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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 23, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000330-MR

RICHARD CRABTREE — APPELLANT

V.

ON APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
NO. 11-CR-00121-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Richard Crabtree appeals as a matter of right from a Judgment of the Carter Circuit Court convicting him of burglary in the first degree and sentencing him, in accord with the jury's verdict, to a maximum term of twenty years in prison. Crabtree was found guilty of having invaded under aggravating circumstances the Grayson, Kentucky home of Robert Evans. On appeal, Crabtree maintains that the trial court's failure to conduct a *Faretta* [*v. California,* 422 U.S. 806 (1975)] hearing, testimony by one witness improperly bolstering that of others, improper closing argument by the prosecutor, and an unsupported jury instruction all, either singly or in conjunction, entitle him to a new trial. He also maintains that the trial court failed to give proper consideration to mitigating factors when it imposed what Crabtree characterizes as the jury's unduly harsh sentence. Convinced that Crabtree has not identified any ground for relief, we affirm the trial court's judgment.

RELEVANT FACTS

The Commonwealth's proof at trial tended to show that during the late night or early morning of July 6-7, 2011, Crabtree, accompanied by James Colley, forced his way at knifepoint into the home of Robert L. Evans on Kibby Street in Grayson. Staying with Evans that night were two of his sons, Raymond Sean Evans and Greg Evans; a grandson, Justin Lee Evans; and Justin's girlfriend, Stephanie Moore.[1] All five of the home's occupants testified to the effect that Crabtree, whom none of them knew, accosted Raymond in front of the house as Raymond was getting into his car, threatened him with a largish knife, and demanded to be let into the home so that he could confront "Scooter," one Scotty Ludwig, concerning a drug transaction gone sour.

Once inside, Crabtree, still holding the knife, screamed that he would cut somebody if Scooter was not produced and proceeded to kick open the doors to the laundry room and a bathroom. While Raymond and Justin attempted to convince Crabtree that Scooter was not there, Moore ran to wake up Greg, and Evans slipped into his bedroom where he kept a loaded revolver. Having thus armed himself, Evans went to the kitchen, where by then Crabtree had arrived, pointed the gun at Crabtree, and ordered him to leave. When Crabtree refused, Evans fired a warning shot into the floor. Crabtree then reached for the gun and a struggle ensued. Raymond, Greg (who by that point had joined the fray), and Justin in fairly short order shoved and punched Crabtree out the back

[1] There was brief reference in the testimony to another relative, Peggy Sharon, apparently Evans's sister or his niece, but the testimony accorded her no role in the events that transpired, and she did not testify at trial.

door. In the meantime, Colley, who had remained in the living room with Moore, ran out the front door. He met with Crabtree coming around the side of the house, and the pair then jumped into a car driven by a third participant, Brittany Lewis. The car sped off, and immediately both Raymond and Moore called 911 on their cell phones. The Evanses all denied that they sold drugs or that Crabtree had been at their house to buy them.

In the aftermath, it was found that Robert Evans had suffered a significant tear on his forearm, apparently from having scraped his arm against the door frame or the surrounding wall as Crabtree was being forced from the house. In addition to the police, therefore, emergency medical care was summoned, but when Evans refused to go to the hospital the EMS workers only bandaged his arm and left the scene. Meanwhile, police officers recognized from an earlier complaint the description of Crabtree and the vehicle in which he fled and so proceeded directly to Colley's residence in Willard, Kentucky, where they found and arrested both Crabtree and Colley. Crabtree told the arresting officer that he must have "lost" his knife. He declined otherwise to make a statement. Raymond and Moore were called to the Grayson police station, and there they identified Crabtree as the person who had invaded their home and threatened them.

Later that night Colley made a statement, and at trial, at Crabtree's behest and with his full concurrence, the Commonwealth played a recording of that statement for the jury. Colley told the officer that earlier that evening Crabtree had given "Scooter" money for pills, that "Scooter" had "ripped him

off" by not delivering the pills, that Brittany Lewis had suggested they look for "Scooter" at the Evans's residence, and that although he did not see Crabtree with a knife, he heard him threaten to "cut" Raymond if Raymond did not let him into the house. Colley stated that he stayed in the living room while Crabtree was trying to search the house and that when he heard the gunshot he ran out the front door.

Based on Colley's statement, the police arrested Lewis, and about three weeks later Crabtree, Colley, and Lewis were jointly indicted on a charge of first-degree burglary. Crabtree was also separately indicted on a charge of first-degree wanton endangerment for having struggled with Evans over the gun. The indictments against Crabtree were consolidated and tried together. At Crabtree's trial, Lewis testified for the Commonwealth. She too stated that Crabtree had been "ripped off" by "Scooter," but in her version it was Colley and his girlfriend who had suggested that "Scooter" could be found at Evans's residence. Lewis testified that she did not see Crabtree with a knife at any time, either before or after the incident. Crabtree called Colley to testify, but aside from acknowledging that he had given a statement to the investigating officer, he invoked his Fifth Amendment privilege not to testify against himself.

Crabtree testified that he had gone to the house on Kibby Street, not in search of Scotty ("Scooter") Ludwig, whom he did not know, but to buy pills, Lewis and Colley's girlfriend having told him that the Evanses dealt in that commodity. He had been allowed into the house for that purpose, he claimed, and had given someone $250 expecting seven pills (Percocets) and $5 change in

return. When several minutes passed and the person did not return with the pills, Crabtree became upset and began demanding either his drugs or his money. His attempt to follow the person into the back part of the house was blocked by two other persons, and while he was arguing with them Evans had approached, pointed a gun at him, and fired a shot. Crabtree claimed to have then grabbed the barrel of the gun so as to point it away from himself, and while holding the gun down to have backed his way to the kitchen door, from which he ran to the car. At no point, Crabtree insisted, had he threatened anyone with a knife or kicked open any door. Crabtree also called both Scotty Ludwig, who testified that he did not know Crabtree and had never had anything to do with him, and his, Crabtree's, sister, who testified that on a number of occasions she had taken pills supplied by the Evanses (known, she claimed, as the "pillbillies") and had witnessed pill transactions at their residence.

The jury acquitted Crabtree of wanton endangerment, but found him guilty, as noted, of first-degree burglary. Crabtree contends that the finding of guilt was based on a jury instruction at odds with his constitutional right to a unanimous verdict. We begin with this contention.

ANALYSIS

I. Crabtree Was Not Denied A Unanimous Verdict.

As Crabtree correctly notes, an aspect of a criminal defendant's right to a jury trial, as guaranteed by Section 7 of the Kentucky Constitution, is that "one may not be deprived of his life or liberty unless twelve of his peers believe him

guilty of a specific crime beyond a reasonable doubt." *Cannon v. Commonwealth,* 291 Ky. 50, 51, 163 S.W.2d 15 (1942). Not infrequently, of course, the General Assembly provides that a specific crime may be committed in more than one way. This Court has long held that when that is the case a jury instruction combining more than one theory of the offense does not run afoul of Section 7's unanimity requirement provided that each theory included in the instruction is supported by the evidence. *Wells v. Commonwealth,* 561 S.W.2d 85 (Ky. 1978). This is so, we have explained, because, "no matter which theory they believed, all the jurors convicted under a theory supported by the evidence and all the jurors convicted the defendant of the same offense." *Smith v. Commonwealth,* 366 S.W.3d 399, 403 (Ky. 2012). If one of the instructed-upon theories is not supported by sufficient evidence, however, and there is a reasonable possibility that one or more jurors relied on the unsupported theory, then "a unanimous verdict has been denied and the verdict must be overruled." *Travis v. Commonwealth,* 327 S.W.3d 456, 463 (2010).[2]

In this case, for example, Kentucky Revised Statute (KRS) 511.020 provides that the basic offense of burglary—knowingly entering or remaining unlawfully in a building with the intent to commit a crime (KRS 511.040)—is aggravated from a class D third-degree offense to a class B first-degree offense

[2] *Travis's* rule of mandatory reversal presumes that the instructional error was preserved. In *Bell v. Commonwealth,* 245 S.W.3d 738 (Ky. 2008), we held that even an unpreserved unanimous-verdict error could be grounds for appellate relief. Here, Crabtree concedes that the alleged error was not preserved, but because we are convinced that there was no error, palpable or otherwise, we need not consider what difference, if any, the lack of preservation makes.

> when in effecting entry or while in the building or in the immediate flight therefrom, he [the person unlawfully in the building] or another participant in the crime:
> (a) Is armed with explosives or a deadly weapon; or
> (b) Causes physical injury to any person who is not a participant in the crime; or
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

The General Assembly has thus established a number of aggravating factors that justify increasing the punishment for burglary. The Commonwealth alleged in this case that Crabtree had committed the aggravated class B offense, and the instruction embodying that allegation combined two of the statutory alternatives, as follows:

> Instruction No. 4, First Degree Burglary
>
> You will find the Defendant guilty of First Degree Burglary under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about July 6, 2011, and before the finding of the Indictment herein, the Defendant, Richard Crabtree, entered or remained in a building owned by Robert Evans without the permission of Robert Evans or any other person authorized to give such permission;
> B. That in so doing, the Defendant knew he did not have such permission;
> C. That the Defendant did so with the intention of committing a crime therein; AND
> D. *That when in effecting entry or while in the building or in immediate flight therefrom, (1.) the Defendant was armed with a deadly weapon OR (2) the Defendant used or threatened the use of a dangerous instrument against Sean Evans [Raymond], who was not a participant in the crime.*

(emphasis supplied). Crabtree contends that part D of this instruction, the part combining two theories of aggravated burglary—the "armed with a deadly weapon" theory, and the "used or threatened the use of dangerous instrument" theory—deprived him of an unanimous verdict because one of the alternatives,

the "armed with a deadly weapon" one, was not supported by the evidence and could have misled one or more of the jurors. We disagree.

A "deadly weapon," the General Assembly has provided, is any one of several expressly listed items including "[a]ny knife other than an ordinary pocket knife or hunting knife." KRS 500.080 (4)(c). As pertinent here, a "dangerous instrument" is "any instrument . . . article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." KRS 500.080(3). The jury instructions accurately incorporated these definitions. Crabtree concedes that the testimony to the effect that he brandished a knife and threatened to cut Raymond with it was evidence sufficient to support a finding that he threatened the use of a dangerous instrument. He insists, however, that the evidence was not sufficient to support a finding that he was armed with a deadly weapon and that the "deadly weapon" jury instruction was thus an error undermining his right to an unanimous verdict.

When being armed with a deadly weapon is an element of the alleged offense, two questions are raised: (1) whether the defendant was armed with the object in question, and (2) whether that object is a deadly weapon. Generally, we have held, both of these questions are to be answered by the jury. *Wright v. Commonwealth,* 239 S.W.3d 63 (Ky. 2007) (citing *Thacker v. Commonwealth,* 194 S.W.3d 287 (Ky. 2006)). There was certainly evidence, as Crabtree again concedes, that he was armed with a knife, but he maintains, in

essence, that no reasonable juror could have deemed the knife anything but an "ordinary pocket knife" and thus not a deadly weapon.

The General Assembly has not said what constitutes an "ordinary" pocket knife. Raymond and Moore both described the knife they saw in Crabtree's hand as having a blade some five to six inches in length. Raymond, indeed, described the knife as "a bit bigger than an ordinary pocket knife."[3] That characterization was not binding on the trial court, of course, but it is consistent, we may note, with statutes in a number of states that distinguish in the "deadly weapon" context between pocket knives having blades three or four inches long and knives with longer blades. Annotation, *Pocket or Clasp Knife as Deadly or Dangerous Weapon for Purposes of Statute Aggravating Offenses such as Assault, Robbery, or Homicide,* 100 A.L.R.3d 287 (originally published in 1980 and now updated weekly) (noting statutes such as Delaware's 11 Del.C. § 222(5), which defines "deadly weapon" and provides expressly that "an ordinary pocketknife shall be a folding knife having a blade not more than 3 inches in length."). Absent guidance from the General Assembly, we need not and do not hold that as a matter of law a pocket knife with any particular blade length is or is not an "ordinary pocket knife," but we are convinced that a

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[3] It is true, as Crabtree notes, that Colley testified to the effect that, although he did not see the knife Crabtree allegedly wielded that night, he knew Crabtree to carry "a little bitty ol'" pocket knife. The jury, however, was not obliged to credit Colley's testimony and so that testimony did not preclude the "deadly weapon" jury instruction. As in the context of motions for a directed verdict, a defendant's motion to exclude an instruction is assessed by considering the pertinent evidence in the light most favorable to the Commonwealth. For that same reason, notwithstanding Crabtree's evidence to the effect that the Evanses dealt pills, there was sufficient evidence to support a finding that Raymond was not a participant in the crime.

reasonable juror here could have believed that Crabtree's knife, with a five to six-inch blade, was not an ordinary pocket knife. Thus, the trial court's inclusion in the instructions of the "deadly weapon" theory of first-degree burglary was not an error and did not deprive Crabtree of an unanimous verdict.

II. The Commonwealth's "Bolstering" of a Witness's Testimony Does Not Require Relief.

A. Testimony That One Witness Confirmed Another Was Not a Palpable Error.

Crabtree next contends that the Commonwealth improperly bolstered the testimony of Robert Evans when the detective who interviewed him testified that his statement the night of the incident had been "confirmed" by other family members. The detective then stated that all of the family members' statements had been "confirmed." Crabtree contends that the detective thus improperly commented on the credibility of other witnesses in contravention of such cases as *Stringer v. Commonwealth,* 956 S.W.2d 883, 888 (Ky. 1997) ("Generally, a witness may not vouch for the truthfulness of another witness.")[4] The impropriety was compounded, he maintains, when during closing argument the prosecutor stated that the credibility of the Evans family witnesses was enhanced by the fact that all five of them had "said the same thing." Crabtree acknowledges that this issue was not preserved, but he

[4] Crabtree also refers us to *Alford v. Commonwealth,* 338 S.W.3d 240, 246 (Ky. 2011), but that case, involving the improper admission of an alleged sex abuse victim's prior consistent statements, is not apposite.

maintains that the error was palpable so as to justify relief under Kentucky Rule of Criminal Procedure (RCr) 10.26.

We agree with the Commonwealth, however, that this case is not meaningfully distinguishable from *Roach v. Commonwealth,* 313 S.W.3d 101 (Ky. 2010). We addressed in that case a detective's testimony to the effect that nothing in the testimonies of three other Commonwealth witnesses was inconsistent with what he had otherwise found in his investigation. That "not inconsistent with" testimony, although somewhat suggestive of a belief about credibility, did not amount to a palpable bolstering error, we explained, because it was likely to have had little practical effect: even without it "the jurors could still compare his [the detective's] account of the results of his investigation with the information provided by other witnesses in their testimony and observe no troubling inconsistencies among their accounts." 313 S.W.3d at 113. *See also Johnson v. Commonwealth,* 405 S.W.3d 439, 459 (Ky. 2013) (noting that a detective's testimony to the effect that two statements were consistent did not amount to an assertion that either of them was true). Likewise here, all five of the Evans family witnesses testified (Evans, Raymond, and Justin called by the Commonwealth; Greg and Stephanie Moore called by Crabtree), so that the jury was fully able to decide for itself to what extent their testimonies were consistent with each other's and what bearing, if any, that consistency had upon their credibility.

True, the detective in this case used the word "confirmed," not "consistent"—the family members' statements had all been "confirmed," he

said. The prosecutor's question to which he was responding, however, was, "Was Robert Evans's statement consistent with [the statements of the other family members]?" The detective answered, "Yes, [Evans's] statement was confirmed; all the family members' statements were confirmed." From the context it is likely that the detective meant and would have been understood as meaning that the statements were consistent, not that their truth had somehow otherwise been established. In any event, there was no palpable error.

B. The Prosecutor's Closing Argument Regarding Credibility Was Not Improper.

Nor was the error, if there even was one, made worse by the prosecutor's reference in closing argument to the consistency of the testimony from the witnesses who occupied Evans's home that night. To be sure, a prosecutor is not to vouch for a witness's credibility. But generally, as Professor Lawson notes, two types of vouching are forbidden: a prosecutor may not place the prestige of the government behind a witness by expressing his or her personal belief in the witness's truthfulness, and a prosecutor may not imply or suggest that facts not before the jury guarantee the accuracy of a witness's testimony. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 4.00[2][b] (5th ed. 2013) (citing *United States v. Tate,* 915 F.2d 400, 401 (8th Cir. 1990), and *United States v. Thornton,* 197 F.3d 241, 252 (7th Cir. 1999)). *See Mack v. Commonwealth,* 860 S.W.2d 275 (Ky. 1993) (holding that prosecutor's statement to jury that it had not heard the full story was reversible error). The prosecutor here did not indulge in either of these forbidden types of vouching.

He commented merely on the evidence pertaining to credibility, which he was entitled to do. *Grundy v. Commonwealth,* 25 S.W.3d 76, 82 (Ky. 2000) ("[We] hold that the Commonwealth's comments [during closing argument] regarding the relative credibility of the witnesses for the prosecution and the defense were entirely proper.").

III. The Prosecutor Did Not Misstate the Law Regarding Illegal Drug Purchases.

Crabtree also complains of what he alleges was another instance of prosecutorial misconduct. Again, the issue was not preserved by an objection at trial, so relief is available only if the misconduct was "flagrant," *i.e.,* outrageously improper or such as to render the trial fundamentally unfair. *Barnes v. Commonwealth,* 91 S.W.3d 564, 568 (Ky. 2002); *Maxie v. Commonwealth,* 82 S.W.3d 860 (Ky. 2002).

In the course of the prosecutor's closing argument, he discussed the elements of first-degree burglary and summarized the evidence which in his view satisfied each one. With respect to the requirement that Crabtree intended to commit a crime within Evans's home, the prosecutor noted the evidence tending to show that Crabtree was irate at having been "ripped off" and argued that it could be inferred that he intended a crime—a threat, say (*e.g.* KRS 508.050), or even an assault—against Scooter Ludwig. Moreover, the prosecutor continued, Crabtree's purported defense—that he was in the home not in pursuit of Ludwig but rather in hopes of purchasing narcotic drugs—was in fact no defense, at least with respect to this element, because, he said, "it is a crime to buy drugs on the street." Crabtree takes issue with this statement

on the ground that it misstates the law—there being no law, in his view, against buying illegal drugs.[5]

Crabtree is correct, of course, that while counsel may, during closing arguments, discuss the law applicable to the case as instructed by the court, "[c]ounsel may not . . . misstate the law or make comments on the law inconsistent with the court's instructions." *Padgett v. Commonwealth,* 312 S.W.3d 336, 351 (Ky. 2010). Crabtree is not correct, however, that the prosecutor violated this rule. Indeed, his assertion that the purchase of narcotics on the street is not a crime borders on the frivolous. The General Assembly has clearly outlawed such purchases (as well as the receipt of such drugs as gifts) by outlawing their possession. KRS 218A.1415. The prosecutor did not misstate the law.

IV. Crabtree Was Not Entitled to a Faretta Hearing.

Prior to trial Crabtree filed a number of *pro se* motions. Most of them were requests for bond reduction, but they included motions to dismiss and for a speedy trial. After trial, he also filed a *pro se* motion for a new trial and a motion for a reduced sentence. With the exception of the motion for a speedy

[5] As will be discussed below with regard to Crabtree's sentence, not long after Crabtree's trial, apparently, Greg Evans was indicted for trafficking in a controlled substance. Referring to this after-the-fact indictment, Crabtree insinuates that the prosecution's reiteration during closing argument that this case "was not about drugs," was not advanced in good faith. The indictment against Evans, however, an upshot possibly of post-trial investigation prompted by Crabtree's sister's rather dramatic testimony, in no way by itself impugns the case the Commonwealth pursued against Crabtree, and Crabtree's unsupported insinuations do not advance any of his claims.

trial,[6] these motions were all denied. Crabtree's initial brief in this appeal argued that the trial court erred, in the face of his *pro se* motions, by not conducting a *Faretta* hearing to inquire into his desire to serve as his own attorney.

In *Faretta,* 422 U.S. at 806, the Supreme Court held that implicit in a criminal defendant's Sixth Amendment right to counsel is a concomitant right to dispense with counsel and to proceed *pro se.* Section 11 of our Kentucky Constitution likewise guarantees criminal defendants the assistance of counsel, and that Section not only implies a correlative right of full self-representation, but allows as well for a partial waiver of counsel. *Hill v. Commonwealth,* 125 S.W.3d 221 (Ky. 2004). When a criminal defendant clearly and unequivocally asserts his right to dispense with counsel, in whole or in part, the trial court must conduct a hearing on the record to establish that, having been warned of the perils of proceeding without counsel or without counsel's full assistance, the defendant still knowingly and voluntarily chooses to proceed *pro se.* Crabtree initially argued that his *pro se* motions entitled him to such a hearing.

Subsequent to the filing of Crabtree's initial brief, this Court rejected a claim virtually identical to his and held that a defendant's mere filing of *pro se* motions did not amount to an unequivocal assertion of the right to dispense with counsel and so did not trigger the trial court's duties under *Faretta* and *Hill. Commonwealth v. Martin,* 410 S.W.3d 119 (Ky. 2013). Although critical of

[6] Crabtree was indicted in late July 2011 and tried in early January 2012.

Martin, Crabtree concedes in his reply brief that that case is dispositive of his claim with one possible exception, which we now address.

At trial, Crabtree was adamant, contrary to his counsel's advice, that the recording of James Colley's police statement be played for the jury. Anticipating Crabtree's waiver of any objection, therefore, the Commonwealth laid a foundation for the statement and prepared to play the recording. Before allowing the Commonwealth to proceed, the Court made certain, through counsel's conferring with Crabtree, that Crabtree understood both that the statement *could be* excluded and that it was counsel's belief that it *should be* excluded. Crabtree persisted, however, in his desire that the recording be played. Crabtree now contends that his disagreement with counsel over this piece of evidence amounted to a waiver of counsel implicating *Faretta.* For at least two reasons, we disagree.

First, we fail to see how a defendant's mere disagreement with counsel over a single tactical decision even suggests a desire to waive counsel, much less unequivocally implies it—especially where, as here, counsel has indicated a willingness, however reluctant, to adopt the tactic the defendant wants. Tactical, even strategic, disagreements between attorney and client are not, after all, an uncommon part of the relationship. *Gill v. Mecusker,* 633 F.3d 1272 (11th Cir. 2011) (holding that defendant's desire to participate in trial strategy decisions did not trigger *Faretta*); *State v. Torkelsen,* 752 N.W.2d 640 (N.D. 2008) (holding that defendant's frustration with counsel's trial strategy did not amount to an unequivocal request to waive counsel). *Cf. United States*

v. Leggett, 81 F.3d 220 (D.C. Cir. 1996) (holding that a client's difference of opinion regarding trial strategy does not create for the attorney a conflict of interest).

To invoke the right to waive counsel, moreover, not only must the defendant's request to do so be unequivocal, but it must also be timely, which we have indicated means that it must be made before meaningful trial proceedings—such as the empanelling of the jury—have begun. *Swan v. Commonwealth,* 384 S.W.3d 77 (Ky. 2012) (citing *United States v. Bishop,* 291 F.3d 1100, 1114 (9th Cir. 2002)). Had either counsel or Crabtree thought that their disagreement over playing Colley's recorded statement somehow involved Crabtree in a waiver of his right to counsel, then they had ample opportunity *prior* to trial to bring the matter to the court's attention. That they did not do. The matter did not arise at trial until nearly the end of the Commonwealth's proof. By that point it was perfectly reasonable for the trial court to understand the situation not as Crabtree's waiving counsel, but rather as counsel's taking appropriate pains to reconcile, on the record, her duties to represent Crabtree both competently and loyally. There was no violation of Crabtree's right to represent himself.

V. Crabtree Was Afforded a Fair and Meaningful Sentencing Proceeding.

Finally, Crabtree contends that the jury imposed an unduly harsh sentence and that the trial court abused its discretion under KRS 532.070 when it refused to lessen that sentence. During the penalty phase of Crabtree's trial, Crabtree testified, both candidly and defiantly, that for the last

fifteen years or so, prior to his arrest in this case, he had regularly used a wide variety of illegal drugs, that he liked the way the drugs made him feel, and that he would more than likely resume using drugs when he was released from custody. He also admitted that he had been convicted of some twenty-three prior crimes, almost all of which were in some way drug-related, and some of which, at least, were felonies. Not surprisingly, given that testimony, the jury recommended a twenty-year sentence, the maximum for first-degree burglary.

As Crabtree correctly notes, while the trial court is not authorized to impose a sentence longer than the one the jury recommended (assuming that the recommendation is within the statutory limits for the crime of conviction), it is authorized to impose a lesser sentence if, "having regard to the nature and circumstances of the crime and to the history and character of the defendant," it is of the opinion "that the maximum term fixed by the jury is unduly harsh." KRS 532.070(1). Pursuant to that provision and to KRS 533.010, which requires the sentencing court to consider alternatives to incarceration, on March 19, 2012, the trial court held a sentencing colloquy. At the colloquy the court gave to the parties copies of a letter it had received four days previously from Raymond Evans, the witness against Crabtree who testified at trial that Crabtree had accosted him in the driveway and demanded at knifepoint to be allowed inside the residence. In the letter Raymond declared that he and his family, although offended by what Crabtree had done to them, did not believe that Crabtree's acts warranted a twenty-year sentence and urged the court to impose a lesser one. In addition to the letter, Crabtree asked the court also to

consider the facts that he had two young children; that he sometimes helped provide care for his father, who had serious health problems; and that, subsequent to the trial, one of the complaining witnesses, Greg Evans, had been indicted for drug trafficking, an indictment, Crabtree maintained, that tended to confirm his claim that he had gone to the Evans home not in pursuit of Scooter Ludwig, but to purchase drugs.

Refusing to modify the sentence recommended by the jury, the trial court expressly considered both Raymond Evans's letter and Greg Evans's indictment and found that neither called for a lesser sentence. It is for the General Assembly, the court noted, not the Evanses, to say how severely a crime may be punished. And, noting that the Pre-Sentence Investigation confirmed that Crabtree had at least nine prior felony convictions and a long history of substance abuse, the court indicated that the jury's sentence was duly informed, as the Evanses' opinion was not. Greg Evans's indictment, furthermore, was merely that, an indictment, not something with any bearing on the sentencing jury's decision.

On May 2, 2012, having in the meantime considered and denied Crabtree's *pro se* motion for a new trial (a motion based on the fact that one of the jurors was hard of hearing), the trial court entered its final judgment sentencing Crabtree to a maximum term of twenty years. Fourteen days later, on May 16, 2012, Crabtree filed a *pro se* motion for "reduction of sentence." In addition to asking the court to reconsider the grounds he adduced at the sentencing colloquy, Crabtree asserted that no one had been injured in the

incident (although Robert Evans had been injured, albeit not seriously), and once again asserted his innocence, claiming that he was more the victim than anyone else since he had been "robbed" of his drug money. A few days later, the trial court summarily denied that motion and on June 18, 2012 denied Crabtree's motion for shock probation. Referring us to *Edmonson v. Commonwealth,* 725 S.W.2d 595, 596 (Ky. 1987), Crabtree contends that the trial court's denials of his requests for a lesser sentence without holding "a full and meaningful hearing" amounted to an abuse of the trial court's sentencing discretion. We disagree.[7]

In *Edmonson,* the trial court prepared its final judgment in advance of the sentencing proceeding, and at the conclusion of that proceeding simply handed the previously-prepared judgment to the parties. We held that because the trial court had evidently made up its mind as to the sentence before the sentencing proceeding, *i.e.,* before the defendant had had "a fair opportunity to present evidence at a meaningful hearing in favor of having the sentences run concurrently or present other matters in mitigation of punishment," it had abused its sentencing discretion. 725 S.W.2d at 596.

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[7] The Commonwealth contends that regardless of its merits Crabtree's *pro se,* post-judgment motion to reconsider his sentence was untimely inasmuch as it was filed outside the ten days that Kentucky Rule of Civil Procedure (CR) 59.05 allows for motions to alter or amend a judgment. *Winstead v. Commonwealth,* 327 S.W.3d 479 (Ky. 2010) (citing *Silverburg v. Commonwealth,* 587 S.W.2d 241 (Ky. 1979) for the proposition that CR 59.05's ten-day limit applies in criminal cases)). Crabtree counters by arguing that the motion could and should have been construed as invoking CR 60.02, not CR 59.05. We need not address that dispute, however, since Crabtree's post-judgment motion does not add materially to the arguments he raised at the sentencing colloquy itself.

Here, however, there is no suggestion of prejudgment. On the contrary, the court took pains at the sentencing colloquy to address Crabtree's contentions with regard to the Raymond Evans letter and the Greg Evans indictment and otherwise plainly considered the nature and circumstances of Crabtree's crime, Crabtree's history and character, and the severity of the sentence recommended by the jury. This was a meaningful judicial sentencing. *See Thornton v. Commonwealth,* 421 S.W.3d 372, 378 (Ky. 2013) (rejecting *Edmonson* claim and upholding twenty-year sentence where, even though brief, the sentencing proceeding did not indicate any "lack of full and fair judicial consideration").

Crabtree contends that he was entitled to a hearing at which Raymond Evans could testify about "why he believed [Crabtree's] sentence should be reduced," and at which the Commonwealth could "explain" how the Greg Evans indictment jibed with the Commonwealth's reliance on seemingly contrary testimony from members of the Evans family at trial. But, as we noted in *Thornton, Edmonson* does not stand for the proposition that in all cases sentencing proceedings need be full-blown evidentiary hearings. On the contrary, generally a proceeding more in the nature of a colloquy among the court and the parties will suffice. The trial court is certainly authorized to conduct an evidentiary hearing and should if material facts are genuinely in dispute, but in most cases a defendant will be accorded "a meaningful hearing" if he or she is allowed to point out inaccuracies in the Pre-Sentence

Investigation and to offer reasons for leniency, and if the court then gives the defendant's statement due consideration before coming to a decision.

Here, Crabtree did not request an evidentiary hearing, so he is entitled to relief only if the hearing he was afforded was so inadequate as to amount to a manifest injustice. RCr 10.26. It was not. Even if we assume that Raymond Evans's letter to the court implicated the "victim impact" provisions of KRS 421.520 (giving a crime "victim" the right to submit a written "victim impact statement" to "be considered by the court prior to any decision on the sentencing or release . . . of the defendant"),[8] the statute requires only that the court consider the victim's written statement, which in effect the court did here by addressing Raymond's letter. The statute does not require the court to hear victim testimony at an evidentiary hearing, and Crabtree has neither identified any other source of such a duty nor shown that Raymond's testimony was essential to a "fair and meaningful" sentencing because it would have provided decisive information not included in his letter.

Again leaving us to guess at the legal basis for his contention, Crabtree also asserts that the trial court palpably erred during the sentencing proceeding by not somehow eliciting from the Commonwealth an "explanation" of its decision to seek an indictment against Greg Evans for drug trafficking not long after it had introduced in this case testimony by Greg Evans denying such

[8] In pertinent part, KRS 421.500 defines a "victim" as "an individual who suffers direct or threatened physical . . . harm as a result of the commission of a crime classified as . . . burglary in the first or second degree." Arguably, then, Raymond Evans qualifies as a "victim" for the purposes of the "impact statement" statutes, but it is not clear, and we do not decide, whether those statutes were meant to apply to statements minimizing, as well as to statements substantiating, the crime's impact.

trafficking. As with Crabtree's insinuation of prosecutorial misconduct, which we noted previously, the suggestion here seems to be that Greg Evans (and possibly other members of the Evans household) testified falsely in this case and that Evans's indictment indicates that the Commonwealth either knew that he did so, should have known it, or should have corrected the false testimony once it found out. Crabtree has not shown, however, how his speculations add up to a palpable error.

A criminal conviction based on perjured testimony can, of course, amount to a due process violation. *Commonwealth v. Spaulding,* 991 S.W.2d 651 (Ky. 1999) (citing *Giglio v. United States,* 405 U.S. 150 (1972)). A predicate for such a finding, however, is a showing by the defendant "that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known." *Spaulding,* 991 S.W.2d at 657. The prosecution of Evans could, conceivably, bring to light facts creating a reasonable certainty that he testified falsely at Crabtree's trial. That possibility, however, did not authorize, much less require, the trial court to pre-try Evans at Crabtree's sentencing. The Evans indictment was not issued until after Crabtree's trial and so plainly could have had no bearing on the jury's sentence. We are no more persuaded, moreover, that Evans's mere indictment establishes a due process violation the trial court was obliged to address than we are that the indictment implies prosecutorial misconduct. The indictment, after all, is not even evidence of Evans's drug trafficking, much less of his perjury. RCr 9.56 ("In every case the jury shall be instructed

[that] . . . the indictment shall not be considered as evidence or as having any weight against [the defendant]."). While Crabtree's concerns are understandable—it is not every day that the Commonwealth seeks indictment of its own recent witness—he has not shown that those concerns are grounded in facts that would justify relief, nor has he shown that the trial court erred by not volunteering to conduct his investigation for him.

CONCLUSION

In sum, Crabtree was fairly tried and properly sentenced. The first-degree burglary instruction did not deprive Crabtree of an unanimous verdict; neither the lead investigator nor the prosecutor prejudicially bolstered Robert Evans's testimony; the prosecutor did not misstate the law regarding the purchase of illegal drugs; Crabtree did not waive counsel and so was not entitled to a *Faretta* warning regarding such waiver; and the trial court's imposition of the jury-recommended twenty-year sentence was not tainted by an inadequate sentencing proceeding. Having found little if any error, we also find no merit in Crabtree's request for cumulative error relief. Accordingly, we hereby affirm the Judgment of the Carter Circuit Court.

All sitting. All concur.

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