COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
FILE NO. 2024-CA-0023-MR
ELECTRONICALLY FILED

COMMONWEALTH OF KENTUCKY **APPELLANT**

Appeal from Fayette Circuit Court
V. Hon. Julie Muth Goodman, Judge
Indictment No. 21-CR-336

CORNELL DENMARK THOMAS, II **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served June 14, 2024, as follows: by mailing to the trial judge, Hon. Julie M. Goodman, Circuit Judge, Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; and Noel Caldwell, 153 Market Street, Lexington, KY 40507 and Jerry L. Wright, 153 Market Street, Lexington, KY 40507; via email to Commonwealth's Attorney Kimberly Baird; and via state messenger mail to Hon. Kathleen Schmidt, Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, KY 40601.

s/ Christopher Henry
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INTRODUCTION

The Commonwealth appeals an order of the Fayette Circuit Court dismissing Cornell Thomas's indictment for—among other crimes—wanton murder.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth requests oral argument to explain why the circuit court exceeded its authority in dismissing this case.

WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(2) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), it contains 8,597 words.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 24, 2021, a Fayette County grand jury indicted Cornell Thomas on one count of murder and one count of leaving the scene of an accident involving a death. (TR Vol. I at 1–2.)

The parties held a bond hearing on April 21, 2021. (VR 4/21/21.) During that proceeding, Sgt. James Boyd—under oath—provided a factual summary of the events giving rise to this case. (*Id.* at 9:16:10.)

In the morning of July 3, 2020, Thomas approached an intersection on Leestown Road. (*Id.* at 9:17:40.) Then, he used the left turning late to bypass vehicles stopped at a red light. (*Id.* at 9:17:50.) Contemporaneously, Tammy Botkin was entering the same intersection. (*Id.* at 9:18:10.) Tragically, she lost her life soon thereafter:

> [Botkin] got approximately halfway through when Mr. Thomas collided into her driver's side. The collision was violent enough to sever Ms. Botkin's torso and eject the upper portion of her body into the roadway. Ms. Botkin's vehicle caught fire and spun into the outbound lanes of Leestown Road.

(*Id.* at 9:18:30.) Notably, Botkin was "a least . . . a middle car, one of three, that entered the intersection just prior to the collision." (*Id.* at 9:28:20.) Additionally, it appeared that Thomas did not attempt to apply the brakes. (*Id.* at 9:19:40.) At the time of impact, Thomas's vehicle was traveling at 95.93 miles per hour (MPH). (*Id.* at 9:20:10.) Botkin was traveling at 14 MPH. (*Id.* at 9:20:30.) Although it was a little unclear, the highest that the speed limit could have been at the time was 45 MPH. (*Id.* at 9:26:20.)

After the collision, Thomas's vehicle spun around; ultimately, it stopped in the inbound lanes of Leestown Road. (*Id.* at 9:18:50.) Thomas then fled the area on foot. (*Id.* at 9:19:05.) Eventually, an officer located him attempting to enter another person's automobile "just a couple blocks away from the collsion . . . ." (*Id.* at 9:19:20.)

From Thomas's "erratic" behavior at the time, Sgt. Boyd "strongly susected drug use." (*Id.* at 9:21:20.) Moreover, Thomas appeared to be in a state of delirium. (*Id.* at 9:33:20.) For example, at different points he said that he was "God" and "crazy." (*Id.* at 9:33:50.) Notably, Thomas claimed that he had ingested drugs that night. (*Id.* at 9:35:10.) When pressed on that subject, Thomas said, "I am everything and everything is me." (*Id.*) And despite the fact that there were no signs that Thomas had imbibed alcohol, he made similar statements about drinking. (*Id.* at 9:21:00, 9:34:50.) At some point, a drug-recognition officer determined "that there was some use of marijuana."[1] (*Id.* at 9:21;30.)

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[1] In an affidavit in support of a search warrant, Sgt. Boyd provided some additional information relating to Thomas's possible intoxication:

> As I spoke to [Thomas] it appeared he was in mental distress. He was rambling on how he was God, he seemed to be hallucinating and he stated he was intoxicated. I did not alert to the smell of an alcoholic beverage, but his mannerisms indicated possible narcotics usage. I then requested a certified Drug Recognition officer to respond to the scene to conduct Standardized Field Sobriety Testing. Officer

Even though a blood test revealed the presence of five nanograms of marijuana, (*id.* at 9:22:20), law enforcement believed that these circumstances could not have explained Thomas's behavior at the scene, (*id.* at 9:22:30).[2] So Thomas was also tested for synthetic cannabinoids and some psychoactive drugs. (*Id.* at 9:23:50.) The tests, however, also did not reveal the presence of any other controlled substances. (*Id.*) Even still, Sgt. Boyd mentioned that it was possible that "there was something synthetic that we were not able to test for . . . because synthetics are always changing." (*Id.* at 9:38:30.)

Later, Thomas filed a motion to dismiss the indictment, attacking the opinion of the Commonwealth's expert witness. (*See* TR Vol. II at 176–80.) The circuit court held a hearing on the matter on May 8, 2023. (VR 5/8/23.)

At the beginning of that proceeding, the court indicated its disapproval of the plea negotiations between the parties because the Commonwealth would not accept probation. (*Id.* at 10:04:25, 10:07:40.) To be more specific, the Commonwealth offered seven years' imprisonment in exchange for a second-degree

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> Mravchick responded to conduct the SFST's and concluded the driver Mr. Thomas Cornell showed signs of impairment.

(TR Vol. I at 15.)

[2] Later, Dr. Timothy Allen testified that the likelihood that the marijuana caused a psychotic break by itself was "extremely low." (VR 5/8/23; 10:25:00.)

manslaughter conviction. (*Id.* at 10:07:40.) The Commonwealth would also dismiss the leaving-the-scene charge; furthermore, the victim's family would submit victim-impact statements concerning probation. (*Id.* at 10:07:50.)

Before hearing testimony, the court relayed its belief that the Commonwealth had not produced enough evidence:

> There needs to be an intent to murder someone, or, or do something wanton and that there are so—there's a difference between criminal acts and tragic accidents. And, based on that, the court is attempting to determine what evidence the Commonwealth is relying on to establish that there was a criminal act here. And if the best it can do is, "I have a doctor who is saying it's a possibility," but acknowledging there was clearly a psychotic break going on, as the police even said, that where is the Commonwealth meeting its standard or its burden to establish that there was a wanton act that created this tragic accident?
>
> And that's where the court is. And the court finds it inappropriate that the Commonwealth—if that's all it has—[will] attempt to make the court the bad guy, by saying, "Oh, we object to probation when we didn't even have any evidence to really begin with to prosecute someone criminally, so that we don't look like the bad guy and leave it on the court." And the court finds that totally inappropriate. So that's why we're here.

(*Id.* at 10:06:05.)

Afterward, Dr. Timothy Allen—an expert[3] who evaluated Thomas—testified. (*Id.* at 10:10:00, 10:11:50.) He explained that Thomas reported essentially "no psychiatric symptoms his entire life until the spring of 2020 . . . ." (*Id.* at 10:12:50.) At that time, Thomas had "numerous psychosocial stressors, financial and otherwise" including: (1) COVID-19 and its impact on his loved ones, (2) raising his son as single parent, and (3) his girlfriend's pregnancy and subsequent miscarriage. (*Id.* at 10:13:00, 10:13:45, 10:14:10.) Thomas reported anxiety symptoms, but he never sought treatment. (*Id.* at 10:13:20.)

When Dr. Allen met with Thomas, he was depressed and frightened over his pending legal difficulties. (*Id.* at 10:15:30.) However, Thomas was working and fulfilling his role as a father, so he was at least "maintaining all of his basic functions . . . ." (*Id.* at 10:15:45.) Thomas was not taking any medications at the time Dr. Allen met with him. (*Id.* at 10:18:10.)

Moreover, Thomas was unaware of any episodes of memory loss before the collision. (*Id.* at 10:16:10.) Since that time, however, his girlfriend and his mother indicated that he did not recall certain conversations with them. (*Id.* at 10:16:20.) This occurrence "was odd for him but not alarming." (*Id.* at 10:16:40.) Based on Dr. Allen's observations, Thomas "did not display . . . symptoms of major mental illness." (*Id.* at 10:17:50.) More specifically, Thomas did not appear to meet the criteria for an anxiety or depression diagnosis; however,

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[3] Defense counsel stipulated to Dr. Allen's qualifications as an expert. (VR 5/8/23; 10:11:40.)

he may have met the criteria for an adjustment disorder stemming from "the fear and concern over his legal case." (*Id.* at 10:18:00.)

From his experience, Dr. Allen did not believe that a one-time psychotic break was likely from the stressors that Thomas had described:

> I think all those factors definitely played a part and created . . . an opportunity for this to occur. I'll just say in, you know, more than 20 years of practicing psychiatry, I don't see people typically have a psychotic break like that from those kind of stressors. That's exceedingly rare, and . . . then to never have one again, never had one before. So . . . that's why . . . I'm not as definitive as a diagnosis, because . . . all the possibilities are rare in this case.

(*Id.* at 10:26:15.)

During his examination, Dr. Allen administered several psychological tests. (*Id.* at 10:18:20.) Thomas also answered a questionnaire about substance abuse. (*Id.* at 10:19:00.) Although Thomas "displayed some elevated scores," they "were generally consistent with . . . smoking marijuana regularly, [and] . . . drinking a drink of alcohol regularly." (*Id.* at 10:19:20.) As a result, "there was . . . some consideration of a substance-abuse issue, but . . . not overwhelmingly." (*Id.* at 10:19:40.)

Ultimately, Dr. Allen noted that there were "no major indicators of current mental illness" affecting Thomas at the time of the evaluation. (*Id.* at 10:20:50.) So Dr. Allen concluded that Thomas's episode was likely caused by substance abuse:

> I believe that he suffered a psychotic . . . disorder in July of 2020 . . . I put it as probable substance-induced, and this is based this on two factors. One is we know he has a history of some substance abuse, albeit only marijuana. And number two is, in my experience, 20 years at KCPC [and] as [a] faculty member at UK, people who have psychotic episodes that last a few days and have essentially no such symptoms before and no such symptoms after, those are substance-induced almost universally.

(*Id.* at 10:21:00.) Stated differently, "based on [his] experience of psychotic illness, when [the episode is] that brief it's most likely substance induced . . . ." (*Id.* at 10:21:50.) Although Dr. Allen acknowledged that the drug tests did not reveal a specific substance to be the cause of Thomas's delirium, he explained that "those [tests] don't catch everything, but they do catch a lot." (*Id.* at 10:22:10.) Still, Dr. Allen could not say with certainty that Thomas's psychotic break was caused by substance abuse:

> **Court**: Is it your belief that no one can ever be living a good life, having no issues, and then faced with COVID and anxiety and financial things, could, at some point, suffer a psychotic break? Is that—or are you saying that is possible?
>
> **Dr. Allen**: It is possible, extremely rare for it to be a one-time thing and never seen again. That's really very rare. But I won't say it's impossible.
>
> **Court**: It's not. All right.

(*Id.* at 10:29:20.)

Despite Dr. Allen's testimony, the circuit court still decided to dismiss the case. (TR Vol. II at 204–27.) In its pre-trial order, the court concluded that the Commonwealth had failed to offer sufficient proof of Thomas's mens rea.

(*See id.* at 219–21.) Moreover, the court relayed its belief that Thomas was unfairly singled out for prosecution. (*See id.* at 211–13, 222–24.) To support that reasoning, the court seemed to rely on (1) its own anecdotal experience, (2) a single case used for comparison, and (3) statistics compiled by the Department of Public Advocacy (DPA). (*See id.*) In part, its discussion of the matter was as follows:

> This Court has at least one other case pending before it wherein the defendant was clearly intoxicated during the accident but was charged with Second Degree Manslaughter (a Class C felony) rather than Murder (a capital offense). Fayette Circuit Court Case 23-CR-00576. The defendant in that case is a twenty-seven-year-old white male. *Id.* The Defendant in the case at bar is a thirty-six-year-old black male and has "no previous arrests." Concerningly, there is direct empirical data showing that selective prosecution and unequal enforcement are common within Fayette County.
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> According to statistics collected by [the DPA] and published by the Fayette County Commission for Racial Justice and Equality, Black or African Americans account for 38.5% of DPA clients despite making up only 15.6% of Lexington-Fayette County's population, and are charged with serious felonies at a grossly disproportionate rate.
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> According to that report, "Blacks or African Americans currently account for 38.5% of [DPA] clients, 60.0% of Burglary 1st, 64.8% of Robbery 1st, 58.9% of Trafficking in Marijuana, 45.9% of Trafficking Controlled Substance, 65.0% of Wanton Endangerment, 73.7% of Possession of Gun by Convicted Felon, 81.3% of Juvenile Clients Charged with Class B, A, or Capital Offense, and a grossly disproportionate 100.0% of Juvenile Clients Transferred to Circuit Court to be Tried as Adults (Fayette)–FY20". *Justice Recommendations*, Fayette County Commission for

> Racial Justice and Equality-Law Enforcement, Justice, and Accountability Subcommittee (Nov. 30, 2020).
>
> Fayette County prosecutors were recommended to conduct comprehensive research and review programs which would report on, among other things, charging disparities affecting Blacks and African Americans. The Court has no information on whether any of these programs have been implemented, and unfortunately, the Commonwealth does not appear to have altered its conduct since those recommendations were made.

(*Id.* at 211–13 (paragraph breaks added; footnotes omitted).) The circuit court ultimately granted the motion and dismissed the indictment. (*Id.* at 226.)

This appeal follows.

ARGUMENT

With all due respect to the circuit court, its analysis in this case was so fraught with legal error that it is difficult to parse. Much of the court's discussion seemed to involve weighing the evidence before trial—a practice that Kentucky precedent expressly forbids. *See*, *e.g.*, *McCue v. Commonwealth*, 652 S.W.3d 218, 221 (Ky. App. 2022). Presumably, that clear prohibition is why the court ultimately decided to premise its dismissal on the selective-prosecution theory. But that reasoning fares no better—indeed, it is foreclosed by United States Supreme Court precedent. *See United States v. Armstrong*, 517 U.S. 456, 470 (1996). For the sake of completeness, though, this brief will address both points.

As an initial matter, the Commonwealth will discuss the reasons that the court acted outside its authority by dismissing this case. From there, the Commonwealth will explain why the evidence was more than sufficient to submit the case to the jury. For these reasons, this Court should reverse and remand with instructions to reinstate Thomas's indictment.

I. The circuit court lacked the authority to dismiss the indictment for want of sufficient evidence.

At the outset, the circuit court could not even reach the sufficiency-of-the-evidence inquiry before trial. Under Kentucky precedent, that determination must be reserved for the directed-verdict stage.

RCr 9.64 provides that "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness." Our Supreme Court has explained it this way: "[T]he authority to dismiss a criminal complaint before trial may *only be exercised* by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial." *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003) (emphasis added). Indeed, our Supreme Court "has consistently held that a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008) (citations omitted).

That's not to say that there are *never* circumstances in which a lower court can dismiss a case before trial. As this Court has recently explained,

"there are justifications for dismissing a case at the pre-trial stage that do not require the trial court to weigh evidence. These justifications are based in the supervisory powers of every court." *McCue*, 652 S.W.3d at 221. Still, it is generally also true that "unless the Commonwealth consents, courts cannot: (1) accept pleas of guilty and unilaterally limit the sentences which may be imposed; (2) amend a charge prior to the presentation of evidence; or (3) dismiss a valid indictment . . . ." *Id.* at 222 (quoting *Flynt v. Commonwealth*, 105 S.W.3d 415, 425 (Ky. 2003)). So the trial court can't just dismiss for any reason. Indeed, "[t]he line of demarcation between judicial authority to dismiss some cases and not others is drawn by the separation of powers doctrine." *Id.* "[P]rosecution of crime is an executive function and . . . the duty of the executive department is to enforce the criminal laws." *Flynt*, 105 S.W.3d at 424 (citations and internal quotation marks omitted).

Numerous published Kentucky cases establish that a trial court runs afoul of separation-of-powers principles by evaluating the evidence before trial. *See*, *e.g.*, *Commonwealth v. Gonzalez*, 237 S.W.3d 575, 579 (Ky. App. 2007). Recently, in fact, this Court discussed our Supreme Court's precedent in this area at length. *See Commonwealth v. Fillhardt*, 652 S.W.3d 213, 216–18 (Ky. App. 2022). Unsurprisingly, this Court determined that "is not within the judiciary's authority to exercise the executive function assigned to the prosecutors to bring criminal charges." *Id.* at 218.

In sum, the circuit court was prohibited from weighing the evidence before trial. That practice is only appropriate at the directed-verdict stage, so the circuit court's analysis below was patently incorrect.

II. Regardless, the Commonwealth presented sufficient evidence to prove the elements of wanton murder.

Below, the court appeared to rely on the purported insufficiency of the evidence in order to support its theory that Thomas was subject to selective prosecution. (*See*, *e.g.*, TR Vol. II at 219–21, 225.) To demonstrate that Thomas was not unfairly singled out, therefore, the Commonwealth must explain why the evidence was sufficient to support a wanton-murder charge. As discussed below, the fact that the Kentucky Supreme Court has blessed cases that are factually analogous to this one significantly undercuts the circuit court's determination that Thomas was unfairly targeted.

A. The Commonwealth preserved its sufficiency-of-the-evidence argument.

This argument is preserved for this Court's review because the circuit court discussed the strength of the evidence against Thomas at length in its order dismissing. (*See*, *e.g.*, TR Vol. II at 219–21.) Although the Commonwealth maintains that this argument was preserved, it requests palpable-error review in the event that this Court holds otherwise.

B. Evidence of intoxication is not required to sustain a wanton-murder charge.

Respectfully, the circuit court erred by glossing over the other circumstances pertaining to the collision. Indeed, this case is a textbook example of wanton conduct.

To reiterate, Thomas used a turning lane to bypass vehicles stopped at a red light. (VR 4/21/21; 9:17:50.) Moreover, the evidence indicates that he did not attempt to apply his brakes. (*Id.* at 9:19:40.) And, importantly, Thomas was exceeding the speed limit by 50 MPH *at a minimum*. (*Id.* at 9:20:10, 9:26:20.) Afterward, Thomas fled the scene on foot. (*Id.* at 9:19:05.) As discussed below, the circumstances are generally analogous to other cases in which a Kentucky appellate court ultimately upheld a wanton-murder conviction.[4]

Admittedly, our Supreme Court has suggested that evidence that a defendant ran a red light—standing alone—is insufficient to support wanton murder. *See Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky. 1994).[5] In *Johnson*, however, there were also other circumstances that strongly indicated that the defendant was not acting wantonly:

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[4] The Commonwealth has declined to relay the familiar directed-verdict standard given that this case involves weighing the evidence pre-trial. Suffice it to say that the verdict should be upheld under that standard if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[5] In that case, "[t]he color of the traffic light at the intersection was disputed." *Johnson*, 885 S.W.2d at 952.

> No evidence was introduced by the Commonwealth of extreme speed or even that the Appellant was exceeding the legal speed limit. Evidence was introduced that the Appellant was not operating the coal truck under the influence of drugs or alcohol; that the Appellant's coal truck was fully loaded; that he was making his third haul of the day; that he blew his horn and swerved to avoid impact; and that he may have run a red light. None of this evidence establishes conduct which rises to the level of manifesting extreme indifference to human life.

Id.

By contrast, our Supreme Court determined that the Commonwealth had met its evidentiary burden in *Brown v. Commonwealth*, 174 S.W.3d 421 (Ky. 2005). In *Brown*, the appellant drove his "automobile into an intersection against a red light and collided with another automobile operated by Debra Conklin and also occupied by Conklin's teenage daughter, Megan." *Id.* at 423. Two passengers in Brown's vehicle were injured, but "Debra and Megan . . . were killed." *Id.*

Brown might have been watching television or racing. *See id.* at 424, 430–31. Moreover, "[t]here was evidence from which the jury could infer that Appellant was driving at a rate of speed between five and fifteen miles per hour over the fifty-five miles per hour speed limit." *Id.* at 424. Notably, *Brown* also involved an appellant running a red light:

> As Appellant approached the intersection, he saw that the traffic light in his direction was red. Nevertheless, he did not slacken his speed, believing that he could "time" the red light, *i.e.*, that the light would change in his favor before he entered the intersection. Appellant admitted and it is undisputed that

> the light was still red when he entered the intersection and that he never applied his brakes.

Id.

Ultimately, the Court found that the evidence was sufficient to support Brown's wanton-murder convictions. *Id.* at 423, 428. In doing so, the Court explained that "intoxication is not a prerequisite to a finding of extreme indifference to human life in a vehicular homicide case." *Id.* at 426.

Our Supreme Court discussed *Brown* in *Berryman v. Commonwealth*, 237 S.W.3d 175 (Ky. 2007), another case dealing with similar facts:

> Contrary to Berryman's arguments, this case is similar to *Brown*. In many important ways, Berryman's misconduct is more egregious than Brown's. Both cases involve a driver who was inattentive to the road. Brown's inattention involved watching television; Berryman's involved monitoring the counting of his illegal drug shipment. Both cases involve defendants who were speeding. But Berryman was exceeding the speed limit by over thirty miles per hour; Brown was exceeding the speed limit by only between five and fifteen miles per hour. And there is no indication that Brown was impaired to any degree by alcohol or other intoxicants. A reasonable inference could be drawn that Berryman was impaired, at least somewhat, by the Xanax in his system. Thus, in many important respects, the facts in this case contain even stronger evidence of wanton conduct than that found in *Brown*.

Id. at 178–79 (footnote omitted).

With that background in mind, consider the circumstances before the Court now. Setting aside any evidence relating to Thomas's intoxication, the other preliminary evidence indicated: (1) Thomas ran a red light with traffic

stopped in front of it, (2) Thomas transitioned to the left turning lane to run the light anyway, (3) during this time, he was going at least 50 miles an hour over the speed limit, (4) Thomas did not attempt to apply the brakes, and (5) after the collision, Thomas fled on foot. (*See* VR 4/21/21; 9:17:50, 9:19:05, 9:19:40, 9:20:10, 9:26:20.)

So, based on these cases it seems apparent that—setting aside any purported "psychotic break"—the circumstances are such that they would suffice to establish wantonness under our Supreme Court's precedent *without* any additional evidence of substance abuse. In order to address the circuit court's analysis comprehensively, however, the Commonwealth will discuss the evidence pertaining to Thomas's mental health and intoxication below.

C. There was sufficient evidence that Thomas was intoxicated.

Again, much of the circuit court's analysis seemed to hinge on whether Thomas was impaired at the time of the collision. (*See* Vol. II at 219–21, 224–25.) If Thomas were not intoxicated, the circuit court seemed to reason, then he could not have formed the requisite mens rea for murder. (*See id.* at 219–21.) In reaching that result, the circuit court simply chose to disbelieve the Commonwealth's mental-health expert. (*See id.* at 220–21.) If the court *had* credited that expert, of course, then it would have been compelled to find sufficient proof of intoxication. In any event, there are problems with the court's analysis from several different angles.

The first relates to Thomas's mental health. Of course, the burden was never on the Commonwealth to prove that Thomas was sane—the burden was on *Thomas* to prove the *opposite*. As our Supreme Court has explained, "[t]he burden of proof as to the question of a defendant's sanity at the time of a homicide never shifts from the defendant." *Star v. Commonwealth*, 313 S.W.3d 30, 35 (Ky. 2010) (citing *Wainscott v. Commonwealth*, 562 S.W.2d 628 (Ky. 1978)). Moreover, this has been the law in the Commonwealth for quite some time. *See*, *e.g.*, *Edwards v. Commonwealth*, 554 S.W.2d 380, 383 (Ky. 1977).

To be sure, on this record the Commonwealth doesn't dispute that Thomas was acting differently on the day of the collision. But that fact alone doesn't discharge Thomas's obligation to prove that he was insane at the time of the offense. *See*, *e.g.*, *United States v. Prigmore*, 15 F.4th 768, 776–77 (6th Cir. 2021) (collecting cases and recognizing that the Sixth Circuit's "caselaw is replete with instances of criminal defendants who exhibited bizarre behavior, but who nonetheless met the Constitution's competency standard"). The primary evidence in the record pertaining to Thomas's mental health was offered by Dr. Allen—and it was his opinion that Thomas's behavior was likely substance-induced. (VR 5/8/23; 10:21:00, 10:29:20.) So it is beyond dispute that Thomas failed to carry his burden before the circuit court.[6]

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[6] A defendant who is found competent to stand trial might be entitled to an insanity defense. To defeat a directed verdict on insanity grounds at trial, the Commonwealth would have needed to present only " 'some evidence' indicating that the defendant was sane at the time of the commission of the crime; i.e.,

Regardless, the evidence below was sufficient to support a reasonable inference that Thomas drove while intoxicated. Two items of evidence are key to this analysis: (1) Thomas' admission after the collision that he had ingested controlled substances, and (2) Dr. Allen's testimony to the effect that Thomas was likely intoxicated.[7] To put a finer point on it, Dr. Allen's testimony provided corroborating evidence for Thomas's out-of-court admission under Kentucky Rule of Criminal Procedure (RCr) 9.60.[8] As a result, the evidence presented at the circuit court was sufficient to submit the case to the jury. Below, the Commonwealth addresses both pieces of evidence—Thomas's admission and the evidence corroborating it—in turn.

1. Thomas's admission that he had taken controlled substances had evidentiary value.

Thomas will likely balk at the Commonwealth's reliance on his admission that he had ingested drugs. But the circuit court couldn't simply discount it as if it were devoid of evidentiary value. Even if there were some reason to

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his mental problems did not preclude him from conforming his conduct to the requirements of law." *Star*, 313 S.W.3d at 35 (citation omitted).

[7] The Commonwealth's sufficiency-of-the-evidence discussion excludes the additional matters referenced in the affidavit for a search warrant. (*See* TR Vol. I at 15.) That document mentions that Thomas's "mannerisms [after the collision] indicated possible narcotics usage." (*Id.*) Moreover, an officer who conducted field-sobriety testing concluded that Thomas "showed signs of impairment." (*Id.*) This Court should take this evidence into account in its analysis, especially given that this case never proceeded to trial.

[8] The Commonwealth will discuss RCr 9.60 in more detail in subsection 3 of this argument.

doubt the truthfulness of Thomas's statement—i.e., the possibility that he didn't know what he was saying due to a mental-health episode—his admission should be evaluated by the factfinder as long as it was not wholly impossible. Stated differently, it was within the purview of the jury to decide whether to believe it.

Kentucky precedent confirms that this is the case. In *Ross v. Commonwealth*, the appellant argued that he should have received a directed verdict at his murder trial. 531 S.W.3d 471, 473, 474–75 (Ky. 2017). To that end, Ross argued that "the only witness linking him to the crime[] was so utterly incredible and untrustworthy as a witness that all of her uncorroborated testimony was unworthy of belief as a matter of law and should have been disregarded in the directed verdict analysis." *Id.* at 475. Our Supreme Court still declined to grant Ross relief, noting that the witness's story was indeed possible. *Id.* at 477. So the mere fact that some details of a witness's testimony are inconsistent does not necessarily remove a credibility determination from the purview of the jury. In fact, our Supreme Court has upheld jury verdicts even while acknowledging that some of the details in a witness's testimony seemed implausible. *See Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990).

Turning to the present case, on this record there perhaps could be reason to question the truth of Thomas's out-of-court confession. But that doesn't matter from an evidentiary standpoint. His admission—i.e., that he had ingested drugs—was not flat-out impossible, so it should be evaluated by the factfinder.

And under RCr 9.60, that confession was sufficient to defeat a directed-verdict motion as long as there was some other evidence corroborating it. As discussed in the next section, there was evidence that fit that bill because Dr. Allen testified that Thomas's condition was likely the result of substance abuse.

2. Dr. Allen's testimony was sufficiently reliable to be evaluated by the factfinder.

To support its conclusion that the Commonwealth failed to present sufficient proof of Thomas's mens rea, the circuit court discounted Dr. Allen's testimony. (*See* Vol. II at 220–21.) As discussed below, however, that decision was unwarranted—Dr. Allen's testimony was sufficiently reliable to be introduced at trial.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), governs the admissibility of expert testimony in Kentucky. *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004). Under *Daubert*, trial courts are gatekeepers, assessing whether testimony is relevant and reliable. *Id.* at 913–14. *Daubert*, however, does not require scientific certainty. *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 104–05 (Ky. 2008); *see also United States v. Otero*, 849 F.Supp.2d 425, 438 (D.N.J. 2012) (explaining that "experience-based expert testimony in numerous technical areas would be barred" if courts needed to "determin[e] whether or not the procedures utilized are sufficient to satisfy scientists that the expert opinions are virtually infallible"). Of course, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruc-

tion on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Moreover, "the trial court's decisions with respect to the admission of expert scientific testimony pursuant to *Daubert* are reviewed for an abuse of discretion." *Debruler v. Commonwealth*, 231 S.W.3d 752, 756 (Ky. 2007).

With that background in mind, consider Dr. Allen's testimony. Below, the court seemingly chose to discount his opinion because of how he worded his conclusion. (*See* TR Vol. II at 220.) But even if Dr. Allen did not state his conclusion with absolute certainly, it should have still been evaluated by the jury:

> Courts generally . . . defer to the jury's ability to weigh the evidence where an expert's opinion is equivocal. For example, an expert may give an opinion that there is a causational link between defendant's activities and plaintiff's injuries, but the expert may be unable to state the opinion with a high or even reasonable degree of medical certainty. In such a case, most courts will admit the opinion while permitting cross-examination to reveal for the trier of fact the expert's uncertainties . . . .

Boggess v. Commonwealth, No. 2001-SC-0263-MR, 2003 WL 1193266, at *5 (Ky. Jan. 23, 2003) (non-binding) (quoting Wright and Gold, *Federal Practice and Procedure; Evidence*, § 6264)); *see also Romano v. John Hancock Life Ins. Co.*, No. 19-21147-CIV, 2022 WL 1447733, at *38 n.29 (S.D. Fla. May 9, 2022) (non-binding) (collecting secondary sources on this point). Obviously, that rule should apply here.

For several reasons, Dr. Allen's testimony had a sufficient evidentiary foundation. Again, Dr. Allen had the experience of "20 years at KCPC [and] as

[a] faculty member at UK . . . .” (VR 5/8/23; 10:21:30.) And although Dr. Allen acknowledged that the drug tests did not indicate a specific substance that Thomas had ingested, Dr. Allen further explained that “those [tests] don’t catch everything . . . .” (*Id.* at 10:22:20.) After the circuit court pressed Dr. Allen on whether someone could suffer a psychotic break after “having no issues,” moreover, he responded that it was “extremely rare for it to be a one-time thing . . . .” (*Id.* at 10:29:20.) Considering everything together, Dr. Allen’s testimony was sufficiently probative to pass the test for admissibility.

In sum, Dr. Allen’s testimony provided sufficient corroboration for Thomas’s extra-judicial confession under RCr 9.60. And, as explained below, the evidence considered by the circuit court was sufficient to survive a directed verdict under our Supreme Court’s precedent.

3. Dr. Allen’s testimony served as some evidence to corroborate Thomas’s extra-judicial confession.

Again, the evidence was sufficient to prove that Thomas was intoxicated during the collision. Before explaining why, the Commonwealth must discuss our Supreme Court’s sufficiency-of-the-evidence analysis in *Blades v. Commonwealth*, 957 S.W.2d 246 (Ky. 1997). Admittedly, that case differs in some respects. But a close examination reveals that it controls the outcome here.

In *Blades*, two officers “responded to citizens’ complaints that a male was staggering in the roadway and that a truck with its emergency flashers operating was parked in the roadway.” *Id.* at 248. The officers arrived and discovered Blades walking down a highway. *Id.* “Upon questioning, [Blades]

strongly smelled of alcohol and failed to pass several field sobriety tests. He was subsequently placed under arrest for public intoxication." *Id.* About a mile down the road, the officers discovered Blades's vehicle. *Id.* "The truck was in the center of the highway and its engine was still running." *Id.* Moreover, Blades "admitted he had driven the truck to its location." *Id.* Later, a breathalyzer test indicated that Blades's blood alcohol content was .234 percent. *Id.*

Still, Blades presented evidence at trial to establish that he was not guilty of driving under the influence (DUI). *Id.* At the outset, Blades acknowledged that he had driven the vehicle to a racetrack on the day he was arrested. *Id.* "[A]t the end of the day," however, "he asked his stepdaughter to drive because he was intoxicated." *Id.* Complicating matters further, "[h]is truck developed a problem while on the highway, and he had started walking in order to get assistance." *Id.* To explain his admissions to the police, Blades claimed that he had lied about driving the vehicle because he was trying to protect his stepdaughter. *Id.* Additionally, another witness averred that he had seen Blades riding as a passenger earlier that day. *Id.* And that wasn't the only witness who claimed that Blades had not been driving: Blades's stepdaughter testified that she—not Blades—had driven away from the racetrack. *Id.* After hearing the evidence, the jury found Blades guilty of DUI anyway. *Id.*

Before our Supreme Court, Blades argued that the evidence was insufficient to support his conviction. *Id.* at 249. In its analysis on this point, the Court relied heavily on RCr 9.60, which "provides that a confession not made

in open court will not warrant a conviction unless corroborated by other proof that such an offense occurred." *Id.* at 250. Indeed, our Supreme Court ultimately rejected Blades's insufficiency-of-the-evidence argument under that rule:

> Although proof beyond a reasonable doubt is necessary to convict of a criminal offense, the proof required by RCr 9.60 to corroborate an extrajudicial confession need not be such that, independent of the confession, would establish the corpus delicti or Appellant's guilt beyond a reasonable doubt; and that proof of the corpus delicti, *i.e.*, that the offense of DUI was actually committed, may be established by considering the confession as well as the corroborating evidence.

Id.

So, why is *Blades* applicable here? The operative evidence in that case related to the defendant's out-of-court confession and the circumstantial evidence corroborating it. *See id.* Similarly, this case involves an out-of-court confession (Thomas's admission that he had ingested drugs) and additional corroborating evidence (Dr. Allen's testimony).

Again, *Blades* involved the sufficiency of the evidence in light of the defendant's out-of-court confession. 957 S.W.2d at 250. The "confession" in that case was the defendant's admission that he had driven the vehicle to the location where it was discovered by the police. *Id.* at 248, 250. But other evidence cast doubt on the validity of that admission. More specifically, *two witnesses* (in additional to Blades's own self-serving testimony) averred that Blades had been a passenger in the vehicle, instead of the driver. *Id.* at 248.

Of course, on this record one could question Thomas's admission that he had ingested controlled substances before the collision: Even though Thomas claimed to have imbibed alcohol, on this record there was no evidence that he had actually done so. (*See* VR 4/21/21; 9:21:00, 9:34:50.) But under *Blades*, the mere fact that some evidence casts doubt on a confession doesn't matter so long as additional evidence corroborates it. *See generally Blades*, 957 S.W.2d at 248, 250 (delineating the evidence against Blades and subsequently holding that it was sufficient to survive a directed verdict). Here, Dr. Allen's testimony did just that. Considering Thomas's confession and the Commonwealth's expert testimony together, the evidence supported an inference that Thomas was intoxicated during the collision. By extension, the Commonwealth could not have unfairly single him out for prosecution.

III. Thomas did not overcome the presumption of good faith to establish selective prosecution.

Apart from its sufficiency-of-the-evidence analysis, the circuit court relied on two other grounds in support of dismissal: selective prosecution and prosecutorial misconduct. (*See* TR Vol. II at 222–25.) The Commonwealth focuses on the former for the remainder of this brief.[9] Because the court failed to

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[9] With respect to the prosecutorial-misconduct ground, the court mentioned that the Commonwealth failed to tell its expert—before he made his diagnosis—that one of Thomas's drug tests came back negative. (TR Vol. II at 224–25.) "Prosecutorial misconduct is a prosecutor's improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment." *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (citation and internal quotation marks omitted). Suffice it to say

point to anything substantial to indicate that Thomas was unfairly singled out, however, the court's selective-prosecution rationale is completely without merit.

A. This Court should decline to review this argument.

Admittedly, the circuit court discussed selective prosecution at length in its order dismissing. (*See* TR Vol. II at 222–26.) But this argument is *not* preserved for this Court's review, and this Court should decline to address it entirely. This is so because the circuit court raised selective prosecution sua sponte in its order. In other words, Thomas did not raise this matter in either his motion to dismiss or his reply—instead, those documents focused only on the sufficiency of the evidence. (*Id.* at 176–80, 185–90.)

In these circumstances, the circuit court exceeded its power by considering the matter at all. Indeed, the court's decision to raise the matter was so beyond the pale that it ran afoul of the party-presentation principle.

Writing for a unanimous Supreme Court, Justice Ruth Bader Ginsberg discussed that precept in *United States v. Sineneng-Smith*, 590 U.S. 371 (2020). In the federal trial court, Sineneng-Smith argued in part that several statutory provisions "violated the Petition and Free Speech Clauses of the First

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that the reasoning espoused by the circuit court does not approach that standard. (*See* TR Vol. II at 224–25.) After all, it's clear that Dr. Allen was informed of both drug tests by the time the court held the evidentiary hearing, and that fact did not alter his ultimate conclusion. (VR 5/8/23; 10:25:20.) And, again, Dr. Allen explained at the hearing that "those [tests] don't catch everything . . . ." (*Id.* at 10:22:00.) So it seems obvious that these circumstances do not merit relief.

Amendment as applied." *Id.* at 374. Before the Ninth Circuit, she repeated the same arguments. *Id.* However, the Ninth Circuit "named three *amici* and invited them to brief and argue issues framed by the panel, including a question Sineneng-Smith herself never raised earlier: '[W]hether the statute of conviction is overbroad . . . under the First Amendment.' " *Id.* Eventually, the Ninth Circuit concluded that a particular statutory provision was overbroad. *Id.* at 375. The United States Supreme Court granted review and determined "that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Id.* So the Court "vacate[d] the Ninth Circuit's judgment and remand[ed] the case for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties." *Id.* at 380. Our Supreme Court engaged in similar reasoning (albeit without using the words "party presentation principle") in *Harrison v. Leach*, 323 S.W.3d 702, 709 (Ky. 2010).

Turning to the present case, the circuit court's decision to raise additional arguments was similarly unwarranted. Indeed, it was particularly egregious here because the burden is squarely on *the defendant* to establish selective prosecution. *See Williams v. Commonwealth*, 213 S.W.3d 671, 685 (Ky. 2006). And it was entirely unacceptable for the circuit court to try to satisfy Thomas's burden for him. As a result, this Court should simply decline to con-

sider selective prosecution at all. But, as explained below, the evidence referenced by the circuit court in support of that claim was plainly insufficient anyway.

B. The circuit court failed to establish the defendant's burden in order to prove selective prosecution.

Before delving into the substance of this claim, the Commonwealth wishes to briefly address the extraordinary circumstances giving rise to this appeal. Again, a citizen of the Commonwealth tragically lost her life because of Thomas's actions. And the Commonwealth's Attorney—in a proper exercise of constitutional authority—decided to seek an indictment for wanton murder, which a grand jury voted to approve. But instead of allowing a jury to hear this case, the circuit court took the extraordinary step of dismissing the indictment on a basis that Thomas did not even argue. And none of the purported evidence cited by the circuit court comes *anywhere close* to what is required to prove selective prosecution. Given these remarkable circumstances, the Commonwealth urges this Court to reverse.

To establish selective prosecution, the defendant has an onerous burden:

> A defendant demonstrates selective prosecution by establishing that: (1) others similarly situated have not been prosecuted; and (2) the prosecution's decision to prosecute was based on impermissible considerations, such as race, religion, political beliefs, or the desire to prevent the exercise of constitutional rights.
>
> Because there is a presumption of good faith prosecution, a defendant challenging an indictment as selective prosecution generally bears a heavy burden

> of proving facts sufficient to satisfy these two requirements.

Leslie W. Abramson, 8 *Kentucky Practice—Criminal Practice & Procedure* § 12:103 (6th ed.) (paragraph break added) (footnotes omitted). "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *see also Johnson v. Commonwealth*, 864 S.W.2d 266, 275 (Ky. 1993) (rejecting a selective-prosecution argument).

Here, there was absolutely no reason to think that Thomas carried his burden of proving selective prosecution. And if this Court has any doubts about the matter, they should be dispelled by the United States Supreme Court's opinion in *Armstrong*, 517 U.S. 456. In that case, the Court "consider[ed] the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race." *Id.* at 458. Below, "respondents were indicted . . . on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same. . . and federal firearm offenses. " *Id.*

"In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black." *Id.* at 459. To support that claim, "they offered only an affidavit by a 'Paralegal Specialist,' employed by the Office of the Federal Public Defender . . . ." *Id.* And the sole allegation in that affidavit

was that the defendant was black in every one of two kinds of "cases closed by the office during 1991 . . . ." *Id.* "Accompanying the affidavit was a 'study' listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case." *Id.* (footnote omitted). Ultimately, the district court granted the discovery motion over the government's objection. *Id.*

The government then moved for reconsideration. *Id.* In support of that motion, "[t]he federal and local agents participating in the case alleged in affidavits that race played no role in their investigation." *Id.* at 460. Moreover, "[a]n Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution . . . ." *Id.* "The Government also submitted sections of a published 1989 Drug Enforcement Administration report . . . ." *Id.* But the respondents replied with additional evidence:

> In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of caucasian users and dealers to minority users and dealers." Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, and a newspaper article reporting that federal "crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black[.]"

Id. at 460–61 (citations omitted). The district court ultimately dismissed the case. *Id.* at 461. "A divided three-judge panel of the Court of Appeals for the

Ninth Circuit reversed . . . ." *Id.* After the court sitting en banc voted to reinstate the district court's order, the Supreme Court granted certiorari. *Id.*

In its analysis, the Court discussed selective-prosecution claims at length. *See id.* at 463–71. The Court made it clear that "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary." *Id.* at 465 (citation and internal quotation marks omitted). And the Court determined that the respondents had not carried their burden:

> In the case before us, respondents' study did not constitute some evidence tending to show the existence of the essential elements of a selective-prosecution claim. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence.

Id. at 470 (citation and internal quotation marks omitted).

Now, consider this case. Admittedly, the circuit court did mention one other case—*one*—for comparison:

> This Court has at least one other case pending before it wherein the defendant was clearly intoxicated during the accident but was charged with Second

> Degree Manslaughter (a Class C felony) rather than Murder (a capital offense). Fayette Circuit Court Case 23-CR-00576. The defendant in that case is a twenty-seven-year-old white male. *Id.* The Defendant in the case at bar is a thirty-six-year-old black male and has "no previous arrests."

(TR Vol. II at 211–12 (footnotes omitted).[10]) But the circuit court completely failed to show that the circumstances in that case were actually similar to the one at bar in any meaningful way. For instance, was the defendant in that case traveling 50 miles above the speed limit, like Thomas? Did the defendant run a red light, like Thomas? Etc. The circuit court didn't even bother addressing these essential details, (TR Vol. II at 211–12), so how could it have possibly found that the selective-prosecution standard was satisfied? After all, "[t]he mere fact that *some* other putative offenders are not prosecuted does not make a case of selective or arbitrary enforcement." *Johnson v. Commonwealth*, 864 S.W.2d 266, 275 (Ky. 1993). The circuit court didn't address any of that in its order, so it could not have met the standard that the Supreme Court employed in *Armstrong*.

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[10] At one point, the court mentioned in passing that it had witnessed a pattern of discrimination in the Commonwealth's charging decisions. (TR Vol. II at 223.) But that bald statement, which the Commonwealth disputes, has no value without any specific information about what happened in those alleged other cases.

Of course, the circuit court's selective-prosecution analysis was not based entirely on the one other case that the court had pending before it. Instead, the court also relied on statistics collected by the DPA.[11] (TR Vol. II at 212–13.) But the circuit court's discussion of those statistics "failed to identify individuals who were not black and could have been prosecuted for the offenses for which [Thomas was] charged, but were not so prosecuted." *Armstrong*, 517 U.S. at 470. So the circuit court's reliance on those statistics was also plainly insufficient to support dismissal. *See, e.g., United States v. Cannon*, 987 F.3d 924, 937–39 (11th Cir. 2021) (holding that a defendant failed to establish a selective-prosecution claim under *Armstrong*); *Broadnax v. Lumpkin*, 987 F.3d 400, 413–14 (5th Cir. 2021) (rejecting a selective-prosecution claim under the federal habeas corpus standard); *United States v. Thorpe*, 471 F.3d 652, 657–65 (6th Cir. 2006) (discussing the defendant's evidence of selective prosecution at length and concluding that he was not entitled to discovery). If anything, the "evidence" considered by that court below was much, much weaker than the circumstances before the Court in *Armstrong*. So if the defendants in *Armstrong* weren't entitled to relief, then Thomas obviously failed to carry his burden here.

[11] It appears that the document containing those statistics is not included in the record.

CONCLUSION

Our legislature tasked prosecutors with enforcing our criminal laws, and it was not within the circuit court's authority to preemptively evaluate the evidence before trial. On top of that, the court dismissed an indictment in a murder case on a basis that the parties didn't even raise. And the evidence that the court cited to support its reasoning was plainly insufficient. Considering everything that happened below, there is no question this case should have gone to a jury to decide guilt. So this Court should remedy the grave injustice presented here. For these reasons, the Commonwealth respectfully requests that this Court reverse with instructions to reinstate Thomas's indictment.

Respectfully submitted,

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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

vs. **21-CR-336**

CORNELL DENMARK THOMAS II **DEFENDANT**

ORDER AND OPINION

On July 25, 2023, the above-styled matter came before the Court for a final hearing on Defendant's April 28, 2023 Motion to Dismiss pursuant to RCr 8.12, 8.14, 8.16, and 8.22. The Court having heard oral arguments from both the Commonwealth and the Defendant, having reviewed memorandum of law from both parties, having examined the Court's record, and the Court being otherwise sufficiently advised, the Defendant's Motion to Dismiss is **HEREBY GRANTED**.

FINDINGS OF FACT

On July 3, 2020, at approximately 7 a.m., the Defendant was involved in a fatal collision with another vehicle. According to the police report written that morning, following the accident the Defendant attempted to flee the scene on foot, and was observed "running on foot and attempting to gain access to another vehicle," at which point he was arrested and charged with Leaving the Scene of an Accident/Failure to Render Aid/Assistance with Death or Serious Physical Injury.

On July 6, 2020, in an affidavit in support of a search of Defendant's vehicle, Sergeant James Boyd described in more particularity the Defendant's behavior following the accident: "As I spoke to the subject it appeared he was in mental distress. He was rambling on how he was God, he seemed to be hallucinating and he stated he was intoxicated." Although the Defendant answered "yes" to officers' questions about whether he had been (a) using alcohol or (b) using drugs, Officer Boyd's affidavit states that he "did not alert to the smell of an alcoholic beverage[.]" Although another officer at the scene conducted field sobriety testing and determined that the Defendant "showed signs of impairment," officers were unable to find any evidence of narcotics use either at the scene or during the later search of Defendant's vehicle. According to later grand jury testimony by Sergeant Boyd, the Defendant "appeared to be in some state of delirium," and the primary focus of the investigation became finding evidence that the Defendant used drugs before the accident.

As of this date, no evidence has ever been produced that the Defendant was under the influence of any substance, legal or illicit, that would have caused the delirium described by Sergeant Boyd. Samples of the Defendant's blood were taken at the hospital following the accident and were immediately sent to a Kentucky State Police forensics laboratory for testing. That testing revealed the presence of delta-9 THC at a concentration of approximately five (5) nanograms per milliliter. However, as stated by Sergeant Boyd to the grand jury, this was not a significant level to establish the Defendant

was under the influence of marijuana. Unsatisfied with these results, the Commonwealth sought a specialty laboratory capable of testing for the presence of any other possible drugs, in hopes the Defendant's delirium had been triggered by use of synthetic marijuana analogues. However, that test also came back negative.

During his grand jury testimony, Sergeant Boyd explained the reasons why the Defendant was ultimately charged with Murder. As he testified, multiple witnesses to the crash reported that the Defendant had run a red light while traveling inbound on Leestown Road at the intersection of Boiling Springs Drive. This resulted in the Defendant striking the victim's vehicle while she was making a left-hand turn from Boiling Springs Drive into the outbound lane of Leestown Road. An analysis of the Event Data Recorder (EDR) in Defendant's vehicle showed that Defendant was traveling at a speed approaching 96 miles per hour when he entered the intersection. The speed limit before the intersection was 45 miles per hour.

All of this information was accurate and unbiased. However, as Sergeant Boyd testified, the murder charge was based on two factors: (1) running a red light traveling at 95.9 miles per hour in a 45 mile per hour zone and (2) "avoid[ing] collision prior to the intersection" by "going around stopped traffic at the red light" by entering the left-hand turn lane. Citing a witness description from the day of the accident in which the Defendant "went around [the witness] on his left in the turn lane," Sergeant Boyd painted a clear picture wherein the Defendant had changed lanes just before the intersection

(traveling at 95.9 miles per hour) in order to avoid colliding with the stopped cars, and therefore "went into that intersection completely wantonly."

Missing from Sergeant Boyd's testimony was a full description of the layout of the intersection where the accident occurred, which provides a far more innocent explanation for the Defendant's presence in the left lane. In the several hundred feet leading up to the intersection with Boiling Springs Drive, the inbound section of Leestown Road is unusual in that the left-hand lane transforms from a lane which goes straight through the intersection (like it does in the prior twelve intersections) to a dedicated left-turn lane. Perhaps more confusingly, unlike in the intersection with Boiling Springs, all prior intersections of inbound Leestown Road have either a dedicated left-turn lane or a left-turn lane which splits off from the main two lanes. In other words, anyone traveling inbound in the left-hand lane of Leestown Road is forced to merge into the right-hand lane in order to proceed straight through the intersection with Boiling Springs. Two different grand jurors alluded to this fact in their questions, asking if the Defendant was "familiar with that area," as, in the juror's words, she knew that the area is "kind of tricky." Another asked if the Defendant was "coming off of New Circle Road" (which would likely place him in the right-hand lane going into the Boiling Springs intersection) or "coming under the underpass" (which would more likely place him in the left-hand lane). Although Sergeant Boyd stated that the Defendant "worked nearby," according to his answer Leestown Road was "not his normal route home," and he did not know

whether the Defendant had exited from New Circle Road or had come from under the underpass.

After two-years of continuances due partially to COVID, on February 7, 2023, the Defendant's attorneys filed a Notice of Intent to Introduce Mental Health Evidence under RCr 8.07(2) bearing on issues of guilt and punishment. In response, the Commonwealth moved under RCr 8.07(B) and RCr 8.07(C)(iii) to request a mental examination of the Defendant by KCPC, which the Court granted. On April 13, 2023, a comprehensive mental examination was conducted by Dr. Timothy Allen, M.D., and a confidential examination report was submitted to the Court and all parties on April 24, 2023.

Dr. Allen's report is peculiar in that its conclusions are not wholly consistent with its findings. Dr. Allen's report documented the following: at the time of the accident, the Defendant was under significant stress due to increased work responsibilities due to COVID, significant racial tension at work following the death of George Floyd, his girlfriend's surprise pregnancy, his girlfriend's later miscarriage caused in part by delayed access to prenatal care due to COVID, his girlfriend's inability to find work due to COVID, and his son's difficulty with remote learning and increased behavioral problems at home, again due to COVID. Dr. Allen's Report, at 4. The Defendant reported that he experienced "increased anxiety and depression in early 2020 because of these numerous stressors." *Id.* The report further documented that after the accident and the Defendant's subsequent hospitalization, he learned from his mother and girlfriend that

they both "had a few conversations with him over the preceding few months in which he would act strangely, speak about religious topics that were out of character for him, and then he would not remember those conversations later." *Id.* Additionally, he did not remember anything about the accident, but learned later of having made statements to the police that "he was God, that he was addicted to 'God and women,' and that he was intoxicated." *Id.* at 5. As later testing confirmed, there was no evidence that the Defendant was intoxicated at the time of the accident. According to Dr. Allen's report, the Defendant was unable to explain why he would have made such statements. *Id.* The Defendant also acknowledged that although he "considered himself to be a Christian," the "discussions that were described in the police reports that [he] was declaring himself to be God or be 'addicted to God' were atypical topics and speech for him." *Id.* Dr. Allen concluded that a "psychotic episode of very short duration, as displayed by [the Defendant], is most often associated with acute intoxication with some drug[,]" and he diagnosed the Defendant with "Probable Substance-Induced Psychosis," while acknowledging that the "[Defendant's] blood toxicology screen showed minimal THC and no alcohol or other drugs." *Id.* at 6. Dr. Allen's diagnosis was based only on speculation that the Defendant may have been "exposed to an intoxicant, either voluntarily or involuntarily, which is not measured by the State lab, such as synthetic cannabis." *Id.* As mentioned earlier, however, the Defendant's blood had already been sent to a specialty laboratory in order to test for drugs the State lab would have missed,

such as synthetic cannabis, yet came back negative. Also, as Dr. Allen's report notes, the only other possible evidence of drug use by the Defendant ("hospital records suggest[ing] a history of IV drug use") were likely "an assumption based on the now debunked concern for a heart valve infection (endocarditis)." *Id.*

Although Dr. Allen does not spend much time in his report on the Defendant's physical condition, the report mentions that the Defendant had been suffering from an undiagnosed lung infection at the time of the accident, likely pneumonia,[1] and that he had experienced "'nagging soreness' in his left shoulder and some episodes of lightheadedness while working out[.]" *Id.* at 5.

In response to Dr. Allen's report, the Defendant filed the present Motion to Dismiss, which was heard first on May 4, 2023, with a longer evidentiary hearing on May 8, 2023, where Dr. Allen testified under oath. In his testimony, Dr. Allen reiterated that the level of THC present in Defendant's blood at the time of the accident—considering that the Defendant was a chronic user—was low enough that "the likelihood of that causing a psychotic episode all by itself is extremely low." May 8, 2023 Hearing at 10:25 a.m. When asked why he did not mention the second drug panel in the Defendant's

[1] There is a growing body of evidence linking short-duration acute psychotic episodes with COVID-19 infections, especially those associated with pneumonia, and with psychosocial stress caused by the COVID-19 pandemic generally. *See e.g.* Ellie Brown, et al., *The potential impact of COVID-19 on psychosis: A rapid review of contemporary epidemic and pandemic research*, 222 Schizophrenia Research 79-87 (2020); Colin M. Smith, et al., *COVID-19-associated brief psychotic disorder*, 13 BMJ Case Reports 8 (2020); Amna Mohyud Din Chaudhary, et al., *Psychosis during the COVID-19 pandemic: A systematic review of case reports and case series*, 153 Journal of Psychiatric Research 37-55 (2022).

evaluation, Dr. Allen admitted that he "found out about the second one after [his] report." *Id.* It was never established as to why the Commonwealth did not advise Dr. Allen of the subsequent lab results or why he did not supplement his report. Once Dr. Allen was advised there were no simulated substances found in the Defendant's blood work, he admitted that his diagnosis that Defendant's psychotic break was "probably substance induced" was based entirely upon speculation. *Id.* Although Dr. Allen stated that life stressors "definitely played a part, and created an opportunity for [the psychotic break] to occur", they were highly unlikely to have done so by themselves considering that the Defendant "never had one again" and "never had one before." *Id.* at 10:26 a.m. However, Dr. Allen's own report documents that the Defendant likely experienced *multiple* other psychotic episodes in the months leading up to the accident which were nearly identical in nature.[2]

After hearing Dr Allen's testimony, the Court asked the Commonwealth what evidence of drug intoxication it intended to rely upon and the Commonwealth admitted it had none. Yet the Commonwealth would not voluntarily dismiss the murder charge against the Defendant in this case even though it acknowledged it had no evidence to support an essential element of the charge that the Defendant was intoxicated the morning of the accident. This Court has at least one other case pending before it wherein

[2] "Mr. Thomas claimed in retrospect, after his arrest and hospitalization in July 2020, he learned from Brandy, his girlfriend, and his mother that they had each had a few conversations with him over the preceding few months in which he would act strangely, speak about religious topics that were out of character for him, and then he would not remember those conversations later." Dr. Allen's Report, at 4.

the defendant was clearly intoxicated during the accident but was charged with Second Degree Manslaughter (a Class C felony) rather than Murder (a capital offense). Fayette Circuit Court Case 23-CR-00576.[3] The defendant in that case is a twenty-seven-year-old white male. *Id.* The Defendant in the case at bar is a thirty-six-year-old black male and has "no previous arrests."[4] Concerningly, there is direct empirical data showing that selective prosecution and unequal enforcement are common within Fayette County. According to statistics collected by the Department of Public Advocacy ("DPA") and published by the Fayette County Commission for Racial Justice and Equality, Black or African Americans account for 38.5% of DPA clients despite making up only 15.6% of Lexington-Fayette County's population, and are charged with serious felonies at a grossly disproportionate rate.[5] According to that report, "Blacks or African Americans currently account for 38.5% of [DPA] clients, 60.0% of Burglary 1st, 64.8% of Robbery 1st, 58.9% of Trafficking in Marijuana, 45.9% of Trafficking Controlled Substance, 65.0% of Wanton Endangerment, 73.7% of Possession of Gun by Convicted Felon, 81.3% of Juvenile Clients Charged with Class B, A, or Capital Offense, and a grossly disproportionate 100.0% of Juvenile Clients Transferred to Circuit Court to be Tried as

[3] According to the police report, the defendant "showed signs of impairment during investigation", was "placed under arrest for DUI" and "made statements about narcotic and alcohol use."; Although the defendant in that case plans to argue that the chemical found in his system was a result of taking his prescribed ADHD medication, and more detailed testing is ongoing, that defendant tested positive for a "methamphetamine byproduct" at the time of the accident. (23-CR-576 Arraignment, June 20, 2023, at 11:06 a.m.)

[4] Dr. Allen's Report, at 4 (as verified by Defendant's confidential Pretrial Report).

Adults (Fayette) – FY20". *Justice Recommendations*, Fayette County Commission for Racial Justice and Equality—Law Enforcement, Justice, and Accountability Subcommittee (Nov. 30, 2020). Fayette County prosecutors were recommended to conduct comprehensive research and review programs which would report on, among other things, charging disparities affecting Blacks and African Americans. The Court has no information on whether any of these programs have been implemented, and unfortunately, the Commonwealth does not appear to have altered its conduct since those recommendations were made.

CONCLUSIONS OF LAW

Authority to Dismiss an Indictment

The authority of a trial court to dismiss an indictment has been summarized by the Kentucky Supreme Court as follows:

> [A] trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases. *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (Ky. 1972); *Barth v. Commonwealth*, 80 S.W.3d 390, 404 (Ky. 2001); *Flynt v. Commonwealth*, 105 S.W.3d 415, 425 (Ky. 2003). However, there are certain circumstances where trial judges are permitted to dismiss criminal indictments in the pre-trial stage. These include the unconstitutionality of the criminal statute, *Hayden*, 489 S.W.2d at 514–515; prosecutorial misconduct that prejudices the defendant, *Commonwealth v. Hill*, 228 S.W.3d 15, 17 (Ky. App. 2007); a defect in the grand jury proceeding, *Partin v. Commonwealth*, 168 S.W.3d 23, 30–31 (Ky. 2005); an insufficiency on the face of the indictment, *Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996); or a lack of jurisdiction by the court itself, RCr 8.18.

Commonwealth v. Bishop, 245 S.W.3d 733, 735 (Ky. 2008).

Caselaw most commonly addresses prosecutorial misconduct during grand jury proceedings, wherein "[a] court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000). In *Baker*, the Kentucky Court of Appeals held that the trial court did not abuse its discretion when it dismissed an indictment which was procured through misleading testimony. *Id.* In order to justify a charge of second-degree assault, the prosecutor in *Baker* allowed a detective to testify to the grand jury that the defendant used a metal bat to beat the victim, when in fact he had used only a wooden stick. *Id.*

However, dismissal of an indictment by the trial court for prosecutorial misconduct is not limited to misconduct before the grand jury. *Commonwealth v. Grider*, 390 S.W.3d 803 (Ky. App. 2012). In *Grider*, dismissal was proper when the Commonwealth disclosed, only after the trial had begun and the jury had been sworn in, that the charges were based on conduct other than that alleged in the indictment. *Id.*

The rule, therefore, is that while a trial court may only dismiss an indictment under "extraordinary circumstances," this encompasses a wide variety of situations:

> Such circumstances include "outrageous government conduct" resulting in violations of due process or offending principles of fundamental fairness, *Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000) (quoting *United States v. Lawson*, 502 F.Supp. 158, 172 (D. Md. 1980)); "flagrant abuse" of prosecutorial authority resulting in prejudice to a defendant, *Commonwealth v. Hill*, 228 S.W.3d 15, 17 (Ky. App. 2007) (quoting *Commonwealth v. Baker*,

> 11 S.W.3d 585, 588 (Ky. App. 2000)); and violations of the right to a speedy trial or mistrials after jeopardy has attached, *Gibson v. Commonwealth*, 291 S.W.3d 686, 690 (Ky. 2009).

Alexander v. Commonwealth, 556 S.W.3d 6, 9 (Ky. App. 2018).

Pursuant to RCr 8.16, "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." The Supreme Court Commentary to that rule from 1962 explains RCr 8.16 as follows: "RCr 8.16 goes to 'permissive' use of preliminary motions. It is the same as Fed. R. Crim. P. 12(b)(1). [ ] The defenses involved in this provision are most like the grounds for a demurrer."

Although there are no Kentucky cases addressing whether a motion may be brought under RCr 8.16 to dismiss an indictment based on pure questions of law, the United States Sixth Circuit Court of Appeals has explicitly ruled that such motions are appropriate under Fed. Crim. Rule 12(b)(1)—the federal counterpart to RCr 8.16, which uses nearly identical language.[6] *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997). "Courts usually say that a motion to dismiss is 'capable of determination' before trial if it involves questions of law instead of questions of fact on the merits of criminal liability." In addition, "courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do

[6] "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1).

not invade the province of the ultimate factfinder." *Id.* In *Craft,* the court held that the trial court was permitted to dismiss an indictment before trial when the statute of limitations had already passed, as that issue was "capable of determination without a trial" and the preliminary factual findings necessary to resolve that issue did not invade the province of the jury. *Id.*

Selective Prosecution

Pursuant to the Fifth and Fourteenth Amendments of the US Constitution, selective prosecution based on race is forbidden. *United States v. Armstrong,* 517 U.S. 456, 465 (1996). A person claiming selective prosecution must show that the prosecutorial decision in question had (1) a "discriminatory effect" and (2) was motivated by a "discriminatory purpose," both of which must be proven by clear and convincing evidence. *Id.*

To prove "discriminatory effect," a defendant must show that similarly situated individuals of a different classification were not prosecuted. *Id.* This may be proven by offering a "comparator" who "committed the same basic crime in substantially the same manner as the defendant . . . against whom the evidence was as strong or stronger than that against the defendant," yet was prosecuted differently. *United States v. Smith,* 231 F.3d 800, 810 (11th Cir. 2000); *United States v. Correa-Gomez,* 160 F. Supp. 2d 748, 750 (E.D. Ky. 2001), aff'd, 328 F.3d 297 (6th Cir. 2003).

To prove "discriminatory purpose," a defendant must show that the prosecutor "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United States*, 470 U.S. 598 (1985). However, "[w]here direct evidence of discriminatory purpose is unavailable, a court may review other factors such as disparate impact, historical background, and specific events leading up to the challenged decision." *Holsey v. Commonwealth*, 2003-CA-000018-MR, 2004 WL 2914750, at *7 (Ky. App. Dec. 17, 2004) (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-267 (1977)).

The Elements of Wanton Murder

Pursuant to 507.020(1)(b), "[a] person is guilty of murder when . . . he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." The elements of this type of murder are satisfied in situations "[i]ncluding, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life[.]" *Id.*

KRS 501.020(3) defines "Wantonly" as follows:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense *when 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. A person *who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.*

(emphasis added).

According to KRS 501.010(4), "'Voluntary intoxication' means intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such duress as would afford a defense to a charge of crime."

Rules of Criminal Procedure regarding Court-Ordered Mental Examinations

Pursuant to RCr 8.07(2)(A), a defendant who intends to introduce expert evidence "relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt or punishment" must file notice of such intent within ninety (90) days of the date of the trial. If the defendant files such a notice, the Commonwealth may file a motion for an examination of the defendant by its own expert, at which point the Court may order a psychiatric or psychological examination. RCr 8.07(2)(B)-(C). Pursuant to RCr 8.07(2)(D)(iii)(c), a report must be filed following that examination which must include "the examiner's findings, opinions and diagnosis as to whether . . . the defendant is, or was at the time of the offense charged, suffering from a mental disease, mental defect or other mental condition bearing on the issue of guilt and the issue of punishment."

The Effect of Mental Illness on Criminal Liability

KRS 504.020(1) states that "[a] person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or intellectual disability, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Although the burden of proof as to the question of a defendant's sanity at the time of a homicide never shifts from the defendant, *Wainscott v. Commonwealth*, 562 S.W.2d 628 (Ky. 1978), "a finding of insanity functions as a complete defense to conviction." *Star v. Commonwealth*, 313 S.W.3d 30, 36 (Ky. 2010).

As to when an insanity finding falls within the province of the jury, a "motion for a directed verdict in a case involving an insanity defense [will] be defeated as long as there [is] 'some evidence' indicating that the defendant was sane at the time of the commission of the crime." *Brown v. Commonwealth*, 934 S.W.2d 242, 246 (Ky. 1996).

ANALYSIS

The core of this matter lies in whether the negation of an element of a criminal offense is a question of law or a question of fact for a jury. In the case at bar, there is no evidence in the record that the Defendant was "sane" at the time of the accident. The Commonwealth has admitted this on the record. All evidence produced—which has come solely from the Commonwealth's own witnesses, Dr. Allen and Sergeant Boyd—establishes that the Defendant was suffering a psychotic break on the morning of the

accident. Furthermore, after conducting exhaustive testing of the Defendant's blood, the Commonwealth's evidence establishes that the Defendant was not voluntarily intoxicated. As Dr. Allen and Sergeant Boyd both stated, the THC found in the Defendant's system was so low that it was extremely unlikely to have caused a psychotic break or to have caused any kind of impairment. Without evidence that the Defendant was voluntarily intoxicated, the Commonwealth cannot prove an essential element of the charge nor can it dispute the Defendant was in a state of psychosis and therefore not acting either intentionally or wantonly.

The only evidence which would support a legal conclusion that the Defendant's psychotic break was voluntarily created rests entirely on Dr. Allen's speculative diagnosis of "Probable Substance-Induced Psychosis". However, as Dr. Allen admitted while under oath during the May 8, 2023 hearing, he had not been made aware by the Commonwealth when he made his diagnosis that the Defendant's blood had been tested a second time, looking specifically for synthetic drugs, and had come back negative. The only thing that Dr. Allen testified to with certainty was that the Defendant was experiencing psychosis the morning of the accident, and had no memory of the accident or the events leading up to it. He could not testify with any degree of medical probability what actually caused the psychosis.

As Dr. Allen stated, "[the Defendant's] documented psychotic episode affected his ability to understand his actions at the time of the accident, therefore affected issues of

guilt and punishment related to the charges of murder and leaving the scene of the accident under RCr 8.07(2)(c)." While Dr. Allen, and the Commonwealth, opine that the weight of this information "will be deferred to the trier-of-fact", it is not the role of the prosecution, or the prosecution's expert, to ultimately determine whether or not a purely legal issue should be left for a jury to decide. In the case at bar, the prosecution has failed to introduce any evidence over the course of two years and four separate hearings that contradict its own expert witness's testimony that the Defendant was suffering a psychotic break at the time of the accident. Furthermore, the prosecution, over the course of four separate hearings, when given every opportunity by the Court offered no evidence to prove that the Defendant acted either "intentionally" or "wantonly". The Court cannot allow the prosecution to proceed and therefore prejudice the rights of the Defendant when the Commonwealth has admitted it has no evidence that the Defendant acted "intentionally" or "wantonly". Given that the Defendant was suffering a psychotic break, his guilt depends entirely on there being evidence that he was voluntarily intoxicated. As the hearings revealed, the Commonwealth lacks any such evidence, and relies entirely on speculation. Pursuant to RCr 8.16 and guided by the Sixth Circuit's decision in *United States v. Craft*, as long the Defendant's sanity is a pure question of law which can be determined "without a trial of the general issue" (which does not invade the fact-finding role of the jury), the Court may dismiss the indictment. *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997).

The Commonwealth's argument that the Court does not have authority to dismiss the indictment due to "separation of powers" ignores the grand jury's role as an independent body and, as the Kentucky Supreme Court has stated, there is a "distinction between the *power to initiate and control* a criminal proceeding and the *power to terminate* it." *Hoskins v. Maricle*, 150 S.W.3d 1, 16 (Ky. 2004), (emphasis in original), (citing *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)).[7] More correctly stated, the prosecution's exclusive power (derived from the executive branch) is limited to discretion over what charge to bring and what penalty to seek. *Moore v. Commonwealth*, 983 S.W.2d 479, 487 (1998). As the Kentucky Supreme Court has explicitly stated, "a court, once having obtained jurisdiction of a cause of action, has, incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (1984).

As noted in its Findings of Fact, the Court has serious concerns over the way this case and others have been prosecuted, each of which could justify a basis for dismissing the indictment. First and foremost, this Court has before it at least one other case in which a white defendant, who was clearly intoxicated (yet otherwise lucid) at the time, was involved in a car accident which resulted in the death of another driver, yet was charged

[7] "[T]he separate powers were not intended to operate with absolute independence[.]" *Hoskins v. Maricle*, 150 S.W.3d 1, 16 (Ky. 2004) (citing *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

by the Commonwealth with only Second-Degree Manslaughter.[8] In the present case, the Commonwealth has chosen to take a black male, who was (a) not intoxicated at the time of the accident and (b) suffering from a psychotic episode, and charge him with Murder, a capital offense. KRS 507.020(2).

Here, there is evidence of a white "comparator" who is alleged to have "committed the same basic crime in substantially the same manner as the [D]efendant . . . against whom the evidence was as strong or stronger than that against the [D]efendant," yet who was charged with a far lesser crime. While there is no *direct* evidence in the present case that the Commonwealth acted with discriminatory purpose, the Court in its 15-year tenure on the bench has noted a clear pattern of disparate charging decisions by the Commonwealth in which white defendants are charged with lesser offenses and given better offers than defendants of color. *See Justice Recommendations*, Fayette County Commission for Racial Justice and Equality—Law Enforcement, Justice, and Accountability Subcommittee (Nov. 30, 2020) (chaired by the Honorable Judge Jennifer Coffman and David Cozart). Although it is within the Commonwealth's exclusive power to decide what charges to bring against a particular defendant, those decisions may not violate equal protection. *Oyler v. Boles*, 368 U.S. 448, 456 (1962). In the case at bar, the Court finds that the Defendant was denied his rights to equal protection, and that such

[8] Fayette Circuit Court Case 23-CR-00576.

denial has clearly prejudiced the Defendant; therefore, the Court finds it appropriate to dismiss the indictment based on this ground as well.

Finally, an indictment may be dismissed due to prosecutorial misconduct. Although no one specific action of the Commonwealth's Attorney's office, taken by itself, is prejudicial enough to warrant dismissal of the indictment, the Commonwealth's decision to proceed forward with a murder charge (despite having no evidence to contradict that the Defendant was suffering a psychotic break the morning of the accident) is enough when combined with evidence of its failure to give the grand jury, Dr. Allen, and the Court all of the relevant evidence.

For example, the grand jury was presented with testimony that the Defendant intentionally "avoided collision prior to the intersection" by "going around stopped traffic at the red light." In reality, there is no evidence that the Defendant made a conscious choice to change lanes in order to avoid stopped traffic in front of him. The only definitive evidence is that the Defendant ran a red light at high speed while experiencing a psychotic break. Furthermore, it is undisputed that Dr. Allen advised the Court during the hearing that the Defendant's blood was tested a second time, specifically for synthetic drugs, before he made his diagnosis. While the diagnoses relied entirely on the Defendant possibly having synthetic drugs in his system at the time of the accident, neither the Commonwealth nor Dr. Allen corrected the report when they knew about the second negative test, thereby undermining its conclusion that the Defendant's

psychosis was "Probable Substance-Induced". The Commonwealth's failure to give its own expert, Dr. Allen, all the evidence cannot be overlooked. Again, given that the Defendant was suffering a psychotic break, his guilt depends entirely on there being evidence that he was voluntarily intoxicated. By correcting the report, therefore, the Commonwealth would have had no basis to proceed with the charges. The Commonwealth's failure to correct the report—which has misled this Court and would have potentially misled the jury—is evidence of prosecutorial misconduct.

While it is somewhat true, in practice, that it is the Commonwealth's role to argue the facts in a light most favorable to the prosecution, the Commonwealth's determination to somehow prove that the Defendant was intoxicated the morning of the accident despite having found nothing to support that position is extremely prejudicial to the Defendant.

As the Kentucky Supreme Court has stated, "[t]he prosecutor has the duty to see that the innocent are acquitted as much as it [has] to see that the guilty person is convicted," *Brafman v. Commonwealth*, 612 S.W.3d 850, 862–63 (Ky. 2020). In addition, it is the prosecutor's duty to "present his cause fairly, and not impress upon the jury any deduction that is not from the evidence strictly legitimate." *Dalton v. Commonwealth*, 287 S.W. 898, 900 (1926). When all the available evidence supports dismissing the indictment because the defendant is not mentally culpable, it is the Commonwealth's duty to do so. The Commonwealth's decision to press on with the charges—which cannot be proven

without misleading a jury—in order to obtain greater leverage in plea negotiations is prosecutorial misconduct.

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Accordingly, having reviewed the facts of the case, the relevant case law, and applicable statutes and being otherwise sufficiently advised, this Court finds that the facts of this case merit dismissal of the indictment under the Court's inherent supervisory powers. Therefore, the Court **HEREBY GRANTS** the Defendant's Motion to Dismiss.

This is a final and appealable order and there is no just cause for delay.

Given under my hand, this 8th day of December, 2023.

Julie Muth Goodman

HON. JULIE MUTH GOODMAN
JUDGE, FAYETTE CIRCUIT COURT

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on this 8 day of December, 2023, via U.S. Mail, first class, to the following:

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