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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 1-8-15 [illegible] D.C.

2013-SC-000385-MR

ANTONY BENJAMIN MOORE APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 12-CR-00797

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING IN PART, AFFIRMING IN PART, AND REMANDING

Antony Moore set fire to an apartment building with approximately thirteen people inside. After a short investigation, Moore was charged with first-degree arson, thirteen counts of first-degree wanton endangerment, receiving stolen property under $500, possession of drug paraphernalia, possession of burglary tools, and being a second-degree Persistent Felony Offender (PFO 2). A circuit court jury convicted Moore of all charges, and Moore was sentenced to 40 years' imprisonment. Moore now appeals the resulting judgment to this Court as a matter of right.[1]

The Commonwealth presented insufficient evidence to sustain a conviction on nine of the thirteen counts of first-degree wanton endangerment. The trial court, accordingly, erroneously denied Moore's motion for directed verdict on the nine counts in issue, so we reverse Moore's convictions on those

[1] Ky. Const. § 110(2)(b).

counts. Moore received a fair trial and there is little evidence to support Moore's theory on appeal that the jury was somehow inflamed by the sheer number of wanton-endangerment counts. We affirm Moore's other convictions and overall sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The Lexington Fire Department was called to the scene of an apartment fire. Before they arrived, a tenant in the building had attempted to ensure all his fellow tenants were safely evacuated. In a matter of minutes, the firefighters were on scene, and several darted into the building to fight the fire. Lieutenant Richard Carlin entered through the front door and navigated a smoke-filled hallway to reach the back door and opened it, venting the building and allowing smoke to escape. Retracing his steps, Carlin came to what appeared to be one of the fire's primary locations, if not its source—Apartment 6. Flames were present in several parts of the apartment, but Carlin was able to extinguish the fire quickly.

With the flames extinguished, the firefighters began to remove their regulator masks and they detected the odor of natural gas. A quick investigation determined that the knobs on the gas stove in Apartment 6 were in the "high" position and the pilot light was out, allowing natural gas to escape into the apartment. The firefighters immediately evacuated and had the gas shut off to the building.

Mark Blankenship, a Chief in the Lexington Fire Department, began talking to witnesses to determine the cause of the fire and quickly focused on

Moore as the prime suspect. Two residents had spotted Moore in the building near the time of the fire and heard him exclaim that the apartment was on fire. As a result of these conversations, Chief Blankenship put out an attempt-to-locate on Moore.

Earlier the same morning, seemingly unrelated at the time, Officer Brian Taylor of the Lexington Police Department responded to the scene of a theft at a residence near the scene of the fire. The victim reported the theft of a military-grade gas mask. Police located a discarded cell phone in the victim's garage, which led Officer Taylor to suspect Moore.

Police arrested Moore that afternoon. Officer Taylor responded to a "subject down" call and, upon arriving at the scene, discovered the subject was Moore. An emergency-medical-services team was already performing treatment on Moore by the time Officer Taylor arrived. On the ground next to Moore was his backpack with a military-grade gas mask attached to it. The theft victim Officer Taylor dealt with earlier in the morning testified at Moore's trial that the gas mask resembled the one taken from his home. A search of Moore's backpack produced a hypodermic needle, garage door opener, and a flashlight.

Chief Blankenship was also present at the scene as Moore received treatment. Seizing the opportunity, Chief Blankenship questioned Moore about the apartment fire and Moore responded: "You must think I set my apartment on fire."

Moore was charged with a single count of first-degree arson, receiving stolen property under $500, possession of drug paraphernalia, possession of

burglary tools, and thirteen counts of first-degree wanton endangerment. The thirteen counts of wanton endangerment stemmed from Chief Blankenship's telephoning each of the apartment building's tenants and inquiring whether they were home at the time of the fire—thirteen said yes. Moore was also charged with being a PFO 2.

At trial, only four residents actually testified that they were home at the time of the fire. Despite the lack of evidence pertaining to the nine remaining wanton-endangerment counts, the jury convicted Moore of all charges, including being a PFO 2. In total, the jury recommended a sentence of 40 years' imprisonment for Moore. The trial court sentenced Moore accordingly.

II. ANALYSIS.

On appeal, Moore presents a single argument for this Court's review: the trial court erroneously denied his directed-verdict motion[2] with regard to nine[3] counts of first-degree wanton endangerment. Moore also alleges the trial court's error was substantial enough to warrant a new trial, especially in light of the Commonwealth's repeated emphasis on the number of individuals

[2] When reviewing the denial of a directed verdict, the test is, "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, . . . the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "[T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Id.* at 187-88.

[3] Moore's brief repeatedly refers to "eight" wanton-endangerment counts being dismissed in light of only four witnesses testifying at trial. Simple math indicates that if there were thirteen counts and only four individuals testified, nine—not eight—counts are at issue. It is clear to this Court that Moore's reference to "eight" counts is nothing more than a mere typographical error. As such, our analysis deals with nine counts instead of the eight argued in Moore's brief.

present at the time of Moore's arson. We agree with Moore, but only to the extent that the trial court erred by denying Moore's directed verdict. A new trial is not warranted.

The predominant source of information at trial regarding the investigation leading to Moore's arrest was Chief Blankenship. The day following the fire, Chief Blankenship obtained a copy of the tenant list from the property manager. As we stated previously, Chief Blankenship then used this list to phone all the residents and ask if they were in the apartment building during the fire. Using this information, along with information gleaned from interviewing witnesses at the scene of the fire, Chief Blankenship charged Moore with thirteen counts of first-degree wanton endangerment. At trial, Chief Blankenship testified to all the names of residents who had stated they were in the building during the fire. But only four of the individuals mentioned by Chief Blankenship testified at trial. And as for the remaining nine individuals, Chief Blankenship's testimony was the only evidence of their presence during the time of the fire.

Within his primary argument that the trial court erred, Moore presents two main reasons for why the denial of his directed-verdict motion was erroneous: (1) Chief Blankenship's testimony was inadmissible hearsay and (2) Chief Blankenship's testimony violated his Sixth Amendment rights under *Crawford v. Washington*.[4]

---

[4] 541 U.S. 36 (2004).

Dealing with the hearsay argument first, generally speaking, hearsay—a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"[5]—is excluded.[6] Our rules of evidence provide specific exceptions to this general rule in which hearsay may be admitted. It is readily apparent, however, that there is no hearsay exception to cover Chief Blankenship's statements; so apparent, in fact, that the Commonwealth agrees with Moore that Chief Blankenship's testimony on the nine counts in question was inadmissible hearsay. Because Chief Blankenship's testimony was the only evidence introduced by the Commonwealth for the nine counts at issue here, the Commonwealth failed to produce competent evidence to support submission of these counts to the jury. So Moore's conviction on nine of the thirteen counts of first-degree wanton endangerment must be reversed.[7]

---

[5] Kentucky Rules of Evidence (KRE) 801(c).

[6] KRE 802.

[7] We pause to highlight a slight discrepancy in the parties' presentation of the record. Moore, of course, argues he properly preserved the trial court's error by making a motion for directed verdict and renewing that motion at the close of the defense's case. The Commonwealth, contending Moore did not specifically argue hearsay or the Sixth Amendment in his directed-verdict motion below, rejects this characterization. In the end, it is a hollow rejection because the Commonwealth concedes that the trial court's error constitutes palpable error. *See* Kentucky Rules of Criminal Procedure (RCr) 10.26. Practically speaking, it is of no import whether Moore preserved the issue or not because as the Commonwealth rightly points out, the trial court's error was both "clear and plain under current law" and "affect[ed] the substantial rights of a party." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (internal citations omitted). The error, therefore, was palpable so even if we assume Moore did not preserve the error, the convictions on the nine counts in question should still be reversed. As we explain below, however, the reversal of these convictions does not impact Moore's overall sentence.

The Commonwealth concedes that Chief Blankenship's testimony did, indeed, violate Moore's constitutional rights; but, as we have found solid ground on which to vacate Moore's conviction for nine counts of wanton endangerment, we need not reach the question of whether his Sixth Amendment rights were violated by Chief Blankenship's testimony. As we have repeatedly stated, we refrain from "reaching constitutional issues when other, non-constitutional grounds can be relied upon."[8]

Despite the trial court's error, we do not, however, agree with Moore that a new trial is warranted. Initially, it is noteworthy that Moore raises no question as to the validity of the jury's verdict on the remaining charges of which he was convicted. While Moore's argument is phrased in such a way as to indicate seemingly a desire for a new guilt phase of trial, Moore has presented evidence warranting, if anything, a new sentencing phase. So we reject any notion that a new guilt phase of trial is necessary because of Chief Blankenship's inadmissible hearsay.

Moore's primary argument for a new sentencing phase is that the Commonwealth's repeated references to Moore's actions putting thirteen people in danger somehow inflamed the jury, prompting a harsher sentence than perhaps Moore would have received if the trial court had not erred. This argument places a subjective gloss over the jury's objective result. In actuality, the jury showed no signs of excitement or prejudice.

---

[8] *Louisville/Jefferson Cnty. Metro Govt. v. TDC Grp., LLC*, 283 S.W.3d 657, 660 (Ky. 2009) (quoting *Baker v. Fletcher*, 204 S.W.3d 589, 597-98 (Ky. 2006)).

Moore's first-degree-arson conviction—a Class A felony conviction—carried a penalty of 20-50 years or life.[9] Accordingly, the minimum sentence that could have been imposed on Moore, assuming all sentences running concurrently, was twenty years' imprisonment. Of course, the jury did not give Moore the minimum sentence; but, on the other hand, the jury stopped far short of the maximum sentence Moore faced. Before any PFO enhancement, the jury recommended a sentence of 35 years' imprisonment for first-degree arson and five years' imprisonment for each first-degree wanton endangerment charge.

The jury did find Moore guilty of being a PFO 2 and, as a result, enhanced the sentence for each first-degree wanton endangerment charge from five years' to ten years' imprisonment. The jury ran all the charges concurrently, however, for an effective total of ten years' imprisonment. Creatively, the jury then opted to recommend five of these ten years run concurrently with the first-degree arson sentence and the remaining five running consecutively. Simply put, the jury recommended 40 years' imprisonment.

The objective evidence of the jury's sentencing deliberations does not bear out that the Commonwealth's emphasis of thirteen people had a heavy impact on Moore's resultant sentence. It appears more likely that the jury endeavored to sentence Moore in the mid-range of the permissible sentencing.

---

[9] First-degree wanton endangerment is a Class D felony with a sentence range of 1-5 years.

Out of a possible 70 years' imprisonment,[10] Moore received 40 years. The vast majority of Moore's sentence stems from his first-degree arson conviction, which in no way depends on the number of people present in the building; rather, Moore could have been guilty of that offense even if the apartment building were empty, as long as he had reason to believe the building was occupied.[11] In final analysis, the mention of thirteen people in the building does not seem to have inflamed the jury or promoted any emotional excess. Moreover, the impact of the trial court's erroneous directed-verdict ruling is mitigated by the jury's decision to run all wanton-endangerment counts concurrently.[12]

The jury reached a reasonable conclusion and absent more evidence of outrage, we are hesitant to go behind the jury's verdict and sentence recommendation. We certainly are unable to find evidence that the jury would have lowered its sentence if the trial court had properly dismissed the nine counts of first-degree wanton endangerment. The trial court's erroneous treatment of Moore's directed verdict motion did not taint the trial to a degree that warrants a new trial, whether guilt or sentencing phase.

---

[10] *See* Kentucky Revised Statute (KRS) 532.110(1)(c).

[11] *See* KRS 513.020.

[12] In essence, Moore was sentenced for a conviction of a single count of first-degree wanton endangerment. Moore levies no challenge to the remaining four counts of first-degree wanton endangerment unaffected by this Opinion. As a result, the trial court's error—palpable or otherwise—does not require a new sentence. *See Swan v. Commonwealth*, 384 S.W.3d 77, 104 (Ky. 2012) ("Though Owens is not subject to retrial for this offense, since this reversal functions as an acquittal, this reversal, like the reversal above of his assault convictions, has no effect on his overall sentence, as the court, when reducing the overall sentence to conform to the statutory cap, ran the sentence for this offense concurrently with the others.").

III. CONCLUSION.

For the foregoing reasons, we reverse Moore's convictions on the nine challenged counts of wanton endangerment and affirm the remaining convictions and sentence. We remand the case to the trial court for the entry of judgment consistent with this opinion.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David Bryan Abner
Assistant Attorney General

Daniel M. Laren
Assistant Commonwealth's Attorney