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RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000199-MR

CURTIS D. PAYNE — APPELLANT

V.

ON APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET CROCKER, JUDGE
NO. 09-CR-00079

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant Curtis D. Payne appeals from a judgment of the Simpson Circuit Court, convicting him of first-degree burglary, third-degree assault, resisting arrest, fourth-degree assault, and first-degree unlawful imprisonment. We conclude that the trial court erred in imposing fines on Payne, who had been deemed to be indigent, and reverse for entry of an amended judgment. In all other respects, we conclude that Payne's assignments of error do not merit reversal, and affirm.

I. BACKGROUND

On July 6, 2009, Payne and his girlfriend Shelly Whittemore were sitting on the back patio of their home, drinking with friends and family in Franklin, Simpson County, Kentucky. Payne testified that he drank sixteen 16-ounce

beers and took several of his prescription Xanax pills over the course of seven hours. At around 9 p.m., Payne and Whittemore had an argument, and Payne threw his beer at Whittemore.

The fight escalated. Payne threw Whittemore to the ground and got on top of her. He then pushed her against a car as she tried to get away. Whittemore testified that Payne grabbed a hold of her arms, trying to pull her into the house. She testified, "I was determined not to go in the house, because I knew he was angry."

Whittemore yelled and called for help. Payne and Whittemore lived next door to Franklin Police Officer Chris Jackson. Officer Jackson was watching television in his home when he heard noise and came outside. Though Officer Jackson was off-duty at the time, Payne acknowledged at trial that he knew Officer Jackson was a police officer.

Officer Jackson separated Payne from Whittemore, and told Whittemore to get her cell phone. When Whittemore returned with her cell phone, Officer Jackson called the police. Officer Jackson told Payne to stay in his yard, and that he would take Whittemore to his house until the police arrived. As Officer Jackson and Whittemore walked toward Officer Jackson's home, Payne approached. He argued with Officer Jackson, slammed him to the ground, and began punching him. At trial, Whittemore described Payne as "wailing on" Officer Jackson, punching him "over and over." Officer Jackson eventually escaped, but Payne grabbed his leg, pulled him to the ground, and continued

hitting him. After Officer Jackson escaped a second time, he and Whittemore ran for his doorway.

Officer Jackson opened his door and began to enter, with Payne in pursuit. Officer Jackson and Whittemore testified that Payne entered the doorway and grabbed Whittemore by her hair, which pulled her to the ground. Officer Jackson attempted to hold on to Whittemore's feet while simultaneously trying to close the door. Officer Jackson testified that, as this was occurring, Payne was hitting him in the head in an attempt to get him to let go of Whittemore. Police found blood spatter on the wall of Officer Jackson's home, three to four feet inside the doorway.

Whittemore testified that she was through the threshold of the house when Payne grabbed her hair. She further testified that she believed Payne would hurt her if he got her back into their house. She was afraid to go back to the house, because she believed he would have "done to me what he did to Officer Jackson." She said that Payne's pulling felt like "my head was going to pop off," or that Payne would break her neck. Police later photographed Whittemore holding hair that had been pulled from her scalp.

While this tug-of-war was occurring, Officer Jackson's wife Sarah, who had been sleeping, was awakened by the noise and came to the front door. Officer Jackson told her to retrieve his weapon, which she did, at which point Payne fled to his house.

Officer Justin Toth, Officer Michael Jones, and others responded. Officers Toth and Jones entered Payne's house, where he was "in a very

combative stance" with his fists clenched, according to Officer Toth. Officer Jones kicked Payne in the stomach, knocking him onto a nearby couch. Payne stood back up, ignoring orders to stay down. Officer Toth deployed his taser into Payne's chest. Police ultimately tased Payne multiple times before he could be placed in a police cruiser. Officer Dale Adams transported Payne to the Simpson County Detention Center. After police determined that Payne needed medical attention, he was transported to Greenview Hospital in Bowling Green.

Payne was indicted for first-degree burglary, third-degree assault (Officer Jackson), first-degree unlawful imprisonment (Shelly Whittemore), fourth-degree assault (Shelly Whittemore), and resisting arrest. At trial, Payne admitted to all charges except for first-degree burglary. Payne strongly denied ever crossing the threshold and entering Officer Jackson's home.

Following a jury trial, Payne was found guilty of all charges. For Payne's felony convictions, the jury recommended, and the trial court imposed, sentences of 20 years' imprisonment (first-degree burglary), 5 years' imprisonment (third-degree assault), and 5 years' imprisonment (first-degree unlawful imprisonment) to run consecutively for a total sentence of 30 years' imprisonment. For Payne's misdemeanor convictions, the jury recommended, and the trial court imposed, a 2-month jail term and a $500 fine (resisting arrest) and a 7-month jail term and a $500 fine (fourth-degree assault). The trial court ordered that the misdemeanor jail terms run concurrently with Payne's felony prison terms, and that Payne pay a total of $1,000 in fines.

Payne's 30-year sentence entitles him to appeal to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. DENIAL OF DIRECTED VERDICT FOR FIRST-DEGREE BURGLARY

Payne argues that the trial court erred in not granting a directed verdict on the charge of first-degree burglary. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). In ruling on a motion for a directed verdict, the trial court must assume that the evidence for the Commonwealth is true. *Id.*

Officer Jackson, Sarah Jackson, and Shelly Whittemore all testified that Payne crossed the threshold of Officer Jackson's house. Whittemore testified that she had crossed the threshold when Payne grabbed her hair. Similarly, Officer Jackson testified that Payne's upper body leaned across the threshold when he grabbed Whittemore's hair. Officer Jackson also testified that Payne punched him repeatedly in the head in an attempt to get him to let go of Whittemore. Officer Jackson testified that this occurred inside his home; this testimony is supported by the blood spatter on the wall, three to four feet past the doorway.

As it pertains to this case, a person is guilty of first-degree burglary "when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and . . . while in the building . . . [c]auses physical

injury to any person who is not a participant in the crime . . . ." KRS 511.020(1)(b). Payne argues there was insufficient evidence that he entered Officer Jackson's home. We disagree. A slight entry, including a slight crossing of the threshold, constitutes entry for purposes of the burglary statute. *Paulley v. Commonwealth*, 323 S.W.3d 715, 724 (Ky. 2010) ("[W]e reaffirm that even a slight entry is sufficient to support a charge of burglary, assuming, of course, the evidence supports all the other requisite elements of a burglary offense . . . .").[1] There was ample evidence that Payne crossed the threshold of Officer Jackson's house.

Payne also argues that there was insufficient evidence that he caused physical injury to Officer Jackson inside the house. Again, we disagree. Officer Jackson testified that Payne hit him while he (Officer Jackson) was inside his house. There was also blood spatter inside Officer Jackson's home. There was no evidence that the blood came from anyone other than Officer Jackson. There was sufficient evidence that Payne caused physical injury to Officer Jackson while inside Officer Jackson's home. Under the evidence presented, it was not clearly unreasonable for a jury to find Payne guilty of

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[1] Payne urges us to reconsider *Paulley* based on that case's dissenting opinion. What Payne fails to recognize is that the dissent in that case was based on a differing view of the evidence, and not on a disagreement over the law. *See Paulley*, 323 S.W.3d at 731 (Venters, J., concurring in part and dissenting in part) ("I have no quarrel with our longstanding and well-settled rule of law that the element of entry contained in our burglary statutes is satisfied by proof of a slight entry into a building by a perpetrator's head, hand, foot, or other body part, or the extension of same by an instrument with which he or she intends to commit a crime. But conviction still requires proof beyond reasonable doubt of **some** entry, however slight. . . . Here, there is no evidence of entry. There is only an inference of slight entry.") (emphasis in original). By contrast, in this case, there was a great deal of evidence that Payne's body crossed the threshold of Officer Jackson's home.

first-degree burglary. The trial court did not err in denying Payne's motion for a directed verdict.

III. EVIDENTIARY ISSUES

Payne argues that the trial court erred in admitting a video recording of his arrest, which was recorded by Officer Dale Adams' police cruiser camera. The entire video was played for the jury at trial. Officer Adams did not participate in the initial confrontation with Payne, nor did Payne's resisting arrest charge stem from any of his conduct toward Officer Adams. However, it was Officer Adams who transported Payne to jail.

The video begins with Officer Adams' siren and emergency lights activated as he drives toward Payne's home. After Officer Adams hears on the police scanner that an officer is down, he increases his speed. After several minutes, Officer Adams arrives and can be seen entering the house. A few minutes later, Payne is led to Officer Adams' cruiser. Payne can be heard arguing with officers as they tell him to get into the car. The sound of Payne being hit with a taser is clearly audible.

Payne can be heard in the back of the police cruiser as he is taken to jail. At several points, Payne laughs maniacally. He is verbally abusive toward Officer Adams, calling him, among other things, a "fucking dummy," a "fucking rookie," and a "punk ass bitch." He repeatedly demands to be taken to the hospital. Officer Adams can be heard on his phone, discussing with someone whether to take Payne to the hospital. Payne continues to yell while Officer

Adams is on the phone. The video ends when the cruiser arrives at the jail, and Officer Adams turns off his vehicle.

Payne objected to the admission of the cruiser video as being cumulative, irrelevant, inflammatory, and prejudicial beyond its probative value. The Commonwealth argued that, because Payne was charged with intentional crimes, the video was probative of Payne's state of mind at the time the crimes were committed.

Relevant evidence is generally admissible. KRE 402. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Relevant evidence may, however, be excluded "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. Appellate courts review evidentiary rulings by the trial court for an abuse of discretion, i.e., "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The video recording in this case was not probative of Payne's mental state at the time he committed any crime with which he was charged. Police testified that they had hit Payne with a taser multiple times when he resisted arrest. Therefore, before the video recording even begins, Payne's mental state had been altered by the repeated use of a taser. It is impossible to know

whether Payne's clearly angry and agitated state was a result of his confrontation with police, or whether it had existed prior to their arrival.

Even if the video accurately reflects Payne's mental state at the time of his crimes, the probative value is very slight compared to the prejudicial effect of the jury watching Payne scream and curse at arresting officers. In addition, Payne was not charged with resisting arrest for any of the conduct seen on the video. The probative value of this evidence is slight compared to its prejudicial effect. The trial court abused its discretion in admitting the video recording.

Under the facts of this case, however, the error was harmless. Payne admitted to the Commonwealth's version of events, except that he denied entering Officer Jackson's house (and therefore denied being guilty of first-degree burglary). However, as previously discussed, there was ample evidence that Payne entered Officer Jackson's home and caused physical injury to Officer Jackson inside the home. Given the strong evidence that Payne was guilty of first-degree burglary, and given that Payne admitted to committing the other crimes with which he was charged, we "can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). Therefore, the error was harmless.

Payne also objects to a portion of the testimony of Franklin Police Chief Anthony Holder. For the most part, Chief Holder testified about his activities the night of the incident, including when he accompanied Payne to Greenview Hospital. In the course of being questioned about Payne's reaction to the

incident and Payne's mental state, Chief Holder stated that Payne seemed to not be taking what had happened seriously. The prosecutor asked Chief Holder whether this was the result of Payne seeming disoriented or confused. Chief Holder responded:

> It seemed, it seemed like it was more because that was his neighbor or something, more than, I don't know. I mean, my entire working life has been in law enforcement, and when you put the badge on, that's a line that no one can cross. So to strike someone that's wearing that badge, I don't know it just, it just affects me. Because I've seen some of my friends that have been, well several of my friends have been shot, some have died, and, and, when you can cross that line to actually assault a police officer in any shape, form, or fashion, it just, it just does something to you if you wear the badge yourself.

Chief Holder went on to say, in response to a question from a prosecutor, that he had been shot six times.

Defense counsel did not object to Chief Holder's testimony, and Payne now requests that we review the testimony for palpable error pursuant to RCr 10.26 (relief may be granted from a palpable error that affects the substantial rights of a party where manifest injustice has resulted). *See also Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009) (palpable error is an error that is "more likely than ordinary error to have affected the judgment," and one that is "shocking or jurisprudentially intolerable") (citations omitted).

We agree that this portion of Chief Holder's testimony was irrelevant, and should have been excluded had defense counsel objected. However, we cannot say that this testimony rises to the level of palpable error. Chief Holder's improper statements were very brief. The vast majority of his testimony

focused on his activities the night of the incident, and on Payne's mental state and lack of obvious intoxication. Furthermore, as previously discussed, the evidence against Payne was strong. Given the overwhelming evidence of Payne's guilt, we do not believe that Chief Holder's brief, improper testimony resulted in manifest injustice. No palpable error occurred as a result of Chief Holder's testimony.

IV. TESTIMONY OF LT. DETECTIVE ARTHUR MCFADDEN

Payne raises two arguments related to the testimony of Lt. Detective Arthur McFadden. Lt. McFadden investigated the crime scene following the incident, and testified as part of the Commonwealth's case-in-chief.

A. Opinion Testimony

Lt. McFadden testified that he took photographs of the inside of Officer Jackson's house, including photos of two blood spatters against a wall. Lt. McFadden opined that this was Officer Jackson's blood, which he determined based on the blood spatters being so deep into the room, and based on the fact that Officer Jackson was farther into the room than Payne. He testified that the blood spatters were near the front door stop, and that this was approximately 42 inches inside the house. He also testified that the spatters were approximately 2 ½ feet from the ground.

Lt. McFadden then explained that he tried to simulate the act of hitting Officer Jackson near the location of the blood spatter. He noted his weight, which at the time of the experiment was approximately ten pounds less than Payne, and his height, which was several inches shorter than Payne. Lt.

McFadden stated, "It was not possible for me to lean in to [sic] the house without gravity taking me in the rest of the way and be able to hit Officer Jackson anywhere where that blood was." He stated that his torso would need to cross the threshold, as well as possibly his foot.

Payne argues that this was expert testimony, and that Lt. McFadden was not qualified as an expert witness. This issue is unpreserved, and Payne requests review for palpable error pursuant to RCr 10.26.

With regard to Lt. McFadden's testimony regarding the blood spatter, we conclude that this was permissible lay opinion testimony. KRE 701 permits opinion testimony from lay witnesses that is (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge. Lt. McFadden's opinions were rationally based on his own perceptions, resulting from his investigation of the crime scene. It was also helpful to the jury in gaining a clear understanding of whether Payne crossed the threshold in the process of punching Officer Jackson. This was the only fact in issue in this case.

And most importantly, Lt. McFadden's testimony was not based on scientific, technical, or other specialized knowledge. He testified only to the existence of blood spatter. He did not offer any opinions as to what conclusions could be drawn from technical aspects of the spatter, such as the angle or pattern. His opinion that the blood belonged to Officer Jackson was

based on Lt. McFadden's perception that Officer Jackson was farther into the house than Payne at the time of the assault.

The testimony constituted permissible lay opinion testimony, and thus it was unnecessary for Lt. McFadden to be qualified as an expert witness. There was no error, and no palpable error. *See Mills v. Commonwealth*, 996 S.W.2d 473, 488-89 (Ky. 1999), *overruled in part on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010) (investigating officer's opinions were rationally based on his perception of the crime scene, and admissible as lay opinion testimony under KRE 701).

However, Lt. McFadden's testimony regarding his reenactment of the assault on Officer Jackson was testimony about an out-of-court experiment. "[O]ur rules of evidence do not address out-of-court experiments specifically, but leave the admissibility of such evidence to the general rules of relevance." *Rankin v. Commonwealth*, 327 S.W.3d 492, 498 (Ky. 2010) (citing Robert C. Lawson, *The Kentucky Evidence Law Handbook*, § 11.15(3) (4th ed. 2003)).

> [E]xperiment evidence is generally admissible if it bears upon a material issue and if the proponent establishes a sufficient similarity between the conditions of the experiment and those of the event in question.
>
> What counts as "sufficient" similarity depends on the purpose for which the evidence is being offered. If the experiment is offered as a simulation of actual events, then there must be a substantial similarity between the experimental conditions and those which are the subject of the litigation.

Id. (citations omitted).

We conclude that the experiment about which Lt. McFadden testified did not bear a substantial similarity to the conditions under which the original assault occurred. The experiment was merely a rough approximation, even though it was offered as a simulation of actual events (i.e., the assault and burglary). Therefore, even if Lt. McFadden had been qualified as an expert witness, the experiment offered was not relevant, and this testimony should have been excluded had there been an objection at trial.

Because there was no objection, we review for palpable error, and conclude that Payne suffered no manifest injustice. Lt. McFadden offered other testimony to support his conclusion that Payne crossed the threshold and punched Officer Jackson. Most significant was Lt. McFadden's entirely proper testimony about the location of the blood spatter within the home. In addition, Lt. McFadden's testimony was supported by the testimony of Officer Jackson. And Sarah Jackson and Shelly Whittemore both testified that Payne crossed the threshold. Under the circumstances of this case, there was no palpable error.

B. Trial Court's Admonition

After Lt. McFadden testified that it would be difficult to hit Officer Jackson without crossing the threshold into the house, the prosecutor asked him, "And as a practical matter, does it matter to you whether the foot got in or not?" Lt. McFadden responded, "No, sir. Not at all. Breaking the plane is all it takes."

Defense counsel objected, and the court sustained the objection, admonishing the jury that the court would instruct the jury on the law. However, following this admonition, the prosecutor asked to approach the bench. The prosecutor stated that he was concerned that the jury had been left with the impression that Lt. McFadden had misstated the law, when he had in fact stated it accurately. Defense counsel did not respond, and without further defense objection, the trial court clarified its earlier admonition.

The court stated that it would not be instructing the jury on "what actual entry is" in the jury instructions. And therefore, the court was concerned that the jury had been given the impression that Lt. McFadden's testimony was incorrect. The court explained that "under Kentucky law whether it's a head or a foot or some other part of the body, ultimately that does constitute entry for purposes of the crime of burglary." The court stated, "And, again, I don't want there to be any confusion here that somehow that Lt. McFadden has misstated the law to you because he in fact has correctly stated that."

Payne argues that this clarifying admonition was erroneous. Because Payne did not object to the admonition, we review only for palpable error pursuant to RCr 10.26.

The trial court properly sustained Payne's original objection. It is the duty of the trial court to instruct the jury on the law. RCr 9.54(1). It was improper for the Commonwealth to attempt to instruct on the law by means of a witness. We disagree, however, with Payne's contention that whether there was an "entry" is entirely a question for the jury. What *constitutes* an entry is a

question of law. *See Paulley*, 323 S.W.3d at 723. ("The question . . . is whether a slight entry . . . constitutes a sufficient entry. We hold that it does."). Therefore, it would have been proper to instruct the jury on the definition of "entry." But this should have been done in the form of a written instruction. *See* RCr 9.54(1) (jury instructions are to be in writing); *Lawson v. Commonwealth*, 309 Ky. 458, 460, 218 S.W.2d 41, 42 (1949) (trial court should include, "when necessary or proper, definitions of technical terms used").

It was also improper for the court to phrase an instruction on the law in terms of Lt. McFadden being correct in his interpretation of it. This amounted to an indirect comment on Lt. McFadden's credibility. *See Chism v. Lampach*, 352 S.W.2d 191, 194 (Ky. 1961) ("In this jurisdiction comments by a trial judge which may reflect upon the credibility of a witness or tend to indicate the court's view of the quality or weight of the evidence are considered improper. Notice is taken of the high regard which jurors generally have of the judge, hence his remarks have great weight and often result in improper influence."). The jury could have inferred from the court's remarks that, because Lt. McFadden was correct in his assessment of the law, he was also correct in his assessment of the facts. This is improper, because questions of fact are reserved exclusively to the jury for determination. *See Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 24 (Ky. 2008); *Young v. State Farm Mut. Auto. Ins. Co.*, 975 S.W.2d 98, 99 (Ky. 1998).

But we cannot say that this amounted to palpable error. *See* RCr 10.26; *Miller*, 283 S.W.3d at 695. The trial court commented only on Lt. McFadden's

assessment of the law. Had the judge told the jury that Lt. McFadden was correct in his assessment of the *facts*, this Court would be much more likely to conclude that palpable error had occurred. However, as it stands, the judge was essentially instructing the jury on the law, and made the unfortunate mistake of phrasing it in terms of Lt. McFadden's testimony. This was primarily an instruction on the law, and not a comment on Lt. McFadden's overall credibility.

In addition, the primary dispute in this case was over *whether* Payne crossed the threshold, and not by *how much*. Payne testified that he never crossed the threshold, while Whittemore, Officer Jackson, and others testified that he did. Payne never argued that he was not guilty of burglary because only part of his body crossed the threshold; he argued that he was not guilty because *no* part of his body crossed the threshold. Therefore, in this case, we conclude that there was no manifest injustice, and no palpable error resulting from the trial court's admonition.

V. FIRST-DEGREE UNLAWFUL IMPRISONMENT

Payne argues that his conviction of first-degree unlawful imprisonment was error. First, Payne argues that this conviction should have been barred by KRS 509.050, the kidnapping exemption statute.[2] We conclude that this issue

[2] "A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. . . ." KRS 509.050.

was not preserved. Defense counsel made a specific motion for a directed verdict on the charge of first-degree burglary, but stated that he would leave it to the court's discretion on the other charges. Defense counsel never specifically raised the issue of the kidnapping exemption statute.[3]

"The kidnapping exemption statute is to be strictly construed and the burden is upon a defendant to show that it should apply." *Murphy v. Commonwealth*, 50 S.W.3d 173, 180 (Ky. 2001) (citing *Timmons v. Commonwealth*, 555 S.W.2d 234 (Ky. 1977)). Here, Payne failed to raise the issue at trial, and thus did not meet the burden of showing that the exemption should be applied. Under the circumstances of this case, there was no palpable error.

Payne also argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree unlawful imprisonment. For purposes of ruling on a directed verdict motion, a court must assume the evidence for the Commonwealth is true. *Benham*, 816 S.W.2d at 187. And this Court will reverse only if it was clearly unreasonable for the jury to find guilt on the charge. *Id.*

"A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which

[3] Payne cites the unpublished case of *Nuckols v. Commonwealth*, No. 2004-SC-000886-MR, 2006 WL 1650970 (Ky. June 15, 2006), for the proposition that a motion for a directed verdict is sufficient to preserve the argument that a charge should not have been prosecuted pursuant to the kidnapping exemption statute. In that case, however, the appellant specifically objected to the kidnapping charge, repeatedly alluded to the kidnapping exemption statute, and had not been given proper notice by the Commonwealth of an amendment to the indictment. *Id.* at *3. Thus, *Nuckols* is inapposite.

expose that person to a risk of serious physical injury." KRS 509.020(1). "The gravamen of unlawful imprisonment in the first degree is not unlawful restraint with intent to expose the victim to the risk of serious physical injury. Instead, the gravamen is an unlawful restraint under circumstances which actually expose the victim to a risk of serious physical injury." *McClellan v. Commonwealth*, 715 S.W.2d 464, 470 (Ky. 1986).

Several incidents support the element of unlawful restraint. Whittemore testified that, immediately after Payne threw his beer can at her, he threw her to the ground and "got on top of [her]." Whittemore testified that Payne held onto her arms at several different times throughout the confrontation. She testified that he had a hold of her wrists, and had her between two vehicles. Officer Jackson testified that Payne had Whittemore "slung up against" a car. In addition, Payne restrained Whittemore when he grabbed her by the hair, preventing her from entering Officer Jackson's home.

With regard to exposing Whittemore to a risk of serious physical injury, Payne grabbed Whittemore by the hair, pulling her so hard that he ripped hair from her scalp. Whittemore testified that it felt as though Payne was going to break her neck, or that her head was going to pop off. In addition, Payne had just "wailed on" Officer Jackson, hitting him at least 20-30 times, according to Whittemore's testimony. A reasonable juror could infer that Whittemore was at risk of a similar injury, had Payne had the opportunity. It was not clearly unreasonable for a jury to find Payne guilty of first-degree unlawful imprisonment. *Benham*, 816 S.W.2d at 187. Therefore, there was no error.

VI. ALLEGED PROSECUTORIAL MISCONDUCT

Payne alleges two instances of prosecutorial misconduct. Both are unpreserved by objection at trial. "Where there was no objection, we will reverse [for prosecutorial misconduct] only where the misconduct was flagrant and was such as to render the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010) (citing *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002); *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996)). In determining whether a prosecutor's misconduct was "flagrant," we consider "(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." *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010) (quoting *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994)).

Payne testified in his own defense, and stated that he retreated as soon as Officer Jackson asked his wife to get his gun. By contrast, Officer Jackson, Whittemore, and Sarah Jackson all testified that Payne did not leave until after Officer Jackson had his gun. During the Commonwealth's cross-examination of Payne, the prosecutor asked him whether the testimony of the three witnesses was "just wrong."

This Court has held that "[a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an

unflattering light as to potentially undermine his entire testimony." *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). In *Duncan v. Commonwealth*, another case where there was no objection at trial, the prosecutor had asked the defendant whether various witnesses were "wrong" in their testimony. 322 S.W.3d at 87. This Court recognized that some courts have distinguished between a witness being asked whether another witness is "lying" or "wrong." *Id.* at 88. We did not need to decide the question to resolve that case, but instead concluded that there was no flagrant prosecutorial misconduct which rendered the defendant's trial fundamentally unfair. *Id.*

Even if the prosecutor's question was improper, we conclude that there was no flagrant prosecutorial misconduct. The prosecutor did not ask Payne to characterize the witnesses as "lying," and thus the prejudice was minimal as compared to *Moss*. The comments were isolated, though deliberately placed before the jury. And finally, as previously discussed, the evidence against Payne was very strong. There was no flagrant prosecutorial misconduct, and Payne received a fundamentally fair trial.

Payne also argues that the prosecutor expressed an impermissible personal opinion. Payne testified that Officer Jackson called him either a "piece of shit" or a "no good piece of shit." The prosecutor attacked Payne's credibility by asking him why he had never mentioned this before. In his closing argument, the prosecutor said:

> I heard that his testimony was that Officer Jackson came over to the scene and he wanted to calm a domestic violence situation down by calling a 270-

> pound man a no good piece of shit. You know, which highly trained officers who show up with no weapons calm a situation down by provoking a man twice their size? Do I believe that Officer Jackson said that? No, I do not.

We conclude that this comment by the prosecutor was not improper. "This Court has repeatedly held that a prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence." *Graham v. Commonwealth*, 319 S.W.3d 331, 341 (Ky. 2010) (quoting *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005)). "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004) (quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987)). "While the prosecutor has a duty to confine his or her argument to the facts in evidence, the prosecutor is entitled to draw reasonable inferences from the evidence, make reasonable comment upon the evidence and make a reasonable argument in response to matters brought up by the defendant." *Childers v. Commonwealth*, 332 S.W.3d 64, 73 (Ky. 2010) (citations omitted).

The prosecutor's statement was a comment on the falsity of a defense position, and it was a reasonable inference based on the evidence. This was a comment on the evidence, and not a personal opinion as to credibility or a statement based on facts not in evidence. There was no prosecutorial misconduct.

VII. SLEEPING/INATTENTIVE JURORS

The jury impaneled for Payne's trial consisted of 14 jurors, with two to be chosen randomly as alternates and dismissed prior to deliberations. During the afternoon on the first day of the trial, the prosecutor asked to approach the bench, and pointed out to the court that two jurors appeared to be nodding off. The court asked the entire jury to stand up and stretch. Defense counsel had no objections and made no motions. In the morning on the second day of trial, the judge told counsel that she was concerned about the attentiveness of the same two jurors. The court then offered to designate these two jurors as the alternates. Defense counsel did not make any motions or request that the jurors be excused as alternates. Finally, just before alternate jurors were drawn, the prosecutor pointed out to the court that one of the same jurors appeared to fall asleep during closing arguments. Defense counsel opined that the juror was listening, and the court drew alternates at random. One of the two allegedly inattentive jurors was chosen at random, while the other sat on the jury for deliberations.

Payne argues that he was denied the right to a jury trial, because the allegedly inattentive juror was permitted to judge his guilt and recommend a sentence. This issue is clearly unpreserved, and Payne requests review for palpable error under RCr 10.26. The trial court offered a solution to the problem now complained of on appeal, and defense counsel rejected this solution. Payne cannot now claim there was error. Defense counsel was twice given the opportunity to have the jurors excused, and yet refused. This was

clearly a matter of trial strategy on the part of defense counsel, and not palpable error. *See Berry v. Commonwealth*, 782 S.W.2d 625, 627-28 (Ky. 1990), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008) ("The defendant, after rejecting the [trial court's remedial offer], cannot complain about the decision he made."); *Rankin v. Commonwealth*, 265 S.W.3d 227, 235 (Ky. App. 2007) ("Because Rankin agreed with the trial court's approach and did not request any further curative measures, he received all the relief that he requested; thus, there is no error to review.") (citing *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003)).

VIII. IMPOSITION OF FINES

Finally, Payne argues that the trial court erred by imposing $1,000 in fines on him, because he had been deemed indigent. The Commonwealth concedes that this was error, and we agree. *See Simpson v. Commonwealth*, 889 S.W.2d 781, 783-84 (Ky. 1994).[4]

Thus, we reverse the portion of the judgment imposing a total of $1,000 in fines, and remand for entry of an amended judgment. In all other respects, the judgment of the Simpson Circuit Court is hereby affirmed

Minton, C.J.; Abramson, Cunningham, Schroder, and Venters, JJ., concur. Scott, J., concurs in result only by separate opinion. Noble, J., concurs except as to sentencing, and would reverse the sentence and remand

[4] While in *Simpson*, the fines were imposed for felonies, and not for misdemeanors as in this case, both KRS 534.030(4) and KRS 534.040(4) have the same language prohibiting the imposition of fines upon indigent defendants.

for a new penalty phase due to the improper admission of the post-arrest tazering.

SCOTT, J., CONCURRING IN RESULT ONLY: Although I concur in the majority's result, I significantly disagree with two points. First, I believe the videotape of Appellant's conduct, beginning with his arrest for these crimes, was admissible and probative for reasons that it reflected his anger and hostility to the officers contemporaneous with the charged events. Thus, it was highly probative as to his state of mind at the time. Secondly, I believe Lt. Detective McFadden's lay experiment in the entryway was highly probative and sufficiently similar to what actually happened. Thus, I would find no error in these two instances.

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