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RENDERED: DECEMBER 19, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000625-MR

JOHNATHAN D. PARKS — APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 10-CR-00058

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Johnathan Parks of manufacturing methamphetamine, first offense, and being a first-degree Persistent Felony Offender (PFO 1). The jury recommended a sentence of twenty-five years' confinement. The trial court accepted the jury's recommendation and entered judgment accordingly. Parks now appeals his judgment of conviction and sentence as a matter of right.[1]

On appeal, Parks alleges four grounds of error in his conviction:

1) the Commonwealth's failure to give proper notice under Kentucky Rules of Evidence (KRE) 404(c) of improper 404(a)-(b) testimony rendered Parks's trial unfair;

[1] Ky. Const. § 110(2)(b).

2) the trial court erred in failing to grant Parks's motion for directed verdict;

3) Parks's right to due process was violated by the forfeiture of his property without proper notice; and

4) Parks's penalty phase was manifestly unjust as a result of numerous errors.

With the exception of the directed verdict issue, these alleged errors are unpreserved below. We affirm Parks's conviction and sentence because we find no error.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Parks, Thomas Lindsey, and Jason Duke, were heading out of town in Parks's Nissan pickup truck on their way to the local dump. Parks's driver's license was suspended so he asked Lindsey to drive. Duke sat in the passenger seat with Parks in the middle next to Lindsey. Duke was not wearing his seatbelt. Leitchfield Police Department Officer Brandon Brooks spotted Duke's seatbelt infraction and initiated a traffic stop.

Officer Brooks approached the vehicle and asked all three men for their identification. After returning to his cruiser to run their IDs through the computer system, Officer Brooks re-approached the vehicle. As he got closer to the vehicle, Officer Brooks noticed Duke reaching down into the floorboard as if trying to hide something. Officer Brooks questioned Duke about his actions, and Duke responded that he had dropped a pocketknife. In the interest of his own safety, Officer Brooks requested all parties step out of the truck. When

Officer Brooks opened the passenger-side door, he immediately spied a clear, unlabeled twenty-ounce plastic bottle containing a clear liquid, a white granular substance, and a black substance. Officer Brooks believed the bottle to be a one-step meth lab.

No member of the trio claimed ownership of this bottle at the scene. So Officer Brooks detained and searched them. Several plastic baggies and coffee filters with residue were found on Duke. The truck was impounded and taken to the police station along with the group.

After obtaining a search warrant, Parks's truck was searched. Of particular interest to the officers were two black bags—one a garbage bag, the other a "laptop sort of case"—in the bed of the truck. Upon opening the black garbage bag, Officer Brooks detected a strong chemical odor, so he immediately closed the bag and waited for the Kentucky State Police (KSP) to arrive to assist with the disposal. The laptop case produced a list of items commonly associated with the production of methamphetamine, including: coffee filters, a digital scale, a black plastic spoon with residue, a red plastic bottle of drain cleaner, a twenty-ounce soda bottle with clear tubing inserted into the cap and containing a white granular substance, a white funnel with residue, a gallon of Coleman camp fuel, Liquid Lightening drain cleaner, lithium batteries, and a cell phone with potentially incriminating photographs. The residue found on various items tested positive for methamphetamine. A KSP narcotics expert searched the garbage bag and found numerous used one-step meth labs and

identified the bottle originally found in the floorboard of the truck during the traffic stop as a one-step meth lab.

The grand jury indicted all three men on charges of manufacturing methamphetamine. Parks was additionally indicted for being a PFO 1. Duke agreed to an open plea to the manufacturing methamphetamine charge and signed an affidavit averring that neither Lindsey nor Parks had any knowledge of the contents of the black bags when they agreed to give him a ride in Parks's truck. Lindsey agreed to plead guilty to the lesser charge of first-degree possession of a controlled substance. In return, Lindsey was required to enter the drug court program and testify against Parks at trial.

Parks did not enter a plea, opting instead to proceed to a jury trial. At trial, the Commonwealth relied heavily on Lindsey's testimony and Parks relied heavily on Duke's testimony. The testimony of these two witnesses was largely divergent. The jury found Parks guilty of both manufacturing methamphetamine and being a PFO 1. The jury recommended a sentence of twenty-five years' imprisonment. The trial court followed that recommendation, entering judgment accordingly.

II. ANALYSIS.

A. Parks's Right to a Fair Trial was not Violated by the Commonwealth's use of Lindsey's Testimony.

Parks first argues his trial was rendered unfair because the Commonwealth, by introducing evidence of other crimes or bad acts, did not proceed according to the prior-bad-acts notice requirements outlined in

KRE 404(c). The crux of Parks's argument centers around a particular exchange at trial between the Commonwealth and Lindsey in which Lindsey mentioned that Parks had smoked meth with him. Parks admits this alleged error is not properly preserved for review but requests this Court review for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26.

This Court reviews an unpreserved error only if the "error affects the substantial rights of a party" and is, of course, "palpable."[2] The substantial rights of a party are affected only "if it is more likely than ordinary error to have affected the judgment."[3] And an error only becomes "palpable" if it is clear and plain under the current law.[4] But, even if the error *is* palpable, relief will only be afforded "upon a determination that manifest injustice has resulted from the error."[5] Manifest injustice is a high burden. Injustice, to some degree, is inherent in nearly all errors by a trial court; but an error becomes *manifest* when it "so seriously affect[s] the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'"[6]

Here, the testimony Parks calls to our attention is as follows:

Commonwealth: How did you meet him [Parks]?

Lindsey: Um, I showed up at a friend of mine's and um, he was there, and um, I pretty much showed up to obtain some meth, and uh he was there, and

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[2] *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009); *see also* RCr 10.26.

[3] *Jones*, 283 S.W.3d at 668 (citations omitted).

[4] *Id.* (citations omitted).

[5] *Id.*

[6] *Id.* (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

> *he had some and he smoked some with me. And after he smoked—smoked a little bit with me,* he requested that I buy a box of pseudoephedrine for him, and I told him I'll see what I can do. (emphasis added).

Parks argues this testimony is improper under KRE 404(b) and, further, is unduly prejudicial with little to no probative value. The most troubling aspect to Parks is the various inferences that can be drawn from this statement. According to Parks, as a result of Lindsey's testimony, the jury could infer: Parks hung out at a house where drugs were able to be obtained, Parks possessed methamphetamine, Parks used methamphetamine, and Parks was either involved in trafficking or manufacturing methamphetamine because he asked Lindsey to buy a box of pseudoephedrine for him. But Parks attempts to now attack this evidence by arguing the Commonwealth did not provide notice that it was going to admit this allegedly improper bad-acts evidence, disallowed under KRE 404(b). Further, Parks argues the evidence essentially amounts to character assassination, which is prohibited under KRE 404(a).

The Commonwealth argues the testimony is relevant for other purposes under KRE 404(b) and that notice was provided. We agree with the Commonwealth and find sufficient the notice provided Parks.

KRE 404(c) requires the Commonwealth give "reasonabl[e] pretrial notice to the defendant of its intention to offer evidence of other crimes, wrongs, or acts." The "intent of KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to

deal with the reliability and prejudice problems at trial."[7] If the Commonwealth fails to provide such notice, the trial court may exclude the evidence or may excuse the failure to give such notice and remedy any unfair prejudice caused by the failure. Previously, we have held that when a defendant is given actual notice of the Commonwealth's intent to introduce KRE 404(b) evidence in time to challenge adequately its admissibility, there is no prejudice.[8] Here, the Commonwealth allowed Parks to listen to the entirety of Lindsey's statement to police before trial. And Parks was well aware that Lindsey would be testifying against him at trial. We are simply unable to find palpable error.

It bears pointing out that KRE 404(c) simply requires "reasonable pretrial notice" be given to the defendant. Arguably, at the very least, the Commonwealth satisfied this burden in this case by filing a motion with the trial court and allowing Parks to listen to the entirety of Lindsey's statement before trial. Parks alleges the motion was inadequate in its specificity. But Parks's failure to object or otherwise indicate how he was not aware of Lindsey's testimony is telling. The Commonwealth, in providing reasonable notice to the defendant, must only "characterize the prior conduct to a degree that fairly apprises the defendant of its general nature."[9]

While the Commonwealth's filing with the trial court may not have been as specific as Parks would prefer, it cannot be reasonably asserted that Parks

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[7] *Dant v. Commonwealth*, 258 S.W.3d 12, 21-22 (Ky. 2008) (quoting *Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky. 1997)).

[8] *See, e.g., Dant*, 258 S.W.3d at 22; *Bowling*, 942 S.W.2d at 300.

[9] *United States v. Barnes*, 49 F.3d 1144, 1148-49 (6th Cir. 1995) (interpreting KRE 404's federal counterpart).

was not put on notice regarding the admission of Lindsey's testimony. Further, this Court has previously found no palpable error when the defendant is well aware of the testimony the Commonwealth proposes to offer and, yet, does not object despite broad or vague references to evidence.[10]

We remain uncertain whether Lindsey's statement was properly admissible under KRE 404(b); but even if we assume it was error, we cannot say it rises to the level of palpable. Lindsey's statement did not unduly prejudice Parks and result in a substantial probability that the trial result would have been different had the statement been excluded. The trial consisted of a great deal of circumstantial evidence regarding Parks's association with two individuals who plead guilty to methamphetamine offenses. It is difficult to comprehend that Lindsey's statement regarding how he met Parks was the cornerstone to Parks's conviction. Indeed, the evidence Parks complains of is a single sentence or paragraph found in Lindsey's nearly twenty-five minute testimony. In a trial where the use and manufacture of methamphetamine is discussed in great detail, we are unwilling to hold a passing reference to Parks's allegedly smoking methamphetamine sufficient to affect Parks's substantial rights. After "consideration of the whole case[,] this Court does not believe there is a substantial possibility that the result would have been any different."[11] We must affirm the conviction.

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[10] *See Ernst v. Commonwealth*, 160 S.W.3d 744, 760 (Ky. 2005).

[11] *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969), *overruled on other grounds by West v. Commonwealth*, 2011-SC-000629 (Ky. June 20, 2013).

B. Parks was not Entitled to a Directed Verdict.

Next, Parks argues the Commonwealth did not provide sufficient evidence to maintain a conviction. Parks's argument is essentially that the Commonwealth did not adequately prove the particular elements of the offense. We disagree.

When reviewing a ruling on a motion for directed verdict, we turn to the standard outlined in *Commonwealth v. Benham*:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony.[12]

On appellate review, this Court must determine if, given the totality of the circumstances, "it would be clearly unreasonable for a jury to find guilt."[13] A defendant is entitled to a directed verdict of acquittal if, indeed, a finding of guilt by a jury would be clearly unreasonable. To defeat a defendant's motion for directed verdict, the Commonwealth must only produce more than a "mere scintilla" of evidence.[14]

With regard to a conviction for the manufacture of methamphetamine, Kentucky Revised Statutes (KRS) 218A.1432 requires a person knowingly: (1) manufacture methamphetamine; or (2) with intent to manufacture

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[12] 816 S.W.2d 186, 187 (Ky. 1991).

[13] *Id.*

[14] *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1993).

methamphetamine, possesses two or more chemicals or two or more items of equipment for the manufacture of methamphetamine. Parks challenges the Commonwealth's proof that he possessed any of the items in his truck. And, further, Parks argues that even if he did possess them, the Commonwealth has not proved he did so knowingly. Parks also challenges the Commonwealth's proof that he intended to manufacture methamphetamine.

The Commonwealth presented a sufficient amount of evidence, albeit largely circumstantial. The circumstantial nature of the evidence prompts Parks's argument that the jury was forced to draw inference on top of inference. We disagree. Certainly, circumstantial evidence "must do more than point the finger of suspicion."[15] But this does not mean the Commonwealth is required to "rule out every hypothesis except guilt beyond a reasonable doubt."[16] And, of course, a trial court "must assume that the evidence for the Commonwealth is true."[17] As the reviewing court, we are not at "liberty to determine credibility or the weight which should be given to the evidence."[18]

With these principles in mind, we review the evidence presented by the Commonwealth. Pertaining to the chemicals or equipment used to

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[15] *Davis v. Commonwealth*, 795 S.W.2d 942, 945 (Ky. 1990) (quoting *Matthews v. Commonwealth*, 481 S.W.2d 647, 648-49 (Ky. 1972)) (internal quotation marks omitted).

[16] *Ratliff v. Commonwealth*, 194 S.W.3d 258, 267 (Ky. 2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)) (internal quotation marks omitted).

[17] *Benham*, 816 S.W.2d at 187.

[18] *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

manufacture methamphetamine, the Commonwealth produced evidence of the laundry list of items found in Parks's truck, including: Liquid Lightening drain cleaner, coffee filters with methamphetamine residue, several used one-step methamphetamine labs, assorted sizes of lithium batteries, and a funnel with methamphetamine residue. Additionally, Lindsey's testimony makes clear Parks was well aware of the contents of the bags Duke placed in the bed of the truck and was intending to manufacture methamphetamine with Duke. We acknowledge that Duke's testimony is inconsistent—nearly diametric—with Lindsey's. But a directed verdict is not proper simply because two witnesses produce competing stories. Lindsey testified that Parks insisted they help Duke get rid of his methamphetamine labs and manufacture some additional methamphetamine so they could get some, as well. And Lindsey testified he witnessed Parks holding the one-step methamphetamine lab in his hand at one point during the trip to the local dump.

Constructive possession involving vehicles and drugs is not found simply because the defendant owns the truck. Instead, it must be shown that the defendant exercised some dominion or control over the contraband.[19] Here, admittedly, the evidence was slight, but Lindsey's testimony did indicate that Parks had held the one-step meth lab and the one-step meth lab was found in

[19] *See Burnett v. Commonwealth*, 31 S.W.3d 878, 880-81 (Ky. 2000), *overruled on other grounds by Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010).

an area of the truck near where Parks was sitting. This is more than a mere scintilla according to our case law.[20]

The evidence against Parks is sufficient to reach the jury. Parks's arguments that Lindsey's testimony is "incredible" and that he changed his story simply because the Commonwealth offered him a sweetheart deal before trial are more proper for the jury. The safety valve referenced by Parks from *Coney Island Co. v. Brown*[21] is to be "sparingly employed" and is entirely inapplicable to the case at hand. In *Potts v. Commonwealth*,[22] we laid to rest Parks's *Coney Island* attack on Lindsey's testimony. The defendant in *Potts* argued a directed verdict should have been granted in his favor because of the primary witness's lack of credibility. The *Potts* Court disagreed and noted the *Coney Island* rule "does not apply to situations . . . where a witness's perception could have been impaired or circumstances indicate that a witness may have had a motive to fabricate."[23] Going further, the *Potts* Court dismissed a broad application of *Coney Island* pointing out that the rule simply "reaffirmed the factfinder's role in determining questions of credibility but held that a directed verdict would be appropriate when a claim is based on testimony that is so contrary to scientific principles or common experience as to be manifestly without probative value."[24]

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[20] *See id.*

[21] 162 S.W.2d 785 (Ky. 1942).

[22] 172 S.W.3d 345 (Ky. 2005).

[23] *Id.* at 350.

[24] *Id.* at 351.

This case does not present testimony that is impossible, contrary to scientific principles or common experience, or manifestly without probative value. Lindsey's testimony may be improbable, but that is for the jury to decide. Parks had the opportunity to attack Lindsey's credibility at trial. Testimony is not "incredible" or "contrary to scientific principles or common experience" simply because a witness may arguably have a motive to lie or tell the story in a certain way. Accordingly, *Coney Island* does not apply here. We are not faced with a verdict that is "palpably wrong"[25] and in need of correction.

Simply put, the situation presented here is an example of an appropriate denial of a directed verdict motion. While the evidence may not be overwhelming, it is certainly more than a mere scintilla. When presented with two witnesses offering competing versions of events, the jury is the proper arbiter of the facts. We cannot conclude that it is clearly unreasonable for a jury to find Parks guilty in this case.

C. Park's Property Rights were not Violated by the Forfeiture of his Truck. Notice was Sufficient.

Parks next argues that his due process rights were violated because his truck was forfeited without his receiving proper notice or having an opportunity to be heard on the matter. We disagree with Parks's argument on this matter and find notice sufficient under the particular circumstances of this case.

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[25] *Coney Island Co.*, 162 S.W.2d at 787.

Under KRS 218A.410 and 218A.460, property involved in criminal conduct centered on controlled substances may be forfeited to the Commonwealth for disposition. Specifically, KRS 218A.410(h) permits the forfeiture of "vehicles . . . which are used, or intended for use, to transport or in any manner to facilitate the transportation, for the purpose of sale or receipt" of controlled substances and equipment used in the manufacture of such. Presumably acting under this statutory provision, the Commonwealth filed a motion with the trial court on August 9, 2011, for the forfeiture of Parks's Nissan truck.[26] The trial court conducted a hearing on September 6, 2011, and ordered the truck to be forfeited to the Commonwealth. The order was entered by the clerk on September 7, 2011. On October 6, 2011, the clerk received returned mail, which was intended for Parks's trial counsel. Apparently, Parks's counsel of record had a P. O. Box address that was her address of record with the trial court, and that P. O. Box was closed at some point after trial. The trial court was not notified of trial counsel's change of address before the returned mail arrived.

Parks now urges this Court to remand the case for a forfeiture hearing because he was not given proper notice. In crafting this argument, Parks relies almost exclusively on *Harbin v. Commonwealth*.[27] In *Harbin*, a convicted defendant had his property forfeited and notice was sent to trial counsel rather

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[26] Parks takes issue with the wording of the motion and the notable absence of any mention of "forfeiture." Without getting into a linguistic discussion, to the extent this is an argument by Parks, we find it meritless.

[27] 121 S.W.3d 191 (Ky. 2003).

than appellate counsel. At trial, Harbin was represented by privately-retained counsel. But, on appeal, Harbin was represented instead by the Department of Public Advocacy (DPA). The Commonwealth in *Harbin* was aware "of both [Harbin's] incarceration and the DPA's appointment for purposes of appeal"; and, as a result, "it should have noticed the motion to the DPA or [Harbin] himself."[28] *Harbin* clearly stands for the proposition that the Commonwealth must act in a manner reasonably calculated to apprise a party of the pendency of the action, and this may involve notifying the defendant or appellate counsel. But the instant case is distinguishable from *Harbin*.

Here, neither the Court nor the Commonwealth had any basis to "reasonably conclude" that sending notice to Parks's trial counsel would *not* "reasonably apprise" Parks of the pending action. No notice of appeal had been filed; and even though Parks had the right to a matter-of-right appeal to this Court, there was no indication of record that he would exercise that right. Indeed, the Commonwealth did not become aware that the address of Parks's trial counsel had changed until nearly a month *after* the forfeiture hearing. It was completely reasonable for the Commonwealth to assume Parks's trial counsel had not changed her address and was still representing Parks.

Furthermore, Parks's letter to the Court, in August 2011, inquiring about the status of his appeal because he had not heard from his attorney is not a sufficient ground for finding the forfeiture notice insufficient. An attorney's failure to communicate with a client does not necessarily mean that

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[28] *Id.* at 196.

representation has been terminated. And a defendant's concern about the unknown status of his appeal does not put the trial court on notice that something may be awry with his representation or his counsel has abandoned him. It is not the duty of the Commonwealth to track down a defendant's counsel. Rather, it is the duty of defense counsel to keep the Court and Commonwealth apprised of any address changes. We cannot say, for the purpose of notice, a party's reliance on opposing counsel's address of record with the court is insufficient.

D. Parks's Penalty Phase was not Palpably Erroneous.

Finally, Parks alleges a number of errors in the penalty phase of his trial. According to Parks, the cumulative effect of these errors rises to the level of palpable error. Parks admits that each of the errors he alleges is unpreserved; and, as a result, he requests this Court review for palpable error under RCr 10.26. We acknowledge Parks's penalty phase did contain errors, but we do not find them to be palpable.

1. Improper Evidence of Parks's Criminal History was Introduced.

In line with common practice, the Commonwealth introduced Parks's prior convictions through the testimony of a Probation and Parole Officer. Evidence of Parks's prior convictions was necessary to prove Parks was a PFO. But, in the instant case, the Commonwealth stepped outside the bounds of what our precedent has allowed. The Commonwealth introduced evidence of prior dismissed charges, rather than convictions. We have routinely held this

to be error.[29] This case is no different. Certainly, the Commonwealth introduced not only improper, but also prejudicial, evidence. But, for the reasons we set forth below, given the specific facts of this case, we cannot say the error was palpable.

In *Chavies v. Commonwealth*, we found the introduction of a prior indictment to be prejudicial but not palpable error. This case aligns with *Chavies*. We did not find the error in *Chavies* to be palpable in part because Chavies did not receive the maximum penalty for the relevant convictions. As a result, it was more likely the jury reached its verdict based on the multiple prior convictions presented to them rather than the improper evidence pertaining to the dismissed charges. To the contrary, this Court *did* find palpable error in *Blane v. Commonwealth*. The facts of *Blane* materially differ from the circumstances presented here. In *Blane*, the sentence imposed was the maximum allowed by statute. And the Commonwealth's Attorney in *Blane* referenced the improper evidence during closing argument. Parks's circumstances do not present such prejudice. Indeed, here, the Commonwealth's Attorney realized the mistake and attempted to rectify the error by having the witness read the proper convictions. In a moment of candor, the Commonwealth's Attorney even acknowledged that the previous testimony by the witness was improper.

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[29] *See, e.g., Blane v. Commonwealth*, 364 S.W.3d 140, 152-53 (Ky. 2012); *Chavies v. Commonwealth*, 354 S.W.3d 103, 114-16 (Ky. 2011).

Parks did not receive the maximum sentence possible under the charges levied against him. Manufacturing methamphetamine, first offense, is a Class B felony, which allows for a maximum sentence of twenty years' imprisonment. With a PFO conviction, Parks faced a possibility of twenty to fifty years' imprisonment or life imprisonment.[30] The jury recommended a sentence of twenty-five years' imprisonment after the PFO 1 conviction. While Parks did not receive the minimum sentence allowed by statute, he did not receive a sentence that indicates the jury was overly impassioned or swayed as a result of the admission of the mentioned improper evidence. We find no palpable error.

2. *Incorrect "Good Time" Testimony was Admitted but did not Rise to Palpable Error.*

Parks next alleges that the Commonwealth elicited improper good- time testimony and his penalty phase was manifestly unjust as a result. The Commonwealth admits the good-time testimony was incorrect, but obviously disagrees with Parks's assertion that the penalty phase was rendered unfair. We agree with the Commonwealth.

During Parks's penalty phase, the Probation and Parole Officer called by the Commonwealth testified that Parks's good-time credit would lower Parks's minimum parole eligibility date. Of course, this testimony is inaccurate. In *Robinson v. Commonwealth*, we noted that "a prisoner does not actually receive

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[30] KRS 532.080. The statute also allows for life imprisonment without the possibility of parole for twenty-five years. That sentence is only imposed if the conviction involves a sex crime with a minor, which, of course, is not present in this case.

credit for his good time until he reaches the minimum parole eligibility."[31] Additionally, in *Robinson*, we held that "[t]he use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material."[32] But, again, the facts of Parks's case are materially different from our finding of palpable error for incorrect good-time testimony in *Robinson*. Robinson received the maximum sentence allowed for his convictions, and the Commonwealth emphasized the testimony during closing argument. There were no such aggravators present in this case. Parks received a sentence on the low-end of the allowable range, and there is no evidence the Commonwealth emphasized the good-time testimony with the jury.

The good-time testimony in Parks's penalty phase, while inaccurate, did not reach palpable error. Parks's substantial rights were not affected, and there was no manifest injustice present.

3. *No Palpable Error Resulted from Trial Court's Failure to Follow Reneer.*

Finally, with regard to his penalty phase, Parks argues the trial court erred significantly by failing to follow the guidelines expressed in *Reneer v. Commonwealth*.[33] In error, the jury was instructed to first find whether Parks was guilty of being a PFO 1. The jury was not asked to recommend a sentence on the manufacturing of methamphetamine charge *before* reaching a verdict on the PFO charge.

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[31] 181 S.W.3d 30, 38 (Ky. 2008).

[32] *Id.*

[33] 734 S.W.2d 794 (Ky. 1987).

The *Reneer* Court outlined the proper procedure when instructing a jury on a PFO charge. If the accused is also charged as a persistent felony offender, the penalty phase and PFO phase can be combined and the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a PFO.[34] But, in *Owens v. Commonwealth*, we squarely dealt with the issue presented by Parks now. In *Owens*, this Court held:

> While we continue to cite *Reneer* as the required practice for the trial courts to follow for PFO sentencing, we have not yet held that the failure to do so is palpable error. We also note that in *Montgomery* . . . , we stated that a jury's failure to set a penalty for the underlying offense before finding PFO status does not violate the provisions of the PFO statute. Nonetheless we strongly encourage trial courts to follow the *Reneer* procedure, and while the failure to do so here is not palpable error, such may not always be the case.[35]

We see no reason to depart from *Owens* in this case. In our opinion, *Owens* adequately resolves the issue presented by Parks's appeal. Of course, this is not to say that palpable error will never be found in a trial court's failure to follow *Reneer*. We reiterate our strong preference for the procedure outlined in *Reneer*, but the particular facts of this case do not present an example of palpable error.

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[34] *Id.* at 798.

[35] 329 S.W.3d 307, 319-20 (Ky. 2011) (internal citations omitted); *see also Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009).

III. CONCLUSION.

For the reasons set forth above, we affirm Parks's judgment of conviction and sentence.

All sitting. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., concur. Scott, J., concurs in result only.

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