent felony offender ("PFO"). (VR: 8/9/21; 4:06:32, 5:28:30). The jury gave him 20 years on the underlying charge, then enhanced it to 34 years with the PFO conviction. (VR: 8/9/21; 5:28:05). The trial court followed the jury recommendation and sentenced him to the 34 years. TR 120-124; attached as Appendix, Tab 1.

He now appeals as a matter of right. Ky. Const. § 115.

Additional facts will be recited in the argument below as needed.

ARGUMENT

I.
The trial court erred by misapplying Marsy's Law.

Preservation.

This issue is preserved by the trial court overruling the defense's objection to the prosecutor's request to let Ms. Cain be in the courtroom as much as she wanted. (VR: 8/9/21; 11:16:55, *et seq.*).

Facts.

The trial court told the jury that Ms. Cain, as "the victim of a crime" was allowed to be in the courtroom under an exception to the separation of witnesses rule. (VR: 8/9/21; 11:17:40).

Law and Analysis.

This issue revolves around the separation of witnesses rule under Kentucky Rules of Evidence ("KRE") 615, a defendant's right to a presumption of innocence, and how Marsy's Law upends both. Under KRE 615:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;

> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
>
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

The specific purpose of the separation of witnesses rule is "to preserve the authenticity of a prospective witness's testimony by preventing influence, even if subtle and subconscious, of one witness's testimony on a prospective witness's testimony." *Dooley v. Commonwealth*, 626 S.W.3d 487, 499, FN 42 (Ky. 2021) (citing McGuire v. Commonwealth, 368 S.W.3d 100, 112-13 (Ky. 2012), *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky. 2004) (quoting *Speshiots v. Coclanes*, 224 S.W.2d 653, 656 (Ky. 1949)); *Reams v. Stutler*, 642 S.W.2d 586, 589 (Ky. 1982)).

Similarly, a defendant's presumption of innocence flows from the due process rights stated in the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution. *Coffin v. U.S.*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978). Similarly, Kentucky Constitution § 11 provides due process protections to criminal defendants.

Marsy's Law, codified as Kentucky Constitution § 26A, states, in part, "a victim" has "the right to be present at the trial and all other proceedings"... "on the same basis as the accused...." Further, § 26A states, "Nothing in this

section shall afford the victim party status, or be construed as altering the presumption of innocence in the criminal justice system." *See also* KRS 421.500(12) (in defining "victim," "Nothing in KRS 421.500 to 421.575 shall be construed as altering the presumption of innocence in the criminal justice system.").

When the trial court allowed Ms. Cain to come in and out of the courtroom and explained to the jury that she was "the victim of a crime," Marsy's Law upended Mr. Cavanaugh's rights to a presumption of innocence and to have witnesses separated.

In *Moore v. Commonwealth*, 323 S.W.2d 577, 578 (Ky. App. 1958), the trial court overruled a defense motion to separate witnesses, all prisoners, who were present when Moore killed a prison guard. "[T]he witnesses were permitted to remain in the court room." *Id.* In reversing based on the trial court's failure to apply the separation of witnesses rule, this predecessor Court held:

> It may be that each witness testified truthfully in this case but, because of the nature of this action and because of the peculiar relationship existing between these witnesses and persons interested in the prosecution, the Court is of the opinion that the trial court erred in refusing to apply the rule of separation. For that reason, the judgment is reversed.

Id. The *Moore* Court stated, "The purpose of the rule is to elicit the truth, unveil the false and promote the ends of justice." *Id.* Just as in *Moore*, the trial court in this case failed in all these respects.

Even if Ms. Cain testified truthfully, there was a "peculiar relationship existing between [her] and persons interested in the prosecution...." Indeed, she was the main complaining witness for the Commonwealth. Normally, "exclusion of the testimony of the witness who heard or was informed of the testimony would seem the appropriate remedy in most cases." *Smith v. Miller*, 127 S.W.3d at 647, citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, note 4, § 11.30[4], p. 892 (4th ed. 2003). The trial court had options to honor KRE 615 and Marsy's Law; such as having Ms. Cain testify first, which would have removed any hint of influence from other witnesses.

Further, the trial court labeling Ms. Cain as a "victim" at the start of trial denied Mr. Cavanaugh his presumption of innocence and invaded the province of the jury. As defined by KRS 421.500(1)(a)(1), a "victim" is someone "directly and proximately harmed as a result of: The commission of a crime classified as a felony...." Thus, the trial court explicitly told the jury that Ms. Cain was someone harmed by a crime. This was the ultimate fact the jury was supposed to determine. *Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985) ("an opinion on the ultimate fact, that is, innocence or guilt...invades the proper province of the jury."). Given that the trial court refused to give lesser-included instructions, this ensured the jury would convict on the sole charge. *See* Issue II, below.

Marsy's Law states it is not to "be construed as altering the presumption of innocence in the criminal justice system...." KRS 421.500(12). In practice,

the trial court acknowledging Ms. Cain as a "victim" who had a right to be present in the courtroom did alter Mr. Cavanaugh's presumption of innocence. She is not a victim until a jury finds she is, just as Mr. Cavanaugh is innocent until a jury finds him guilty. The trial court erred in allowing Marsy's Law to overcome Mr. Cavanaugh's right to a presumption of innocence and right to keep witnesses from listening to other witnesses prior to their testimony. These errors resulted in a violation of Mr. Cavanaugh's constitutional rights to a fair trial and to due process. Fifth, Sixth, and 14th Amendments, United States Constitution; §§ 2, 3, 7, and 11, Kentucky Constitution. Mr. Cavanaugh's case must be remanded to the trial court for a new trial.

II.
The trial court erred in not giving lesser-included instructions.

Preservation.

This issue is preserved by defense counsel asking for assault under extreme emotion disturbance ("EED") and second-degree assault instructions. (VR: 8/9/21; 3:03:57, 3:20:42). The trial court refused. (VR: 8/9/21; 3:04:09).

Facts.

Defense counsel argued an EED instruction was warranted because Ms. Cain testified to Mr. Cavanaugh's behavior before, during, and after the stabbing. (VR: 8/9/21; 3:05:38). Specifically, she stated that prior to the

stabbing, he told her he knew she was cheating on him and that "he just snapped." (VR: 8/9/21; 1:19:20, 1:53:40). Further, second-degree assault can be committed wantonly, so this instruction was also warranted. (VR: 8/9/21; 3:21:02).

The trial court refused to instruct on EED, stating that under *Driver v. Commonwealth*, 361 S.W.3d 877, 888 (Ky. 2012), an EED instruction "must be supported by some definite, non-speculative evidence." (VR: 8/9/21; 3:04:09). Similarly, the trial court declined to instruct on second-degree wanton assault, stating it had considered giving the instruction based on wantonness, but because first-degree assault can also be committed wantonly, the trial court did not want to confuse the jury. (VR: 8/9/21; 3:22:00).

Law and analysis.

A trial court must "instruct the jury on affirmative defenses and lesser-included offenses if the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the charged offense but was guilty of the lesser one." *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (*citing Fredline v. Commonwealth*, 241 S.W.3d 793 (Ky. 2007); *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007)).

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); *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999). "[A] trial court's decision not to give an instruction is reviewed for an abuse of discretion." *Harris*, 313 S.W.3d at 50 (*citing Crain v. Commonwealth*, 257

S.W.3d 924 (Ky. 2008)). Further, on a claim of error in failing to give a requested jury instruction, an appellate court reviews the evidence in the light most favorable to the party requesting the instruction. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005) (*citing Ruehl v. Houchin*, 387 S.W.2d 597, 599 (Ky. 1965)).

A. Assault under EED instruction

Assault under EED is a lesser offense of first-degree intentional assault. Under KRS 508.040, a defendant charged with an assault offense may establish in mitigation that he acted under EED. The purpose of the statute is to "provide the same type of mitigating, degree-reducing factor in the law of assault as exists in the law of homicide." LRC Commentary to KRS 508.040. The definition of EED, which applies to assault cases as well as homicide cases, was fashioned by this Court in *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-469 (Ky. 1987):

> Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as [the] defendant believed them to be.

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

Under the facts of this case, Mr. Cavanaugh was entitled to an instruction on assault under extreme emotional disturbance. The law in Kentucky allows a jury to determine the degree of culpability by providing jury instructions on lesser-included offenses. A jury could reasonably believe that Mr. Cavanaugh believing Ms. Cain was cheating on him with someone close to him and "just snapping" ought to mitigate the culpability of his actions. Where the evidence is such that the jury could come to any of several conclusions, the court is required to submit instructions on the various alternatives. *Allen v.*

Commonwealth, 245 Ky. 660, 54 S.W.2d 44 (Ky. 1932). The jury was not given the option of any lessers. A new trial is required.

B. Second-degree assault instruction

Similarly, second-degree wanton assault is a lesser-included offense of first-degree assault. First-degree wanton assault requires "Under 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." KRS 508.010(1)(b). In contrast, under KRS 508.020(1)(c), a person is guilty of second-degree wanton assault when "He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument."

Here, a jury could have found Mr. Cavanaugh acted wantonly, that "he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." KRS 501.020(3). A jury could have believed when he "just snapped," he was acting wantonly. The trial court considered giving the instruction but stopped short based on a fear of confusing the jury. (VR: 8/9/21; 3:22:00). The trial court had a duty to give lesser-included instructions, but failed to do so.

The requirement that lesser-included offense instructions be given to a jury is designed to prevent a jury from convicting an individual of a crime, even if all of its elements have not been proven, simply because the jury believes that the defendant committed some crime and feels the individual must be convicted of something. As the United States Supreme Court stated: "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." *Beck v. Alabama*, 447 U.S. 625, 634 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 212-213 (1973)).

The trial court erred in this case. The trial court refused to instruct on the lesser-included charges and prevented the jury from convicting Mr. Cavanaugh on the lessers. That error led to prejudice. As *Beck* stated, "the failure to give the jury the 'third option' of convicting on a lesser-included offense would seem inevitably to enhance the risk of an unwarranted conviction." 447 US at 637.

The trial court's denial of Mr. Cavanaugh's request for assault under EED and second-degree wanton assault denied him due process of law, a fair trial, and reliable sentencing. 5th, 6th, and 14th Amend., U.S. Const.; §§ 1, 2, 3, 7, and 11 Ky. Const.; RCr 9.54(1). Reversal is required.

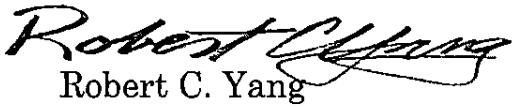
III.
Cumulative error.

In the event this Court determines the errors detailed in the arguments above are not individually reversible, Mr. Cavanaugh requests reversal for a new trial under 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).

CONCLUSION

This Court must remand this case with instructions that Mr. Cavanaugh be granted a new trial.

Respectfully submitted,



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