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RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

NO. 2004-SC-000518-MR

WESLEY MEEKS — APPELLANT

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 01-CR-00155

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Greenup Circuit Court jury convicted Wesley Meeks of second-degree manslaughter, first-degree burglary, and theft by unlawful taking over $300, and then fixed punishment at the maximum sentence of thirty-five years' imprisonment. The trial court entered judgment accordingly. In his direct appeal from that judgment, Meeks argues that the prosecutor's remarks to the jury in closing the penalty phase of the trial were so coercive as to constitute a palpable error requiring reversal and retrial of the penalty phase. We disagree and affirm.

Monte Montgomery returned home from work and interrupted a burglary in progress. Montgomery's wife later discovered his lifeless body in a pool of blood on the bathroom floor. He died as a result of multiple contact gunshots to the head. His body appeared to have been beaten, and his pants were pulled down to his ankles. The postmortem report disclosed evidence of blunt trauma to the penis consistent with the force of human teeth and the presence of another's semen on Montgomery's body around the penis and groin area.

The burglars took several items of personal property from the home and drove away in two of Montgomery's vehicles. One of the vehicles was wrecked, and the other was driven into a ditch. A neighbor who spotted the vehicles called for a wrecker; and, upon arriving, the wrecker driver noticed Curtis Clifton nearby. Clifton had a bloody hand that he had wrapped with a t-shirt. Clifton's bloody hand and the presence of blood in one of the vehicles aroused the driver's suspicions, and he called law enforcement. While waiting for law enforcement to arrive, the wrecker driver also noticed Meeks, who appeared to be intoxicated. As Meeks approached, Clifton ordered Meeks to sit quietly in a car lest he tell the truck driver "every damn thing" he knew.

When the state trooper arrived, Meeks and Clifton were arrested for public intoxication. Jewelry was found in Meeks's pockets. Eventually, Meeks admitted taking items from the Montgomery home; but he told the police "[w]hen I got there, that dude [Montgomery] was already dead."

Along with Clifton, Meeks was indicted for murder, burglary in the first degree, theft by unlawful taking over $300, sodomy in the first degree, and gross abuse of a corpse. Clifton pled guilty to the charges and received a sentence of life without the

possibility of parole for twenty-five years. Meeks's case went to trial. At the close of the Commonwealth's case, the trial court granted Meeks's motion for a directed verdict on the sodomy and gross abuse of a corpse charges. Ultimately, Meeks was found guilty of the lesser-included offense of manslaughter in the second degree, as well as burglary in the first degree, and theft by unlawful taking over $300. The jury recommended that Meeks receive the maximum sentence: twenty years' imprisonment for the burglary conviction, ten years' imprisonment for the manslaughter conviction, and five years' imprisonment for the theft by unlawful taking conviction, all to be served consecutively, for a total sentence of thirty-five years' imprisonment. The trial court sentenced Meeks in accordance with the jury's recommendation, after which Meeks filed this direct appeal.[1]

Meeks's only argument on appeal is that the Commonwealth's closing argument in the penalty phase was so improper as to require a new penalty phase trial. Meeks admits that this alleged error is unpreserved. So our review is governed by Kentucky Rules of Criminal Procedure (RCr) 10.26, which provides that "[a] palpable error which affects the substantial rights of a party may be considered by . . . an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable."[2] A palpable error "must involve prejudice more egregious than

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[1] *See* Ky. Const. § 110(2)(b).

[2] Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1997) (citing BLACK'S LAW DICTIONARY (6th ed. 1995)).

that occurring in reversible error[.]"[3] A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.[4] Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error.[5] If not, the error cannot be palpable.

Meeks asserts that palpable error lies in the following excerpt taken from the prosecutor's closing argument to the jury in the penalty phase. The jury's deliberation in the penalty phase was brief as compared to the more than twelve hours it spent in deliberation of the verdict in the guilt-innocence phase. According to Meeks, the Commonwealth chided the jury so strongly that the argument impelled the jury to fix a manifestly unjust penalty for the crimes:

> It's a hard day when one of our citizens loses his life, like Mr. Montgomery. There's nothing more precious than our lives, to our citizens here in Greenup County. I want to thank each one of you for [your] work on this jury, and the time that you have spent here. I know folks are busy and they don't have time—a year to spend on someone else's family, in trying to exact a major [sic] of justice for this terrible death that the Montgomerys have experienced in this case. The fire inside of me temporarily died down. I respect your verdict. I don't agree with it, but I'll live with it, because that's what jury trials are all about. But, it's important that Mel and Marydel and I try these cases and find out what jury's [sic] think and how they do value the lives of their neighbors and citizens. And, I'll take this into consideration, as we do all trials—all jury trials, and the answers that you give, in guiding our future decisions. I've done everything I can to bring the facts before you. Maybe another lawyer could have done better or worse, but nobody worked any harder

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3 Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005).

4 *Id.*

5 Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969)).

than I did, than Mel did, than Marydel did and our staff, and the many people that donated their time without pay, to this case. And, I think you know that, and I think the Montgomery family knows that. I hope they do. I hope they will forever be my friends. Manslaughter in the first [sic] degree, a class C felony. [sic] That's next to the lowest form of a felony that we have in Kentucky, with class D being the lowest. It carries five to ten years. And, somewhere in there will be the price that you will exact for the death of Mr. Montgomery. A death that occurred in his own home, his own castle, an execution, I say, that was totally unwarranted and unjustified no matter how much they seek to reward—or excuse it, or find some excuse for what happened here. I hope it never happens again in this county. But, the way things are going in our world today, I really doubt that. I believe it will happen again. All and all, I think we're in a good place, because this seldom ever happens. It's unfortunate that [it] happened to the Montgomery family. It would be unfortunate for any family. I ask you to exact the price within the range of penalty that you have chosen, and certainly, the maximum. I don't know if you could exact a price that would balance the scales of justice in this case, for the death of Mr. Montgomery. But, the closest that you can come to it now, is ten years. Keep in mind, that second[-]degree manslaughter is not considered to be a violent crime. It's considered to be a crime of wantonness; a degree of culpability that rises just above recklessness in this state. So, parole eligibility for second[-]degree manslaughter is twenty percent; a percentage of the price that you will exact for Wesley Meeks for that life.

. . . .

But, what I'm asking you to do—I'm asking you to consider all of these instructions, but the Commonwealth contends that this is the [sic] probably the most serious crime that—even though you haven't found that—it's still very serious, when someone is killed in their own home, by shots to the head. And, I'm asking you to run these sentences consecutively, and I never do this—I never do this—I never tell the jury what I think they should do, and this is probably the first time that I have ever done this. But, I have to plead to you to give the maximum to this man, to try to come as close as you can, at this point, to exacting justice and

balancing the scales in this case and give him thirty-five years.

Trial counsel has wide latitude to make for his or her client the most persuasive closing argument.[6] And although the transcript shows that this prosecutor expressed regret that the jury found Meeks guilty of manslaughter in the second degree, not intentional murder, it is well-established that a prosecutor may use the closing argument to attempt to "persuade the jurors the matter should not be dealt with lightly."[7] In the case at hand, the Commonwealth's closing argument, though cluttered with irrelevant references to such matters as how hard the Commonwealth had worked on presenting its case, is, in totality, merely a request that the jurors not take Montgomery's death lightly.[8] And we note that the Commonwealth had sought the death penalty for Meeks and introduced evidence showing that Montgomery was killed without provocation and suffered indignities of a sexual nature. So the Commonwealth's expression of disappointment with the jury's failure to find Meeks guilty of intentional murder and its exhortation to the jury to fix the maximum punishment allowed for the lesser offense is neither surprising nor improper. Even if a timely objection had been made, the Commonwealth's arguments would not constitute reversible error.

But even if we assume for the sake of thorough analysis that the quoted portions of the Commonwealth's closing were erroneous, that error certainly would not be so egregious as to rise to the level of palpable error. Our reported decisions contain

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6 *See, e.g.,* Wheeler v. Commonwealth, 121 S.W.3d 173, 180 (Ky. 2003).

7 Harness v. Commonwealth, 475 S.W.2d 485, 490 (Ky. 1971).

8 *See* Hamilton v. Commonwealth, 401 S.W.2d 80, 88 (Ky. 1966) (permitting Commonwealth to recommend level of punishment to jury); Soto v. Commonwealth, 139 S.W.3d 827, 874 (Ky. 2004) (same).

statements of a far more *ad hominem*, coercive nature that have been found not to constitute reversible error.[9] Since the statements at issue in the case before us are decidedly more benign than many found not to warrant reversal, Meeks simply cannot show that the Commonwealth's closing was so improper, prejudicial, and egregious as to have undermined the overall fairness of the trial.[10]

For these reasons, we affirm the judgment of the Greenup Circuit Court.

ALL CONCUR.

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[9] *See, e.g.,* Ferguson v. Commonwealth, 401 S.W.2d 225, 228 (Ky. 1965) (calling a defendant a "beast"); Holbrook v. Commonwealth, 249 Ky. 795, 61 S.W.2d 644, 645 (1933) (calling a defendant a "desperado"); Hamilton, 401 S.W.2d at 87 ("I'll put it this way. If you don't inflict the death penalty in this case, then you are going to open the door to every robber, to every person that wants to take advantage of a tavern operator-a store keeper, anybody who handles money in their place of business. You are going to open the door and tell them to come on in boy. If you don't get it or get shot at-shoot him down. And then after it's all over you get life. That's what you are going to be saying.").

[10] Soto, 139 S.W.3d at 873 ("[a]ny consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair.").

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