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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
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# Supreme Court of Kentucky

2012-SC-000790-MR

ANTHONY OWENS

APPELLANT

V. ON APPEAL FROM SPENCER CIRCUIT COURT  
HONORABLE CHARLES R. HICKMAN, JUDGE  
NO. 10-CR-14

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

A jury found Anthony Owens (Owens) guilty of: two counts of sodomy in the first degree; one count of sexual abuse in the first degree; and one count of assault in the fourth degree. He was sentenced to thirty-five years' imprisonment.

Owens appeals as a matter of right, asserting two arguments. First, the trial court erroneously denied his motion to suppress his statement to police because it was elicited in violation of the Fourth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. Second, the trial court erred in allowing cumulative and improper opinion evidence to be admitted during trial, which resulted in manifest injustice. Having reviewed the record and the arguments of the parties, we affirm.

## **I. FACTS**

On the morning of February 9, 2010, Owens agreed to babysit his neighbors' three-and-a-half year old child, B.H., while B.H.'s parents ran an errand. Upon their return two hours later, B.H.'s parents found their child asleep and wearing different clothes. Within an hour-and-a-half, B.H. began vomiting. When B.H.'s parents changed his clothes, they noticed bruises and sores throughout his body that had not been there before they left. When asked, Owens responded that B.H. had fallen down the stairs.

B.H.'s parents immediately took him to the hospital. At the hospital, additional injuries to his body began to emerge. These injuries included: linear abrasions across his upper back consistent with fingernail scratches; bruising on his sides, left cheek, abdomen, hips, thighs, legs, and buttocks; trauma to his salivary glands; and severe trauma to his genitalia.

The next day, Detective Mitch Harris (Detective Harris) interviewed Owens, who was accompanied by his mother. Prior to the interview, Owens and his mother read a Statement of Rights that outlined Owens's right to remain silent, right to consult an attorney, and right to stop questioning at any time. Both Owens and his mother signed a waiver of these rights, stating that they had done so freely, voluntarily, and without threat or promise, after having the rights read and explained to them.

Detective Harris took Owens to a separate room where he questioned him for approximately an hour. During this time, Owens admitted to ejaculating on B.H., anally penetrating B.H., orally sodomizing B.H., forcing oral sodomy on

B.H., and punching B.H. up to five times. Neither Owens nor his mother objected to Detective Harris's questioning Owens, and Owens did not withdraw any of the admissions he made to Detective Harris during the interview.

A Spencer County Grand Jury indicted Owens with: three counts of sodomy in the first degree; three counts of sexual abuse in the first degree; and one count of assault in the fourth degree. Owens subsequently filed a motion asking the circuit court to suppress his statement on the grounds that he did not understand his rights. The circuit court denied Owens's motion because: Owens and his mother signed a waiver of their rights; Owens had previous experience in the criminal justice system, specifically with the *Miranda*<sup>1</sup> warnings; and Owens testified during the suppression hearing that he, in fact, did understand his rights. The court ruled that, in light of the totality of the circumstances, Owens's statements were knowingly and voluntarily made; thus, they were admissible at trial. As noted above, the jury found Owens guilty, and the court sentenced him to thirty-five years' imprisonment, consistent with the jury's recommendations.

Owens appeals as a matter of right, arguing that the circuit court erroneously denied his motion to suppress and erroneously admitted opinion testimony. We disagree and, for the reasons set forth below, affirm the circuit court's ruling. We set forth any additional facts as necessary below.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

## II. ANALYSIS

### 1. Motion to Suppress Owens's Statement.

Owens argues that the trial court erroneously denied his motion to suppress his statement to police. We disagree.

Our standard of review on a motion to suppress is two-fold. First, we must determine if the trial court's findings of fact were clearly erroneous. *Cummings v. Commonwealth*, 226 S.W.3d 62, 65 (Ky. 2007). Second, we must conduct a *de novo* review of the trial court's application of the law to those facts. *Id.*

Owens asserts the trial court's ruling was erroneous for two reasons. First, because of his limited intelligence, he was unable to knowingly and voluntarily waive his rights. Second, as a result of his limited intelligence, he was unable to resist Detective Harris's coercing him into making a statement.

Overriding Owens's arguments is the contention that his limited intelligence impaired his capacity for self-determination. Owens cites to *Bailey v. Commonwealth*, 194 S.W.3d 296 (Ky. 2006), to support this contention. However, as Owens concedes, the facts in *Bailey* are "clearly distinguishable" from the present case. Most detrimental to Owens is the fact that, in *Bailey*, empirical evidence was introduced to demonstrate Bailey's limited intelligence. Here, Owens offered no empirical evidence whatsoever to show an intellectual deficit, rather, he asked the trial court to accept his word as truth. This, the trial court was not required to do; therefore, we discern no error in the trial court's determination that Owens knowingly and voluntarily waived his rights.

As to the issue of coercion, we find that Detective Harris's actions were not unduly coercive when viewed from the perspective of a defendant with normal intelligence. Because Owens has not provided any empirical evidence that he has any intellectual deficits, we cannot determine, and the trial court could not have determined, that Detective Harris's actions were unduly coercive from the perspective of an intellectually deficient defendant.

In light of the absence of evidence showing Owens's limited intelligence, we find that the trial court's findings of fact were not clearly erroneous; therefore, the court's ruling denying Owens's motion to suppress was not in error.

We note the Commonwealth's argument that this issue has not been preserved. However, our review of the record indicates that Owens's argument centered on his inability to knowingly and voluntarily waive his rights. This argument goes directly to Owens's intelligence and was not merely a narrowing of his argument to the trial court. *Cf. Henson v. Commonwealth*, 20 S.W. 3d 466 (1999) (finding that Henson's presentment to the trial court of a broad constitutional issue did not preserve for review a narrower coercion issue).

## **2. Detective Harris's Testimony.**

Owens argues that the trial court erred by permitting Detective Harris to give cumulative and unqualified testimony of an ultimate issue of fact, which resulted in manifest injustice. Owens specifically complains of eight statements made by Detective Harris during trial. Detective Harris made two statements elicited during direct examination: 1) "from [his] training and

experience, there was no way these injuries were caused by a fall down a flight of stairs”; and 2) (paraphrasing) from his training and experience, the first thing a person charged with a physical or sexual abuse crime will do is blame the victim. Furthermore, Detective Harris made six statements in response to Owens’s questioning during cross-examination. He testified that: 1) from the bruising on the victim, the incident lasted more than ten seconds; 2) in his opinion, Owens wiped B.H. clean after he physically and sexually abused him; 3) no one ever admits to being a pedophile; 4) he knew the three-year-old had not stripped down and raped the sixteen-year-old; 5) in his opinion “[Owens] abused [B.H.] and forced him to sodomize him. He forced his penis in his mouth”; and 6) he believed that “B.H. was physically and sexually abused” and that he believed “Owens physically stuck his penis in the 3½-year-old’s mouth.” Most, if not all, of the aforementioned is opinion testimony and its admission was erroneous.

We note that, on direct-examination, Owens did not object to Detective Harris’s testimony and, on cross-examination, did not request that any of Detective Harris’s responses be stricken, nor did he ask for an admonition. “One who asks questions which call for an answer has waived any objection to the answer if it is responsive.” *Hodge v. Commonwealth*, 17 S.W.3d 824, 845-846 (Ky. 2000).

Owens concedes that the issue has not been preserved for review, and asks us to review the issue for palpable error pursuant to RCr 10.26. “An error is palpable only if it is ‘shocking or jurisprudentially intolerable.’” *Allen v.*

*Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)). Owens must show a “probability of a different result or [an] error so fundamental as to threaten [his] entitlement to due process of law.” *Martin*, 207 S.W.3d at 4. We find no such error.

As we held above, Owens’s statement to Detective Harris was admissible at trial. In his statement, Owens gave a detailed confession to the crimes at issue, and the jurors viewed this statement in its entirety. The Commonwealth introduced testimony of numerous witnesses, both experts and laymen, who testified to the severity of B.H.’s injuries. Additionally, the jury heard the testimony of B.H.’s parents, who testified to the timing and extent of B.H.’s injuries. Considering the totality of the Commonwealth’s evidence, we find no “shocking or jurisprudentially intolerable” error in the trial court permitting Detective Harris’s statements. Furthermore, in light of the overwhelming evidence of guilt, we find there is no “substantial possibility that the result would have been any different” had these statements been excluded.

*Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983).

### **III. CONCLUSION**

Based on the preceding, the trial court is affirmed.

All sitting. All concur.

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