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RENDERED: DECEMBER 17, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000173-MR

MALIK SHABAZZ JOHNSON — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 12-CR-1400

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Malik Johnson appeals as a matter of right from a Judgment of the Fayette Circuit Court convicting him of murder and tampering with physical evidence. Ky. Const. § 110(2)(b). Johnson raises three issues on appeal: 1) that the trial court erred when it prohibited the defense from calling a witness to testify; 2) that results of a gunshot residue test should have been suppressed; and 3) that the trial court erred when it ordered him to pay restitution without holding a hearing. We now reverse Johnson's judgment and sentence and remand the matter to the trial court.

RELEVANT FACTS

On September 25, 2012, Jaleel Raglin was shot three times at close range in his girlfriend's apartment. At the time of the shooting, Raglin's girlfriend, Dajure Jones, was outside of the apartment smoking a cigarette. Jones's mother, Tracy Kirksey, and Kirksey's boyfriend, Ricky Goldsmith, were

in the apartment in a bedroom with the door closed. Hearing gunshots, Jones, Kirksey, and Goldsmith rushed into the living room where they found Raglin lying dead. Raglin had been shot twice in the back and once in the head.

Police quickly identified Malik Johnson and Marquez Shelby as suspects. A McDonald's employee uniform shirt with the name "Malik" was recovered from under Raglin's body at the hospital. Malik Johnson was an ex-boyfriend of Dajure Jones. Johnson and Shelby are first cousins. Dajure Jones told detectives that she and Raglin had encountered Shelby at the gate of her apartment complex on the day of the shooting. According to Jones, Shelby approached Raglin, threatened him, and stated that he had a gun. Shelby was later seen standing at the steps of the apartment moments after the shooting by Tracy Kirksey who observed him from her bedroom window. Once in custody, Johnson and Shelby were tested for gunshot residue. The tests revealed that both men had particles consistent with gunshot residue on their hands. In his statement to police, Johnson stated that he and Shelby went to Jones's apartment on September 25th. According to Johnson, he and Raglin began to fight after Raglin tried to hit him. Johnson stated that he took a gun from his back pocket and accidentally fired two shots into Raglin's back, and another shot into the apartment. Johnson did not confess to shooting Raglin in the head. After the shooting, Johnson left the gun in a nearby park. The gun was later found under a couch at Johnson and Shelby's grandmother's home, allegedly hidden there by Shelby.

Johnson was indicted by a Fayette County grand jury on the charges of murder and tampering with physical evidence. Shelby was never charged in connection with Raglin's murder. At trial, defense counsel argued that Johnson had given a false confession after being implicated by Shelby in an earlier police interview. Although Shelby was supposed to be a prosecution witness, he refused to take the witness stand and testify. After several bench conferences and a lengthy deliberation, the trial court ordered that Shelby could not be called as a witness because he intended to invoke his Fifth Amendment right against self-incrimination. The jury convicted Johnson of murder and tampering with physical evidence. Upon the jury's recommendation, the trial court sentenced Johnson to serve a 25-year prison term and ordered him to pay $8,225.00 in restitution. This appeal followed.

ANALYSIS

I. Johnson's Confrontation Rights Were Violated By the Commonwealth's Opening Statement.

During opening statements, the Commonwealth told the jury that Shelby would testify about his knowledge of the events surrounding Raglin's murder. Specifically, the prosecutor explained that Shelby would testify that he met Johnson at Jones's apartment on the day of the shooting, and waited outside the apartment as Johnson went inside. She stated to the jury that Shelby would testify that Johnson later exited the apartment with a handgun that he gave to Shelby, explaining that he "pistol-whipped" Raglin.

Before the jury was called in on the second day of trial, the Commonwealth informed the trial court and Johnson's counsel that Shelby,

who had voluntarily arrived at the courthouse that morning, was refusing to testify if called as a witness. The trial court called Shelby to the bench, and emphatically impressed upon him the moral and legal obligations inherent in his duty to testify. Shelby informed the trial court that he would not testify "out of respect" for his family and himself. The trial court appointed counsel to Shelby, and took a short recess. After discussing the matter, Shelby's counsel returned and informed the trial court that Shelby still intended not to testify. The trial court brought Shelby back into the courtroom, placed him under oath, and informed him that the Commonwealth and defense counsel had questions for him. When the trial court asked if Shelby would be "willing to answer those questions," Shelby invoked his Fifth Amendment right to remain silent and not incriminate himself. The trial court held Shelby in contempt, sentenced him to serve six months, and instructed a sheriff's deputy to take him into custody. When the parties and the trial court discussed whether Shelby had the right to invoke the Fifth Amendment, the trial court quickly concluded that he did not.

During a lunch break later that day, the trial court ordered Shelby returned to the courtroom. Once again, the trial court attempted to convince Shelby to testify, and, once again, Shelby refused. Later that afternoon, Shelby was brought back before the court for a fourth time. After a short discussion, Shelby's counsel and the Commonwealth agreed that Shelby could invoke his Fifth Amendment right against self-incrimination as to tampering with physical evidence. When asked by the trial court if Shelby intended on invoking his

Fifth Amendment right even if he was not asked about the physical evidence, or about his involvement in the crime, Shelby's counsel stated that he believed that he would invoke the privilege. His attorney went on to explain that Shelby did not want to incriminate himself in tampering with physical evidence and possibly complicity to murder. Although the prosecutor insisted that she had no present intentions of charging Shelby with any crime, Shelby's attorney noted that the prosecutor could not promise immunity to his client.

The trial court then asked all of the attorneys what they anticipated Shelby's testimony to entail. Shelby's counsel, having just been appointed to represent him that morning, replied that he had no idea what Shelby would say or what the evidence would be, but speculated that Johnson's counsel would argue that someone else (probably Shelby) committed the murder.[1] Finding that Shelby could invoke his Fifth Amendment right, the trial court ruled that he could not be called as a witness by either the Commonwealth or Johnson. Shelby was released from custody. When asked by Johnson's counsel if Shelby could at least be seen by the jury, the trial court concluded that he could not.

On appeal, Johnson argues that his Sixth Amendment right to confront the witnesses against him was violated when the Commonwealth made remarks about Shelby's anticipated testimony and then failed to produce him as a witness. He also contends that the trial court erred when it refused to allow the parties to call Shelby as a witness because the court did not adequately explore whether he could have offered relevant testimony without

[1] This was in fact Johnson's theory of the case.

incriminating himself. The Commonwealth insists that the trial court made the correct ruling. For reasons explained fully herein, we agree that Johnson's confrontation rights were violated by the Commonwealth's opening statement. Because we believe that the prejudicial effect of admission of the summary of Shelby's anticipated, but never introduced, testimony constituted palpable error, we agree that Johnson is entitled to a new trial.

A. Recitation of a Key Witness's Testimony During the Commonwealth's Opening Statements Violated the Defendant's Sixth Amendment Rights.

The Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution guarantee the right of a criminal defendant to confront those witnesses against him. To secure the fundamental right of confrontation, a criminal defendant must be afforded the opportunity to cross-examine witnesses. *Pointer v. Texas*, 380 U.S. 400 (1965). In the landmark *Crawford v. Washington* decision, the Supreme Court held that the Confrontation Clause prohibits the admission of testimonial, out-of-court statements unless the declarant is available to be cross-examined (or where the defendant has had a prior opportunity to cross-examine the declarant). 541 U.S. 36 (2004). In other words, "[t]he Sixth Amendment prohibits the admission of a testimonial statement of a declarant who does not appear at trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." *Roach v. Commonwealth*, 313 S.W.3d 101, 111 (Ky. 2010). Johnson alleges that the Commonwealth's recitation of Shelby's testimony, coupled with the trial court's decision to excuse Shelby as

a witness, violated his right to confrontation as guaranteed by the Sixth Amendment.

It is worth noting that long before the *Crawford* decision, the Supreme Court recognized the fundamental importance of the right to adequate cross-examination in securing Sixth Amendment confrontation rights. In *Bruton v. United States*, the confession of a codefendant was introduced at the trial of a defendant charged with armed robbery. 391 U.S. 123 (1968). The codefendant's confession, which was introduced through the testimony of a postal inspector, inculpated the defendant in the crime. *Id.* at 124. The trial court in *Bruton* recognized the testimony as inadmissible hearsay evidence, and instructed the jury to disregard it. *Id.* at 125. On appeal, the Supreme Court reversed the conviction, holding that a limiting instruction did not (and cannot in every circumstance) cure an "encroachment on the right to confrontation." *Id.* at 128. The Supreme Court reached a similar conclusion in *Douglas v. Alabama*, 380 U.S. 415 (1965). In *Douglas*, the government elicited incriminating evidence against the defendant in an attempted murder case through the examination of a codefendant. 380 U.S. at 416. In reversing the conviction, the Supreme Court determined that the government's treatment of a codefendant as a hostile witness and subsequent cross-examination constituted a violation of the defendant's confrontation rights. *Id.* at 419.

A third pre-*Crawford* case, *Frazier v. Cupp*, 394 U.S. 731 (1969), presents a set of facts notably similar to the case at bar. In *Frazier*, Martin Frazier was indicted alongside his cousin, Jerry Rawls, for murder in an Oregon state

court. 394 U.S. at 733. Rawls pleaded guilty to the offense. *Id.* Prior to Frazier's trial, the prosecutor conferred with multiple sources (police officers, probation officers, and family members) to confirm that Rawls, who was awaiting sentencing, would testify at Frazier's trial. *Id.* At trial, the prosecutor provided a summary of Rawls's expected testimony in his opening statement, interwoven with portions of Frazier's confession. *Id.* When Rawls was called to testify, he informed the court of his intention to assert his privilege against self-incrimination. *Id.* at 734. The court dismissed Rawls and instructed the jury to not consider "any statement made by counsel in your presence during the proceedings concerning facts of this case as evidence." *Id.* Frazier was convicted of second-degree murder.

In his petition to the Supreme Court for habeas relief, Frazier contended that placing the "substance" of Rawls's statement before the jury during the prosecutor's opening statement gave credibility to the government's case "in a form not subject to cross-examination." *Id.* The Supreme Court held that the opening statement did not overemphasize Rawls's expected testimony in such a way that would overpower the jury's ability to "appraise the evidence objectively and dispassionately." *Id.* at 736-37. The Supreme Court further concluded that the court's instruction was sufficient to preserve Frazier's confrontation rights in light of the opening statement. *Id.* at 736. While the Supreme Court dismissed the notion that a prosecutor acting in good faith could not, as a rule, violate a defendant's confrontation rights, the Court held that the prosecutor's reasonable belief that a witness would testify is a factor to consider when

undertaking the analysis. *Id.* Ultimately, the Supreme Court concluded that the prosecutor's opening statement in Frazier's trial did not warrant habeas relief. *Id.* at 737. In denying the petition, the *Frazier* Court explained that "some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable." *Id.* at 736.

Having reviewed the record, we agree that the Commonwealth's recitation of Shelby's anticipated testimony constituted a violation of Johnson's confrontation rights under *Crawford* and other Sixth Amendment precedent. In Johnson's case, the prosecutor devoted a substantial portion of the Commonwealth's opening statement to reciting Shelby's anticipated testimony. The prosecutor informed the jury that Shelby would testify that he argued with the victim before calling Johnson and asking him to meet him at the victim's girlfriend's apartment. The prosecutor went on to state that Shelby would explain that he watched Johnson enter Raglin's apartment, that Johnson admitted to "pistol whipping" Raglin, and that Johnson gave Shelby the murder weapon to hide. The prosecutor based her remarks on Shelby's police interviews. These statements are clearly "testimonial" in nature—that is, procured for the "primary purpose" of obtaining evidence for trial or an out-of-court substitute for trial testimony. *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Although the Commonwealth expected Shelby to take the stand, his invocation of his Fifth Amendment right not to testify made him (for the purposes of Johnson's confrontation rights) an unavailable declarant of out-of-

court statements. Thus, the Commonwealth's opening statement violated *Crawford's* prohibition on testimonial, out-of-court statements.

B. The Opening Statement Constituted Palpable Error.

Having concluded that *Crawford* applies, we must now determine whether the introduction of those statements compels reversal. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (holding that the violation of a defendant's confrontation rights is subject to harmless-error analysis). The Commonwealth argues that Johnson waived his objection to the comments made during the opening statement by not requesting an admonition or mistrial at the time the statements were made. This response is without merit, however, as at the time the opening statements were made, all of the parties believed that Shelby would testify. The Commonwealth also notes that Johnson did not seek an admonition or mistrial after his motion to call Shelby as a witness was denied. Regardless, errors of constitutional significance are subject to palpable error review. *Walker v. Commonwealth*, 349 S.W. 3d 307, 313 (Ky. 2011). We will reverse on the basis of palpable error where an error results in manifest injustice. Kentucky Rule of Criminal Procedure (RCr) 10.26; *Martin v. Commonwealth*, 207 S.W.3d 1, 2 (Ky. 2006). This Court has come to recognize manifest injustice as an error that "seriously affected the fairness, integrity, or public reputation of the proceeding." *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013).

There were no eyewitnesses present to testify about precisely what happened inside the apartment when Raglin was killed. The people inside the

apartment at the time of the shooting (Jones, Kirksey, and Goldsmith) did not see who entered the dwelling, nor did they see who shot Raglin. Shelby's expected testimony, presented by the Commonwealth in its opening statement, not only placed Johnson at the crime scene at the time of the shooting, but described Johnson's claim that he "pistol whipped" Raglin and placed the murder weapon in Johnson's hands immediately after the shooting.[2] Unlike *Frazier*, there was no limiting instruction to direct the jury to disregard the portions of the opening statement that referred to Shelby's anticipated, but never introduced, testimony. Even if the trial court had admonished the jury, the prejudicial effect of the opening statement was likely too great to be diminished by a limiting instruction. *See Bruton*, 391 U.S. at 125. As noted in the *Frazier* decision, the Commonwealth's good-faith belief that Shelby would testify is not the sole determining factor when assessing Johnson's Sixth Amendment claim. 394 U.S. at 736-37. And while there is no evidence to suggest that the Commonwealth acted in bad faith, we cannot fathom that the recitation of such damning testimony, without any opportunity for cross-examination, had little or no impact on the overall fairness of the proceeding. In sum, we agree that the Commonwealth's opening statement that relayed Shelby's expected testimony, testimony that never materialized from a witness who never testified, constituted palpable error.

C. Johnson's Challenge Under Our *Combs* Decision is Misplaced.

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[2] The Commonwealth's opening statement revealed that Shelby disclosed to police officers that he saw Tracey Kirksey looking out the window of the apartment. This account was later corroborated by Kirksey's own testimony.

In addition to the *Crawford* challenge, Johnson contends that the trial court erred when it did not adequately explore whether Shelby could have offered relevant testimony without incriminating himself. Johnson cites our *Combs v. Commonwealth* decision, where we held that a trial court should allow parties to engage in a "dry-run" of a witness's testimony where a witness purports to have a Fifth Amendment privilege to avoid testifying. 74 S.W.3d 738, 745 (Ky. 2002). The primary purpose of staging a "dry-run" is to provide the trial court with an opportunity to preview a party's questions and the witness's answers so that the court may determine whether it can accommodate a witness's valid assertions of privilege without impairing a party's ability to engage in adequate cross-examination. *Id.* When a dry-run reveals that a witness will refuse to answer substantive questions related to the crime, "the truth-seeking function of the court is impaired." *Id.* at 743. It is in these instances where questioning a witness will only "[frustrate] cross-examination" on material issues that courts should resort to the "drastic remedy" of barring a witness's testimony completely. *Id.* at 744.

Johnson is correct that the trial court failed to engage in a *Combs*-proscribed dry-run of Shelby's testimony prior to his dismissal as a potential witness. However, *Combs* specifically addresses three contexts (recognized by federal courts) for when a dry-run should take place:

> (1) where a defense witness invokes the privilege as to one or more cross-examination questions from the prosecution (implicating the defendant's Sixth Amendment right to compulsory process); (2) where a prosecution witness invokes the privilege as to one or more of the defense's cross-

> examination questions (implicating the defendant's Sixth Amendment confrontation rights); and (3) where the defendant testifies in his or her own defense, but invokes the privilege as to one or more of the prosecution's questions on cross-examination (implicating the defendant's Fifth Amendment right to testify in his own defense).

Id. at 742-43 (internal citations omitted). In the present case, Shelby was the Commonwealth's witness refusing to answer *any questions* from *either party.* Therefore, the scenarios described in *Combs* fail to encompass the precise issues arising from Shelby's invocation of his alleged Fifth Amendment rights. Because we are reversing and remanding Johnson's conviction and sentence for a new trial based on the *Crawford* issue created by the Commonwealth's opening statement, we need not wade into the mire as to the applicability of *Combs* to the facts presented here.

II. The Trial Court Properly Denied Johnson's Suppression Motion.

Johnson contends that the trial court erred when it denied his motion to suppress the results of a gunshot residue (GSR) test. Because this issue will likely resurface on remand, we address it as well.[3]

Johnson moved to suppress the results of a gunshot residue test performed mere hours after Raglin's shooting. Detective Tim Upchurch and Sergeant Pete Ford of the Lexington Police Department testified at a suppression hearing. Detective Upchurch testified that Johnson had come to the police station voluntarily on the night of Raglin's murder. After Raglin's shooting, Johnson met investigating officers at the police station where he was

[3] Given the Court's disposition reversing and remanding the matter to the trial court, we need not address Johnson's third issue concerning restitution.

asked if he would consent to a gunshot residue test and to having buccal swabs taken from his mouth. Johnson agreed, but the officers did not record his verbal consent, nor did they obtain written consent. Detective Upchurch explained that Johnson did, however, acknowledge during the video-taped interview with officers that he had consented to the GSR test being performed. On cross-examination, Detective Upchurch conceded that he had received written consent for the gunshot residue test from Marquez Shelby, and that the form given to Shelby included a variety of warnings concerning the scope of the consent to conduct the test. Sergeant Ford corroborated Detective Upchurch's account, testifying that he heard Johnson verbally consent to the GSR test. He further testified that Johnson had agreed to come to the police station on his own, that he was not handcuffed, and that he was not under arrest at that time.

The trial court denied Johnson's motion to suppress, finding that Johnson had voluntarily consented to the gunshot residue test. At trial, a forensic expert testified that particles consistent with gunshot residue were present on Johnson's hands on the night of Raglin's murder. The expert testified that the presence of gunshot residue can be attributed to discharging, handling, or being in close proximity to a discharging firearm.

On appeal, Johnson argues that he did not voluntarily consent to the gunshot residue test, and, therefore, the results should have been suppressed. Although the trial court did not make in-depth factual findings, Johnson accepts the testimonies of Sergeant Ford and Detective Upchurch. Instead,

Johnson asserts that the officers' testimonies establishes that he was in police custody when he was asked to submit to testing, and that his consent was the product of implicit coercion. The standard of review for a motion to suppress is two-fold. First, we must examine the factual findings of the trial court to ascertain whether those findings are supported by substantial evidence; findings supported by substantial evidence are accepted as conclusive. RCr 9.78. Second, the Court asks whether the trial court's ruling was correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). Upon review, we agree that the trial court correctly denied Johnson's motion to suppress the results of the GSR test.

The taking of physical evidence constitutes a search for the purposes of the Fourth Amendment. *Farmer v. Commonwealth*, 6 S.W.3d 144 (Ky. App. 1999); *see also Schmerber v. California*, 384 U.S. 757 (1966). Warrantless searches are considered per se unreasonable, absent circumstances satisfying one of the exceptions to the rule. *Katz v. United States*, 389 U.S. 347 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Consent to search is one such exception. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In order to establish a valid consent to search, the government must prove that based on the circumstances surrounding a defendant's consent, that the consent was voluntarily given—that is, not the product of either explicit or implicit coercion. *Id.* at 228-29. The Commonwealth bears the burden of establishing by a preponderance of the evidence that consent was voluntarily given. *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992).

Because knowledge of the right to refuse consent is not a prerequisite for voluntariness, law enforcement officers are not required to inform a suspect that they may refuse consent. *Schneckloth*, 412 U.S. at 231-32. Therefore, Johnson cannot prevail solely on the basis that the officers failed to inform him that he could refuse to submit to the GSR test. Nor can Johnson rely on the fact that the officers failed to read him his *Miranda* rights prior to administering the test. It is well settled that a suspect or witness need not be advised of his or her *Miranda* rights (a creature of the Fifth Amendment) before submitting to a search for physical evidence (consent for which is required under the Fourth Amendment). *Cook*, 826 S.W.2d at 331. Rather, Johnson must prove that the circumstances surrounding his giving of consent amounted to implied coercion, thereby rendering his consent involuntary.

The evidence adduced at the suppression hearing established that Johnson agreed to come to police headquarters on his own accord, and was driven to the station by a police officer. Johnson was told that he was the suspect in a criminal investigation, and then asked if he would submit to GSR testing. Johnson agreed to be tested. The GSR test was then performed outside of the police officer's work room, away from the interview room. At that point, Johnson was not under arrest. Johnson was later taken to the interview room, where he was given his *Miranda* rights and questioned by officers. When asked, he told the officers that he had consented to the GSR testing that was performed. The law enforcement officers were under no legal obligation to present a consent form to Johnson—in fact, the officers were under no legal

obligation to inform Johnson of his right to refuse consent. *Schneckloth*, 412 U.S. at 231-32. Therefore, the fact that Shelby was given a consent form for the GSR testing (while Johnson was not) does not support the inference that Johnson was coerced.

Based on the foregoing, we agree that the testimony presented at the suppression hearing clearly supports the trial court's conclusion that Johnson voluntarily consented to the GSR testing. It is apparent that Johnson was not subjected to any coercion or deception when he agreed to submit to the GSR test. As such, we agree that the trial court properly denied the suppression motion.

CONCLUSION

The judgment and sentence are hereby reversed, and the matter is remanded to the Fayette Circuit Court for further proceedings consistent with this opinion.

All sitting. Minton, C.J.; Abramson, Noble, and Venters, JJ., concur. Cunningham, J., dissents by separate opinion in which Keller and Wright, JJ. join.

CUNNINGHAM, J., DISSENTING: I lament the continual lowering of our palpable error threshold in criminal cases. Therefore, I must respectfully dissent.

We should be reluctant to assert errors in the trial proceedings when they are not egregious enough for the defense lawyer to object. The majority's reversal of this conviction because of its notion of palpable error raises three

very troublesome realities regarding our dilution of the concept of palpable error.

First, when an objection is not made to a development at trial, the trial judge is not provided the opportunity to correct the error in such a way as to avoid subsequent conviction, time consuming appeals, and then the cost and trouble of a second trial. Here for instance, if a motion for mistrial had been made, the trial judge may have granted the motion and restarted the process a short while later. Or, despite the majority's statement to the contrary, a properly crafted admonition may have helped avert any pivotal prejudice.

Second, the majority fails to recognize that a defendant may not object as part of his trial strategy. To reverse for palpable error in such cases gives the defendant the luxury of having his cake and eating it too. Experienced trial attorneys know the importance of not over-selling their cases to a jury because doing so often creates significant credibility issues. When an attorney promises the jury during opening statement that he or she will present a witness and then fails to do so, that failure often inures to the advantage of the opposing party. Such was the case here. When the Commonwealth failed to produce Shelby as a witness, Johnson's counsel used that to his advantage during closing argument. Counsel noted that, not only did Shelby not say what the Commonwealth said he would say, but the Commonwealth failed even to produce Shelby as a witness. As Johnson stated to the jury, "[The Commonwealth] told you they could prove a lot of things," but failed to do so.

Johnson should not now be rewarded with a new trial because what may have been a strategic choice did not garner the outcome he sought.

Finally, the good faith misstatements by the Commonwealth during its opening statement did not create a "manifest injustice," which made it likely that a different result would have been reached, or appear "shocking or jurisprudentially intolerable." *Martin*, 207 S.W.3d 1, 3-4. As the majority notes, the Commonwealth told the jury in opening statement that Shelby would testify to essentially three things: that Johnson went into Jones's apartment; that Johnson came out of Jones's apartment and said he had pistol-whipped Raglin; and that Johnson gave Shelby a pistol. This testimony would have proven that Johnson was in the apartment, that he had a gun, and that he and Raglin fought. In a vacuum, that may have been rather damning evidence. However, in the context of this trial, it was not because Johnson admitted: that he had gone into Jones's apartment; that he and Raglin had fought; that during the fight he had pulled a pistol out of his pants; that he had accidently shot Raglin twice in the back; and that he had randomly fired into the apartment. Thus, Johnson admitted that he went into the apartment, that he and Raglin fought, and that he had a gun. Those are essentially all of the facts to which Shelby was going to testify.

The only fact left in dispute was whether Johnson intended to shoot Raglin. Johnson testified that the shooting was accidental. However, because Shelby was not present in the apartment, nothing in his testimony would have clarified the issue of intent. The majority implies that the statement that

Johnson said he "pistol-whipped" Raglin was used to prove Johnson intended to kill Raglin. However, that statement is as likely to show lack of intent as it is to show intent. The jury could have inferred from that statement that Johnson did not intend to kill Raglin but merely intended to hit him with the gun, and the shooting was either in self-defense or an accident. I fail to see how exclusion of the statement that Johnson "pistol-whipped" Raglin would have changed the result. Therefore, I fail to see how the inadvertent misstatements by the Commonwealth during opening statement caused a manifest injustice sufficient to mandate reversal. *See McCleery v. Commonwealth*, 410 S.W.3d 597, 606 (Ky. 2013) (we will not reverse unless "it can be determined that manifest injustice, i.e., a repugnant and intolerable outcome, resulted from [the] error.").

Keller and Wright, JJ., join.

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