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RENDERED: FEBRUARY 19, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000896-MR

DON EARL SMITH — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
CASE NO. 05-CR-00317

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Don Earl Smith appeals as a matter of right from a November 7, 2006 Judgment of the McCracken Circuit Court convicting him of rape, sodomy, sexual abuse, possession of a controlled substance, and being a persistent felony offender in the second degree. Smith's convictions are based on the sexual assault of his seven-year-old granddaughter, S.S. S.S. testified at trial that Smith had made her watch pornographic movies with him, rub lotion on his "private area," and have sexual intercourse and oral sex with him. After the jury found Smith guilty of all charges and recommended sentences on each charge, Smith was sentenced to life imprisonment. Smith now alleges that the trial court erred by permitting the Commonwealth to engage in flagrant prosecutorial misconduct and by refusing to grant a taint hearing to determine

whether the victim's testimony was the product of suggestion. Having found that neither of Smith's claims of error warrants a new trial, we affirm.

RELEVANT FACTS

In October 2004, S.S., her father E.S., and her younger brother C.S., moved in with Don Smith, E.S.'s father. S.S. was seven years old when she began living with Smith, her grandfather. After staying with Smith for approximately three months, E.S. and his children moved out. The following summer, S.S. traveled to Georgia to visit her mother, K.B., who had recently completed a drug rehabilitation program and had been released from prison. While staying with her mother, S.S. revealed that while she had been living with "Papaw Don," he had done "bad things" to her. S.S. told her mother that Smith had made her watch pornographic movies with him and rub lotion on his genitals, that he touched her private area, that he inserted his penis into her vagina, and that he made her put her mouth on his penis. S.S.'s mother then called E.S., who in turn reported Smith to the McCracken County Police. Upon receiving the report, McCracken Police Detective Rob Estes along with Detective Nathan Young went to Smith's house and escorted him back to the police station for questioning.

Although Smith initially denied any abuse of S.S., he eventually confessed to Detective Estes that S.S. had "jacked him off" once and that it was possible that he had engaged in sexual intercourse with S.S. Smith explained that on one occasion, while S.S. was rubbing lotion on his hand, she touched his penis and before he knew it, he had ejaculated. Also, Smith revealed that he had memories of waking up in his bed and finding S.S. on top of him trying

to have sex with him. Based on these statements, the police obtained a search warrant for Smith's house. The search revealed two pornographic movies as well as drug paraphernalia. The police then arrested Smith.

On August 5, 2005, the McCracken County Grand Jury indicted Smith on two counts of first-degree sexual abuse, first-degree rape, first-degree sodomy, second-degree possession of a controlled substance, possession of drug paraphernalia, and persistent felony offender (PFO 2d). Smith's trial began on August 14, 2006. The Commonwealth presented evidence of Smith's guilt through the testimonies of S.S., S.S.'s mother and father, Detective Estes, and Dr. Deanna St. Germain, the physician who examined S.S. In his defense, Smith called three women with whom he had previously lived. These women testified that they had never witnessed Smith engaged in inappropriate sexual behavior with children and that they were surprised by the allegations against him.

Following the presentation of evidence, the jury found Smith guilty of all charges. On November 7, 2006, the trial court imposed the jury's recommended sentence of life imprisonment on both the rape and sodomy charges, ten years for the two counts of sexual abuse (enhanced by the PFO 2nd charge), and five years for possession of a controlled substance. The trial court determined that Smith's sentences should run consecutively for a total sentence of "two life sentences." This appeal followed.

ANALYSIS

I. Although the Prosecutor Acted Improperly During Smith's Trial, Smith Did Not Suffer Manifest Injustice Warranting a New Trial.

Smith alleges several instances of prosecutorial misconduct, claiming that the prosecutor made misstatements during his voir dire of the jury members; his guilt phase opening statement and closing argument; his direct examination of S.S.'s father, S.S.'s mother, S.S., and Detective Estes; and his penalty phase opening statement and closing argument. This Court has held that "[a]ny consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996), *overruled on other grounds by* Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008). After first determining that a prosecutor did engage in misconduct, this Court will reverse a defendant's convictions and grant him a new trial

> only if the [prosecutor's] misconduct is 'flagrant' *or* if each of the following three conditions is satisfied:
> (1) Proof of defendant's guilt is not overwhelming;
> (2) Defense counsel objected; and
> (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

Matheney v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006) (citing United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994). Although Smith contends that the prosecutor acted improperly on many occasions throughout his trial, he only objected to the alleged misconduct twice—once after the prosecutor's opening statement and once during his closing argument. After having reviewed the record, we find that the prosecutor did not act improperly in either instance.

During the Commonwealth's opening statement, the prosecutor stated that he knew it was his responsibility to try Smith for these crimes and he intended "not to drop the ball;" that Smith's confession to the police was "the most disturbing thing" he had ever read in his time practicing law; that of all the cases he has tried as a prosecutor, this case kept him up at night; that the forensic interviewer who met with S.S. had been trained to talk to children and not to lead them; that Smith's explanation that he woke up to find S.S. on top of him trying to have sex did not make sense; that what the doctor will say in her testimony is consistent with S.S.'s story; and that if the evidence showed Smith committed the crimes, the jury should find him guilty because "that is your job." At the close of the Commonwealth's opening, Smith objected to the "whole opening statement," arguing that the prosecutor had argued the case before any evidence had been presented and had improperly told the jury that it was their job to return a guilty verdict. Following his objection, however, Smith's counsel neither requested an admonishment from the trial judge nor moved for a mistrial. The trial court overruled Smith's objection.

Counsel is allowed "wide latitude" in opening statements, "may draw reasonable inferences from the evidence," and may outline "why the evidence supports their particular theory of the case." Wheeler v. Commonwealth, 121 S.W.3d 173, 180-81 (Ky. 2003). Here, the prosecutor's comments regarding the forensic interviewer and the examining doctor simply outlined how the evidence would support the Commonwealth's theory of the case and did not constitute improper conduct. In addition, although it would be

improper for a prosecutor simply to tell a jury that it was their job to return a guilty verdict, in this case, the prosecutor's comment taken in its context was permissible. Near the end of his opening statement, the prosecutor stated

> If the evidence shows this man committed those crimes, a lot of attorneys get up there and say I really hope you find him guilty. I don't hope you do anything. You better. That is your job.

As read in context, the prosecutor merely stated that if the evidence proves Smith committed the crimes charged, the jury should find him guilty. Although certainly awkwardly worded, this statement simply informs the jury of their responsibility and does not amount to prosecutorial misconduct.

Furthermore, the prosecutor's opening comments that he did not intend to "drop the ball" and that Smith's theory of the case did not make sense were also proper. In stating that he did not intend to "drop the ball," the prosecutor was telling the jury that he knew he had the burden of proving Smith committed the crimes charged and he intended to meet it. In stating that Smith's explanation did not make sense, the prosecutor was appropriately commenting "on evidence" and "as to the falsity of a defense position." Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). Thus, the prosecutor did not engage in any improper conduct during his opening statement.

Smith's second objection came during the prosecutor's closing argument. During his closing, the prosecutor commented that Smith's

explanation for how S.S. had "jacked him off" was a lie. The prosecutor stated

> I'm telling you that if there were such a thing as a b.s. flag, I'm tossing it. It doesn't work that way. It has never worked that way. And that too is a lie. And you know how I know that is a lie?

At this point, Smith's counsel objected, arguing that the prosecutor was injecting his own personal opinion into the case. The trial judge ordered the prosecutor to rephrase his statement, which he agreed to do. Smith did not request any additional relief, and the prosecutor continued with his argument. This Court has previously held that "failure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted." West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989). Because Smith did not request any specific admonition or mistrial and appeared to be satisfied with the prosecutor's agreement to rephrase his statement, this claim of error is not properly preserved for appellate review. Id.

However, because Smith has requested that any unpreserved allegation of prosecutorial misconduct be reviewed for palpable error, we also note that the prosecutor did not act improperly in making this statement. During a closing argument, "[a] prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter, 744 S.W.2d at 412. Here, the prosecutor argued to the jury that Smith's explanation did not make sense and that it was a lie. Based on previous cases where this Court rejected a claim of misconduct, the prosecutor in Smith's case did not act improperly simply by arguing to the jury that Smith's theory for

how S.S. "jacked him off" was false. *See* Stopher v. Commonwealth, 57 S.W.3d 787, 806 (Ky. 2001) (where the prosecutor classified the defense theory as "stupid"); Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky. 1997) (where the prosecutor labeled defense witnesses' testimony as a "story"); Slaughter, 744 S.W.2d at 412 (where the prosecutor criticized defense counsel for "pulling a scam").

Smith's remaining allegations of prosecutorial misconduct were not objected to during trial and are raised for the first time on appeal. If these allegations are determined to constitute misconduct, we note that the three conditions listed in Matheney, supra, do not apply because Smith did not object to these instances at trial. Thus, in order to be entitled to a reversal, Smith must show that the prosecutor's misconduct was "flagrant." Matheney, 191 S.W.3d at 606. Furthermore, because these claims of error are unpreserved, Smith must also demonstrate that he has suffered manifest injustice pursuant to RCr 10.26 in order to warrant a new trial. Id. at 607 n.4.

Smith claims that on several occasions throughout his trial the prosecutor improperly expressed his own personal opinion about the case and about the credibility of certain witnesses. During the Commonwealth's voir dire, the prosecutor asked the potential jury members if they thought "a child would lie about this and put themselves through all of this and continue [to] lie for a year and a half now?" The prosecutor also told the jury pool that he believed the evidence was so overwhelming against Smith, that no reasonable person would be able to determine that he is innocent.

During the Commonwealth's closing argument, the prosecutor said that although not everyone who goes to prison is evil, this case is different; that to believe Smith in this case, you would have to believe that S.S. is a pathological liar, even though the social workers, police, and prosecutor all believe her; that if a seven-year-old had come to him and said she was having sex, he would have taken her to her parents or the police and would not have used her to gratify his needs like Smith did; that the doctor's testimony was reasonable and she had no reason to lie; and that he took pride in removing people from society who hurt others.

Lastly, during the Commonwealth's penalty phase opening statement, the prosecutor said that he had been paranoid and frightened during the guilt phase, but that as far as he is concerned, the work was done; that it had been hard for him to "look at good people and talk about bad things;" that he hoped that he would never have to prosecute cases like this again, but he would if he had to because he believed it was that important. Furthermore, when the prosecutor explained the parole eligibility guidelines to the jury during the penalty phase, he asked the jury to sentence Smith to two counts of life in prison. He stated, "by my calculation, that makes S.S. twenty-nine years old . . . Quite frankly, I think that is too early. But that is the least I think would be an appropriate sentence."

Although Smith is correct that it is improper for a prosecutor to give his personal opinion about a witness's character, Moore v. Commonwealth, 634 S.W.2d 426, 438 (Ky. 1982), it is appropriate for a prosecutor to comment on the weight of the evidence and demonstrate how it implicates the defendant's

guilt. Woodall v. Commonwealth, 63 S.W.3d 104, 125 (Ky. 2001). Here, during his voir dire of the jury members, the prosecutor simply emphasized his theory that the evidence would overwhelmingly show that Smith was guilty of sexually abusing S.S. This comment did not amount to misconduct. In addition, the unpreserved allegations of misconduct during the prosecutor's closing argument were not improper. In referencing the testimonies of the social worker, the police, the nurse, and the doctor, the Commonwealth referenced the evidence supporting its theory that S.S. was telling the truth and Smith was lying. As noted above, a prosecutor is entitled to comment on "the falsity of a defense position." Slaughter, 744 S.W.2d at 412; Soto v. Commonwealth, 139 S.W.3d 827, 873 (Ky. 2004). Furthermore, the prosecutor's comment revealing how he would have responded to S.S.'s sexual admission highlighted the suspicious way Smith reacted, which was additional evidence probative of his guilt.

Lastly, the prosecutor's comments during the penalty phase were not improper. Although not necessarily relevant to the jury's sentencing recommendation, the prosecutor's statements referencing how difficult this case had been and how he did not want to encounter a similar case were not so erroneous to rise to the level of prosecutorial misconduct. The prosecutor's comment recommending what he thought would be an appropriate sentence was also not improper.

Smith's next allegation of misconduct involves the prosecutor's questions during his direct examination of witnesses. Smith argues that the prosecutor improperly elicited testimony that resulted in witnesses vouching for the

credibility of other witnesses. During S.S.'s father's direct testimony, he stated that he believed his daughter's allegations of sexual abuse because of "what she had told me about the circumcision."[1] During S.S.'s mother's testimony, she stated that E.S. had told her he believed every word of S.S.'s allegations. S.S.'s mother also testified that S.S.'s story of the abuse had always been consistent. During S.S.'s direct testimony, she stated that Smith was lying when he told the police that it was all her idea; that what she had told her mother was the truth; and that she was being honest when she answered all the prosecutor's questions.

Detective Estes testified on direct examination that part of their investigation process involves conducting a forensic interview and then determining if the victim is making a true allegation. Detective Estes also stated that the police corroborated S.S.'s story by asking Smith certain questions and by going to Smith's house; that Smith's statements were similar to what S.S. had told the police; that Smith was lying and not being honest during the police interrogation; that S.S.'s explanation for what happened was more credible than Smith's; and that if someone asked him if he had sex with a seven-year-old, he would adamantly deny it instead of reacting as Smith did.

Smith is correct that it is improper for a witness to vouch for the truthfulness of another witness. *See* Stringer v. Commonwealth, 956 S.W.2d

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[1] E.S. testified that when he first talked to S.S. about her allegations, he had asked her what the difference was between her brother's "pee-pee" and her grandfather's "pee-pee", knowing that Smith had never been circumcised but that S.S.'s younger brother had. E.S. testified that S.S. had told him that Papaw Don's pee-pee had more skin over the end of it.

883, 888 (Ky. 1997). Furthermore, "a witness should not be required to characterize the testimony of another witness . . . as lying." Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997). Here, the prosecutor repeatedly asked different witnesses their opinion on who was telling the truth about S.S.'s allegations of sexual abuse, resulting in testimony that characterized S.S. as being truthful and Smith as lying. This conduct was plainly improper and the prosecutor should not have engaged in this type of direct examination.

Smith's next allegation of prosecutorial misconduct involves the erroneous admission of victim impact testimony during the guilt phase of Smith's trial. During E.S.'s direct testimony, E.S. testified that his daughter needs "closure," but that she will not be able to move past this experience until the trial is over. During S.S.'s mother's testimony, she testified that S.S. is now very touchy, she wants people to notice her, and she thinks she has done something wrong if people don't pay attention to her. In addition, during the Commonwealth's closing argument, the prosecutor stated that S.S. was a trouper to go through the trial and that she would be fine just to spite Smith. In Bennett v. Commonwealth, 978 S.W.2d 322, 325-326 (Ky. 1998), this Court reiterated that victim impact evidence should not be introduced during the guilt phase of a trial, but rather should be reserved for the penalty phase. Here, we agree with Smith that the prosecutor's questions elicited testimony about S.S. that was not relevant during the guilt phase of Smith's trial. Thus, the prosecutor's conduct in this instance was again improper.

Lastly, Smith alleges that the prosecutor improperly ridiculed Smith's counsel during one of the Commonwealth's objections. While Smith's counsel was cross-examining S.S., the prosecutor objected to one of the defense counsel's questions and said, "I know you are not trying to trick her. That was never said. If you show me a document that says that, I will eat it." Although the Commonwealth is granted latitude in presenting its argument and raising objections, the prosecutor must nonetheless "stay within the record and avoid abuse of defendants and their counsel." Whitaker v. Commonwealth, 298 Ky. 442, 183 S.W.2d 18, 18 (1944). Although the misstatement by the prosecutor was relatively minor in this instance, the fact remains that he should not have made such a remark to Smith's counsel and his conduct was improper.

Having found that the prosecutor acted improperly by eliciting testimony resulting in witnesses vouching for the victim's credibility, by admitting victim impact testimony during the guilt phase, and by making an improper comment during an objection, we now must determine if the prosecutor's improper behavior constitutes flagrant misconduct.[2] Four factors are balanced to determine whether a prosecutor's misconduct is flagrant:

> (1) whether the remarks tended to mislead the jury or to prejudice the accused;
> (2) whether they were isolated or extensive;
> (3) whether they were deliberately or accidentally placed before the jury; and
> (4) the strength of the evidence against the accused.

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[2] As noted above, the three-step analysis from Matheney, 191 S.W.3d at 606, does not support Smith's claim because he objected to only two instances of misconduct at trial and the prosecutor did not act improperly in either instance.

Carroll, 26 F.3d at 1385. Regarding the first factor, although the prosecutor's misconduct during Smith's trial may not have misled the jury, it certainly prejudiced Smith. The prosecutor elicited testimony that resulted in several witnesses stating that they believed S.S. was telling the truth in her allegations of sexual abuse. In addition, the witnesses' testimonies about how S.S. was dealing with the difficult circumstances could have resulted in the jury being more sympathetic towards S.S. Secondly, the prosecutor's comments were not isolated---his misstatements occurred throughout his direct examination of several witnesses, during one of his objections, and during his closing argument.

Although there is no evidence that the prosecutor knowingly and deliberately acted improperly during Smith's trial, the fact remains that he intended to elicit testimony from several witnesses that resulted in improper vouching. It is unlikely that the prosecutor would have accidentally asked numerous witnesses to comment on the truth of S.S.'s allegations. This line of questioning appears to have been planned by the Commonwealth, and thus, to have been deliberately placed before the jury. Lastly, although the evidence against Smith may not have been overwhelming, the Commonwealth's case was strong. Smith did not necessarily confess to all the charges during his interview, but he made several statements that implicated his involvement in sexually abusing S.S., such as admitting that S.S. "jacked him off" and that he may have engaged in sexual intercourse with S.S. In addition, the testimonies of S.S., S.S.'s mother and father, as well as Detective Estes were particularly

damaging to Smith's case and strongly probative of his guilt. Finally, while the physician who examined S.S. was not able to say definitively that sexual abuse occurred, the physician testified that she found a scar on S.S.'s anus, evidence that S.S. had suffered a "blunt trauma," and other physical evidence in her vaginal area that was "concerning for abuse."

Overall, three of the four factors used to determine whether the prosecutor's misconduct was flagrant favor Smith's contention. The prosecutor's misstatements were prejudicial towards Smith, the improper comments were not isolated, and the misconduct was certainly intentional, if not deliberate. However, because the evidence against Smith was strong, the fourth factor heavily supports the Commonwealth. Although whether the prosecutor's misconduct during Smith's trial was flagrant or not is a close call, because Smith has failed to show that he suffered manifest injustice, he is not entitled to a new trial.

A defendant may be granted a new trial based on an unpreserved claim of error only if it is shown that there would be a "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). In this case, if the prosecutor had acted properly throughout Smith's trial, there is still not a probability that the jury would have acquitted Smith. During S.S.'s testimony, she confidently revealed that Smith had sexually abused her. S.S. testified that Smith made her watch pornographic movies with him, gave her money to do "bad stuff" with him, and made her put lotion on his "boy part;" that she saw "boy stuff" come out of the end of his "boy part;" and that he put his penis

inside her and she put her mouth on Smith's penis. In addition, the jury heard a tape of Smith's interview with the police, where he admitted that S.S. had "jacked him off" once and stated that it was possible that he had engaged in sexual intercourse with S.S. Because there is no probability that the jury would have reached a different result if the prosecutorial misconduct had not occurred, Smith did not suffer manifest injustice and is not entitled to a new trial. Furthermore, despite Smith's contention, the cumulative effect of the prosecutor's misconduct did not threaten Smith's right to due process.

II. The Trial Court Did Not Err By Denying Smith's Request for a Taint Hearing.

In a pre-trial motion, Smith requested that the trial court hold a "taint hearing" in order to investigate the tactics used to interview the child-victim, S.S. Smith argued that because S.S. had been subjected to so many interviews, her testimony could be the product of suggestion and not reliable. The trial court, however, denied Smith's motion, explaining that according to Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002), taint hearings are unnecessary. The trial court then held a competency hearing and determined that S.S. was competent to testify at trial. Smith argues on appeal that this Court should overrule Pendleton, supra, and require trial courts to hold taint hearings when the defendant presents sufficient evidence that the victim's testimony may be the product of suggestion.

In Pendleton, the defendant moved in a pre-trial motion to disqualify the child-victim's testimony regarding the defendant's sexual abuse of her, arguing that it was the product of the social worker's coercion. Id. at 525. The trial

court denied this motion and determined instead that the victim was competent to testify. Id. On appeal, the defendant alleged that the trial court erred by not holding a hearing to determine whether the victim's testimony was reliable. This Court disagreed and held that because the trial judge had properly found the victim to be competent, because the victim was able to identify her perpetrator and disclose details about the abuse at trial, and because the defendant was able to challenge the victim's credibility on cross-examination, no error occurred. Id. at 526. Similarly, in Smith's case, the trial court first determined that S.S. was competent to testify at trial. After this finding of competency, S.S. testified at trial, naming Smith as her abuser and disclosing the details of the abuse. In addition, Smith was able to explore his belief that S.S.'s testimony was coerced during his cross-examination of S.S. at trial.

This Court finds the reasoning in Pendleton, supra, to be persuasive and sees no need to overrule its holding. As stated in Pendleton, it is within a trial court's discretion to determine whether a witness is competent to testify, and there is no need to require a second hearing to scrutinize the reliability of a witness's testimony once competency has been established. *See* Id. at 525. Thus, the trial court did not err in denying Smith's motion for a taint hearing.

CONCLUSION

Although the prosecutor engaged in several instances of improper conduct during Smith's trial, Smith did not suffer manifest injustice from such misconduct. Even if the prosecutor had acted properly throughout Smith's trial, there is not a probability that the result of Smith's proceeding would have

been different. Therefore, Smith is not entitled to a new trial. Furthermore, this Court declines to overrule Pendleton, supra, and instead, finds that the trial court did not err in refusing to hold a taint hearing to question whether the victim's testimony was the product of suggestion. Having determined that Smith is not entitled to a new trial, the November 7, 2006 Judgment of the McCracken Circuit Court convicting Smith of rape, sodomy, sexual abuse, possession of a controlled substance, and PFO 2d is affirmed.

Minton, C.J.; Abramson, Cunningham, Scott, and Venters, JJ., concur. Schroder, J., dissents by separate opinion in which Noble, J., joins.

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Supreme Court of Kentucky

2006-SC-000896-MR

DON EARL SMITH — APPELLANT

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ON APPEAL FROM MCCRACKEN CIRCUIT COURT
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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE SCHRODER

I believe the prosecutor's misconduct in this case, in particular his questioning of Detective Estes, combined with Detective Estes' improper testimony itself, was so egregious as to rise to the level of palpable error.

As to the taint hearing issue, I believe the reasoning in Pendleton is flawed, as it confuses the concepts of competency and credibility, with reliability. Because taint (suggestibility) calls into question the reliability of evidence, it implicates the gatekeeping function of the trial court.

Noble, J., joins this dissenting opinion.