Commonwealth of Kentucky
Supreme Court
No. 2009-SC-000221

KENNETH JONES — **APPELLANT**

v.

Appeal from Carlisle District Court
Hon. Timothy A. Langford, Judge
Indictment No. 08-CR-9

COMMONWEALTH OF KENTUCKY — **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 this 20th day of August, 2010, mailed via U.S. Mail to Honorable Timothy A. Langford, Judge, Courthouse, 114 E. Wellington Street, P. O. Box 167, Hickman, KY 42050, sent via electronic mail to Hon. Mike Stacy, Commonwealth's Attorney, and by regular mail to Hon. Erin Hoffman Yang, Asst. Public Advocate, Dept. Of Public Advocacy, 100 Sower Blvd., Suite 302, Frankfort, Ky.40601, Attorney for Appellant.

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INTRODUCTION

Appellant, Kenneth H. Jones, was found guilty but mentally ill in the Carlisle Circuit Court of one count of murder and sentenced to twenty-five years in prison. He brings this appeal as a matter of right.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument would be of assistance to the Court in considering this matter as the issues are fully addressed by the parties briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellant was indicted by the Carlisle County grand jury on April 17, 2008, and charged with one count of murder (TR I, 2). The charge arose after appellant shot Perry Warren to death on March 3, 2008 (Id.). On May 15, 2008, appellant entered a plea of not guilty to the charge in the indictment (TR I, 6). Appellant was tried by a jury on the charge in the indictment beginning on January 26, 2009, and continuing through February 20, 2009.[1]

As appellant does not raise any issue concerning the sufficiency of the evidence supporting his conviction, a detailed recitation of the evidence presented at trial is not necessary for a consideration of the issues presented a trial. Thus, the Commonwealth will present a limited recitation of the facts. Appellant believed that the victim, Perry Warren, appellant's neighbor, was tamper with his residence and pumping chemicals into it. Appellant had turned his residence into a fortress by lining it with electric fencing, placing razor blades on the roof, padlocking the shelves and refrigerator, and caulking all of the seams (VR2, 2/19/09, 10:28:40-10:35:40). Appellant had also placed five security cameras connected to motion detectors on his property (VR2, 2/19/09, 10:27:00).

Appellant never denied that he did, in fact, shoot Mr. Warren on March 3, 2008, however, he claimed that he did so in self-defense. In contrast, Billy Trevathan and

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[1] Trial began with jury selection, opening statements, and the presentation of the Commonwealth's first witnesses on January 26, 2009 (VR4, 1/26/09, 9:03:00, et. seq.). On the night of January 26, 2009, Kentucky was hit by a devastating ice storm that forced the trial to be continued until February 18, 2009, at which time trial reconvened with the jury being replayed the portions of the trial that had occurred on January 26.

his son, Josh, testified that appellant came to their house after the shooting and asked them to call 911 (VR4, 1/26/09, 2:59:30). Josh testified that appellant told them he shot Mr. Warren and "he won't be putting chemicals in my house anymore." (VR4, 1/26/09, 2:57:20). Billy Trevathan testified appellant came up to him and said he "shot the S.O.B." (VR4, 1/26/09, 3:30:40).

Detective Jerry Jones investigated the shooting and testified that appellant told him he did not go to Mr. Warren's house to harm him, but that Mr. Warren had pulled a gun on him (VR2, 2/18/09, 9:49:30). However, Jailer Will Ben Martin testified that appellant had stated to him that he had taken "care of a job I have been meaning to do for a long time." (VR5, 2/19/09, 3:46:50). Appellant testified in his own defense and claimed that he had gone to Mr. Warren's home on March 3, 2008, intending to talk to Mr. Warren (VR3, 2/20/09, 2:34:20). He testified Mr. Warren got mad and told him to leave (Id.). Appellant then claimed Mr. Warren drew a firearm and pointed it at him (VR3, 2/20/09, 2:36:10). Appellant claimed he told Mr. Warren he was leaving, then heard a shot, drew his own weapon and shot Mr. Warren (VR3, 2/20/09, 2:36:30-2:40:10).

Appellant also presented evidence in support of an insanity defense. He presented testimony from Dr. Michael Nicholas, a psychologist, who testified that appellant suffered from a delusional disorder and could not control his actions or impulsive behavior when the delusions "kicked in." (VR 5, 2/20/09, 11:31:20-11:46:10). In contrast, the Commonwealth presented testimony from Dr. Richard Johnson, also a psychologist, who testified that, in his opinion, appellant had no mental disease or defect

that prevented him from conforming his conduct with the law (VR5, 2/19/09, 1:56:30). Dr. Johnson further testified that he did not believe appellant had any type of delusional disorder (Id.).

After hearing all of the evidence, the jury found appellant guilty but mentally ill of murder (TR II, 227). After the penalty phase, the jury recommended that appellant be sentenced to twenty-five years in prison for the conviction. On March 19, 2009, the trial court entered its judgment and sentence on plea of not guilty (TR II, 280-83)[2]. The trial court found appellant guilty but mentally ill of murder and sentenced him to twenty-five years in prison in accordance with the jury's verdict (Id.). This appeal followed.

Additional facts will be set forth below as necessary in support of the Commonwealth's arguments.

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[2] In reviewing the trial court's judgment, the undersigned noticed that it contains a typographical error that this Court should order corrected pursuant to RCr 10.10, as the error is clearly a clerical mistake. Specifically, the judgment recites that the offense was "committed on or about March 13, 2008 . . . ." According to the indictment, the evidence presented at trial, and the instructions, the offense was actually committed on or about March 3, 2008, not March 13, 2008. This Court should order that the judgment be corrected pursuant to RCr 10.10 to reflect the correct date the offense was committed.

ARGUMENTS

I.

THE JURY INSTRUCTIONS WERE NOT ERRONEOUS

Appellant first argues that the trial court erroneously instructed the jury when it included a definition of "Use of Defensive Force" as set forth in KRS 503.055(3). Appellant argues that this instruction improperly "negated Kenneth Jones' defense and lowered the Commonwealth's burden of proof." Appellant Brief, p. 15. Appellant further argues that the inclusion of this instruction violated the "bare bones" principle of jury instructions. Neither claim has merit.

KRS 503.055(3) provides as follows:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

Under Instruction Number 2, Definitions, the trial court provided the jury with a definition of "Use of Defensive Force" and defined that phrase exactly as it is set forth in the statute above. This definition was given at the request of the Commonwealth on the basis that Mr. Warren, at the time he was shot by appellant, was not engaged in any unlawful activity when he was attacked by appellant while standing in his own driveway, a place he had a right to be. As such, under the statute, Mr. Warren had no duty to retreat and had the "right to stand his ground and meet force with force, including deadly force."

Appellant objected to the instruction during a discussion of the jury instructions on the basis that the statute was intended to provide a defense and did not apply to a victim (VR1, 2/20/09, 4:49:50). This was the sole basis for appellant's objection. He made no argument that the instruction lowered the Commonwealth's burden of proof or violated the bare bones principle of jury instructions. Thus, to the extent appellant's arguments in his brief to this Court diverge from the objection he presented to the trial court, those arguments are not properly preserved for appeal. "Where a party specifies his grounds for an objection at trial, he cannot present a new theory of error on appeal. Ruppee v. Commonwealth, 821 S.W.2d 484 (Ky. 1991). To borrow Justice Lukowsky's oft-quoted acerbity, 'appellant's will not be permitted to feed one can of worms to the trial judge and another to the appellate court.' Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976)." Gabow v. Commonwealth, 34 S.W.3d 63, 75 (Ky. 2000), *overruled on other grounds by* Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

First, contrary to appellant's position at trial, nothing in the language of KRS 503.055(3) limits its application to criminal defendants. The language of the statute does not say, for example, "A defendant who is not engaged . . . ." The language of the statute says "A **person** who is not engaged . . . ." Clearly, Perry Warren was a person at the time appellant came into his driveway and shot him on March 3, 2008. There is no allegation that Mr. Warren failed to meet any of the circumstances under the statute which provides him with the right to stand his ground and meet force with force. Thus, the Commonwealth was properly allowed to argue that if the jury believed Mr. Warren

was standing in his driveway, was attacked by appellant and reasonably believed force, including deadly force, was necessary to prevent appellant from causing him death or great bodily harm, then Mr. Warren had the right to stand his ground and meet appellant's force.

Obviously, this argument would negate appellant's self-defense claim, if the jury accepted the argument, because Mr. Warren would have been justified in using force against appellant based on his reasonable belief appellant intended to cause Mr. Warren death or great bodily harm even if appellant did not begin firing his gun immediately upon exiting his truck in Mr. Warren's driveway. However, the jury still could have found appellant was acting in self-defense under the instructions given to them by the trial court.

Appellant testified that he pulled into Mr. Warren's driveway and exited his truck asking Mr. Warren if they could talk (VR3, 2/20/09, 2:33:40-2:34:20). Appellant testified that he kept his hands where Mr. Warren could see them and said they needed to talk (Id.). Appellant then testified that Mr. Warren became irrate and told appellant to leave (Id.). Appellant testified that he kept his hands in the air and again asked Mr. Warren if they could talk (Id.). Appellant said Mr. Warren then drew a firearm and pointed it at appellant (VR3, 2/20/09, 2:36:10). Appellant testified he told Mr. Warren he was leaving, but wanted to talk to him about the poisoning (VR3, 2/20/09, 2:36:30). Appellant testified Mr. Warren pointed the firearm at him and he heard a shot (VR3, 2/20/09, 2:38:00). At that point, appellant testified that he drew his weapon and fired back at Mr. Warren (VR3, 2/20/09, 2:40:10).

If the jury believed appellant's version of the facts, he was clearly acting in self-defense regardless of Mr. Warren's statutory right not to retreat and meet force with force. Under appellant's version of the facts, the jury could not have found Mr. Warren had a reasonable belief that using force was necessary to prevent appellant from causing him death or great bodily harm. Under appellant's version of the facts, the jury could not have believed Mr. Warren was meeting force with force because appellant testified he approached Mr. Warren in a nonthreatening manner with his hands up to show he was not armed.

However, the Commonwealth is required to disprove a claim of self-defense once it is established by the defendant as it becomes an element of the offense that the defendant "was not privileged to act in self-protection." KRS 500.070(1); Commonwealth v. Hager, 41 S.W.3d 828, 837-38 (Ky. 2001). In order to disprove appellant's claimed right to self-defense in this matter, the Commonwealth introduced evidence that appellant was the initial aggressor of the confrontation with Mr. Warren, KRS 503.060(3), and that, even if the jury believed Mr. Warren fired first, he was entitled to do so if he reasonably believed such force was necessary to prevent appellant from causing him death or great bodily harm under KRS 503.055(3).

Finally, even if the trial court erred by including the definition of "Use of Defensive Force" in the jury instructions, the error was harmless. First, the phrase "Use of Defensive Force" does not appear in any other instruction other than the definitions. The phrase is not employed in either the instructions containing the elements of the various offenses the jury could consider or in the self-defense instruction. Further, there

was nothing inappropriate, or objected to, about the Commonwealth's closing argument that Mr. Warren did not have to retreat from appellant as he was in a place he was legally entitled to be and could use force to meet force if he reasonably believed it was necessary to prevent appellant from causing him death or great bodily harm. The Commonwealth could have made that argument whether the definition of "Use of Defensive Force" was in the instructions or not.

Thus, there is no possibility that the inclusion of the "Use of Deadly Force" definition had any effect on the outcome of the trial and did not effect the jury's verdict. If the inclusion of the definition was erroneous, that error was harmless.

II.

APPELLANT'S RIGHT TO PRESENT A DEFENSE WAS NOT VIOLATED BY THE TRIAL COURT'S EXCLUSION OF EVIDENCE THAT HE BELIEVED HE WAS BEING POISONED IN JAIL

During his direct testimony, appellant sought to testify that he believed he was being poisoned while incarcerated pending the trial of this matter (VR3, 2/20/09, 3:02:20). The Commonwealth objected when appellant's counsel asked whether appellant had been having any problems while he was incarcerated (Id.). At a bench conference, appellant's counsel asserted that appellant believed he was being poisoned with arsenic while he was incarcerated and that such was relevant as to whether or not he was insane (VR3, 2/20/09, 3:02:30). The Commonwealth asserted that such evidence was irrelevant to whether or not appellant was insane at the time the offense was committed (Id). The trial court sustained the Commonwealth's objection on the basis that

evidence appellant believed he was being poisoned in jail was not relevant to the issue of whether appellant was insane at the time he murdered Perry Warren. The trial court did not abuse its discretion in making that determination, and there was no error.

The standard of review of a trial court evidentiary ruling is abuse of discretion. Anderson v. Commonwealth, 231 S.W.3d 117, 119 (Ky. 2007). A trial judge abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 578 (Ky. 2000) (*citing* Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). In the case at bar, the trial court's decision sustaining the Commonwealth's objection to appellant testifying that he believed he was being poisoned in jail was supported by sound legal principles and it was not arbitrary, unfair or unreasonable. As such, the trial court did not abuse its discretion.

Appellant argues that the evidence was relevant to his presentation of an insanity defense, and, thus, should have been admitted. However, evidence that appellant believed he was being poisoned in jail was irrelevant to whether or not he was insane at the time he murdered Perry Warren. The evidence was simply not probative of the issue of insanity. Further, appellant had already produced evidence that he suffered delusions through the testimony of Dr. Nicholas as well as his own testimony that he believed he was being poisoned in his home by Mr. Warren. Evidence that those delusions continued in the jail was merely cumulative of evidence already produced.

Further, appellant was not denied his right to present a defense by the trial court's exclusion of his testimony that he believed he was being poisoned in jail. The

right to present a defense is not violated by every limitation placed on the admissibility of evidence. Beaty v. Commonwealth, 125 S.W.3d 196, 208. Rather, the exclusion of evidence violates a defendant's constitutional rights when "it significantly undermine[s] fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998). As this Court has stated:

> Chambers [v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)] holds that application of evidentiary rules cannot be applied so as to completely bar all avenues for presenting a viable defense. It does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense.

Mills v. Commonwealth, 996 S.W.2d 473, 489 (Ky. 1999).

In this case, it can not be reasonably argued that appellant was denied the right to present a defense of insanity. Appellant presented testimony from Dr. Nicholas that, in his opinion, appellant likely suffered from a delusional disorder that caused him to get stuck in thinking patterns, and that, when the delusions kicked in, appellant did not have the ability to retract from his actions and behaved impulsively (VR3, 2/20/09, 11:46:10). Appellant also testified that he long believed Warren was trying to poison him in his home, and presented evidence that those beliefs had caused him to turn his home into a fortress lined with electric fencing, razor blades, caulking on the seams, etc. Appellant also vigorously cross-examined Dr. Richard Johnson, a KCPC psychologist, who testified that he did not believe appellant suffered from any mental disease or defect. Finally, the trial court properly instructed the jury regarding insanity as a defense to appellant's charge. In short, the trial court provided appellant with a full and fair

opportunity to present an insanity defense to the jury despite its decision to exclude evidence that appellant allegedly, and subjectively, believed he was being poisoned in jail after his arrest.

Appellant's reliance on Weaver v. Commonwealth, 298 S.W.3d 851 (Ky. 2009), is misplaced. In Weaver, this Court found that the trial court erred by excluding expert testimony the defendant sought to introduce in support of a voluntary intoxication defense. Specifically, this Court held that the trial court improperly excluded the expert testimony in Weaver based on Tate v. Commonwealth, 893 S.W.2d 368 (Ky. 1995), wherein this Court had held that physical addiction was not a mental disease or defect that would support an insanity defense Id. at 856. This Court determined Weaver was offering the expert testimony in support of a voluntary intoxication defense, not an insanity defense. Id.. Finally, while this Court did not find the exclusion of the expert testimony amounted to a constitutional violation of the right to present a defense, this Court did find the error to be reversible because the expert testimony was relevant to the intoxication defense and was "potentially helpful to the jury in explaining how the specific substances ingested may have affected Weaver's intent **at the time of the incident."** Id. at 857.

The exclusion of appellant's testimony that he allegedly believed he was being poisoned in jail after the commission of the offense in this matter is in no way similar to the trial court's exclusion of expert testimony regarding the defendant's intoxication at the time of the incident in Weaver. Appellant's belief that he was being poisoned in jail after the commission of the offense was not relevant to whether he was

insane at the time of the offense, nor would that evidence have been helpful to the jury in determining whether appellant was insane when he shot Mr. Warren on March 3, 2008. Appellant was given a full opportunity to present his insanity defense by expert testimony and his own testimony.[3] There was no error in the exclusion of evidence that appellant believed he was being poisoned in jail.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING SCOTT DAVIDSON TO TESTIFY

Appellant next alleges that the trial court erred by allowing the Commonwealth to call Scott Davidson as a rebuttal witness after Davidson had remained in the courtroom following his testimony during the Commonwealth's case in chief. Appellant's argues that this was a violation of KRE 615. However, the trial court did not abuse its discretion by allowing the Commonwealth to call Davidson in rebuttal despite the technical violation of the rule.

KRE 615 provides that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion." "Strict compliance with the rule is not mandatory...." Jacobs v. Commonwealth, 551 S.W.2d 223, 225 (Ky. 1977). "The purpose of this rule is, obviously, to prevent a prospective witness from adjusting his testimony to conform to

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[3] Of course, this defense was severely undermined by the testimony of appellant's best, and lifelong, friend, Mr. Moyers, who was called by appellant and testified that he did not believe appellant was delusional (VR5, 2/20/09, 10:39:10).

that which he hears during the interrogation of other witnesses." Id..

In this case, Davidson testified on rebuttal that he and Perry Warren had hunted together and done a lot of target practice together in the past (VR3, 2/20/09, 3:49:20). Davidson further testified that, although Davidson considered himself to be a good shooter, he could not out shoot Warren with either a pistol or a rifle (Id.). In Davidson's opinion, Warren could shoot the .22 rifle found near his body very fast from either his hip or shoulder (VR3, 2/20/09, 3:49:00). Finally, Davidson testified that he believed Warren could have shot a person if he believed he needed to do so (VR3, 2/20/09, 3:50:00). On cross-examination, Davidson conceded that he had never shot guns with Warren when Warren had been using methamphetamine (VR3, 2/20/09, 3:50:30).

Appellant argues that "Davidson's testimony was elicited to bolster the Commonwealth's theory that Perry Warren was ambushed since given the opportunity to draw his gun, he would have surely 'put a bullet' in Jones. Davidson had just heard the Commonwealth's cross-examination, suggesting that no competent young man could be bested in a gun fight and likely felt compelled to defend the abilities of his late cousin and friend." Appellant's Brief, pp. 24-25. Accepting appellant's contention as true, it does not provide a basis for excluding the testimony of Davidson due to a violation of KRE 615. Appellant's argument is lacking any contention that Davidson's testimony was altered as a result of evidence he heard during the trial. Absent such a showing, any error in the failure to separate witnesses under KRE 615 is harmless. *See* Justice v. Commonwealth, 987 S.W.2d 306, 315 (Ky. 1999) (KRE 615 not violated where there was no valid argument that particular witness had altered his testimony).

In Hatfield v. Commonwealth, 250 S.W.3d 590, 595 (Ky. 2008), this Court held that "[t]he mere threat or speculation that a witness could tailor testimony is not persuasive of its own accord to warrant prejudicial error." In this case, appellant offers nothing but speculation that, after hearing appellant's cross-examination, Davidson "likely felt compelled to defend the abilities of his late cousin and friend." Davidson's testimony was brief and straightforward. He testified that he had been hunting and target shooting with Warren many times, and Warren was, in Davidson's opinion, a very good shot. He further believed Warren could shoot a .22 rifle very fast from either his hip or shoulder, and would be able to shoot a person if he believed he needed to do so. There is simply no valid argument that Davidson altered his testimony regarding Warren's abilities with a firearm based on evidence he might have heard during the trial of this matter. Davidson's testimony was nothing more than his observations of Warren's abilities while hunting and target practicing with Warren, and his opinions based on those observations.

Appellant's reliance upon Mills v. Commonwealth, 95 S.W.3d 838, 840-41 (Ky. 2003), in support of his argument is misplaced. In Mills, this Court found error in the trial court's decision to permit the victim of a robbery to remain at the Commonwealth's table during trial along with the lead law enforcement investigator. Id.. The Commonwealth then called the victim as its final witness during its case in chief. Id.. First, this Court found the victim did not fall into the list of exceptions set forth under KRE 615. Id.. The Court then determined the error was not harmless because: 1) the victim was the only witness to the robbery; 2) the victim heard the lead investigator

testify in detail regarding the victim's statement taken the night of the robbery, including the specific events of the robbery and the victim's description of the suspects; 3) the victim heard the investigator testify as to the defendant's exact height and weight taken from the defendant's driver's license; and, 4) the victim heard the investigator testify about the details of the photo lineup from which the victim identified the defendant. Thus, by the time the victim took the witness stand, "his memory had been completely refreshed as to the details of the robbery and the description of the perpetrators." Further, as the only witness to the robbery, the victim's credibility was crucial to the prosecution and he was able to ensure there was no inconsistency by hearing the testimony of the other witnesses.

In this case, Davidson's credibility was hardly crucial to the Commonwealth's case. Further, it can hardly be argued that Davidson's recollection of Warren's abilities with a firearm was refreshed based on anything he might have heard during the trial of this matter. With nothing more than a threat of speculation that Davidson's testimony was altered by the violation of KRE 615, any error must be found harmless.

IV.

THE COMMONWEALTH'S QUESTIONING OF APPELLANT DOES NOT AMOUNT TO PALPABLE ERROR

Appellant next argues that the Commonwealth improperly questioned him during cross-examination when he was asked if other witnesses lied during their trial testimony. Appellant concedes that this claim was not preserved for review by an

objection at trial, and requests that this Court review for palpable error under RCr 10.26.

It is ordinarily improper to ask a witness to comment on the truthfulness of another witness. Moss v. Commonwealth, 949 S.W.2d 579 (Ky.1997).

> A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

Id. at 583.

However in Moss, this Court declined to reverse, noting that "appellant's failure to object and our failure to regard this as palpable error precludes relief." Id.. Similarly, here, Appellant did not object to the prosecutor's questions at trial. Since this error is not preserved, this Court reviews the issue under the palpable error standard of RCr 10.26. A palpable error is one which "affects the substantial rights of a party" and will result in "manifest injustice" if not considered. Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003). "Manifest injustice" means that "a substantial possibility exists that the result of the trial would have been different." Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997).

Appellant contends that four questions during his cross-examination amounted to palpable error. The Commonwealth asked appellant if jailer Will Ben Martin was lying when he testified appellant made an incriminating statement (VR3, 2/20/09, 3:35:10-3:35:40). The Commonwealth then asked appellant if the Trevathans were lying when they testified appellant made a different incriminating statement (Id.).

Finally, the Commonwealth asked appellant if the Trevathans were lying when they testified appellant showed no remorse for shooting Perry Warren (Id.). Although the form of the Commonwealth's questions may have technically violated Moss, the substance of the questions were not manifestly inappropriate. For example, the prosecutor was entitled to question appellant about making the incriminating statements because appellant denied that he made them.

The difference between proper and objectionable questions are often nuanced by slight changes in wording. Because of this, the form of a question can be corrected by a timely objection. For this reason, this Court will not find palpable error unless there is a reasonable possibility that the result would have been different without the improperly phrased questions. In his brief, appellant cites to no cases from this Court or the Kentucky Court of Appeals where a violation of Moss has been found to be a palpable error. In fact, appellant makes no argument that the alleged error in the Commonwealth's questioning in this case amounts to palpable error. Rather, his entire argument consists solely of rhetoric about the duties of prosecuting attorneys.

The absence of discussion of Kentucky case law finding violations of Moss to be palpable error or other argument as to how the questioning in this case violated RCr 10.26 is hardly surprising. The simple answer is there is not a single reported or unreported opinion where either this Court or the Court of Appeals has found a Moss violation was palpable error. Even Moss, itself, which reaffirmed the holding that such questioning was improper found the violation was not a palpable error.

Likewise, this Court has refused to find palpable error arising from a violation of Moss even when the death penalty has been imposed. *See* Ernst v. Commonwealth, 160 S.W.3d 744, 764 (Ky.2005) ("On several occasions, the Commonwealth's Attorney brought to Appellant's attention the trial testimony of various Commonwealth's witnesses and asked him whether he would characterize those statements as lies. We have held that this method of cross-examination is improper. . . . However, after a review of the record as a whole, we are not persuaded that the result would have been different had these questions been withheld."); St. Clair v. Commonwealth, 140 S.W.3d 510, 554 (Ky. 2004) ("although the Commonwealth's cross-examination of Appellant included some questioning that was impermissible under *Moss*, we find no reversible error in the form of the Commonwealth's questioning of Appellant because we conclude that the totality of the circumstances are persuasive that exclusion of the proper inquires would not have resulted in [a] different verdict[ ] in this case.") (internal citation omitted); Caudill v. Commonwealth, 120 S.W.3d 635, 662 (Ky.2004) ("we conclude that the totality of the circumstances are persuasive that exclusion of the improper inquiries would not have resulted in different verdicts in this case"); Tamme v. Commonwealth, 973 S.W.2d 13, 28 (Ky. 1998) ("While we do not approve of this type of cross-examination, *i.e.*, asking one witness to characterize the testimony of another, . . . there was no contemporaneous objection and we are unpersuaded that absent this inquiry, the result would have been different.").

In this matter, even if the Commonwealth's questions were improper such questions did not amount to palpable error. Appellant makes no allegation that the

evidence was insufficient to support the jury's verdict. Appellant has failed to show that any manifest injustice occurred or that the result would have been different had the questions not been asked. There was no palpable error.

V.

THERE IS NO CUMULATIVE ERROR

Appellant lastly claims that he should be entitled to relief on the basis of cumulative error in the event this Court determines none of the individual errors merit relief. However, as none of the errors alleged warrant relief individually, they do not become meritorious when considered cumulatively. Sanborn v. Commonwealth, 975 S.W.2d 905, 913 (Ky. 1998); McQueen v. Commonwealth, 721 S.W.2d 694, 701 (Ky. 1986). The whole is not greater than the sum of its parts, and this claim is likewise without merit.

CONCLUSION

Based upon the foregoing, the judgment of conviction and sentence imposed against appellant by the Carlisle Circuit Court must be affirmed.

Respectfully submitted,

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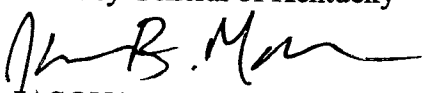

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