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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001287-MR

HANSEL PROPES — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 12-CR-00112

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Hansel W. Propes appeals a judgment of the Casey Circuit Court sentencing him to ten years after a jury convicted him of second-degree trafficking in a controlled substance (TICS), second offense.[1] After careful review, we affirm in part, vacate in part, and remand for a new penalty phase and

[1] Kentucky Revised Statutes (KRS) 218A.1413(2)(a), a Class C felony for a second offense, but a Class D felony for a first offense. The indictment was returned September 14, 2012.

sentencing hearing due to jurors receiving inaccurate testimony about parole eligibility. Additionally, a separate order imposing court costs must be corrected.

FACTS

On October 28, 2011, Propes sold eighty pills containing hydrocodone to confidential informant (CI) David Bryant for $560.00 in a controlled buy recorded on both audio and videotape. The buy occurred in Propes's Liberty, Kentucky, apartment the month after he was released on shock probation from a conviction for two counts of second degree TICS, first offense—the result of a guilty plea entered on May 9, 2011, for which two concurrent three-year sentences were imposed for a total of three years.

At a one-day trial on April 30, 2013, the Commonwealth's case consisted of testimony from Bryant, a convicted felon who targeted Propes after learning from a neighbor related to Propes that Propes was selling pills, and then received a personal telephone call from Propes saying he had eighty pills for sale at a cost of $7.00 apiece; lead Detective Dennis Allen of the Casey County Sheriff's Department who thoroughly searched Bryant and his vehicle both before and after the buy, provided $560.00 to Bryant with which to make the buy, and observed the transaction from a distance; Jennifer Hatfield, the Kentucky State Police (KSP) Central Lab drug chemist who tested the pills and determined they contained hydrocodone; and, Sgt. Courtney Longacre, the KSP evidence custodian who established the chain of custody.

The centerpieces of the Commonwealth's case were audio and videotapes of the controlled buy which were played for jurors after a brief orientation by Det. Allen. The defense did not object to the playing of the tapes or request redaction of any portion of them. When the tapes were played in open court, jurors heard Bryant and Propes discuss their ages and a stroke Propes had suffered about eight years earlier. The men then haggled over the price of the pills with Propes responding he knew nothing about pills, but "eggs" were $7.00 each for a total of "five sixty;" and, when Bryant asked again for a break on the price of the pills, Propes said the price was firm and a bargain. Propes mentioned he had been in prison from June until September 2011, when he was released on shock probation—it was important for jurors to know this fact because Propes would argue he had learned his lesson by being imprisoned and wanted to avoid returning to prison. Bryant was heard counting to eighty, two at a time (presumably counting pills), and to 560 by hundreds and twenties (presumably counting money). The two men then discussed the composition of the pills, price differences, and whether the pills contained Tylenol. Bryant again asked for a break on the price of the pills and tried—unsuccessfully—to keep $10.00 for gas money. Before Bryant departed, Propes said he would receive "them a little earlier next month"—perhaps the twenty-first or twenty-second—and would be in touch with Bryant before then. At the conclusion of the buy, Bryant returned to Det. Allen and handed him a green prescription pill bottle containing eighty pills, stating Propes had removed the "Lortab with acetaminophen" label from the bottle

in Bryant's presence. A search of Bryant revealed no cash. After playing the two tapes, the Commonwealth rested its case and a defense motion for a directed verdict was denied.

Propes took the stand in his own defense testifying he had met Bryant through a cousin, had known him at least two years, considered him to be a friend, and referred to Bryant as a "former client." Propes acknowledged having prior dealings with Bryant whom he described as one of three good customers who routinely bought hydrocodone pills from him. According to Propes, Bryant bought pills from him monthly.

Propes testified he had been convicted and incarcerated in 2011 for selling hydrocodone and had been released in September 2011, just a month before this buy occurred on October 28, 2011. Propes stated he had decided upon his release from prison he would no longer sell drugs. He also testified he was able to "live pretty comfortable" on his Social Security disability check.

Propes admitted meeting with Bryant on October 28, 2011, but claimed all he sold to Bryant that day was five dozen eggs he had recycled from a Sav-a-Lot dumpster and was storing in the drawers of a refrigerator. Propes said he charged Bryant $1.00 for each dozen eggs. When asked to explain the counting that occurred on the tapes, Propes stated he thought Bryant was making a joke. He

testified Bryant had picked up a bottle of Neurontin,[2] emptied the contents into his hand and counted the pills—Propes said he did not know why Bryant did this.

On cross-examination, the prosecutor challenged Propes about his direct examination testimony wherein he stated he had been convicted, "served my time," and decided not to sell pills anymore. The prosecutor pointed out that Propes had not served his full sentence, but only about three months of it, because he had received shock probation—a fact Propes had already revealed during the recorded buy. Ultimately, defense counsel objected to the relevance of the cross-examination, to which the prosecutor responded, "I'll withdraw that Judge." At the end of the exchange, there was no request for an admonition and none was given by the trial court *sua sponte.*

When the defense rested, the Commonwealth recalled Bryant to inquire whether he had purchased eggs from Propes. Bryant was taken aback by the question and testified he had never bought eggs from Propes. He also stated he did not see a refrigerator inside the apartment. Bryant reiterated there was only one pill bottle in the apartment, he watched Propes remove the label from that bottle, and Bryant took the bottle with him when he left Propes's apartment.

At the conclusion of the guilt phase, jurors convicted Propes of TICS in the second degree. During the subsequent penalty phase, the Commonwealth offered testimony from Marshall Smith, Propes's probation and parole officer.

[2] Due to Propes's poor health he has numerous prescriptions—so many he cannot remember them all. Neurontin is a pain medication.

Smith testified Propes had pled guilty to two counts of TICS in the second degree, first offense, in Casey County Indictment No. 11-CR-25, for which he was sentenced to serve two concurrent three-year terms. Smith further testified Propes was on probation on October 28, 2011, the date on which the controlled buy with Bryant occurred. The Commonwealth then introduced, without objection, Commonwealth's Exhibit #6 titled "Certification on the Calculation of Parole Eligibility." With the exhibit in hand, the prosecutor asked Smith to identify the document and tell jurors how much time Propes would serve before becoming eligible to meet the parole board if sentenced to a ten-year term. Smith responded Propes would be governed by the "fifteen percent rule" and would serve a minimum of eighteen months before meeting the parole board if sentenced to a ten-year term.[3] No one challenged the completeness or accuracy of Smith's testimony.

After deliberating, jurors found Propes guilty of second-degree TICS, *second offense.* However, due to a drafting error, jurors were not asked to fix a term of punishment. With the agreement of the Commonwealth and the defense, the trial court corrected the instructions by hand, and jurors retired to deliberate once more, fixing punishment at ten years.

At a sentencing hearing on June 24, 2013, the trial court imposed a term of ten years and denied Propes's request for probation. From the bench, the trial court ordered Propes to pay $155.00 in court costs within six months of

[3] According to Commonwealth's Exhibit #6, Propes would not become eligible to meet the parole board on a ten-year sentence until he had served two years.

release, saying the order would be reviewed on January 27, 2014. That same day, a separate written order on court costs was entered. That order states $155.00 is "[t]o be paid in full within six (6) months of release." However, it also set a show cause date of January 27, 2014, stating Propes had until that day at 1:00 p.m. to pay the full amount or appear in open court to explain his noncompliance. Propes now appeals from the final judgment as a matter of right.

ANALYSIS

Propes raises nine issues on appeal—seven of which pertain to the guilt phase—none of which were preserved by contemporaneous objection or objection on the grounds now asserted on appeal. Propes requests palpable error review of all nine claims.

We begin with an explanation of palpable error review and how it differs from our review of preserved errors. "[A] general request is not adequate to invoke palpable error review under RCr[4] 10.26." *Shepherd v. Commonwealth,* 251 S.W.3d 309, 316 (Ky. 2008). An appellant must identify all unpreserved errors for which palpable error review is sought and explain how each alleged error constitutes manifest injustice. *Id.* Propes admits none of the claims asserted on appeal was preserved below and specifically requests palpable error review under RCr 10.26 for each, but rarely discusses how or why the unpreserved errors rise to the level of manifest injustice.

[4] Kentucky Rules of Criminal Procedure.

Relief is available under RCr 10.26 only when an alleged error is "palpable" and "affects the substantial rights of a party." Even then, relief is appropriate only "upon a determination that manifest injustice has resulted from the error." *Id.* Stated otherwise, an unpreserved error is not reversible under RCr 10.26 if "upon consideration of the whole case, a substantial possibility does not exist that the result would have been different. . . ." *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (quoting *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986)). "To be palpable, an error must result in manifest injustice, either through the 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Jones v. Commonwealth*, 331 S.W.3d 249, 256 (Ky. 2011) (citing *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), *as modified* (May 23, 2006)). In other words, to deem an unpreserved error palpable, we must consider "whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Id.* Ultimately, "palpable error 'must involve prejudice more egregious than that occurring in reversible error[.]'" 9 Ky. Prac. *Crim. Prac. & Proc.* § 32:70 (5th ed.).

Of the nine errors alleged, two require action, although not necessarily for reasons asserted by Propes. First, jurors received inaccurate testimony about parole eligibility from Propes's probation and parole officer. Using incorrect testimony violates due process when the testimony is material. *Napue v. Illinois,* 360 U.S. 264, 269, 272, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). When the

Commonwealth knows, or should have known, testimony was inaccurate, the test for materiality is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). Neither lack of preservation, nor good faith error, excuses introduction of materially false information where "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Robinson v. Commonwealth,* 181 S.W.3d 30, 38 (Ky. 2005) (citing *Agurs,* 427 U.S. at 103, 96 S.Ct. at 2397)).

After jurors found Propes guilty of second-degree TICS, they were asked to determine whether the crime was his first offense, a Class D felony carrying a penalty range of one to five years, or, his second offense, a Class C felony carrying a penalty range of five to ten years. If convicted of a Class D felony, Propes's earliest parole eligibility date would have been calculated using the "fifteen percent rule," as Smith testified, but he could not have been sentenced to a term of ten years—five years being the maximum sentence for a Class D felony. Conversely, if convicted of a Class C felony, Propes would be subject to the "twenty percent rule"—not the "fifteen percent rule"—and would serve a minimum of two years before becoming eligible to meet the parole board. Smith being the only witness to testify about parole eligibility, jurors were left with the mistaken impression that if they fixed his punishment at ten years, Propes would be eligible for parole after serving just eighteen months—instead of the mandatory twenty-four months. Although no objection was voiced, Smith's testimony was

clearly incorrect based on the certified calculation of parole eligibility[5] introduced by the Commonwealth, and under *Napue*, the error must be corrected. The Commonwealth should have noticed this error during trial and corrected the mistake, but did not—perhaps because this was the prosecutor's first jury trial.

While the Commonwealth's brief characterizes Smith's testimony as "at best incomplete, or inaccurate at worst," we discern no saving grace and deem it necessary to vacate the sentence and remand for a new penalty phase limited to the issue of punishment. In reaching this conclusion, we distinguish *Cox v. Commonwealth,* 399 S.W.3d 431, 434 (Ky. 2013)—cited by the Commonwealth—wherein a probation and parole officer clumsily attempted to explain how long a felon remains on parole using language our Supreme Court described as "unartful perhaps," but "not so incomplete as to be misleading." We cannot say the same for Smith's testimony which was just plain wrong; a person serving a ten-year sentence cannot be a Class D felon and does not meet the parole board after serving just eighteen months; instead, he serves a minimum of twenty-four months. Thus, we vacate the sentence and remand for proceedings consistent with this Opinion.

While mentioned by neither party, the judgment states Propes was convicted of "Second Degree Trafficking in a Controlled Substance;" however,

[5] We cannot say with certainty whether jurors had access to Commonwealth's Exhibit #6 during deliberations, but we do know it was not published to the jury during Smith's testimony. Even if the exhibit went to the jury room, we will not speculate on whether jurors looked at it. What we do know is Smith's testimony was heard by the jury, did not accurately reflect Kentucky's parole eligibility guidelines, and may have affected the punishment fixed by the jury.

nowhere does it mention jurors found this crime to be a second offense. While a conviction for second-degree TICS was the verdict in the guilt phase, during the subsequent penalty phase jurors found this was Propes's second offense, making him guilty of a Class C felony rather than a Class D felony. This distinction is critical because imposition of a ten-year sentence would have been impossible were Propes convicted of only second-degree TICS, first offense. Because a new penalty phase and sentencing hearing are necessary to correct inaccurate testimony about parole eligibility, we are confident this additional error will be corrected on remand if the same result is obtained.[6]

Second, the separate order on court costs must be corrected for a variety of reasons, but not on the grounds suggested by Propes. Propes claims the trial court erroneously imposed court costs on him because he is an indigent whose sole income is derived from a monthly Social Security disability check, he was represented by appointed counsel at trial, and there was no proof he had a reasonable ability to pay. Citing *Maynes v. Commonwealth,* 361 S.W.3d 922 (Ky. 2012), the Commonwealth argues court costs may be imposed on indigents and there was proof Propes had the ability to pay because he personally testified he lived "pretty comfortable" on his Social Security disability income. Due to lack of preservation, no record was developed on this issue and thus our review is severely hampered.

[6] At the conclusion of trial, the trial court thanked jurors for their service and advised them this had been her first jury trial as a newly elected judge.

However, court costs, "being part of the punishment imposed by the court, are part of the sentence imposed in a criminal case," *Travis v. Commonwealth,* 327 S.W.3d 456, 459 (Ky. 2010), and unpreserved sentencing issues "may be raised for the first time on appeal." *Cummings v. Commonwealth,* 226 S.W.3d 62, 66 (Ky. 2007); *Wellman v. Commonwealth,* 694 S.W.2d 696, 698 (Ky. 1985). Thus, this issue is squarely before us.

Final judgment was not entered until July 12, 2013, making entry of the order imposing court costs on June 25, 2013, premature.

> There is a material difference in the status of a defendant following the verdict of guilt and his status after a final judgment has been entered and sentence pronounced. The verdict is but the basis of the judgment and is not effective until there is a judgment. Its return and acceptance by the court are but interlocutory steps toward final disposition, for it may be set aside and judgment thereon arrested if the judge be of [the] opinion, in the exercise of a judicial discretion, that it ought to be.

Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029, 1033-34 (1941). Furthermore, the order is internally inconsistent in that it gives Propes six months *after* release from prison to pay court costs—which would be a minimum of two years on a ten-year sentence assuming Propes meets the parole board at the earliest possible date and is immediately released—but also ordered him to pay the court costs by January 27, 2014, or show cause for noncompliance. These two timeframes being inconsistent, the trial court must correct the order.

In *Maynes,* our Supreme Court distinguished between a "needy" person under KRS 31.110, and a "poor" person under KRS 23A.250. Once

convicted, a defendant is to pay court costs unless found to be a poor person. KRS 23A.205. A poor person being defined as one "unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing." KRS 453.190(2). Under *Maynes,* 361 S.W.3d at 929, court costs may be imposed on a defendant who is needy but not poor. *See also Smith v. Commonwealth,* 361 S.W.3d 908 (Ky. 2012). Only if a defendant is both needy and poor is the trial court prohibited from imposing court costs. Having already ordered correction of two other sentencing errors, on remand, the trial court is directed to make a finding on whether Propes is a poor person; if he is not, an appropriate order imposing court costs may be entered.

We are convinced none of the seven remaining claims requires reversal. First, Propes claims the trial court wrongly allowed introduction of "investigative hearsay" when Bryant testified he learned from his neighbor—Bobby Joe Propes, Propes's "kinfolk"—that Propes was selling pills. While standing silent at trial, on appeal Propes attacks Bryant's testimony on four grounds: the statement did not fall within a recognized exception to the rule against hearsay as stated in KRE[7] 802; none of Propes's relatives testified—thereby denying Propes the opportunity to cross-examine them; Bryant bolstered his own testimony and credibility by telling jurors Propes's own family was aware of and openly discussed Propes's illegal drug activity; and, Bryant's testimony

[7] Kentucky Rules of Evidence.

branded Propes a drug dealer. All of these claims emanate from a single fleeting statement:

> Well, I guess I heard it through some of his kinfolk that he was selling pills on the street – Bobby Joe Propes lives next to me down in Adair County.

The Commonwealth points out that Propes admits this claim is unpreserved, but argues the claim *as if* it were preserved, completely ignoring the showing required for reversal on grounds of palpable error.

We are unconvinced reversal is necessary. Our Supreme Court has labeled investigative hearsay "a misnomer, an oxymoron[.]" *Sanborn v. Commonwealth,* 754 S.W.2d 534, 541 (Ky. 1988).

> The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.

Id. First, as a CI and not a police officer, Bryant could not give investigative hearsay. Second, since there was no motion *in limine* filed to exclude how Bryant learned Propes was selling pills, no objection to the statement during trial, and no request for an admonition to minimize any damage caused by the statement, we have no explanation of why the Commonwealth thought it important to ask Bryant —"tell us how you came to learn of this information about Mr. Propes"—and we will not speculate on that reason. Third, while Bryant's statement may have been

inadmissible as "hearsay," that is not Propes's claim and we will not rewrite his brief for him. Fourth, when Propes took the stand during his own case-in-chief, he testified in great detail about his prior conviction for trafficking in hydrocodone and his resulting conviction.

In light of the overwhelming evidence against Propes—including his own testimony and his voice on the recordings which he admitted was his—we do not believe Propes would have been acquitted but for Bryant's single fleeting comment which was not repeated in closing argument. This case is distinct from *Kerr v. Commonwealth*, 400 S.W.3d 250, 259 (Ky. 2013), wherein the prosecutor repeated and emphasized the inadmissible hearsay during closing argument to such an extent the appellate court could not say it did not sway the jury's verdict. If preserved by objection, we would have characterized this statement as harmless error and would not have reversed the conviction. Therefore, we will not reverse under the heightened standard of palpable error. *Jones,* 331 S.W.3d at 256.

In another unpreserved claim, Propes alleges Det. Allen wrongfully bolstered Bryant's credibility and reliability by testifying he had worked with Bryant as a CI several times and the safeguards surrounding controlled buys had never indicated Bryant had done anything "inappropriate or illegal." On appeal, Propes alleges this testimony violated KRE 404(a) and 608 by allowing Det. Allen —the Commonwealth's first witness—to bolster Bryant's credibility and reliability *before* it had been attacked—although defense counsel would ultimately pit Bryant

against Propes and ask jurors to decide who was more believable. For the following reasons, we discern no error, and certainly no palpable error.

The Commonwealth asked Det. Allen a series of questions about safeguards used with controlled buys—including thorough searches of the CI and his vehicle both before and after the buy to prevent the planting or concealment of evidence. In investigations using two other CIs, these safeguards had revealed dishonest informants who tried to retain drugs for themselves after making a buy; however, that had not been Det. Allen's experience with Bryant. We do not consider this line of questioning to be a direct comment on Bryant's character. However, if it was, we do not believe "the admission of improper evidence of the character of a mere witness affected [Propes's] substantial rights and constituted manifest injustice so as to require reversal as palpable error. KRE 103(e)." *Fairrow v. Commonwealth*, 175 S.W.3d 601, 607 (Ky. 2005).

Propes's next unpreserved claim is the Commonwealth violated KRE 401, 403 and 404 by introducing during the trial's guilt phase unredacted audio and videotapes of the controlled buy in which Propes revealed he had served five months in prison on a three-year sentence and had been released on shock probation the month before the controlled buy with Bryant occurred. While the introduction of evidence of other criminal acts should generally be avoided, not every instance requires reversal. *Jones v. Commonwealth*, 331 S.W.3d at 256; *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994). Here, the two tapes were evidence of the controlled buy itself and were introduced for a non-hearsay

purpose. *Norton,* 890 S.W.2d at 635. Had Propes successfully requested redaction, the Commonwealth could have prepared a redacted tape or muted the objectionable portion of the original tape as it was played, but there being no objection, we will not reverse the conviction—especially since defense counsel revealed during his opening statement that Propes had a record and Propes fully discussed his prior conviction when he testified during his case-in-chief. Furthermore, as noted in the Commonwealth's brief, Propes's revelation may have been trial strategy. By not seeking redaction, jurors learned of the prior conviction and Propes was able to argue he had experienced prison, found it to be unpleasant, did not want to experience it again, and had chosen never to sell drugs again. We discern no error—palpable or otherwise.

In another unpreserved error, Propes claims Det. Allen should not have been allowed to "interpret" the audio and video recordings because he did not personally observe the drug transaction and his testimony invaded the province of the jury. *Cruzick v. Commonwealth,* 276 S.W.3d 260, 265 (Ky. 2009). The Commonwealth responds Det. Allen interpreted nothing—he merely oriented jurors to the setting and sequence of events they would see and hear.

This is not a scenario in which jurors were provided a written transcript or a stranger to the buy deciphered inaudible or garbled words. After Bryant testified, a short break was taken to set up equipment to play the audio and video recordings for the jury. Det. Allen was then recalled to the stand and generally described what jurors were about to see and hear, consistent with

Cruzick. At no time did Det. Allen "interpret" any inaudible portion of the tapes. Thereafter, the separate video and audio tapes were played. Det. Allen did not testify while the tapes were being played. Jurors were left to determine for themselves what they saw and heard. *Gordon v. Commonwealth,* 916 S.W.2d 176, 180 (Ky. 1995). Again, there was no error—palpable or otherwise.

Next, Propes claims the Commonwealth wrongly impeached him on a collateral matter by cross-examining him about the controlled buy occurring while he was on shock probation. To put this claim in context, on direct examination, Propes stated he had previously sold hydrocodone—describing Bryant as one of his (former) regular customers—had been imprisoned for it, and had "served [his] time." Calling Bryant a former client laid the groundwork for defense counsel to argue in closing that Bryant knew enough about Propes to set him up, curry favor with the police and pocket $100.00 for the successful tip. Similarly, revealing he had served time for selling pills enabled Propes to tell jurors he had experienced prison life; did not want to repeat that mistake; and, had decided upon his release from prison not to sell hydrocodone anymore—yet he did, within one month.

Propes appears to claim this allegation was preserved by an objection at trial on the grounds of relevance, but also requests further review under RCr 10.26. Propes cannot feed one can of worms to the trial judge and another to us. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010) (internal citations omitted). Objecting to relevance did not apprise the trial court he

believed he was being improperly impeached on a collateral matter and no record was created on that ground. *Winstead v. Commonwealth,* 283 S.W.3d 678, 688 (Ky. 2009) (objection preserves issue on specific ground(s) asserted in trial court); *Ruppee v. Commonwealth,* 821 S.W.2d 484, 486 (Ky. 1991) (party cannot switch grounds for objection on appeal). Moreover, we cannot review issues on which the trial court had no opportunity to rule. *Regional Jail Authority v. Tackett,* 770 S.W.2d 225, 228 (Ky. 1989). Furthermore, Propes takes the trial court to task for not admonishing the jury when the Commonwealth withdrew its question in the wake of defense counsel's objection to relevance—conveniently overlooking the fact that defense counsel did not request an admonition as required by RCr 9.22; there is no requirement that a trial court *sua sponte* admonish a jury. *Hall v. Commonwealth*, 817 S.W.2d 228 (Ky. 1991), *overruled on other grounds by Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996).

Apart from the lack of preservation, there was no error. Propes testified he had "served [his] time." Propes having opened the door, the Commonwealth simply walked through the open door—wholly consistent with Kentucky's wide open cross-examination under KRE 611. *Blair v. Commonwealth*, 144 S.W.3d 801, 806 (Ky. 2004). We discern no error—palpable or otherwise.

Next, Propes argues the Commonwealth made an impermissible "send a message" argument to the jury during the guilt phase closing argument and argued facts not in evidence. While conceding the allegation is unpreserved, he

again requests palpable error review under RCr 10.26. The passage about which Propes now complains was as follows:

> Mr. Propes is not going to stop selling hydrocodone pills as long as a doctor prescribes them. And as long as a pharmacy will provide them to him for that prescription, he's going to sell them. He does not care where they go. You didn't hear him on the tape saying, "you're not going to sell these to any children, are you?" or, "you're not going to sell these to so and so." He didn't care where they were going. He wanted his $560.00. You heard the confidential informant count out $560.00. You heard Det. Allen say that he gave the confidential informant $560.00. When the confidential informant came back, he didn't have the $560.00 anymore; he had a bottle of pills that he got from Hansel Propes. This is your county. This is your community. You live here. Your family is here. Hansel Propes is not going to stop selling pills unless you stop him. And he's already proven that. So I'm going to ask you to find Mr. Propes guilty here today. Thank you for your time.

In reviewing claims of prosecutorial misconduct, we reverse only if the alleged misconduct was such that it undermined the overall fairness of the proceedings. *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004). However, prosecutors have wide latitude in closing argument and may attempt to convince jurors the matter before them should not be dealt with lightly. *Brewer*, 206 S.W.3d at 350.

After reviewing the Commonwealth's entire closing argument, we are convinced Propes suffered no manifest injustice. The "message" requested by the Commonwealth in this case was to be sent to Propes, not the community at large. At no point did the Commonwealth "cajole or coerce a jury to reach a verdict that would meet the public favor" or suggest jurors "convict on grounds not reasonably

inferred from the evidence." *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005). Furthermore, some of the prosecutor's comments were entirely permissible because they simply responded to matters raised by the defense. *Lynem v. Commonwealth*, 565 S.W.2d 141 (Ky. 1978); *Hunt v. Commonwealth*, 466 S.W.2d 957 (Ky. 1971). Defense counsel asked the jury to find Propes not guilty; the prosecutor asked them to find Propes guilty. Defense counsel argued Propes had learned his lesson from his prior conviction; the prosecutor argued Propes would continue selling hydrocodone unless convicted as evidenced by his prior conduct. Additionally, the prosecutor's comments on the absence of particular evidence—clearly not intended to mislead the jury—did not rise to the level of palpable error. *Preacher v. Commonwealth,* 391 S.W.3d 821, 850 (Ky. 2013).

Upon consideration of the entire trial and the context in which the unobjected to comments in question were made, we discern no substantial possibility the Commonwealth's closing argument seriously affected the overall fairness of the proceedings. *Hall v. Commonwealth*, 337 S.W.3d 595, 612-13 (Ky. 2011). The comments neither prejudiced Propes's right to a fair trial, nor unduly pressured the jury to punish him. Any error in the closing argument, if indeed one occurred, did not rise to the level of being palpable. *See Carver v. Commonwealth*, 303 S.W.3d 110 (Ky. 2010).

In yet another unpreserved error, Propes argues the guilt phase was marred by cumulative error and requests reversal under RCr 10.26. Cumulative

error refers to "multiple errors, [which] although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth,* 313 S.W.3d 577, 631 (Ky. 2010). The doctrine applies only when individual errors are "substantial" and at least border on being prejudicial; the doctrine is not implicated when individual errors do not raise "any real question of prejudice." *Id.* Here, other than the two issues we have already directed be corrected, the unpreserved errors raised no question of real prejudice in the face of overwhelming evidence of guilt. Therefore, the doctrine of cumulative error is inapplicable and reversal is not required. *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012).

For the foregoing reasons, the finding of guilt entered by the Casey Circuit Court is affirmed in all respects. Due to jurors receiving inaccurate testimony about parole eligibility, and entry of a premature and internally inconsistent order on court costs, however, we vacate the sentence and the order imposing court costs and remand for a new penalty phase, a new sentencing hearing, and any other proceedings the trial court deems appropriate on the issue of court costs.

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