IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

MODIFIED: OCTOBER 23, 2008
RENDERED: MAY 22, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000421-MR

CARLTON EVAN MCINTOSH — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN GRISE, JUDGE
NOS. 05-CR-00347-002 AND 05-CR-00643

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On February 4, 2005, two masked individuals, one of them armed with what appeared to be a handgun, robbed the Fairview Branch of South Central Bank in Bowling Green. The robbers collected about $10,000.00 from the teller drawers and fled on foot. In April 2005, a Warren County grand jury charged Carlton McIntosh with having participated in the bank heist, and in May 2006, following a jury trial, McIntosh was convicted of first-degree robbery. The jury further found that McIntosh is a first-degree persistent felon (PFO) and pursuant to that finding recommended that his twenty-year sentence for the robbery be enhanced to life imprisonment. McIntosh appeals as a matter of right from the Warren Circuit Court's May 31, 2006 Judgment sentencing him in accord with the jury's recommendation. He raises several allegations of error, but primarily contends that he was denied his constitutional right to confront

one of the witnesses against him. Because this issue was not properly preserved for review and does not present an instance of palpable error, we affirm the trial court's Judgment.

RELEVANT FACTS

The Commonwealth alleged that McIntosh was aided in the robbery by Delanea Slaughter, his twenty-year-old girlfriend, and Richard Banks, his second cousin. McIntosh and Slaughter both resided in Indiana, but according to Slaughter they frequently visited Bowling Green, where several members of McIntosh's extended family lived. Slaughter testified that they had driven to Bowling Green in December 2004, ostensibly to retrieve a vehicle McIntosh had left there, and had stayed on through January 2005, living sporadically with friends, McIntosh's family members, and at motels. During their stay Slaughter obtained employment at a nursing home. She testified that McIntosh had mentioned the possibility of a bank robbery, had shown her a mask, and that a couple of days before the robbery they had purchased a revolver-like BB-gun from Wal Mart, but not until the morning of the robbery itself had he told her which bank they were to rob and how they were to do it. On the morning of February 4, Banks borrowed his girlfriend's car and led Slaughter and McIntosh to a parking lot not far from the bank where they left their car. Banks then drove the other two to the entrance of the bank and after checking inside, presumably for police officers, signaled them to proceed. He then went into a neighboring store, Nation's Medicines, while Slaughter and McIntosh entered the bank.

According to Slaughter and the bank surveillance photos, she and McIntosh both wore hoods, masks, and gloves. McIntosh stood outside the tellers' counter, displayed

the BB-gun, and apparently had the tellers open their drawers. Slaughter then went behind the counter and loaded the money into a plastic grocery bag. According to Slaughter they were in the bank no longer than a minute. They then ran from the bank to their car, stripping their disguises on the way, and drove to the house of one of McIntosh's relatives. There they rendezvoused with Banks, who drove them to his girlfriend's house. The plan, apparently, was for Banks's girlfriend to drive McIntosh and Slaughter to Indianapolis, but the girlfriend backed out. The pair wound up waiting a day and then simply drove themselves to Indianapolis in their own car.

As it happened, the Nation's Medicines security cameras caught Banks behaving suspiciously at just the time of the robbery, which led Bowling Green detectives to question him. He named Slaughter and McIntosh. McIntosh was known to reside in Indianapolis, where after further investigation, including the discovery that Slaughter and an African-American male companion had just paid cash for a used car, led to the pair's arrest. McIntosh was arrested at the couple's motel room, and a subsequent search of the room produced a black, revolver-like BB-gun, a bag of marijuana, clothes, and receipts from recent clothing purchases and car repairs.

At trial the Commonwealth introduced testimony by a number of bank employees, customers, and McIntosh's relatives, including testimony tending to show both that the robbers had taken a large number of two-dollar bills and that that evening McIntosh and Slaughter had given a large number of such bills to one of McIntosh's relatives. Primarily, however, the case rested upon the testimony of Slaughter and Banks. As noted above, Slaughter's testimony was particularly damning. Not only did she detail McIntosh's perpetration of the crime, but her own involvement added the

appearance, at least, that a very young woman (Slaughter was about twenty at the time) had been used and manipulated by a much older man (McIntosh was about forty).

Banks's testimony was hardly less damaging, and it is his testimony that brings us to McIntosh's principal claim of error. Banks had pled guilty by the time of McIntosh's trial and apparently had begun to serve his sentence. He acknowledged his family relationship with McIntosh, but when asked to describe the events of February 4, 2005 he denied having any recollection of the bank robbery whatsoever. The Commonwealth then began laying the foundation for the introduction of Banks's prior statements to the police by asking him if he had not told them a series of details about the robbery. Banks asserted that his recollection of the police interviews was no better than his recollection of the robbery, and not far into the Commonwealth's series of questions he announced that he was "pleading the Fifth" and would give no more answers. When the court told him that he had waived his Fifth Amendment right by pleading guilty and ordered him to respond, Banks reverted to his lack of recollection, although he did at one point deny having ever told anyone that he served as a lookout for the robbers.

Having laid a foundation, the Commonwealth moved to play for the jury two video recordings of Banks being interrogated by the police, on the ground that Banks's prior police statements were inconsistent, for the purposes of KRE 801A(a)(1), with his non-responsive testimony. McIntosh's counsel objected. He explained, "Your honor, my position is that, unless he denies it, and she [the Commonwealth's Attorney] uses it to impeach, those videos are not admissible." The court overruled counsel's objection and permitted the introduction of Banks's prior statements. In them he ultimately

provided a description of the robbery in substantial accord with the description Slaughter provided. Banks was no more responsive during cross-examination than he had been during direct. He claimed no recollection of having ever met Slaughter and otherwise again denied any recollection of the robbery.

On appeal, McIntosh contends that Banks's unresponsiveness rendered him essentially unavailable for cross-examination and that his hearsay statements to the police were thus introduced in violation of the Sixth Amendment to the United States Constitution as recently interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We disagree.

ANALYSIS

I. The Admission of Banks's Statements to the Police Did Not Violate the Confrontation Clause.

We begin by noting that this issue was not preserved by appropriate objection at trial. As quoted above, counsel's objection asserted only that until Banks denied having made his statements to police, as opposed to not remembering them, the prior statements should not be deemed "inconsistent" with his testimony for the purposes of KRE 801A(a)(1), the rule which permits the introduction at trial of a testifying witness's prior inconsistent statement. The objection included no reference to the constitution, to the right of confrontation, or to cross-examination, nothing, in other words, to alert the trial court to a ground for objection beyond the evidence rule. Generally, of course, "[w]hen a party states grounds for an objection at trial, that party cannot assert a different basis for the objection on appeal." Fairrow v. Commonwealth, 175 S.W.3d 601, 607 (Ky. 2005). Accordingly, McIntosh's Sixth Amendment claim is subject only to palpable error review.

There can be no palpable error, of course, without an error, and we agree with the Commonwealth that the admission of Banks's statements to the police did not run afoul of the rule laid down in Crawford. In Crawford, as McIntosh notes, the Supreme Court held that if the declarant does not testify at trial, his "testimonial" hearsay statements are not admissible, regardless of the hearsay rules, unless he is unavailable to testify and his hearsay statements were previously subject to cross-examination. *Id.* at 54. The Supreme Court has yet to provide a thorough definition of "testimonial," but in Crawford it noted that under any definition of that term a witness's accusatory statements elicited during police interrogation would be included. *Id.* at 68. There is no question then that Banks's statements to the investigating officers tending to inculpate McIntosh were "testimonial" under Crawford.

As the Crawford Court explained, however,

> when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Id. at 59 (citation omitted). McIntosh contends that although Banks was present at trial he did not truly "appear for cross-examination" because his evasiveness rendered meaningful cross-examination impossible. Absent meaningful cross-examination, McIntosh maintains, Banks's testimonial statements to the police should have been excluded regardless of the hearsay exception for prior inconsistent statements. In Estes v. Commonwealth, 744 S.W.2d 421 (Ky. 1987), we held that a witness's privileged refusal to testify did indeed render him unavailable for cross-examination for constitutional purposes and that such a refusal could not serve as the basis for invoking

KRE 801A(a)(1).

Absent a testimonial privilege, however, and there is no claim in this case that Banks was privileged not to testify, the Supreme Court has indicated that a witness's inability or refusal to recall the events recorded in a prior statement or the events surrounding the making of the statement does not implicate the Confrontation Clause. In United States v. Owens, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988), a case in which the victim of an assault had given a statement to police accusing the defendant, but at trial testified that he had no recollection of why he made the accusation, the Court held that the victim's memory loss did not deprive the defendant of a constitutionally adequate opportunity for cross-examination:

> The Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Id. at 559 (some internal quotation marks and citations omitted; quoting Delaware v. Fensterer, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)). The witness, the Court observed, had been placed under oath, had answered questions, and had been subject to the jury's observation.

Although Crawford did not discuss what it means for a witness to "appear for cross-examination," Crawford did not overrule Owens, and several courts have held that under Owens a witness "appears for cross-examination" if he willingly takes the stand, answers questions in whatever manner, and exposes his demeanor to the jury, thus giving the defense an opportunity to address the witness's prior testimonial statements. United States v. Ghilarducci, 480 F.3d 542 (7th Cir. 2007); State v. Pierre, 890 A.2d 474 (Conn. 2006) (collecting cases); State v. Real, 150 P.3d 805 (Ariz. App. 2007). *But see*

State v. Nyhammer, 932 A.2d 33 (N.J. Super. 2007) (confrontation right denied when alleged infant sex-abuse victim became completely unable to testify about her prior statements). We agree with these Courts that Owens remains controlling, and under Owens, McIntosh was afforded a constitutionally adequate opportunity to cross-examine Banks. Banks willingly took the stand; answered defense counsel's questions, though not as McIntosh might have wished; and gave the jury an opportunity to compare his demeanor at trial with his demeanor during his interrogations. His testimony enabled McIntosh to argue that Banks's prior allegations were solely the result of Banks's desire to deflect blame from himself and to curry favor with the police. Crawford and Owens do not require more.

Hoping to avoid this result, McIntosh notes that under KRE 804(a)(3) a declarant is "unavailable" as a witness if he "[t]estifies to a lack of memory of the subject matter of the declarant's statement." He argues that Banks's lack of memory rendered him "unavailable" under this rule, and that he thus should also be deemed "unavailable" under Crawford. The Supreme Court rejected a similar argument in Owens, where it was urged that the federal counterpart to KRE 804(a) likewise required a finding that the forgetful witness was "unavailable" and so precluded finding him "subject to cross examination" for the purposes of Fed. R. Evid. 801(d). That rule permits the introduction of out-of-court identifications provided that the identifications are "subject to cross examination" at trial. The defendant argued that it was inconsistent to say on the one hand that a forgetful witness was "unavailable," but on the other hand to say that he was "subject to cross-examination." Noting the different purposes of the two rules, however, the Supreme Court explained that the inconsistency was apparent rather than

real:

> [This] situation . . . presents the verbal curiosity that the witness is "subject to cross-examination" under Rule 801 while at the same time "unavailable" under Rule 804(a)(3). Quite obviously, the two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide."

484 U.S. 563-64.

Similarly here, Crawford's provision that the Confrontation Clause does not bar testimonial hearsay statements if the declarant "appears for cross-examination," has a different purpose from that of KRE 804, which provides that certain hearsay statements may be admitted if the declarant is "unavailable." Despite the seeming verbal kinship, the two standards are distinct, and there is no inconsistency in saying that Banks may have been "unavailable" for the purposes of KRE 804, but that he "appeared for cross-examination" for the purposes of Crawford and Owens. The trial court, in sum, did not err by admitting the video reproductions of Banks's statements to the police.

II. The Magistrate Validly Issued the Motel-Room Search Warrant.

As noted above, McIntosh was arrested outside an Indianapolis motel, and after the arrest the officers obtained a search warrant for his motel room, where they found and seized the black BB-gun, a small bag of marijuana, receipts, and clothing. Prior to trial McIntosh moved to suppress the motel-room evidence on the ground that the warrant was obtained on the basis of stale information. The trial court denied the motion, and the motel-room evidence was discussed and some of it introduced at McIntosh's trial. On appeal, McIntosh renews his contention that the search warrant was invalid because it was based on information too stale to supply probable cause. We disagree.

A search warrant may be issued, of course, if there is probable cause to believe that the search will uncover evidence of a crime. The United States Supreme Court has explained that the probable cause determination is to be based on the totality of the circumstances and that the issuing magistrate need only make

> a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The magistrate's determination is entitled to great deference and

> should be upheld so long as the magistrate had a "substantial basis for concluding that a search would uncover evidence of wrongdoing."

Ragland v. Commonwealth, 191 S.W.3d 569, 583 (Ky. 2006) (quoting from Gates).

As McIntosh correctly notes, probable cause diminishes with the passage of time so that the age of the information presented to the magistrate is one of the circumstances he or she must consider. In reviewing the issue of staleness, however, "it is important to look at the nature of the offense and the length of criminal activity, not simply the number of days that have elapsed." *Id.* at 583. Instead of measuring staleness solely by counting the days on a calendar,

> courts must also concern themselves with the following variables: the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?), etc. . . . As these variables demonstrate, even if a significant period has elapsed since a defendant's last reported criminal activity, it is still possible that, depending upon the nature of the crime, a magistrate may properly infer that evidence of wrongdoing is still to be found on the premises. . . . Furthermore, where recent

> information corroborates otherwise stale information, probable cause may be found.

Id. at 584 (internal quotation marks and citations omitted).

In this case, the officer's warrant application was presented to the magistrate on March 4, 2005. Its accompanying affidavit noted the February 4, 2005 bank robbery, the arrest warrants that had been issued for Slaughter and McIntosh, Slaughter's February 15 $2,650.00 cash purchase of a used van, her cash payments of $38.25 per night for the motel room from February 12 until March 3, Slaughter's African-American companion during the van transaction, and McIntosh's presence at the motel. The application sought authority to search the motel room for evidence "used in the robbery or taken during the robbery . . . [s]pecifically, any U.S. currency, a handgun or replica [there]of, any ammunition associated with a handgun and black face masks used in the robbery."

Although, as McIntosh contends, gun, money, and masks could have been disposed of during the intervening month, the continuing utility of the gun and the money, Slaughter's recent cash transactions, and the possible future utility of the masks, made it fairly probable that the gun, the masks, and some of the money would have been retained after the crime and would be found in the motel room. The warrant was valid, therefore, and the trial court did not err when it denied McIntosh's motion to suppress the motel-room evidence.

III. The Admission of Evidence that McIntosh Purchased Drugs Was Harmless Error.

Prior to trial McIntosh also moved to suppress any evidence that he and Slaughter used or purchased drugs. The Commonwealth countered with a motion

pursuant to KRE 404(b) to introduce Slaughter's testimony that the pair had spent some of the stolen cash on marijuana and cocaine. Granting the Commonwealth's motion, the trial court opined that Slaughter's proposed testimony was admissible either because it was "inextricably intertwined" with other evidence essential to the Commonwealth's case (KRE 404(b)(2)) or because, by showing that the pair had been able to afford costly pursuits in the weeks immediately following the robbery, it tended to show that they were in fact the perpetrators (KRE 404(b)(1)). When asked to account for the stolen proceeds at trial, Slaughter testified that in addition to the van, the month worth of motel rooms, and some clothing, she and McIntosh had purchased marijuana and cocaine. McIntosh contends that this evidence was not properly admitted under KRE 404(b) because its prejudicial effect was grossly disproportionate to any probative value. We agree.

Evidence of a defendant's "other crimes, wrongs, or bad acts" is not admissible as proof of the defendant's character or of his propensity to break the law. KRE 404(b), however, permits the introduction of such evidence

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

This rule is to be applied cautiously, we have explained, in accord with its fundamental purpose of "prohibit[ing] unfair inferences against a defendant." Anderson v. Commonwealth, 231 S.W.3d 117, 120 (Ky. 2007). To be admissible under the rule, the evidence of other criminal or wrongful acts must be (1) relevant for some purpose

other than to prove criminal predisposition, (2) sufficiently probative to warrant introduction, and (3) sufficiently probative so that its probative value outweighs its potential for prejudice to the accused. *Id.;* Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994). We agree with McIntosh that with respect to Slaughter's drug testimony this standard was not met.

The Commonwealth's main concern was to counter an inference that because Slaughter and McIntosh were not caught with a significant amount of cash only a month after allegedly stealing $10,000.00, they likely were not the thieves. Drug purchases are clearly relevant to an attempt to account for the missing cash, and significant drug purchases soon after a theft by individuals with no income would be probative that they had perpetrated the theft. The probative value of the drug evidence here, however, was diminished by the fact that no evidence indicated that the alleged drug purchases exceeded Slaughter's and McIntosh's ordinary means. Slaughter testified only that the pair had purchased marijuana and cocaine. She did not say in what quantities or how much money was spent. Absent those additional facts the drug evidence contributed only marginally to the purported accounting. On the other hand, as McIntosh notes, the drug evidence was apt to be significantly prejudicial as it added to the impression that McIntosh was an unsavory older man taking advantage of a young woman—precisely the sort of character evidence KRE 404(b) is meant to exclude absent a compelling need for it. As there was no compelling need for the marginally probative drug evidence here, the trial court abused its discretion by admitting it.

That is not the end of the matter, however, for as we noted in Anderson, supra, RCr 9.24 requires that evidentiary errors be deemed harmless "if there is no reasonable

possibility that [the erroneously admitted evidence] contributed to the conviction." 231 S.W.3d at 122. The error here was harmless. The case against McIntosh may fairly be characterized as overwhelming. Slaughter's testimony and Banks's statements were significantly corroborated by the two-dollar-bill evidence, by McIntosh's participation in the van purchase, and by the presence of the BB-gun in the pair's motel room. There is no reasonable probability that absent the drug evidence either the guilty verdict or the sentence would have been any different.

Finally, McIntosh contends that having admitted the drug evidence the trial court erred by failing to admonish the jury to consider it only as part of the Commonwealth's attempt to account for the stolen money. Generally, however, the right to an admonition is waived unless the admonition is requested. Coulthard v. Commonwealth, 230 S.W.3d 572 (Ky. 2007). Here there was no request. Prior to trial, it appears, the possibility of an admonition was discussed, but during trial, when the evidence was introduced, McIntosh's counsel did not renew the issue. The trial court did not err by not giving an unrequested admonition.

IV. McIntosh's Trial Was Not Marred by Palpable Error.

McIntosh also alleges two errors which he concedes were not preserved by appropriate objection at trial but which, he contends, so plainly undermined the fairness of the proceedings as to amount to palpable error. Under RCr 10.26, a palpable error is an error which is apparent from the record, which affects the substantial rights of a party, and which has resulted in a manifest injustice. Relief may be granted for palpable error only upon a showing of "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin v.

Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). McIntosh's allegations fail to meet this standard.

A. The Jury Instructions Provided a Recognized Definition of "Deadly Weapon."

First, McIntosh contends that the jury instructions incorporated an invalid and overly broad definition of "deadly weapon" and consequently permitted his conviction of first-degree robbery when at most his crime was second-degree. Jury Instruction No. 1, First Degree Robbery, provided as follows:

> You will find the defendant guilty of First-Degree Robbery under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about February 4, 2005, and before the finding of the indictment herein, Carlton McIntosh stole money from South Central Bank;
> B. That in the course of so doing and with the intent to accomplish the theft, he used or threatened the immediate use of physical force upon any person not a participant in the crime; AND
> C. That when he did so, he was armed with a deadly weapon.

"Deadly weapon" was then defined in instruction no. 3 as

> any object intended by its user to convince a victim that it is a deadly weapon and the victim is in fact so convinced.[1]

As McIntosh notes, the trial court's definition of "deadly weapon" is circular, in that it uses the term to be defined in the body of the definition. McIntosh's complaint, however, is not that the trial court's definition was unclear or unartful, but that it does not comport with the statutory definition, which, in pertinent part, provides that a "deadly weapon" is

> [a]ny weapon from which a shot, readily capable of

[1] *See* Wright v. Commonwealth, 239 S.W.3d 63 (Ky. 2007), for a more recent specimen first-degree robbery instruction.

> producing death or other serious physical injury, may be discharged.

KRS 500.080(4)(b). He contends that a BB-gun is not such a weapon. Had the trial court employed the statutory definition, as McIntosh contends it was obliged to do, he claims he could not have been convicted of first-degree robbery.

As the Commonwealth correctly points out, however, in Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965), a case in which it was alleged that the robber may have used a toy pistol rather than a real one, the former Court of Appeals held that within the context of the pre-Penal Code robbery statute,

> any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one.

Id. at 729. This is the definition the trial court employed. The Penal Code was adopted in 1974 and included in the section that became KRS 500.080(4)(b) the statutory definition of "deadly weapon" quoted above. Nevertheless, in Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976), this Court, relying on commentary to the Penal Code's then new robbery provisions, held that in the robbery context the Merritt definition of "deadly weapon" remained "as viable now as it was prior to the adoption of the code." 544 S.W.2d at 221. That viability was recently extended in Thacker v. Commonwealth, 194 S.W.3d 287 (Ky. 2006) and Shegog v. Commonwealth, 142 S.W.3d 101 (Ky. 2004). In light of this precedent, it cannot be said that the trial court committed a palpable error when it employed the Merritt definition of "deadly weapon" in this case. We recognize, however, that our continuing reliance upon Merritt has drawn scholarly criticism, *see* Robert G. Lawson & William H. Fortune, Kentucky Criminal Law § 13-7(c)(3) (1998), and in a case where the issue is properly preserved would warrant

further consideration.

B. Competent Evidence Supported the Jury's PFO Finding.

McIntosh's second claim of palpable error concerns his sentence. He contends that his PFO status was determined on the basis of incompetent evidence. He correctly notes that one of the elements of that status is that he committed his current offense while on release or within five years of discharge from a prior felony sentence. KRS 532.080. He argues that the Commonwealth relied upon inadmissible hearsay to prove his last discharge date and thus that it failed to prove the required temporal connection between this current offense and a prior one.

Through a detective on the case, the Commonwealth introduced exemplified copies of four prior felony convictions. The most recent was an Indiana Judgment entered December 11, 1997, which sentenced McIntosh to two years (730 days) for residential entry and battery. McIntosh was given sentence credit of 178 days for time spent in confinement before sentencing. That left him with a bit more than a year-and-a-half to serve. The earliest he could have been discharged, therefore, was about June 1999. When asked when McIntosh had been discharged from that sentence, the detective referred to his file and testified, without objection, that "his effective date of discharge from the Indiana Department of Corrections was January 21, 2001." The basis for this testimony does not appear in the record, and McIntosh correctly notes that it appears to be hearsay subject to objection. The absence of an objection, however, very likely reflects that fact that the judgment itself adequately established the temporal element of McIntosh's PFO status and/or that the detective's information was accurate. *Cf.* Commonwealth v. Mixon, 827 S.W.2d 689 (Ky. 1992) (upholding, in the absence of

objection, oral proof of PFO elements read from documents which were not introduced). In any event, because McIntosh has not shown that he was prejudiced by the detective's hearsay, its admission cannot be deemed a palpable error.

CONCLUSION

In sum, notwithstanding Banks's evasiveness when he testified at McIntosh's trial, he nevertheless "appeared for cross-examination," and thus the introduction into evidence of his testimonial hearsay statements to police investigators did not deprive McIntosh of his constitutional right to confront the witnesses against him. Nor were McIntosh's rights violated when the police searched his motel room pursuant to a validly obtained warrant. Neither the jury instruction defining "deadly weapon," nor the admission of oral proof of McIntosh's discharge date from a prior sentence amounted to palpable error. Finally, although the trial court abused its discretion by admitting insufficiently probative evidence of McIntosh's alleged drug purchases, the error, in light of the overwhelming evidence of McIntosh's guilt, was clearly harmless. Accordingly, we affirm the May 31, 2006 Judgment of the Warren Circuit Court.

All sitting. Lambert, C.J., Abramson, Cunningham, Minton, Noble, and Scott, J.J., concur. Schroder, J., concurs in result only by separate opinion.

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RENDERED: MAY 22, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000421-MR

CARLTON EVAN MCINTOSH — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
NOS. 05-CR-00347-002 AND 05-CR-00643

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE SCHRODER

CONCURRING IN RESULT ONLY

The dilemma in the present case is that Banks was forced to testify after attempting to invoke the Fifth Amendment. In United States v. Owens, 484 U.S. 554, 561, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988), the Court stated that "[o]rdinarily, a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." A witness who has to testify after being denied the Fifth is hardly a willing witness! However, Owens also generally indicates that the Clause is satisfied so long as the witness answers the questions posed to him on cross-examination, albeit evasively or with a faulty memory. Id. at 554. Therefore, I concur in result.

Supreme Court of Kentucky

2006-SC-000421-MR

CARLTON EVAN MCINTOSH — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN GRISE, JUDGE
NOS. 05-CR-00347-002 AND 05-CR-00643

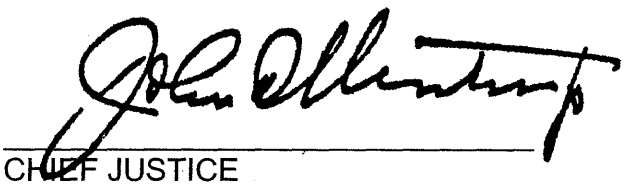
COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION ON THE COURT'S OWN MOTION

The petition for rehearing filed by Appellant, Carlton Evan McIntosh, is DENIED. The Memorandum Opinion of the Court, rendered on May 22, 2008, is MODIFIED on its face by substitution of the attached opinion in lieu of the original opinion. Said modifications do not affect the holding.

All sitting. All concur.

ENTERED: October 23, 2008.



CHIEF JUSTICE