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Supreme Court of Kentucky

2021-SC-0399-MR

CHRISTIAN RICHARD MARTIN — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 19-CR-00298

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE BISIG

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Christian Richard Martin was convicted in Christian Circuit Court on three counts of murder; two counts of burglary; one count of arson; one count of attempted arson; and three counts of tampering with physical evidence. He received three life sentences without the possibility of parole for the murders; a life sentence for arson; twenty years' imprisonment for attempted arson; twenty years' imprisonment for each count of burglary; and five years for each count of tampering with physical evidence for a total sentence of life without the possibility of parole. Martin appeals to this Court as a matter of right.[1]

Martin argues the trial court erred by (1) admitting hearsay statements that the victims feared him; (2) allowing his ex-wife and stepson to refuse to

[1] Ky. Const. § 110(2)(b).

testify on Fifth Amendment grounds; (3) excluding certain alleged alternative perpetrator ("aaltperp") evidence; (4) admitting evidence of a bullet casing that was discovered by a lay witness and excluding evidence that the same witness failed a polygraph examination; (5) denying his motion for directed verdict on the arson and murder charges; and (6) allowing his convictions on two counts of first-degree burglary to stand in violation of double jeopardy principles. Having carefully reviewed the record and arguments, we reverse Martin's arson and attempted arson convictions, otherwise affirm, and remand for entry of a judgment consistent with this Opinion.

FACTS AND PROCEDURAL HISTORY

Martin served as a Major in the United States Army and was stationed at Fort Campbell, Kentucky. He was married to Joan Harmon. Martin and Harmon resided in Pembroke, Kentucky, with Justin Elijah Harmon, Harmon's minor son from a previous relationship.[2] The marriage between Martin and Harmon was fractious. In 2012, Martin filed for divorce. The marriage was ultimately annulled after it was discovered Harmon had never divorced her previous husband. During an argument regarding the divorce, Martin's daughter overheard Harmon tell Martin that she would ruin his life and military career if he left her.

[2] For clarity, we will refer to Joan Harmon as "Harmon" and Justin Elijah Harmon as "Justin."

Harmon asked neighbors, Calvin "Cal" Phillips and his wife, Pamela "Pam" Phillips, to help her move out of the residence she shared with Martin.[3] During the move, Cal observed what he believed to be classified military information located on a laptop computer and computer disks. Cal took possession of the items and turned them over to the Federal Bureau of Investigation (FBI). Harmon also told Cal that Martin was physically abusive to Justin and her. She gave him photographs depicting Justin's injuries, which Cal provided to military police.

The military charged Martin with various offenses relating to the mishandling of classified information and the physical abuse of Justin. Cal was scheduled to testify at the court-martial. In the weeks and months leading up to the court-martial, Cal and Pam made statements to several individuals indicating their fear that Martin would harm or kill them and that, if anything happened to them, authorities should investigate Martin. After several continuances, the court-martial proceeding was scheduled for December 2015.

On November 18, 2015, Pam left for work around 7:00 a.m. Around noon, she was informed that a washing machine she had ordered could not be delivered to her home because no one was there. Pam was concerned, so she left work earlier than usual, around 5:00 p.m., to go check on Cal. When she arrived at the residence, Pam called a friend, Frances Marlene LaRock, to ask if

[3] "Although our normal practice is to refer to people by their surnames rather than their first names in our opinions," we will refer to members of the Phillips family by their first names to avoid confusion. *Roach v. Commonwealth*, 313 S.W.3d 101, 104 n.2 (Ky. 2010).

she had seen Cal. LaRock had called Cal earlier in the day to check on his sick dog, but no one answered. LaRock had also gone to the Phillips' residence around 2:00 p.m., and found the front door open, which was unusual, but assumed that Cal was out working in the back field.

Pam told LaRock to hold on the line because she saw something. LaRock heard a scream, as if someone had been startled, and then silence. LaRock returned to check on Pam, and found the front door open, but no one answered. At that time, Pam's car was parked normally. About an hour later, LaRock returned again to check on the Phillipses. At this time, Pam's car had been moved to face the other direction and the front door of the house was closed.

Early the next morning, around 2:15 a.m., John Homick, a nearby resident, was awakened by the sound of two explosions or gunshots coming from somewhere on his farm. He thought the sounds were possibly caused by trespassing hunters and did not investigate. Later that morning, Homick saw a car smoldering in his field. Police discovered two sets of human remains inside the burnt vehicle. The vehicle was registered to the Phillipses. Police officers then went to the Phillips' residence where they discovered Cal's remains in the cellar among signs of a fire.

Police continued to search the Phillips' property[4] and discovered blood in the backyard next to a distinctive World War II-era pistol, which was known to

[4] The Phillips' property was processed for evidence on at least three separate occasions: November 19, 2015; November 30, 2015; and December 4, 2015.

belong to the Phillips' neighbor, Ed Dansereau. Subsequent testing indicated that the blood belonged to Dansereau. Pam's blood was also discovered on the back door and in the yard. Police confirmed the burnt remains in the vehicle belonged to Pam and Dansereau. Several hairs were recovered from Dansereau's vehicle, which had been located between his residence and Pam's burnt vehicle. While certain hairs were "consistent" with a sample taken from Martin, only one hair was suitable for definitive DNA testing and it did not match Martin.

Projectile fragments recovered from the bodies of Pam and Dansereau confirmed they had been shot multiple times with a .22 caliber firearm. Martin owned several .22 caliber firearms. Forensic testing was inconclusive, meaning that the examiner could neither confirm nor exclude the possibility that the recovered fragments were linked to Martin's .22 caliber firearms.

Cal was killed by unique G-2 RIP .45 caliber bullets fired from a Glock pistol. He suffered several gunshot wounds and blunt force trauma injuries to the head, face, and extremities. The police found a .45 caliber Glock pistol when they searched Martin's home safe. Again, forensic testing of the recovered fragments was inconclusive.

No arrests were made in the immediate aftermath of the murders. Martin eventually left Pembroke and moved to North Carolina where he worked as a commercial airline pilot. At some point, he was convicted at the court-martial proceeding. *United States v. Martin*, ARMY 20160336, 2019 WL 1076998 at *1 n.2 (A. Ct. Crim. App. Mar. 5, 2019). Martin was dismissed

from the Army and sentenced to "confinement for ninety days, forfeiture of all pay and allowances, and a reprimand." *Id.*

Following the murders, the Phillips' son, Matt Phillips, and his aunt, Diana Phillips, installed cameras and otherwise secured the Phillips' residence. Several months later, in April 2016, Diana noticed a metallic object under some wood on the breezeway to the back porch. She showed the object to Matt who realized it was a shell casing and called the police. Apparently, police had concerns regarding the circumstances surrounding the discovery of this evidence.[5] In any event, in 2018, testing revealed the casing was fired from Martin's Glock.

On May 11, 2019, Martin was arrested at the Louisville Airport as he was preparing to pilot a commercial flight. He was later indicted on three counts of murder, two counts of burglary, one count of arson, one count of attempted arson, and three counts of tampering with physical evidence. Venue was transferred from Christian County to Hardin County.

At trial, Martin presented an aaltperp defense asserting that his ex-wife Harmon wanted to ruin him, and so had her boyfriend commit the murders and plant the shell on the Phillips' porch to frame him. Given Martin's theory of the case, Harmon and Justin invoked the Fifth Amendment privilege against self-incrimination. Following a hearing, the circuit court ordered that neither Harmon nor Justin could be called as a witness at trial.

[5] At a suppression hearing, it was revealed that police requested Diana to submit to a polygraph examination, which she apparently failed. However, the trial court excluded this evidence at trial over Martin's objection.

Martin therefore developed his aaltperp defense through argument and other witnesses. Martin explicitly implicated Harmon in the murders during his opening statement. Martin also presented testimony from his daughter that Harmon threatened to ruin him and his military career when he told her that he wanted to end their marriage. Martin likewise presented testimony from Harmon's work supervisor, Lisa Petrie, that Harmon was strangely excited, and almost happy, in the immediate aftermath of the murders. Harmon's statements about the murders and other behavior disturbed Petrie to the point that Petrie reported Harmon to police.[6] Martin further presented evidence that about a month after the murders, Harmon brought Pam's cellphone to an AT&T store, claiming she had found it in the yard of her residence in Elkton, Kentucky.[7] When Harmon returned the phone to AT&T, it had been reset to factory settings.

Martin also produced evidence that Harmon was known to carry a Glock pistol. Martin further attempted to cast doubt on the integrity of the investigation because Harmon was romantically involved with William Stokes, who was related to Ed Stokes, a Christian County Sheriff's Deputy. Former assistant Commonwealth's Attorney Katherine Foster[8] also testified that, in her

[6] The content of Harmon's alleged statements to Petrie is unknown.

[7] Elkton is located in Todd County, about 10 miles from Pembroke.

[8] Foster currently serves as an assistant Christian County Attorney.

opinion, military prosecutors improperly attempted to pressure her into dismissing bigamy charges against Harmon. [9]

The jury found Martin guilty on all counts. He received a total sentence of life without the possibility of parole. This appeal followed.

ANALYSIS

1. HEARSAY STATEMENTS REGARDING THE VICTIMS' FEAR OF MARTIN WERE ADMISSIBLE UNDER KRE 803(3)'S STATE-OF-MIND EXCEPTION.

For his first contention of error, Martin argues the trial court abused its discretion by allowing four witnesses to testify concerning statements made by Cal and Pam concerning their fear of Martin. We disagree.

A trial court has wide discretion in admitting evidence. *Daugherty v. Commonwealth*, 467 S.W.3d 222, 231 (Ky. 2015). On appeal, we will not disturb a trial court's decision to admit evidence absent an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). To

[9] Harmon later pleaded guilty to a felony charge of bigamy in Christian Circuit Court. She was granted pretrial diversion. Harmon completed pretrial diversion two days prior to trial in the present matter. The Commonwealth subsequently filed a motion in limine to exclude any reference to the bigamy charges under KRS 533.258. The trial court ruled that Harmon could not be impeached with the bigamy conviction because it was dismissed-as-diverted. However, the trial court also left open the possibility that reference to the bigamy charge could be appropriate in a different context. It appears that reference was made, during trial, to the prosecution of Harmon on unidentified charges. Martin has not challenged the trial court's ruling on the Commonwealth's motion in limine on appeal.

The military courts concluded that the military prosecutors did not commit misconduct through their communications with Foster. *United States v. Martin*, ARMY 20160336, 2019 WL 1076998 at *2 (A. Ct. Crim. App. Mar. 5, 2019). However, Foster opined the military court did not discern any misconduct because she ultimately refused to dismiss the charges against Harmon.

overturn the trial court's ruling, we must be convinced the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Prior to trial, the Commonwealth filed a notice of its intent to admit the following hearsay statements into evidence under the forfeiture by wrongdoing exception contained in KRE[10] 804(b)(5):

- About two weeks before he died, Cal told Steven Durham that he feared Martin would kill him before the court-martial.
- Cal told Steve Bollinger that if he ever ended up missing or dead to point the authorities to Martin.
- Cal told Major James Garrett, one of the prosecutors from the court-martial, that he was afraid of Martin because Martin knew he had provided the information that led to the court-martial.
- Pam told Penny Cayce that she and Cal were afraid to leave the house unoccupied because they were afraid Martin would be in the house when they got back. Pam told Cayce she was worried Martin would hurt her and the authorities should look at Martin if anything happened to her.

Martin objected to this evidence, arguing the forfeiture by wrongdoing exception did not apply and the statements should otherwise be excluded under the hearsay rule and KRE 403. The trial court conducted an evidentiary hearing on the issue prior to trial. Christian County Sheriff's Department Lieutenant Leonard Scott Smith was the sole witness who testified at the hearing.[11] He recounted his investigation and interviews with Durham,

[10] Kentucky Rules of Evidence.

[11] At the time of the investigation, Smith was a detective for the Kentucky State Police.

Bollinger, Garrett, and Cayce. Smith testified that Pam and Cal's fears were based on their belief that Martin was trying to intimidate them by walking his dog around their property. Martin did not produce any evidence at the hearing. Following the hearing, the trial court determined the statements were admissible under the forfeiture by wrongdoing exception contained in KRE 804(b)(5). The statements above were ultimately entered into evidence during the Commonwealth's case-in-chief, over Martin's renewed, contemporaneous objections.

"A fundamental rule in the law of evidence is that hearsay evidence is inadmissible evidence." *Walker v. Commonwealth*, 288 S.W.3d 729, 739 (Ky. 2009). Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." KRE 801(c). Here, the statements of Cal and Pam regarding their fear of Martin were made out-of-court, were offered to prove their fear of Martin, and thus were inadmissible unless the statements fall within the scope of some exception to the hearsay rule. *Id.*; KRE 802.

KRE 804(b)(5) is one such exception, providing that the hearsay rule does not bar admission of "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." When a party seeks to introduce hearsay evidence under this forfeiture by wrongdoing exception, the "trial court must hold an evidentiary hearing before ruling on the admissibility of the proposed hearsay." *Parker v. Commonwealth*, 291 S.W.3d 647, 669 (Ky. 2009).

The evidentiary hearing should be conducted prior to trial, if practicable. *Id.* At the evidentiary hearing, "the proponent of the hearsay must first introduce evidence establishing good reason to believe that the defendant intentionally procured the absence of the declarant, then the burden of going forward shifts to the party opposing introduction of the hearsay to offer credible evidence to the contrary." *Id.* at 670. The burden of proof on admissibility of evidence under the forfeiture by wrongdoing exception is preponderance of the evidence—the same standard under KRE 104(a) used when admissibility depends on a question of preliminary fact. *Id.*

> The paradigm example of forfeiture by wrongdoing occurs when
>
> > a crime is committed, and the person ultimately accused of the crime later commits some other wrongful act that makes a witness unavailable (he intimidates or even kills the witness), so the crime charged and the act that brings into play the forfeiture exception are different acts, occurring at different times and places.

5 Christopher B. Mueller & Laird C. Kirkpatrick, 5 *Federal Evidence* § 8:134 (4th ed.). Indeed, the forfeiture by wrongdoing exception applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Parker*, 291 S.W.3d at 668 (quoting *Giles v. California*, 554 U.S. 353, 359 (2008)). A design to prevent a witness from testifying is distinct from the situation where the charged crime merely caused or resulted in the unavailability of the witness, i.e., a typical murder case. *Id.*

Once a design to prevent a witness from testifying has been identified, the plain language of KRE 804(b)(5) does not limit the applicability of the forfeiture by wrongdoing exception to the proceeding at which the witness

would have testified. The exception "applies not only in the original case for which the declarant was an actual or potential witness, but also in any subsequent prosecution pertaining to the wrongful procurement of the witness's unavailability." *United States v. Johnson,* 495 F.3d 951, 970 (8th Cir. 2007). Consequently, under the forfeiture by wrongdoing exception a defendant forfeits "his hearsay and confrontation objections not only with respect to 'a trial on the underlying crimes about which he feared [the victim] would testify,' but also 'in a trial for murdering her.'" *Id.* (quoting *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999)).

In the present appeal, we conclude the trial court properly determined, by a preponderance of the evidence, that Martin intended to prevent Cal from testifying at the court-martial proceeding. After all, Cal discovered the evidence of Martin's crimes, provided that evidence to authorities, and was killed mere weeks before he was scheduled to testify in the resulting court-martial against Martin. As such, Cal's statements fall squarely within KRE 804(b)(5)'s forfeiture by wrongdoing exception to the hearsay rule.

On the other hand, the Commonwealth failed to produce any evidence that Martin intended to prevent *Pam* from testifying. Pam was neither scheduled to testify at the court-martial nor did she present any incriminating evidence to the authorities. Tellingly, in its pre-trial notice, the Commonwealth stated it was "prepared to offer evidence sufficient to believe that the defendant murdered Calvin Phillips for the purpose of making *him* unavailable as a witness against him, thus making the above outlined statements admissible."

(Emphasis added). Consequently, the Commonwealth failed to carry its burden of proving that Martin intentionally procured Pam's absence to prevent her from testifying. Therefore, the trial court erred in finding Pam's hearsay statements admissible under KRE 804(b)(5).

While we conclude that Pam's statements regarding her fear of Martin therefore did not fall within the forfeiture by wrongdoing exception to the hearsay rule, we also conclude nonetheless that those statements do fall within the scope of a separate hearsay exception, namely KRE 803(3)'s state of mind exception.[12] In relevant part, KRE 803(3) excepts from the hearsay rule a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . ." To fall within this exception, "the out-of-court statement must express the declarant's *present* mental, emotional or physical condition." *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 197 (Ky. 2017). In other words, the exception is limited to statements regarding the declarant's mental or physical condition "then existing" at the time the statement is made. As such, a "critical element of the [state of mind] exception [is] the contemporaneity of the statement and the state of mind it manifests. . . .

[12] While the trial court erroneously found Pam's statements admissible under the forfeiture by wrongdoing exception to the hearsay rule, we may nonetheless uphold the admission of that evidence on other grounds appearing in the record, such as the state of mind exception. *See Wilson v. Commonwealth*, 381 S.W.3d 180, 190 (Ky. 2012) ("[A]n appellate court may affirm a lower court's decision on other grounds so long as the lower court reached the correct result." (quoting *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009))); *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009) ("[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record.").

[S]tatements reporting states of mind that existed at earlier points in time cannot qualify for admission under this exception." *Id.* at 198 (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.50[3] at 645 (4th ed. 2003)).

We have previously held that "[s]tatements of fear may be admissible pursuant to KRE 803(3)['s]" state of mind exception. *Bray v. Commonwealth*, 68 S.W.3d 375, 381 (Ky. 2002). Here, Pam's statements expressed a contemporaneous fear of Martin. Cayce, Pam's co-worker who testified regarding the statements, stated that Pam said she was afraid to leave her house for the holidays because if she did, Martin would be in her house waiting for her when she got back. Cayce further testified that Pam also said she believed Martin would hurt her, and that if anything happened to her, Cayce should point authorities to Martin. We have little trouble concluding that Pam's statements regarding her then existing fear of Martin fall well within the scope of the state of mind hearsay exception. Similarly, while Cal's statements regarding his fear of Martin were admissible under the forfeiture-by-wrongdoing exception, those statements too were admissible under the state of mind exception because they expressed his then existing fear of Martin. Thus, both Cal and Pam's statements regarding their fear of Martin fell within the scope of hearsay exceptions—Pam's within KRE 803(3)'s state of mind exception and Cal's within both the state of mind exception and KRE 804(b)(5)'s forfeiture by wrongdoing exception.

While the statements of both Cal and Pam fell within the hearsay exceptions, that alone does not render them admissible. Rather, the statements must also satisfy the relevancy requirements of KRE 401 to 403 before they may be deemed admissible. *See Ernst v. Commonwealth*, 160 S.W.3d 744, 753 (Ky. 2005); *Parker*, 291 S.W.3d at 669 ("[A] trial court—as the gatekeeper of evidence—may decline to permit a party's presenting evidence, including evidence of forfeiture by wrongdoing, if the trial court finds that evidence to be inadmissible."); *Sturgeon*, 521 S.W.3d at 198 ("To be admitted as evidence, an out-of-court statement that fits within the state of mind exception must still meet the relevancy provisions of KRE 401-403.").

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Such evidence is generally admissible provided its admission does not conflict with constitutional or statutory laws, our Rules of Evidence, or other Rules adopted by this Court. KRE 402. Of course, even relevant evidence that is otherwise admissible "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

Here, we first note that the statements by Cal and Pam both involve victim state of mind evidence. A victim's state of mind is relevant of course only if it is in some way at issue in the case. KRE 401; *Harris v.*

Commonwealth, 384 S.W.3d 117, 128 (Ky. 2012) ("[S]tatements that can be understood as reflecting the basis for a victim's fear of a defendant are not admissible where the victim's state of mind is not at issue.").

We previously noted in *Bray* that a victim's state of mind may be at issue and thus relevant where the defendant claims "self-defense, an accidental death, or suicide." *Bray*, 68 S.W.3d at 381. However, *Bray's* enumeration of circumstances in which a victim's state of mind may be relevant was not exclusive. *See id.* (noting that outside of cases involving self-defense, an accidental death, or suicide, victim state-of-mind statements "*usually* have 'little relevancy . . . .'") (emphasis added). Rather, *Bray* took its limited enumeration of circumstances in which a victim's state of mind might be relevant from *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). In that case, we simply noted in dicta that Nevada and other jurisdictions recognize that a victim's state of mind might fall within the state-of-mind hearsay exception and be relevant in cases of self-defense, accidental death, or suicide. *Partin*, 918 S.W.2d at 222 (citing *Shults v. Nevada*, 616 P.2d 388 (1980)). Neither *Partin* nor *Bray* in any way indicate that a victim's state of mind is relevant *only* in such circumstances. Nor did the Nevada authority relied upon in *Partin* contain any such limitation. *See Shults*, 616 P.2d at 394.

Indeed, in *Partin* we concluded that evidence the victim was fearful of the defendant was relevant and admissible despite the fact that the case did *not* involve any claim of self-defense, accident, or suicide. *Partin*, 918 S.W.2d at

223; *id.* at 225 (Stumbo, J., dissenting). In any event, relevancy is a fact-intensive inquiry made in consideration of the particularities of a given case, and thus there can be no definitive and exclusive enumeration of the types of cases in which evidence regarding a victim's state of mind might be relevant and admissible. *Bray* should not be read as setting forth any such list.

Turning again to the present case, we conclude that because Martin raised an alternative perpetrator defense at trial, Cal and Pam's statements regarding their fear of Martin were relevant. Where a defendant raises an aaltperp defense, a victim's fear that the defendant would harm or kill him or her bears directly on whether it is more or less probable that the defendant or the alleged alternative perpetrator committed the harm or killing. It is plainly relevant under such circumstances for a prosecutor to point to the victim's fear to counter the defendant's contention that not he, but someone else, harmed the victim.

Put differently, by raising an alternative perpetrator defense, the defendant will often place the victim's state of mind at issue insofar as a fear of the defendant tends to undercut the defendant's assertion that someone else committed the crime, just as a victim's fear of the defendant undercuts an assertion that the death resulted from accident, self-defense, or suicide. As such, a victim's expression of fear the defendant will harm or kill her—particularly where, as here, the expression of fear bears close temporal proximity to the crime—is relevant insofar as it bears on the probability that

the defendant rather than an alternative perpetrator was the source of the harm.

Here, Martin's defense at trial was that Harmon and her boyfriend were responsible for the murders, not him. That Cal and Pam both expressed contemporaneous fear of Martin shortly before their deaths tended to undercut that assertion and thus was highly relevant. KRE 401. Moreover, the strong probative value of this evidence was not strongly outweighed by any danger of undue prejudice, confusion, or delay. To the contrary, while the jury heard evidence of Cal and Pam's fear, Martin was also allowed to thoroughly develop his alternative perpetrator defense at trial to counter that evidence. Accordingly, because Cal's statements fell within the forfeiture by wrongdoing exception, because both Cal and Pam's statements fell within the state of mind exception, and because both Cal and Pam's statements were directly relevant given Martin's raising of an alternative perpetrator defense, the admission of those statements at trial was proper.

2. THE TRIAL COURT PROPERLY PERMITTED WITNESSES TO INVOKE FIFTH AMENDMENT PRIVILEGE.

For his second contention of error, Martin argues the trial court erred by allowing Harmon and Justin to invoke their Fifth Amendment privilege against self-incrimination. Martin further argues the Commonwealth could have offered them immunity in exchange for their testimony. We conclude the trial court properly allowed Harmon and Justin to invoke the Fifth Amendment.

Both Martin and the Commonwealth subpoenaed Harmon and Justin to testify. Harmon and Justin were each represented by separate counsel and

invoked the Fifth Amendment privilege. Martin and the Commonwealth argued that Harmon and Justin were required to appear and testify. The trial court considered requiring the witnesses to provide a "dry run" of their testimony, but Harmon and Justin made it known through counsel that they were not willing to answer any questions because Martin had accused them of being aaltperps in his opening statement. Additionally, Harmon and Justin noted the Commonwealth had briefly considered them suspects in the murders. The trial court initially determined that Harmon and Justin would be required to testify because their answers to any questions were not likely to be inculpatory. However, the court subsequently reconsidered and quashed the subpoenas, reasoning the very nature of Martin's aaltperp theory would potentially incriminate both Harmon and Justin.

The Sixth Amendment[13] affords a criminal defendant the right to "compulsory process for obtaining witnesses in his favor." However, the right to compulsory process does not include "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *McLemore v. Commonwealth*, 590 S.W.3d 229, 237 (Ky. 2019) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). When a witness invokes the Fifth Amendment privilege, the defendant's right to compulsory process must yield. *Id.* at 239.

"Whether a prospective witness has invoked his Fifth Amendment privilege against self-incrimination is a question of fact to be determined by the

[13] U.S. Const. amend. VI.

trial court." *Id.* at 236. Kentucky caselaw recognizes that "neither the prosecution nor the defense may call a witness knowing that the witness will assert his Fifth Amendment privilege against self-incrimination, and we have applied this black-letter law in cases where a witness invokes the privilege in order to avoid answering *any* substantive questions." *Taylor v. Commonwealth*, 611 S.W.3d 730, 739 (Ky. 2020) (quoting *Combs v. Commonwealth*, 74 S.W.3d 738, 742 (Ky. 2002)). In such a situation, a witness's presence is not required to determine whether the privilege applies and a "dry run" of the witness's testimony is not necessary. *Id.* Instead, an attorney may invoke the privilege on the witness's behalf. *Id.*

When confronted with a witness's invocation of the Fifth Amendment, a "court must be able to discern from the character of the question and the other facts adduced in the case some tangible and substantial probability that the answer of the witness might help to convict him of a crime." *Young v. Knight*, 329 S.W.2d 195, 201 (Ky. 1959). "The particular question which a witness refuses to answer may not be considered in isolation." *Id.* Rather, the court must examine "the setting in which the question was asked," to determine whether "there is reasonable possibility of exposure to prosecution or involvement in a crime by reason of a responsive answer." *Id.* If so, then "the claim of privilege must prevail." *Id.* However, "the danger of self-incrimination to be apprehended must be real and substantial in the ordinary course of things, for the law does not permit a witness arbitrarily to hide behind an imaginary or unappreciable danger or risk." *Id.* "To sustain the privilege, it

need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* We review a "trial court's decision to preclude a witness from being called to testify due to the invocation of the Fifth Amendment privilege against self-incrimination for an abuse of discretion." *McLemore*, 590 S.W.3d at 237.

In the present appeal, the trial court properly permitted Harmon and Justin to refuse to testify. Harmon and Justin, through counsel, unequivocally intended to invoke the Fifth Amendment in response to any substantive questions. In his opening statement, Martin's counsel explicitly implicated Harmon and Justin in the charged crimes as part of a calculated attempt to ruin his life and career. Beyond mere argument, Martin was also permitted to present aaltperp evidence before the jury. Harmon and Justin further noted the Commonwealth briefly considered them to be suspects before focusing upon Martin. Under these circumstances, we conclude the trial court's finding was amply supported by substantial evidence and the application of sound legal principles. Therefore, we discern no abuse of discretion.

Martin also argues the Commonwealth's failure to offer immunity to Harmon and Justin in exchange for their testimony resulted in the impairment of his constitutional right to present a defense. Contrary to federal law, Kentucky law does not allow a prosecutor to unilaterally grant immunity to a witness to compel the witness's testimony. *Commonwealth v. Brown*, 619

S.W.2d 699, 702 (Ky. 1981), *overruled on other grounds by Murphy v. Commonwealth*, 652 S.W.2d 69 (Ky. 1983). While this Court previously called upon the General Assembly to empower Kentucky prosecutors with the same authority exercised by their federal counterparts, that call has not been answered. *Id.* ("The Congress of the United States has seen fit to authorize federal prosecutors to grant immunity from further prosecution to witnesses who refuse to testify. 18 U.S.C. secs. 6001-6005. We believe that similar legislative action is required in our Commonwealth to give its prosecutors this authority."). Therefore, we cannot discern any error arising from the Commonwealth's failure to offer immunity.

3. THE TRIAL COURT PROPERLY EXCLUDED CERTAIN AALTPERP EVIDENCE.

For his third contention of error, Martin argues the trial court precluded him from presenting an aaltperp defense. We disagree.

The admissibility of aaltperp evidence depends on the ordinary application of the rules of evidence, primarily the relevancy rules contained in KRE 401, 402, and 403. *Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016). As noted above, Martin presented evidence through other witnesses that Harmon found Pam's phone in her yard after the murders, that she sometimes carried a Glock pistol, and that her boyfriend was in the area on the day of the murders. He also presented his daughter's testimony regarding Harmon's threats to ruin him and ruin his military career. Martin further presented the testimony of Harmon's co-worker that she engaged in excited and disturbing behavior after the murders that resulted in a report to police.

Clearly, the trial court did not prevent Martin from developing a thorough alternative perpetrator defense.

Martin further specifically complains he was not permitted to ask LaRock whether she thought Harmon's relationship with Cal was unhealthy. This line of questioning was based on statements LaRock had made to police investigators that she thought Cal's relationship with Harmon was a bad idea and that Harmon often told Cal what to do. The trial court sustained the Commonwealth's objection based on its view that a witness's invocation of the Fifth Amendment privilege extended to all statements attributable to the witness. The trial court then admonished the jury to disregard the question.

Contrary to the trial court's ruling, a witness's invocation of the Fifth Amendment privilege does not necessarily preclude all evidence of statements attributable to the witness. *Marshall v. Commonwealth*, 60 S.W.3d 513, 519 (Ky. 2001). Under KRE 804(a)(1), a witness is considered unavailable for the purpose of the hearsay exceptions if the witness invokes a privilege, including the Fifth Amendment privilege. *Id.* In *Gray*, this Court held the trial court erred by excluding aaltperp evidence consisting of inculpatory statements the aaltperp had made to federal agents when the aaltperp had invoked the Fifth Amendment at trial. 480 S.W.3d at 266, 268.

However, while the trial court erred in excluding LaRock's testimony regarding the allegedly unhealthy relationship between Harmon and Cal on Fifth Amendment grounds, the error was harmless. Again, Martin thoroughly developed his aaltperp defense at trial, including by presenting evidence that

Harmon wished to ruin him and his military career, that she behaved strangely after the murders, that her boyfriend was in the area at the time of the crimes, and that she purportedly found Pam's cell phone in her yard after the murders. We cannot find that the exclusion of an additional piece of evidence that Harmon may have had an unusual or unhealthy relationship with Cal would have resulted in any harm or prejudice to Martin's ability to present his aaltperp defense.

Martin further complains the trial court erroneously excluded testimony 1) by Deputy Noisworthy regarding statements Harmon allegedly made to him after she returned Pam's cellphone to AT&T, and 2) by Durham regarding an alleged message Harmon asked him to convey to Justin. Deputy Noisworthy testified concerning his investigation into the recovery of Pam's cellphone. Noisworthy viewed surveillance video indicating that Harmon brought Pam's phone to the AT&T store. While Noisworthy was at the store, Harmon called him. When defense counsel asked Noisworthy if Harmon "was trying to tell you the story of how she came . . . [interrupted]", the Commonwealth objected. The trial court sustained the objection. Defense counsel requested to approach the bench, which the trial court denied. When the trial court allowed counsel to approach approximately five minutes later, Martin argued Harmon's statement to Noisworthy was admissible as a statement against interest. Martin however did not tell the court what Harmon allegedly said to Noisworthy. The trial court refused to allow the evidence.

Martin also sought to introduce evidence concerning a statement Harmon made about the murders to Steve Durham. On direct examination, Durham testified concerning his relationship with Cal. During cross-examination, defense counsel asked Durham if he was also friends with Harmon. The Commonwealth objected claiming the question was irrelevant, which the trial court overruled. Defense counsel then asked Durham if he had delivered a message about the murders from Harmon to Justin. The record reflects the following exchange:

> **Defense Counsel**: Isn't it true that you've taken a message from Joan about the murders to her son? Do you know her son?
>
> **Commonwealth**: Objection your honor, hearsay.
>
> **Trial Court**: Overruled.
>
> **Durham**: I don't believe I know her son, who is her son?
>
> **Def. Counsel**: Her son is Justin Harmon.
>
> **Durham**: Ok.
>
> **Def. Counsel**: He worked down at the Dollar General. Do you remember going to see her son down at the Dollar General?
>
> **Durham**: No, not specifically.
>
> **Def. Counsel**: You don't recall bringing him a message from Joan at the Dollar General?
>
> **Durham**: No.
>
> **Com.**: Your honor, may we approach.

At the ensuing bench conference, the trial court stated the witness gave a responsive answer. Defense counsel argued Durham denied delivering the message. The trial court stated defense counsel could put on evidence to

establish that Durham delivered a message, but would not allow Martin to "backdoor" Harmon's statement into evidence. Again, Martin did not apprise the court of the alleged content of the message.

KRE 103(a)(2) provides that on appeal, error may not be predicated upon a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." An offer of proof for purposes of this rule is a statement adducing what the party "expects to be able to prove through a witness's testimony." *Henderson v. Commonwealth*, 438 S.W.3d 335, 340 (Ky. 2014) (citation omitted). The rule serves two purposes:

> First, the offer of proof provides the trial court with a foundation to evaluate properly the objection based upon the actual substance of the evidence. And, of equal importance, an offer of proof gives an appellate court a record from which it is possible to determine accurately the extent to which, if at all, a party's substantial rights were affected.

Id.

To properly preserve for appellate review an objection to the exclusion of evidence, the offer of proof must provide the grounds for admission of the evidence, the substance or content of the evidence, including some indication of "the facts sought to be elicited or the specific facts the witness would establish," and the significance and relevance of the evidence. *Id.* at 341-45 (quoting 21 Fed. Prac. & Proc. § 5040 (2d ed.)). While an offer need not be formal or overwhelmingly detailed, it also cannot be "too vague, general, or conclusory." *Id.* at 342 (quoting 21 Fed. Prac. & Proc. § 5040.1 (2d ed.)). Rather, it must include a level of specificity sufficient to serve its dual purposes

of allowing the trial court to properly consider the admissibility of the evidence and allowing the appellate courts to review the ruling for error.

Here, Martin never made a proper offer of proof regarding either Harmon's statement to Noisworthy or her message to Justin. At most, counsel simply informed the trial court the evidence would show Harmon made *some* statement against interest, and asked Durham to convey *some* message about the murders to Justin. The trial court was left in the dark—and indeed, after full merits briefing, this Court likewise remains in the dark—as to the content of Harmon's alleged statement and message. Nor can we perceive the substance or content of this evidence from context. As such, we have no way to evaluate whether the trial court erred in excluding that evidence. Thus, because Martin failed to meet the specificity required for a proper offer of proof, we cannot find these issues preserved.

4. THE TRIAL COURT PROPERLY ADMITTED PHYSICAL EVIDENCE.

Martin next argues the trial court erred by admitting the physical evidence of the spent bullet casing recovered by Diana Phillips because of an inadequate chain of custody. Martin further argues the trial court erred by excluding evidence that Diana failed a polygraph test. We disagree.

At the outset, Martin has not cited any authority in support of his argument that the evidence of the bullet casing was inadmissible because of a lack of foundation or chain of custody issues. Martin points to circumstances casting doubt on the origin of the evidence, but these factors impact the weight of the evidence rather than its admissibility. *Rabovsky v. Commonwealth*, 973

S.W.2d 6, 8 (Ky. 1998). Further, the trial court properly excluded polygraph evidence concerning the discovery of the evidence.

The exclusion of polygraph evidence did not violate Martin's constitutional rights. An established rule of evidence does not infringe upon a criminal defendant's right to cross-examine adverse witnesses under the Sixth Amendment unless the rule is "arbitrary or disproportionate to the purposes [it is] designed to serve." *Dennis v. Commonwealth*, 306 S.W.3d 466, 473 (Ky. 2010) (citation omitted). A rule is "arbitrary" if it excludes evidence favorable to a defendant but does not serve any legitimate purpose. *Id.* To determine whether an evidence rule is "disproportionate," a court must weigh "the importance of the evidence to an effective defense, [and] the scope of the ban involved." *Id.* (citation omitted).

This Court has consistently held polygraph evidence is inadmissible because such evidence is not scientifically reliable and otherwise usurps the jury's role as "finder of fact to determine the credibility of witnesses." *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984) (citation omitted). We have recognized a limited exception when a defendant attempts to challenge the credibility of his own confession. *Rogers v. Commonwealth*, 86 S.W.3d 29, 38 (Ky. 2002).

Rogers is inapplicable to the present case. Kentucky's longstanding rule prohibiting the admission of polygraph evidence is legitimate and proportionate to any limitation on a defendant's right to cross-examine adverse witnesses. *See United States v. Scheffer*, 523 U.S. 303, 312 (1998). "[T]he exclusion of

unreliable evidence is a principal objective of many evidentiary rules." *Id.* Given the lack of scientific consensus on the reliability of polygraph evidence, a per se prohibition on the admissibility of such evidence is neither arbitrary nor disproportionate. *Id.* Moreover, preservation of the jury's role as factfinder is an equally legitimate governmental interest. *Id.* at 313. Indeed, "[a] fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.'" *Id.* (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)). The trial court did not err by excluding the polygraph evidence.

5. MARTIN WAS ENTITLED TO DIRECTED VERDICT ON ARSON, BUT NOT MURDER CHARGES.

For his fifth contention of error, Martin argues he was entitled to a directed verdict on the charges of first-degree arson and attempted first-degree arson. Martin further argues he was entitled to a direct verdict for the murders of Pam and Dansereau. We conclude that while Martin was entitled to a directed verdict on the arson and attempted arson charges, he was not entitled to a directed verdict on the charges for the murders of Pam and Dansereau.

A. DIRECTED VERDICT STANDARD

A directed verdict is "[a] ruling by a trial judge taking the case from the jury because the evidence will permit only one reasonable verdict." *Verdict*, *Black's Law Dictionary* (11th ed. 2019). CR[14] 50.01 authorizes the entry of a directed verdict as follows:

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right

[14] Kentucky Rules of Civil Procedure.

> so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

CR 50.01 applies to criminal trials by operation of RCr[15] 13.04. *Ray v. Commonwealth*, 611 S.W.3d 250, 258 n.24 (Ky. 2020).

On appellate review, a trial court's denial of a defendant's motion for directed verdict should not be reversed unless the appellate court determines "it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). When confronted with a motion for directed verdict, the trial court must assume the truth of the Commonwealth's evidence and "draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Id.* Questions regarding the weight of the evidence and the credibility of witnesses are reserved to the sole province of the jury. *Id.*

A conviction must be based on "evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Id.* at 187-88. However, purely circumstantial evidence may support a conviction if, "based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt." *Graves v. Commonwealth*, 17 S.W.3d 858, 862 (Ky. 2000). A reviewing court must consider all of the evidence

[15] Kentucky Rules of Criminal Procedure.

presented at trial, even in a case requiring remand due to the erroneous admission of evidence. *Lockhart v. Nelson*, 488 U.S. 33, 41-42 (1988) ("A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.").

The Commonwealth is not required to "rule out every hypothesis except guilt beyond a reasonable doubt." *Rogers v. Commonwealth*, 315 S.W.3d 303, 311 (Ky. 2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). This Court has further recognized, "jury instruction issues and directed verdict issues are distinct for purposes of appeal." *Sutton v. Commonwealth*, 627 S.W.3d 836, 847 (Ky. 2021). Indeed, "[t]he directed-verdict question is not controlled by the law as described in the jury instructions, but by the statutes creating the offense." *Smith v. Commonwealth*, 636 S.W.3d 421, 434 (Ky. 2021) (citation omitted). Essentially, "the question on a directed verdict motion is not necessarily what evidence supporting the defendant was solicited, but rather what evidence the Commonwealth produced in support of its burden of proof." *Sutton*, 627 S.W.3d at 848.

B. MARTIN WAS ENTITLED TO DIRECTED VERDICT ON CHARGES OF FIRST-DEGREE ARSON AND ATTEMPTED FIRST-DEGREE ARSON.

Martin argues he was entitled to a directed verdict on the charges of first-degree arson and attempted first-degree arson because there was insufficient evidence to show the victims were alive at the time the fires were started.

Martin concedes the claims related to the arson charges were not properly preserved for review and requests palpable error review.

When a party has failed to properly preserve an issue for review, RCr 10.26 authorizes this Court to grant appropriate relief "upon a determination that manifest injustice has resulted from the error." A palpable error is "easily perceptible, plain, obvious, and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). The failure to grant a directed verdict based on the insufficiency of evidence is subject to palpable error review because "it is clear that a different result would occur, since a defendant convicted on insufficient proof should be acquitted." *Commonwealth v. Goss*, 428 S.W.3d 619, 627 (Ky. 2014). A conviction based on insufficient evidence necessarily results in manifest injustice. *Id.* We will accordingly review for palpable error.

KRS 513.020 defines first-degree arson as follows:

> (1) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion, and;
>
> > (a) The building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied; or
> >
> > (b) Any other person sustains serious physical injury as a result of the fire or explosion or the firefighting as a result thereof.

A deceased person cannot occupy a building. *Luna v. Commonwealth*, 460 S.W.3d 851, 884-86 (Ky. 2015). This Court has specifically held a defendant cannot be convicted of first-degree arson when the Commonwealth failed to produce sufficient evidence that the person inside the building was alive at the

time of the fire and that the defendant was aware of this fact. *Id.* However, a trial court may properly deny a motion for directed verdict when the evidence is inconclusive as to whether the victims were alive when the fire was started. *Bray v. Commonwealth*, 68 S.W.3d 375, 385 (Ky. 2002). Nevertheless, even if the evidence is inconclusive, the Commonwealth still bears the "burden to produce evidence indicating [the victim] was alive at the start of the fire and [the defendant] set the fire aware of that fact." *Luna*, 460 S.W.3d at 886.

The Commonwealth points to evidence that the bodies of Pam and Dansereau were badly charred when they were recovered. Additionally, the Commonwealth further refers to evidence of a fire discovered near Cal's body. Thus, the Commonwealth argues the evidence was inconclusive so the jury could reasonably infer they were alive when the fires were started. In *Luna*, this Court rejected a similar contention and failed to credit such an inference where "the Commonwealth has produced no evidence to shed light on when the fire was started." 460 S.W.3d at 886.

Further, in the present appeal, as in *Luna*, "not a single witness offered any testimony at trial to suggest" that the victims were still alive at the time of the fires. *Id.* at 884. A medical examiner, Dr. Jeffrey Springer testified that the cause of Pam's death was "multiple gunshot wounds to the head and torso." The cause of Dansereau's death was "multiple gunshot wounds to the head." Dr. Springer determined that both Pam and Dansereau likely died at the instant they were shot or within "a few short seconds." He further stated they were both "essentially dead instantly." Similarly, Dr. Randall Falls, Jr., a

medical examiner, testified concerning Cal's autopsy. Dr. Falls determined that Cal died as a result of multiple gunshot wounds to the neck and torso. While this testimony does not conclusively establish whether the victims were alive at the time the fires were set, it is the Commonwealth's burden to produce affirmative evidence on the issue. The Commonwealth did not produce evidence concerning the time or specific location of the victims' deaths. Without more, we cannot conclude the charges of first-degree arson and attempted first-degree arson were properly presented to the jury. Therefore, the trial court erred by denying the motion for directed verdict on these charges.

C. MARTIN WAS NOT ENTITLED TO A DIRECTED VERDICT ON MURDER CHARGES.

Martin next argues he was entitled to a directed verdict for the murders of Pam and Dansereau. We disagree.

KRS 507.020 defines murder in pertinent part:

> (1) A person is guilty of murder when:
>
> > (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime[.]

Considering the evidence in the light most favorable to the Commonwealth, we conclude the trial court properly denied Martin's motion for directed verdict on the murder charges. The .45 caliber shell casing directly linked Martin's Glock to the murder of Cal in his residence. The Glock was found in Martin's possession. Police discovered the blood of Pam and Dansereau at the site of Cal's murder. Dansereau's firearm was also located there. Additionally, while evidence of motive and opportunity, taken alone, cannot withstand a motion for directed verdict, this type of evidence "is particularly significant where the other evidence presented is wholly circumstantial." *Marcum v. Commonwealth*, 496 S.W.2d 346, 349 (Ky. 1973); 41 C.J.S. Homicide § 476 (2023). Although the evidence against Martin was primarily circumstantial, we conclude the Commonwealth produced more than a scintilla of evidence. Therefore, the trial court properly denied the motion for directed verdict on the murder charges.

6. THE BURGLARY CONVICTIONS DID NOT VIOLATE DOUBLE JEOPARDY.

For his next contention of error, Martin argues his two convictions for first-degree burglary violated double jeopardy principles because the Commonwealth failed to prove he unlawfully entered the Phillips' residence with the intent to commit a crime on separate occasions. We disagree. Martin claims this argument was preserved for review through his motion for directed verdict. It does not appear from the record that Martin specified double jeopardy grounds in his motion for directed verdict. Regardless, double jeopardy protection cannot be forfeited. *Kiper v. Commonwealth*, 399 S.W.3d 736, 741 (Ky. 2012).

KRS 505.020(1) provides, "[w]hen a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense." Under KRS 505.020(1)(c), a defendant may not be convicted of more than one offense when "[t]he offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses." This Court recently explained, "[t]he difference between multiple, independent criminal acts and one continuous course of criminal conduct generally is 'a sufficient break in the conduct and time so that the acts constituted separate and distinct offenses.'" *Johnson v. Commonwealth*, --- S.W.3d ---, 2023 WL 4037845 at *4 (Ky. 2023) (quoting *Welborn v. Commonwealth*, 157 S.W.3d 608, 612 (Ky. 2005)). "If there is a break in time and conduct that allows for the defendant, even momentarily, to pause and reflect, and form or reform intent to commit an additional act, then the Commonwealth has not presented two alternative theories for the perpetration of one crime; it has presented proof of two separate criminal acts." *Id.* at *5.

KRS 511.020 defines first-degree burglary in pertinent part:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he or she knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or she or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon;
>
> (b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

The nature of "burglary is an invasion of the possessory property right of another." *Matthews v. Commonwealth*, 709 S.W.2d 414, 420 (Ky. 1985). "The crime of first-degree burglary [is] complete once [the defendant] unlawfully entered the premises while armed with an intent to commit a crime." *McClellan v. Commonwealth*, 715 S.W.2d 464, 472 (Ky. 1986).

While a defendant ordinarily cannot be convicted of multiple burglaries resulting from the unlawful entry of a single building on a single occasion, the Commonwealth presented sufficient evidence in the present appeal to support two separate burglary convictions. *See State v. Hodges*, 386 N.W.2d 709, 710 (Minn. 1986). Here, the evidence supported a reasonable inference that Cal was killed in his home before Pam was informed around noon that the washing machine could not be delivered. Again, the .45 caliber shell casing found at the scene matched Martin's .45 Glock. Pam left for work around 7:00 a.m. Martin's work records showed that he logged in to his work computer at 9:50 a.m. and logged out at 3:32 p.m. Pam left work around 5:00 p.m. and called LaRock from her residence at 5:30, at which time LaRock heard Pam scream before the line went silent. Pam's blood was found at the scene. Reserving questions of credibility and the weight to the jury, we conclude the Commonwealth produced sufficient evidence that Martin unlawfully entered the Phillips' residence with the intent to commit a crime on two separate

occasions. Therefore, Martin's convictions on two counts of first-degree burglary did not violate principles of double jeopardy.

7. REVERSAL IS NOT REQUIRED ON GROUNDS OF CUMULATIVE ERROR.

Finally, Martin contends the doctrine of cumulative error warrants reversal. Under this doctrine, "multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Leavell v. Commonwealth*, 671 S.W.3d 171, 184 (Ky. 2023) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010)). The only errors found here are in the trial court's failure to grant a directed verdict on the arson charges and to admit LaRock's testimony that Cal's relationship with Harmon was unhealthy.[16] Neither resulted in prejudice to Martin, given that we are reversing his arson convictions and that the exclusion of LaRock's testimony was at most harmless. As we have previously noted, "[w]here, as in this case, . . . none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." *Id.* (quoting *Brown*, 313 S.W.3d at 631). We thus do not find that the doctrine of cumulative error warrants reversal here.

[16] As noted above, Martin failed to provide an offer of proof sufficient to preserve his arguments regarding the admissibility of Harmon's statements to Noisworthy after returning Pam's phone to AT&T or Durham's alleged transmission of a message from Harmon to Justin. We thus have not considered, much less found, whether the trial court's determinations constituted error.

CONCLUSION

In sum, we conclude the trial court erred in failing to grant a directed verdict in Martin's favor as to the counts for arson in the first degree and attempted arson, and therefore reverse those convictions. We otherwise affirm the trial court and remand for entry of a judgment consistent with this Opinion.

VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. VanMeter, C.J.; Keller and Lambert, JJ., concur. Nickell, J., dissents by separate opinion in which Conley, J., joins. Thompson, J., not sitting.

NICKELL, J., DISSENTING: Respectfully, I dissent. The hearsay evidence concerning Cal and Pam Phillips' fear of Martin and their belief that he would harm them in the future was inadmissible and should have been excluded. The evidence of the victims' fear was irrelevant because Martin did not place their state of mind at issue. Additionally, evidence of the victims' belief concerning Martin's future actions falls outside the state of mind exception contained in KRE 803(3). As such, the victims' belief concerning Martin's future actions was insufficiently probative to be admitted into evidence regardless of the applicability of the forfeiture by wrongdoing exception.

The issue regarding the relevance of both Cal and Pam Phillips' fear of Martin is the same. Statements which satisfy any hearsay exception remain inadmissible unless the evidence is otherwise relevant. *Ernst v. Commonwealth*, 160 S.W.3d 744, 753 (Ky. 2005). Forfeiture by wrongdoing "is not an exception that automatically admits murder victim hearsay statements

against the accused murderer." 2 Robert P. Mosteller et al., *McCormick on Evidence* § 253 (8th ed.). "Stated differently, a trial court—as the gatekeeper of evidence—may decline to permit a party's presenting evidence, including evidence of forfeiture by wrongdoing, if the trial court finds that evidence to be inadmissible." *Parker v. Commonwealth*, 291 S.W.3d 647, 669 (Ky. 2009). In other words, while a finding of forfeiture by wrongdoing operates as a waiver of confrontation and hearsay objections, it does not constitute a waiver of the relevancy requirements. Specifically in this context, a trial court must carefully weigh the probative value of any such evidence against the risk of undue prejudice "in order to avoid the admission of facially unreliable hearsay[.]" *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997) (citation omitted).

In *Harris v. Commonwealth*, 384 S.W.3d at 129, we held the trial court abused its discretion by admitting evidence of the victim's fear in a homicide case where the defendant asserted a general denial and alibi defense. We explained the victim's state of mind was not at issue because the defendant "did not raise any of the defenses that would make testimony revealing [the victim's] state of mind relevant." *Id.* The defendant "never claimed self-defense, that [the victim's] death was a suicide or that it was an accident." Id. We concluded "[t]he statements were thus irrelevant and should not have been admitted." *Id.* The reasoning of our decision in *Harris* applies with equal force to the present appeal.

Likewise in *Blair v. Commonwealth*, 144 S.W.3d 801, 805 (Ky. 2004), we reversed a murder conviction in part because the trial court improperly admitted irrelevant hearsay evidence regarding the victim's fear when the defendant denied committing the offense. We succinctly stated, "[t]he statements about [the victim's] fears about Appellant also fell within the scope of KRE 803(3) but were inadmissible because they were irrelevant." *Id.* (citing *Bray*, 68 S.W.3d at 381–82). "The admission of [this] hearsay evidence . . . standing alone, would warrant reversal for a new trial." *Id.* at 806-07. Professor Lawson endorsed the reasoning of *Harris* and *Blair* in emphasizing "the critical need for relevance of statements offered under the state of mind exception[.]" Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.50[3][c] (2022 ed.).

In my view, a defendant's claim that someone else committed the crime is logically equivalent to a general denial or an alibi defense. A claim of alibi "is not an affirmative defense, but only a fact shown in rebuttal, and the burden of proving the primary fact or allegation of guilt beyond a reasonable doubt remains upon the commonwealth." *See Davis v. Commonwealth*, 290 Ky. 745, 162 S.W.2d 778, 779 (1942) (citation omitted). Similarly, the law does not impose any affirmative burden of proof or persuasion upon a defendant who asserts an aaltperp defense. *Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016). Instead, the presentation of aaltperp evidence depends solely on the rules of relevancy. *Id.* ("But we do not require a defendant to recount a precise theory of how the aaltperp did the deed."). Unlike self-defense, accident, and

suicide, an aaltperp defense does not affirmatively place the victim's state of mind in issue.

Beyond the question of relevancy, a declarant's statements of belief are specifically excluded from the state of mind exception and should not be used to prove the actions and intent of another person. KRE 803(3); *Shepard v. United States*, 290 U.S. 96, 104 (1933). As set forth in KRE 803(3), the scope of the state of mind exception encompasses

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), *but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.*

(Emphasis added). The exclusion of statements of belief from the state of mind exception in KRE 803(3) represents a codification of Justice Cardozo's reasoning in the *Shepard* decision. *Lawson, supra* at § 8.50[2][e].

In *Shepard*, the government sought to admit a murder victim's hearsay statement that "Dr. Shepard poisoned me." *Id.* at 98-99. The Supreme Court primarily held that the statement did not qualify as a dying declaration. *Id.* at 99. Likewise, the statement did not satisfy the state of mind exception because the government

> did not use the declarations by [the victim] to prove her present thoughts and feelings, or even her thoughts and feelings in times past. *It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband.* This fact, if fact it was, the government was free to prove, but not by hearsay declarations.

Id. at 104 (emphasis added); *see also United States v. Brown*, 490 F.2d 758, 771 (D.C. Cir. 1973) ("Through a circuitous series of inferences, the court reverses the effect of the statement so as to reflect on defendant's intent and actions rather than the state of mind of the declarant (victim).").

In the present appeal, the following statements of belief were admitted over Martin's objection:

- Steve Durham testified that Cal said, "Kit Martin was going to kill him," and "this guy [Martin] is going to kill me."
- Steve Bollinger testified that Cal said "if he ever come up missing or dead . . . look across the road, that all fingers would be pointing towards Mr. Martin."
- Penny Cayce testified that Pam said "If anything happens to us, you need to tell the police. All they need to do is look at that yahoo across the street."

The reasoning of the *Shepard* decision applies with equal force to the present appeal. Otherwise, we must "drill a new and unusually deep hole in the hearsay rule" because "[i]t is not customary to accept one man's extrajudicial assertions as evidence of another's mental state." John MacArthur Maguire *The Hillmon Case - Thirty-Three Years After*, 38 Harv. L. Rev. 709, 717 (1925).

Thus, when the victim's state of mind is used to prove the identity of the probable murderer, there is "an overwhelming deficiency in relevance" in the absence of a claim of self-defense, suicide, or accidental death. *Brown*, 490 F.2d at 780. Further, "the danger that the statement in question would be misused by the jury on the disputed issue of identity is extremely high." *Id.* at 779. Indeed, leading commentators have recognized

> statements of fear by the victim should usually be excluded because of the risk of jury misuse. For the most part, they only weakly support inferences about what the victim probably did or did not do on the occasion when he was killed, but they strongly suggest inferences about what defendant did then or before. Of course the [state of mind] exception does not allow this use of such statements, making them prejudicial to defendants because of the risk that the factfinder might use such statements in drawing inferences about the defendant's conduct.

4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:72 (4th ed.). Ultimately, "[t]here thus appears to be no legally relevant purpose for the introduction of this evidence other than for the clearly improper inference it supports as to the probable identity of the murderer." *Brown*, 490 F.2d at 781.

"Homicide may not be imputed to a defendant on the basis of mere suspicions, though they are the suspicions of the dying." *Shepard*, 290 U.S. at 101. Given the otherwise underwhelming evidence against Martin, I have no doubt the erroneous admission of this irrelevant and extremely prejudicial hearsay evidence warrants reversal. *Compare Blair*, 144 S.W.3d at 806-07 (holding erroneous admission of hearsay evidence constituted prejudicial error) *with Harris*, 384 S.W.3d at 129 (holding erroneous admission of hearsay evidence was harmless in light of overwhelming evidence of defendant's guilt). The statements of the victims' fear were not only irrelevant, but they were also impermissible to the extent they were used to predict Martin's future actions. *Shepard*, 290 U.S. at 104; *Brown*, 490 F.2d at 781. Further, the prejudicial effect of this inadmissible evidence was not limited to the convictions involving Cal and Pam Phillips—the same evidence also implicated Martin in the crimes against Ed Dansereau. *See Hammond v. Commonwealth*, 366 S.W.3d 425, 433

(Ky. 2012) (holding improper admission of evidence under forfeiture by wrongdoing necessitated reversal of convictions involving multiple victims).

In closing, I echo the *Brown* Court's emphatic description of the harm produced by the erroneous introduction of irrelevant state of mind evidence:

> The statement presented all the classic hearsay dangers and abuses. Here was that voice from the grave casting an incriminating shadow on the defendant. On what grounds did the victim base his fear of appellant? Was the fear a rational one? Even if justified in fearing someone, was appellant the proper focus of that fear? These questions cry out to be voiced as part of defense counsel's cross-examination. Yet there is no one to cross-examine or confront. The damaging evidence stands impregnable— irretrievably lodged in the jurors' minds. We find that the erroneously admitted evidence here is equally as crucial as that in *Ireland*, *supra*— that it "strikes at the heart of the defense."

Brown, 490 F.2d 781. Because these evidentiary errors deprived Martin of a fair trial, I would reverse the judgment and remand this matter for a new trial. Therefore, I respectfully dissent.

Conley, J., joins.

COUNSEL FOR APPELLANT:

Julia K. Pearson
Adam Meyer
Assistant Public Advocates

COUNSEL FOR APPELLEE:

Daniel J. Cameron
Attorney General of Kentucky

Robert Baldridge
Assistant Attorney General