IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: DECEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000634-MR

CYNTHIA MULLINS — APPELLANT

V.

ON APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
NO. 09-CR-00140

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Cynthia Mullins appeals from a Judgment of the Pike Circuit Court convicting her of first-degree assault and imposing a twenty-year sentence. Mullins raises five issues on appeal: (1) the Commonwealth failed in its burden to show a serious physical injury justifying a finding of assault in the first degree; (2) the trial court erred in denying the motion for mistrial based on the improper testimony of a pretrial services officer; (3) the trial court erred in determining Mullins was competent to stand trial; (4) the Commonwealth committed a *Moss* violation when it asked Mullins to comment on the truthfulness of a witness; and (5) the guilty but mentally ill jury instruction was incorrect. We find no error on the first, third, and fifth claims. Regarding the other claims, we find the admission of the pretrial services officer's testimony about certain information obtained from Mullins to be in error and that some of the Commonwealth's questions to Mullins constituted a *Moss*

violation. However, the unpreserved error regarding the pretrial services officer's testimony is not palpable and the Commonwealth's *Moss* violation was not sufficiently egregious as to justify reversal.

RELEVANT FACTS

On April 9, 2009, Lora Hall Damron was shopping at the Pikeville, Kentucky, Wal-Mart with her three-year old daughter in tow. The then eight-months pregnant Damron encountered Cynthia Mullins, a woman whom she had never met before, several times throughout the store. Their first meeting was innocuous enough, as Mullins greeted Damron as if the two were acquaintances. However, Damron became increasingly suspicious of Mullins who appeared to be following her through the store. As Damron was collecting some last minute items from the soda aisle, Mullins approached her from behind. Turning, Damron witnessed Mullins wielding a five-inch steak knife. Mullins stabbed Damron three times in the left thigh before fellow shopper Randy Stiles tackled Mullins to the ground. A bleeding Damron was assisted by Wal-Mart employees who provided her a chair and applied pressure to her wounds. Meanwhile, Mullins was pinned to the floor by Stiles until the police arrived.

Detective Phillip Reed of the Pike County Police Department was the first to arrive at the scene. He observed a large amount of blood on Damron, saturating her pants, as well as blood on the floor. Detective Reed took custody of Mullins and interviewed her at the police station. His interviews with Mullins and witnesses revealed that Mullins selected a steak knife and a

pair of scissors from the aisles of Wal-Mart, later electing to use the knife in the attack. The knife's protective plastic covering was found in Mullins's shopping cart.

Damron was taken by ambulance to Pikeville Medical Center, a local hospital, where she was examined by doctors. The treating physicians at Pikeville Medical Center, concerned with her unborn child's fluctuating heart rate, ordered that Damron be transferred by helicopter to the University of Kentucky Hospital in Lexington, Kentucky. At the University of Kentucky Hospital, Damron was given fifteen sutures to treat three 1 – 2 centimeter stab wounds on her left thigh. She was monitored for twenty-four hours by medical staff and released the following day.

Mullins was indicted by a Pike County grand jury on April 29, 2009. She was charged with one count of first-degree assault and as a second-degree persistent felony offender. After a jury trial at which she raised an insanity defense, Mullins was found guilty but mentally ill of first-degree assault and sentenced to twenty years in prison.[1] She appeals as a matter of right to this Court, Ky. Const. § 110(2)(b).

ANALYSIS

I. The Commonwealth's Proof Supported the Assault in the First Degree Conviction.

Mullins contends there was insufficient proof of a "serious physical injury" to convict her of assault in the first degree and thus the trial court erred

[1] The Commonwealth dismissed the second-degree persistent felony offender charge prior to the penalty phase.

in denying her motion for a directed verdict. In a criminal case, the United States Constitution mandates that the government prove every element of the charged offense beyond a reasonable doubt, and any failure to do so violates the accused's right to Due Process. *In re Winship*, 397 U.S. 358 (1970). *See also* KRS 500.070(1).

This alleged error is unpreserved,[2] and we therefore analyze the claim pursuant to Kentucky Rule of Criminal Procedure ("RCr") 10.26. Under RCr 10.26, a reviewing court may reverse for unpreserved error "if it deems the error to be a palpable one which affected the defendant's substantial rights and resulted in manifest injustice." *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (*citing Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)). We find no palpable error on these facts.

To convict Mullins of assault in the first degree, the Commonwealth had to prove that Mullins intentionally caused serious physical injury to Lora Beth Damron by means of a deadly weapon or a dangerous instrument. KRS 508.010.[3] When determining whether a defendant caused a "serious physical injury," the issue is whether there was proof of an act that did, in fact, cause

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[2] At the close of the Commonwealth's proof, Mullins's counsel moved for a directed verdict without stating specific grounds for the motion. After a brief recess, Mullins renewed the motion on the grounds that the Commonwealth failed to identify Mullins as the perpetrator. The motion was again renewed at the close of Mullins's case based on the Commonwealth's failure to refute evidence that the defendant was mentally ill. Kentucky Rule of Civil Procedure ("CR") 50.01 requires that a directed verdict motion "state the specific grounds therefor" in order to preserve the issue for appellate review. *Pate v. Commonwealth*, 134 S.W.3d 593, 597 (Ky. 2004); *Anderson v. Commonwealth*, 352 S.W.3d 577, 581 n.4 (Ky. 2011). The insufficiency of evidence as to serious physical injury was never raised before the trial court.

[3] The jury was not instructed on the wanton form of first-degree assault.

"serious physical injury." *Anderson v. Commonwealth*, 352 S.W.3d 577 (Ky. 2011). In order to be deemed "serious physical injury," the injury must produce a substantial risk of death, serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ. KRS 500.080(15).[4] The question of whether an act produced a substantial risk of death must be determined on a case-by-case basis, considering the "totality of the evidence" in each case. *Cooper v. Commonwealth*, 569 S.W.2d 668 (Ky. 1978). Not all risks are substantial, and not every "what could have happened" scenario will support a finding of a serious physical injury. *Bell v. Commonwealth*, 122 S.W.3d 490 (Ky. 2003).

The Commonwealth did not call any medical experts to testify about Damron's injuries. Instead, Detective Phillip Reed and Damron gave testimony regarding the attack and its aftermath. According to Damron, she was initially transported to Pikeville Medical Center following the attack, but was then flown

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[4] We need only address the "substantial risk of death" definitional prong within KRS 500.080(15). There is nothing in the record to suggest that Damron has suffered a prolonged loss or impairment of a bodily organ, as Damron did not testify to an inability to walk or any other loss of bodily function. Nor are we convinced that Damron has suffered serious or prolonged disfigurement or prolonged impairment of health. According to her testimony at trial, Damron has scars on her legs that are visible when she wears shorts. While a scar does constitute disfigurement, *Anderson*, 352 S.W.3d at 582, small scars on a victim's legs do not constitute "serious or prolonged" disfigurement under the statute. *But cf., Jones v. Commonwealth*, 737 S.W.2d 466 (Ky. Ct. App. 1987) (assault victim's loss of an eye constituted serious and prolonged disfigurement sufficient to prove serious physical injury). As for prolonged impairment, Damron testified to a "constant bruise" sensation and minor discomfort during exercise. We do not find that this rises to the level of "prolonged impairment." *But cf., Parson v. Commonwealth*, 144 S.W.3d 775 (Ky. 2004) (finding of prolonged impairment of health was supported by evidence of the victim's ongoing neck and back pain, muscle spasms, numbness in right arm, inhibited range of motion, and use of regular medications for pain).

to the University of Kentucky Hospital. While there she received stitches to treat several stab wounds on her thigh and her unborn child was also monitored for twenty-four hours due to an irregular fetal heartbeat. In addition to injuries to her thigh, Damron also received defensive wounds on her palms. Her pants and shirt were covered in blood, and there was blood on her three-year old daughter as well.[5] When Detective Reed arrived on the scene, he observed a large amount of blood covering Damron from her upper thigh to her knee as well as some blood on the floor. When asked by the Commonwealth to compare the amount of blood at the Wal-Mart to that of other assault scenes, Detective Reed characterized it as "more [blood] than normal," and further stated that the amount of blood on the floor indicated the use of a weapon (such as the 5-inch knife) in the attack.

While medical testimony may be preferred, lay testimony may be used to establish the seriousness of physical injury. *Brooks v. Commonwealth*, 114 S.W.3d 818 (Ky. 2003) (*citing Johnson v. Commonwealth*, 926 S.W.2d 463 (Ky. Ct. App. 1996)). The testimony offered by Damron and Detective Reed sufficiently demonstrated a serious physical injury that produced a substantial risk of death, notably the risk posed by Damron's loss of blood. As noted, Detective Reed, a police officer with eight years experience at the time of the incident, testified to a "large" amount of blood on the victim, "more than normal" in reference to other assault crime scenes. *See Brooks*, 114 S.W.3d at

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[5] Three-year old Riley was unharmed in the attack. The blood on Riley presumably belonged to Damron, as no testimony was given regarding injuries to anyone other than Damron.

823-24. (evidence of a large amount of blood pooled in the victim's lap after a stabbing was sufficient to support a finding of serious physical injury producing a substantial risk of death). Detective Reed also observed Wal-Mart employees applying pressure to Damron's wounds, which indicates that lay onlookers deemed her injuries serious enough to require aid.

It is unclear whether records regarding Damron's medical treatment were considered by the jury.[6] In any event, the medical records corroborate Damron's testimony that she was initially taken by ambulance to Pikeville Medical Center, but was ultimately flown to the University of Kentucky Hospital where she received sutures for her stab wounds and she and her unborn child were monitored for twenty-four hours.

As noted by the Court in *Cooper*, 569 S.W.2d at 668, what constitutes a substantial risk of death "turns on the unique circumstances of an individual case." Damron was eight and one-half months pregnant at the time of the attack and her condition must be considered when evaluating the seriousness of her physical injuries. *Cooper,* 596 S.W.2d at 671 (seventy-four year old woman suffering from a chronic pulmonary condition, was found to have suffered serious physical injury due to her existing physical condition during the course of a rape that left only bruises on the victim); *Schrimsher v.*

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[6] In her brief, Mullins claims that Damron's medical records were not seen by the jury. While the Commonwealth stated that he "did not have any desire to put them in front of the jury," the trial event log indicates that the records were "marked and admitted." An earlier exhibit, an Affidavit of Indigency, was also "marked and admitted" but designated as "not to go back to the jury." Because the medical records carried no such designation in the event log, the record is unclear regarding whether the jury saw Damron's medical records. No issue is raised regarding the admission of the medical records.

Commonwealth, 190 S.W.3d 318 (Ky. 2006) (reasonable jury could conclude that two months of healing time was "prolonged" with respect to the young life of a six-month-old victim). The testimony regarding the amount of blood at the scene and Damron's subsequent medical treatment, while not extensive, was sufficient for a reasonable juror to conclude that Mullins inflicted a serious physical injury on Damron, subjecting her to a substantial risk of death. Certainly, we cannot say that there was palpable error—manifest injustice—on these facts.[7]

In support of her argument that there was insufficient proof of serious physical injury, Mullins relies on this Court's recent decision in *Anderson*, 352 S.W.3d at 577. In that case, we found insufficient evidence of serious physical injury where the victim received a single straight-razor cut to his jawbone, was treated with sutures and IV medication in the emergency room and sent home the same day. Notably, there was no evidence of the blood loss that Anderson suffered from the single cut to his face. 352 S.W.3d at 582. Mullins contends that although Damron was a "sympathetic" victim who endured a "dramatic" attack, her injuries were not serious enough to meet any definitional prong of KRS 500.080(15).[8] Mullins offers the holding in *Anderson*, that it is not "what

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[7] We note that the jury was properly given the option of convicting Mullins of second-degree assault, a charge requiring merely physical injury.

[8] Mullins correctly notes in her brief that aside from a brief reference to the proximity of the stab wounds to the victim's stomach during closing arguments, the Commonwealth did not offer proof that Damron's unborn child faced a "substantial risk of death." However, it should be noted that no proof was given to that effect presumably because it was Damron, not her unborn child, whom the Commonwealth sought to prove suffered serious physical injury.

could have happened, but what *did,* in fact, happen," as the determinative inquiry in establishing the seriousness of an injury. 352 S.W.3d at 581. Specifically, Mullins claims that there was insufficient evidence of serious blood loss or devastating wounds to support a finding of a substantial risk of death. She also points to the fact that Damron was conscious following the attack, eventually delivering a healthy baby after a full-term pregnancy, as evidence of a non-life threatening injuries. We have already addressed the blood evidence, finding Detective Reed's testimony particularly compelling, and we have noted the medical care administered, including air transport and 24 hours at UK Medical Center. As for Damron's consciousness immediately following the attack, as well as her subsequent healthy delivery, we find Mullins's argument unavailing. Our past decisions support the contention that the fact that Damron's injuries were not *more* serious than they actually were does not mean there was not a substantial risk of death created by Mullins's aggressive attack. *See Brooks*, 114 S.W.3d at 818 ("The fact that the victim was found before he bled to death does not change the life threatening nature of his injuries."); *Cooper*, 569 S.W.2d at 668 ("Because [the victim] didn't die on that occasion did not nor could it erase the fact of 'substantial risk of death.'")

In sum, there was sufficient evidence for a reasonable jury to conclude that Damron suffered "serious physical injury" in this knife attack, and certainly no manifest injustice in Mullins's conviction for first-degree assault on these facts. Accordingly, her first alleged error merits no relief.

II. Testimony From Pretrial Services Officer Admitted in Violation of RCr 4.08 Was Not Palpable Error.

Mullins claims that the trial court erred in denying her motion for a mistrial based on the improper testimony of Pretrial Services Officer Michael Thacker. Thacker's testimony revealed pretrial investigation information that is deemed confidential by Kentucky Rule of Criminal Procedure ("RCr") 4.08.[9] While we agree that part of his testimony was erroneously admitted, the unpreserved error does not constitute palpable error.

The Commonwealth called Pretrial Services Officer Michael Thacker to testify about his interview with Mullins on May 8, 2009. After Thacker explained the purposes of a pretrial investigation, defense counsel objected to the witness, citing the confidentiality rule regarding the pretrial interview as the basis for the objection. When the trial court asked about the relevance of the testimony, the Commonwealth noted its intent to introduce Mullins's Affidavit of Indigence ("AOI"). Upon further inquiry by the trial court, the Commonwealth stated that the AOI and accompanying testimony were being offered to demonstrate Mullins's lucidity one month after the arrest, evidence to refute her insanity defense. The trial court overruled the objection. The Commonwealth then asked whether Thacker interviewed Mullins, and if she was able to provide the requested information including the information required for the AOI. Thacker confirmed that Mullins was lucid, able to provide

[9] We note that proposed amendments to RCr 4.08 become effective January 1, 2013. However, the language mandating the confidentiality of information obtained during the pretrial services interview remains unchanged.

answers to pretrial questions including those in the AOI, and that she signed the AOI. During his testimony, Thacker revealed that Mullins had two children, aged fourteen years. This was the only personal information about Mullins derived from the interview that Thacker testified to before the jury. At the conclusion of Thacker's testimony, the prosecution continued with its case, calling Detective Phillip Reed to the stand. Notably, while the trial court allowed Thacker's limited testimony, it correctly ruled that the AOI could not go back to the jury with other exhibits during deliberations.

At the conclusion of Detective Reed's testimony, the defense moved for a mistrial based on Thacker's testimony. As a basis for the motion, the defense offered RCr 4.08, which states that the information obtained during the pretrial services interview is deemed confidential and protected from disclosure absent written consent or the application of an exception. The trial court denied the motion for a mistrial.

Mullins now contends that the admission of Thacker's testimony violated RCr 4.08, which states in pertinent part: "Information supplied by a defendant to a representative of the pre-trial services agency during the defendant's initial interview or subsequent contacts, or information obtained by the pre-trial services agency as a result of the interview or subsequent contacts, shall be deemed confidential and shall not be subject to subpoena or to disclosure without the written consent of the defendant." Mullins specifically claims that the trial court erred in denying her motion for a mistrial based on the violation of RCr 4.08.

We must first determine if Mullins's motion for a mistrial, which was not contemporaneous with the objection to Thacker's testimony, was timely made and therefore preserved for appellate review. In her brief, Mullins compares the instant case to *Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008), wherein this Court found that the testimony of a pretrial services officer was admitted improperly, but ultimately determined that the objection to the testimony was untimely. In *Couch*, the defense objected to the improper testimony after the trial court, sitting as the trier of fact in a bench trial, rendered a finding of guilty. 256 S.W.3d at 10. Mullins argues that the delay in *Couch* is distinguishable from the facts of this case, where defense counsel objected to Thacker's improper testimony before it was admitted and later moved for a mistrial. While this is true, Mullins's motion for a mistrial was nevertheless untimely.

RCr 9.22 requires an objecting party to "make known to the court the action which that party desires the court to take." It is well settled that a party seeking a mistrial must timely ask the court to grant him or her such relief. *West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989) (*citing Jenkins v. Commonwealth*, 477 S.W.2d 795 (Ky. Ct. App. 1972)). Here, defense counsel objected to Thacker as a witness, but failed to move for a mistrial until after the conclusion of the objectionable testimony and, the conclusion of the subsequent witness's testimony. In order to afford the trial court an opportunity to correct an error, a party must object and seek relief at the time the error or objectionable behavior occurs. *Hadley v. Commonwealth ex rel.*

Jackson, 105 S.W.3d 427 (Ky. 2003) (*citing* CR 46; KRE 103; and *Jenkins v. Commonwealth*, 477 S.W.2d 795 (Ky. 1972)). Because counsel requested relief in the form of a mistrial well after the objection to the witness was made and overruled,[10] Mullins's motion for a mistrial was untimely.

Having determined the error was unpreserved, we review for palpable error. RCr 10.26; *see also Couch v. Commonwealth*, 256 S.W.3d at 7 (admission of the testimony of a witness violating the criminal procedure rule governing the confidentiality of pre-trial services agency records reviewed for palpable error). An error is palpable when it affects the defendant's substantial rights and results in manifest injustice. *Barker v. Commonwealth*, 341 S.W.3d at 114 (*citing Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)).

First, we note that to the extent Thacker testified about Mullins's lucidity and ability to cooperate with the pretrial interview by providing personal biographical and financial information, there was no error. The rule does not prohibit this. However, the admission of Thacker's testimony about completion of an AOI and information regarding Mullins's children violated RCr 4.08 because the rule plainly states that all information in the AOI, including information supplied by the defendant as well as information obtained by the officer as a result of the interview, "*shall* be deemed confidential." RCr 4.08. (emphasis supplied). The fact that an AOI was completed, in our view, is

[10] The defense should have moved for mistrial upon the trial court's overruling the objection to the witness in order to allow the trial court the opportunity to correct the error as well as preserve the issue for appeal. *See Hadley v. Commonwealth ex rel. Jackson*, 105 S.W.3d 427 (Ky. 2003).

covered by the rule. Thacker's testimony about completion of an AOI and about the number and ages of Mullins's dependents, while certainly limited in nature, violated the letter of RCr 4.08.

Although we find that Thacker's testimony, in part, violated RCr 4.08,[11] we do not find the error to be palpable. To determine whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Barker*, 341 S.W.3d at 112 (*citing Commonwealth v. McIntosh*, 646 S.W.2d 43 (Ky. 1983)). It is clear from the record that the Commonwealth's purpose in offering Thacker's testimony was to demonstrate Mullins's lucidity one month after the crime in order to rebut the defense's claim that she was insane. Mr. Thacker identified the questions she was asked as part of the pretrial interview and for completion of the AOI and confirmed that Mullins provided answers to each and signed the AOI form. Although the fact of the AOI and its completion were improperly admitted, the AOI was never shown to the jury and, with the exception of the number and the ages of her children, Mullins's responses were never revealed to the jury.[12]

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[11] In her brief, Mullins's refers to the Commonwealth's use of *Burns v. Level*, 957 S.W.2d 218 (Ky. 1998) for the definition of "palpable" as "easily perceptible, plain, obvious and readily noticeable." That case, however, addresses a trial court's reliance on a statute that was invalidated as unconstitutional two years after the conclusion of the trial. *Burns*, 957 S.W.2d at 222. While we agree that the violation of RCr 4.08 was "plain," the palpable error analysis does not end with the determination that an error was "easily perceptible." *See Couch*, 256 S.W.3d at 7.

[12] During defense counsel's opening statement, the fact that Mullins has two children was revealed to the jury. Also, the defense developed proof as to Mullins's mental status and hospitalizations that would have easily been viewed by the jury as precluding steady, gainful employment.

While RCr 4.08 was violated, given the limited nature of the objectionable testimony, it is inconceivable that absent Thacker's challenged testimony Mullins would have received a different result at trial. In short, there was no palpable error as to the mistrial motion.[13]

III. The Trial Court Did Not Err in Determining Mullins Competent to Stand Trial.

Mullins claims that the trial court erred in determining that she was competent to stand trial. A defendant is incompetent to stand trial if, as a result of mental condition she lacks capacity to appreciate the nature and consequences of the proceedings against her or to participate rationally in her own defense. KRS 504.060(4). Moreover, a defendant who is deemed incompetent may not stand trial as a matter of due process under the United States Constitution. *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 421 (Ky. 2011) (*citing Drope v. Missouri*, 420 U.S. 162 (1975)). A trial court's determination of competency must be based on the preponderance of the evidence. *Chapman v. Commonwealth*, 265 S.W.3d 156, 174 (Ky. 2007). We review a trial court's competency determination for clear error, and will reverse only when that finding is not supported by substantial evidence. *Jackson v.*

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[13] To the extent Mullins has asked for review of the denial of the objection lodged before Thacker testified, it is a preserved error. However, admission of the evidence that an AOI was completed and that Mullins had two fourteen-year-old children was harmless error. *Winstead v. Commonwealth*, 283 S.W.3d 678-89 (Ky. 2009) (error is harmless when "reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.") Evidence that Mullins completed an affidavit regarding indigency and had two children (which her own counsel mentioned in opening statement) had no substantial influence on the outcome of her trial.

Commonwealth, 319 S.W.3d 347, 349 (Ky. 2010) (*citing Chapman v. Commonwealth*, 265 S.W.3d 156, 174 (Ky. 2007)).

Mullins was initially determined to be competent to stand trial after a competency hearing on August 3, 2008. During a pretrial hearing which took place on November 12, 2009, counsel for Mullins asked the court to order a second competency evaluation, admitting that Mullins was uncooperative during her first evaluation at the Kentucky Correctional Psychiatric Center ("KCPC"). The court so ordered, and Mullins returned to KCPC. A second competency hearing took place on April 6, 2010, where Dr. Stephen Free, a forensic psychologist from KCPC, and Dr. Eric Drogan, a psychologist retained by the defense, testified. Based on three separate reports, Dr. Free testified that Mullins was able to understand the nature of the proceedings against her and was able to assist in her own defense, and was therefore competent to stand trial. Defense expert Dr. Drogan testified that having evaluated Mullins, he was unable to offer an expert opinion of her trial competency. In an April 20, 2010 Order, the trial court again found Mullins competent to stand trial, noting that there had been no change in Mullins's condition that would alter the court's initial finding of competence. Mullins now maintains that the trial court's determination that she was competent to stand trial was not supported by substantial evidence, and was therefore clearly erroneous. We disagree.

There is substantial evidence in the record supporting the trial court's competency determination. Mullins was a patient at KCPC for a total of fifty-two days over the course of two years. She was admitted to the facility on three

different occasions, and was evaluated by Dr. Free during each stay. These evaluations culminated in three reports detailing Mullins's mental and behavioral condition. Dr. Free employed a variety of instrument testing with Mullins in order to determine if she was suffering from a mental illness. The test results suggested that Mullins was "malingering," *i.e.,* fabricating or exaggerating symptoms of mental illness. Aside from his own tests and observations, Dr. Free relied on staff reports from KCPC nurses, correctional officers, social workers, and psychiatrists in drafting his reports. Notable among these observations were the changes in Mullins's presentation, appearing impaired before psychological evaluators, but behaving normally with correctional officers and fellow patients. Dr. Free concluded that Mullins did not appear to be suffering from brain damage, nor was she mentally retarded or psychotic, and attributed her odd behavior to a personality disorder and long-term substance abuse. It was his expert opinion that Mullins understood the nature of the legal proceedings before her, and was capable of assisting in her defense.

As noted, Mullins was also evaluated by defense expert Dr. Drogan, who testified at her second competency hearing. Like Dr. Free, Dr. Drogan testified that he would at times have to stop the evaluation due to Mullins's lack of cooperation. However, Dr. Drogan was unsure as to whether Mullins could "turn it on and off" as Dr. Free suggested in his testimony. Both psychologists administered the Miller Forensic Assessment of Symptoms test ("M-FAST"), an instrument designed to determine if a patient is malingering. And while Dr.

Drogan reported that Mullins passed the M-FAST during his evaluation, Dr. Free testified that she had failed when he administered the test. Ultimately, Dr. Drogan was unable to form an expert opinion of Mullins's trial competency. Thus, there was no expert testimony that she was incompetent.

Mullins contends that the "bulk" of the testing that Dr. Free testified to was "dated," and therefore an inaccurate measure of Mullins's mental state at the time of the crime. However, Dr. Free did not observe any deterioration in Mullins's condition, testifying that she appeared "to be the same person each time" she was evaluated. While Dr. Free admits that he would have preferred to conduct more intelligence tests, he claimed that an accurate diagnosis of psychosis would have been impossible given the fact that Mullins was uncooperative and malingering.

Arguing that her lack of cooperation with her own counsel supports her incompetence to stand trial, Mullins points this Court to our decision in *Commonwealth v. Wooten*, 269 S.W.3d 857 (Ky. 2008). In *Wooten*, we found that the trial court's determination that a defendant was incompetent, notwithstanding experts' testimony to the contrary, was supported by substantial evidence. 269 S.W.3d. at 865. While it is true that an expert's conclusion regarding competency may be outweighed by other evidence of a defendant's inability to assist in his or her own defense, such is not the case with Mullins. Unlike the lukewarm competency determination of the experts in *Wooten* (testifying that the defendant was only "marginally competent" and "unable to intelligently evaluate" legal options), *id.* at 864, Dr. Free

unequivocally determined that Mullins was capable of assisting in her own defense and understanding her legal situation.

In sum, Mullins failed to offer sufficient evidence of incompetence, and likewise failed to rebut Dr. Free's finding of competency to stand trial. While Dr. Drogan disagreed with some of Dr. Free's conclusions, he was unable to make his own determination regarding Mullins's competency. *See Jackson v. Commonwealth*, 319 S.W.3d 347 (Ky. 2010) (trial court's finding of competency was supported by substantial evidence when the defendant failed to rebut the Commonwealth's expert's testimony). The trial judge had the opportunity to observe Mullins throughout two competency hearings and, having once found her competent to stand trial, was not persuaded to alter this determination at the conclusion of a second competency hearing. *See Mozee v. Commonwealth*, 769 S.W.2d 757 (Ky. 1989) (observations of a defendant during two competency hearings indicated that the defendant was able to cooperate with attorneys). Indeed, there was no sound reason to do so. The trial court's finding of competency was supported by substantial evidence, and will not be disturbed on appeal.

IV. The Commonwealth's *Moss* Violation Does Not Constitute Grounds for Reversal.

Mullins acknowledges that her claim that the Commonwealth committed a *Moss* violation when it cross-examined her is unpreserved, and she requests

palpable error review pursuant to RCr 10.26. While we agree that some of the Commonwealth's questions were improper, we do not find palpable error.[14]

During the cross-examination of Mullins, the Commonwealth began a line of inquiry that ultimately led to two instances in which Mullins was specifically asked if the KCPC psychologist, Dr. Free, was lying during his testimony to the court:

Commonwealth: How do you feel about [Dr. Free] saying that you were faking the results of your tests? Trying to make yourself look worse than you are?

Mullins: He is a doctor of the courtroom. He's going to say whatever he has to say.

Commonwealth: So he was telling the truth about you?

Mullins: Yeah.

After a short break, the Commonwealth's cross-examination resumed, and Mullins was again asked if Dr. Free was lying:

Commonwealth: Did you tell [Dr. Free] you stabbed somebody?

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[14] An unpreserved *Moss* violation is sometimes reviewed not as a trial court error but as a form of alleged prosecutorial misconduct as explained in *Duncan v. Commonwealth,* 322 S.W.3d 81, 87 (Ky. 2010):

> [p]rosecutorial misconduct can assume many forms, including improper questioning and improper closing argument. *Brown v. Commonwealth,* 313 S.W.3d 577 (Ky. 2010); *State v. Singh,* 259 Conn. 693, 793 A.2d 226 (2002). If the misconduct is objected to, we will reverse on that ground if proof of the defendant's guilt was not such as to render the misconduct harmless, and if the trial court failed to cure the misconduct with a sufficient admonition to the jury. Where there was no objection, we will reverse only where the misconduct was flagrant and was such as to render the trial fundamentally unfair. *Barnes v. Commonwealth,* 91 S.W.3d 564 (Ky. 2002); *Partin v. Commonwealth,* 918 S.W.2d 219 (Ky. 1996).

Regardless of the standard, palpable error or prosecutorial misconduct, there is no ground for reversal here.

Mullins: No.

Commonwealth: You didn't tell him that?

Mullins: We didn't talk that.

Commonwealth: So when he wrote that in his report, and testified to it, he was lying?

Mullins: Dr. Free's never a liar. I like Dr. Free.

The defense did not object to the questions. Mullins now contends that these questions constituted a violation of the rule adduced in *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), which recognizes that requiring a witness to characterize another witness's testimony as false or truthful is improper because such questions "places the witness in such an unflattering light as to potentially undermine his entire testimony." *See also Duncan,* 322 S.W.3d at 87. ("Not only do such questions invade the jury's role as sole determiner of credibility and unfairly require the witness to disparage another witness, but they are usually misleading, for . . . mistake rather than either witness's dishonesty could account for disparities in their testimonies.")

Upon review, it is clear that the Commonwealth's purpose for the scrutinized line of inquiry was to emphasize the inconsistencies in Mullins's own testimony. On direct examination, defense counsel asked Mullins why she was at Wal-Mart that day, to which she replied, "Probably to stab someone." Mullins later contended, however, that she physically could not "hold a knife in [her] hand," and that she did not stab anyone. She testified to being "crazy" and "nuts" on direct examination, but when the Commonwealth asked if she was feigning mental illness as suggested by Dr. Free, she was evasive, stating

that Dr. Free was a "doctor of the courtroom," and "he is going to say whatever he has to say." Mullins also denied telling Dr. Free that she stabbed someone, despite the fact that Dr. Free had testified to a conversation at KCPC wherein she admitted to stabbing someone and classified the offense as a "minor charge."

Regardless of the Commonwealth's purpose, the questions requiring Mullins to comment on Dr. Free's truthfulness fit the framework of improper cross-examination inquiry as outlined in *Moss*. Like the objectionable questions in *Moss*, the Commonwealth specifically asked Mullins if she believed that Dr. Free was "lying." *Moss*, 949 S.W.2d at 583. Mullins was placed in the "unflattering light" described in *Moss*, where she either had to admit to malingering or contend that Dr. Free was lying in both his report and his testimony before the court. Strangely, though, Mullins did not really characterize Free's statements as "lies." At most, she was evasive or deemed Dr. Free truthful, which of course gave some credence to the Commonwealth's malingering contention.

Although we find that the questions were improper, we cannot say they constitute palpable error due to manifest injustice, RCr 10.26, nor do they constitute flagrant misconduct that rendered Mullins's trial fundamentally unfair. *Duncan*, 322 S.W.3d at 87. *See also, Newman v. Commonwealth*, 366 S.W.3d 435 (Ky. 2012) (accusation that a witness lied elicited by an improper question was already before the jury and therefore did not constitute palpable error). Mullins's own contradictory testimony included an admission that she

went to Wal-Mart to stab someone and the contrast between her version of herself and the crime versus Dr. Free's professional assessment was otherwise properly before the jury. The cross-examination questions were plainly improper but they had no substantial impact on the verdict. The Commonwealth's attempt to impeach Mullins by improperly questioning her regarding Dr. Free's testimony simply does not warrant reversal under either RCr 10.26 or the prosecutorial misconduct standard of review.

V. The Guilty But Mentally Ill Jury Instruction Was Proper.

Finally, Mullins argues that the trial court erred when it instructed the jury on the meaning of a "guilty but mentally ill verdict." Mullins contends that the language in the guilty but mentally ill jury instruction was incorrect, and therefore her guilty but mentally ill conviction for first-degree assault is in question. Mullins concedes that this error is unpreserved, and asks for palpable error review pursuant to RCr 10.26.

A defendant may be found guilty but mentally ill, KRS 504.120(4), if the prosecution proves beyond a reasonable doubt that the defendant committed an offense, and the defendant proves by a preponderance of the evidence that he or she was mentally ill at the time of the offense. KRS 504.130. Mullins claims that the jury instruction given in her case regarding the consequence of a guilty but mentally ill verdict was reversible error. Specifically, she contends that the statement that "[i]f the Defendant is found guilty but mentally ill . . . treatment *shall* be provided to the Defendant," (emphasis supplied) was

erroneous under our decision in *Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010). We disagree.

This Court addressed the language of a guilty but mentally ill jury instruction in *Brown v. Commonwealth*, 934 S.W.2d 242 (Ky. 1996). In *Brown*, this Court noted that there is really no guarantee of mental health treatment for a defendant who is found guilty but mentally ill in our state courts. *Brown*, 934 S.W.2d at 245 *(citing Mitchell v. Commonwealth*, 781 S.W.2d 510 (Ky. 1990) (Leibson, J., dissenting)). The Court stated that the phrase "*may or may not*" be provided treatment is a more accurate reflection of the realities of the guilty but mentally ill sentence in Kentucky than is the "*shall*" receive treatment language provided by KRS 504.150. *Id.* at 246. The *Brown* Court expressed concern over the "constitutionality and effectiveness" of the guilty but mentally ill instruction and statute, stating that "the constitutionality of the GBMI statute depends, at least in part, upon how the jury is instructed in rendering such a verdict." *Id.* However, because the language of the challenged jury instructions in that case tracked the statutory language, the *Brown* court was unwilling to label those instructions unconstitutional or otherwise deficient. *Id.*

In *Star*, 313 S.W.3d at 30, this Court found no error in guilty but mentally ill jury instructions that complied with the "may or may not be provided treatment" language noted in *Brown*. Mullins now argues that the mandatory, "shall receive treatment" jury instruction in her case was incorrect in light of the holdings of *Brown* and *Star*. That is a misreading of our

precedent. In *Star* this Court simply found the "may or may not" language of the challenged jury instructions fell within the suggested parameters of *Brown*. *Star,* 313 S.W.3d at 37. As correctly noted by the Commonwealth, our disposition in *Star* does not make such language mandatory. Here, like the instruction in *Brown*, the guilty but mentally ill jury instruction tracks the language of KRS 504.150 and Mullins raised no objection before the trial court. There is clearly nothing manifestly unjust about an instruction that tracks statutory language. As such, we find no palpable error in the jury instruction in Mullins's case even if the "may or may not" receive treatment instruction addressed in *Star* has been recognized as probably more accurate.

CONCLUSION

The Commonwealth offered sufficient evidence of the victim's serious physical injury to support the assault in the first degree conviction. While the testimony of a pretrial services officer regarding completion of an AOI and information supplied by Mullins was improperly admitted, palpable error did not result. The trial court did not err when it found Mullins competent to stand trial, as the court's competency determination was based on substantial evidence. Although the Commonwealth committed a *Moss* violation when it asked Mullins to comment on the truthfulness of a witness, the error did not constitute palpable error or prosecutorial misconduct justifying reversal. Finally, we find no palpable error in the language of the guilty but mentally ill

jury instruction that tracked statutory language regarding treatment. For the foregoing reasons, we affirm the Judgment of the Pike Circuit Court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting.

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