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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 16, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000652-MR

JORDAN GREEN

APPELLANT

V. ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 14-CR-00003-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Jordan Green appeals as a matter of right from a judgment of the Kenton Circuit Court sentencing him to a twenty-year prison term for first-degree robbery and being a persistent felony offender in the first degree. Ky. Const. § 110(2)(b). Green alleges the trial court erred in three ways: (1) by allowing a witness to comment on surveillance video from the night of the robbery; (2) by refusing to permit Green to question the venire panel on the differences between preponderance of the evidence and a reasonable doubt; and (3) by allowing the Commonwealth to ask a defense witness a question knowing that the witness would respond by asserting his Fifth Amendment protection against self-incrimination. For the following reasons, we affirm the judgment and sentence of the Kenton Circuit Court.

FACTS AND PROCEDURAL HISTORY

The evidence presented by the Commonwealth at trial reflected the following facts. During the evening of June 10, 2013, Jordan Green gathered with some friends at the home of Robert and Bobby Turner. Among those in attendance were Robert and Bobby Turner, Jeremy Bowling, and Anthony Wallace. During the evening, Green suggested to the group that they rob the Garrard Market, a nearby convenience store. There was only a short distance between the Garrard Market and the Turner residence; the residence was across the street and offset from the south side of the market. Subsequently, Green devised a plan to carry out the robbery.

It was agreed that Bowling and Robert Turner would commit the robbery. Wallace would provide the pair with a .45 caliber Hi-Point handgun. Green advised that Robert Turner should be armed with the handgun, given that he was a juvenile. Additionally, Bobby Turner and Green would serve as lookouts inside the store. Green instructed the group that he would appear to be acting as an innocent bystander during the robbery.

At 10:00 p.m. that same evening, Goitom Teklhymnot was working at the Garrard Market filing the daily balance sheets as part of the process to close the store for the day. After the sole remaining customer in the store left, Green and Bobby entered. However, before Green entered he stared off in the direction of the Turner residence. This was a signal to Bowling and Robert Turner to prepare for the robbery.

Subsequently, Green feigned interest in merchandise while Bobby Turner left the store to give an update to Bowling and Robert Turner. After learning from Bobby Turner that the store was empty, Bowling and Robert Turner entered. Next, Robert Turner drew the handgun and pointed it at Teklhymnot. In response, Green backed away from the counter and walked slowly to the door of the store, stopping there to watch the robbery.

Bowling then went behind the counter and struck Teklhymnot on the head knocking him to the door. Thereafter, Bowling opened a cash drawer and seized cash. After watching Bowling obtain the money, Green departed. Moments later, Bowling and Robert Turner also left, following Green. The three men split up shortly thereafter, with Bowling and Robert Turner going to the residence of their friend Logan Bowman.

Shortly after the robbery, Teklhymnot was discovered by a customer who called 911. Subsequently, three officers of the Covington Police Department (CPD) responded to the Garrard Market. The initial police response consisted of securing the scene, interviewing Teklhymnot, and reviewing the store's surveillance video. Afterwards, the police began a canvass of the neighborhood during which CPD Detective Gregory Andrews observed Green standing on the porch of the Turner residence. After Detective Andrews learned that Green had been in the store at the time of the robbery, he summoned the lead investigator, CPD Detective Corey Warner to speak to Green.

While Green refused to give a recorded statement to the police that evening, he told the officers that the robbery had been committed by two men

“a Mexican and a black guy.” During this conversation, Green was wearing a white T-shirt. When the robbery occurred, Green had been wearing an orange polo shirt, which was not visible on his person or near the porch. Green concluded his interview with the police, by informing them that he was going back to his mother’s nearby residence. However, Green instead went to Bowman’s residence to rendezvous with Bowling and Robert Turner. During their meeting, Green informed Bowling and Robert Turner about his interaction with the police. He also received his portion of the robbery proceeds.

Two days after the robbery, Green went to the police station and made a recorded statement. He told the police that he had been dropped off near the convenience store the night of the robbery by his brother, John Harrington, to purchase cigarettes, a soda, and snacks. While he was in the store, Green explained that two men, one African American and the other Hispanic, committed the robbery. While the robbery was ongoing, Green left the store. Green recounted that he was on the porch of the “Taylor” [sic] residence by the time that the robbers left the store.

However, there were some issues with Green’s account. Green declined to provide Robert Turner’s number to police when asked. Additionally, the police were unable to reach Green’s mother by telephone or find any evidence that John Harrington, Green’s alleged brother, had ever existed. Further questions about Green’s account were raised following the apprehension of Robert Turner and Bowling, both of whom gave statements to the police which incriminated Green.

Subsequently, Green was interviewed for a second time. In his interview, Green was inconsistent about who had allegedly dropped him off outside the Garrard Market, claiming that it might have been Zach Lairson or Justin Hill. Additionally, Green admitted to talking to the clerk multiple times prior to the robbery and knowing that the clerk did not have access to a firearm. After this second interview, Green was charged for his involvement in the robbery.

During Green's trial, Bowling testified as part of a plea agreement reached with the Commonwealth. Bowling's testimony laid out Green's involvement in the robbery, from its inception to its violent conclusion. To rebut Bowling's account, Green testified on his own behalf. Green admitted to being present at the Turners' residence when the planned robbery was discussed, but insisted that he refused to participate in the robbery and left the house at approximately 6:00 p.m.

According to Green, it was happenstance that he went to the Garrard Market that evening. Green was surprised that the Market was still open, after normal closing time, and he decided to go there for cigarettes and snacks. Green alleged that he decided to go to the Garrard Market without giving any thought to the conversation with his friends from earlier that evening, where they discussed robbing the store. However, Green admitted that he had withheld information from the police about the identity of the robbers. Additionally, Green acknowledged that he had lied to the police during their investigation.

Subsequently, the jury found Green guilty of complicity to first-degree robbery. Following the penalty phase of the trial, the jury found Green guilty of being a persistent felony offender in the second degree and recommended a sentence of twenty-years. The trial court sentenced Green in conformance with the jury's recommendation. Green now appeals as a matter of right.

ANALYSIS

I. The Trial Court's Decision to Allow Detective Warner to Testify as to his Interpretation of the Surveillance Video was Harmless Error.

Green argues that the trial court abused its discretion in permitting Detective Warner to narrate the surveillance video from the night of the robbery. While we agree the trial court erred in this regard, the error was harmless. Kentucky Rule of Criminal Procedure (RCr) 9.24. ("The court . . . must disregard any error or defect in the proceedings that does not affect the substantial rights of the parties.").

Prior to trial, Green made an oral motion in limine arguing that Detective Warner should not be permitted to offer expert opinion regarding the robbery depicted on the Garrard Market surveillance video. Green argued that the surveillance video was self-explanatory and the jury did not need anyone to interpret what was on the recording. However, Green conceded that the Commonwealth could have Detective Warner note objective facts during the playing of the recording such as identifying the individuals present during the robbery. In response, the Commonwealth argued that Detective Warner should be able to note those observations that guided his investigation. The trial court determined that Detective Warner could offer his lay opinion based on what he

observed on the recording and what effect those observations had on the ensuing investigation.

During his trial testimony, Detective Warner explained how he acquired the surveillance videos from the night of the robbery. Detective Warner went on to confirm that the footage was an accurate depiction of the market and identified the individuals who were present during the robbery.¹ After Detective Warner had identified Green and Bobby Turner on the recording, the Commonwealth asked him, “[a]t this point in your observation did anything catch your attention about these two?” Detective Warner said in response, that “[m]y understanding is Green and Bobby Turner are friends at this point. They don’t acknowledge one another when they walk into the store.” Green objected to Detective Warner’s response, but his objection was overruled.

Later in Detective Warner’s testimony, the Commonwealth asked, “Detective, when viewing this section of the video--anything that caught your attention?” Detective Warner began to respond using the phrase “in my experience,” to which the trial court sustained an objection from Green. Subsequently, Detective Warner answered by saying “[w]hen Robert Turner—who is the subject that comes in and points the gun at the clerk, Mr. Teklhymnot—dressed in black, he—with his left hand gently sweeps aside

¹ Green alleges that while Detective Warner was permitted to identify the individuals present in the store, that his trial testimony misidentified Robert and Bobby Turner. However, a review of the record does not support this argument as Detective Warner correctly identified the Turners in his trial testimony.

defendant Jordan Green.” Green objected to Detective Warner’s use of the word “gently,” but the objection was overruled.

After the objection was overruled, the Commonwealth asked Detective Warner for his observations while Robert Turner was at the counter. Detective Warner replied by saying:

Robert Turner comes into the store brandishing a firearm. He’s pointing it directly at the clerk Mr. Teklhymnot with his right hand. As he’s doing so, he’s gently pushing aside defendant Jordan Green with his left hand. While he’s doing this, defendant Jordan Green is actually reaching across Robert Turner to retrieve his snack cakes or whatever he was about to purchase off of the counter. Then he is completely disregarded by both Robert Turner and Jeremy Bowling and proceeds to put himself behind the gunman, Robert Turner at this point and he slowly backs up towards the entry exit door.

Additionally, the Commonwealth inquired of Detective Warner as to whether there was anything that caught his attention during a later portion of the recording. In response, Detective Warner said the following:

Yes, the defendant actually stops prior to exiting the store. Once he begins to go out the store after a few seconds pause, where neither Turner or Bowling are paying any attention to him whatsoever at this point as he starts to exit the store. While he’s focusing on both Turner and Bowling, and in that general direction, he stops with the door open and he looks both north on Garrard, south on Garrard, and proceeds to step out of the store and walk around the corner onto 19th Street.

Green argues that these portions of Detective Warner’s testimony exceeded what is permissible for lay opinion testimony under Kentucky Rule of

Evidence (KRE) 602, KRE 701, and the applicable case law.^{2 & 3}

In *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999) *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), the Court addressed whether it was permissible for a police officer to narrate during the playing of a crime scene video. The Court determined that whether the narrative testimony was permissible would depend on the application of KRE 602 and KRE 701. *Id.* at 488.

Under KRE 701, a witness may testify “in the form of an opinion or inference” if it is (1) “[r]ationally based on the perception of the witness;” (2) “[h]elpful to a clear understanding of the witness’ testimony or the determination of a fact in issue;” and, (3) it is “[n]ot based on scientific, technical, or other specialized knowledge.” Additionally, KRE 602 limits the scope of permissible lay opinion testimony offered under KRE 701 to those matters within the personal knowledge of the witness. *See Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009).

As such, “narration of a video may be proper but only if it is comprised of opinions and inferences that are rationally based on the witness’s own

² In support of his argument, Green suggests that this Court review *Alvarez v. State*, 147 So. 3d 537 (Fla. Dist. Ct. App.), *review denied*, 153 So. 3d 909 (Fla. 2014). As there is recent case law from this Court that resolves this issue, it is unnecessary to address Florida precedent.

³ Green also includes in this section of his argument an unpreserved claim that Detective Warner characterized the statement of another witness as a lie. During trial, the Commonwealth asked Detective Warner if Green’s pretrial statement that one robber went up 19th Street and the other went up Garrard Street was consistent with the recording. Detective Warner disagreed with the statement. There was no objection to Detective Warner’s statement at the time of trial, and it therefore it can only be considered for palpable error. Under these circumstances we cannot conclude that manifest injustice resulted from Detective Warner’s statement.

perceptions of which he had personal knowledge and that are helpful to the jury.” *Boyd v. Commonwealth*, 439 S.W.3d 126, 131 (Ky. 2014). However, a witness is not permitted to interpret audio or video evidence, as that testimony would invade the province of the jury and its function as the finder of fact. *Cuzick*, 276 S.W.3d at 265-266.

We review a trial court’s rulings on evidentiary issues for an abuse of discretion. *Meece v. Commonwealth*, 348 S.W.3d 627, 645-646 (Ky. 2011) (citation omitted). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

In the case at bar, the trial court abused its discretion by permitting Detective Warner to interpret the recording. Detective Warner was properly permitted to note that the recording was an accurate depiction of the store and to identify the individuals present during the robbery. Similarly, he was permitted to provide context to the surveillance video such as orienting the jury to the various camera views. However, his commentary exceeded what was permissible in several instances.

Detective Warner improperly interpreted the interactions, or the lack thereof, between Green and Bobby Turner when they walked into the store. Once Green and Bobby Turner had been identified for the jury, the jury was able to evaluate what actually occurred based on their own review of the surveillance video. Similarly, while Detective Warner was permitted to diagram

the actions of the robbers, it was improper for him to say that Robert Turner “gently [swept] aside defendant Jordan Green,” as he had insufficient personal knowledge of this event.

Additionally, Detective Warner improperly interpreted the actions of Robert Turner and Bowling when Green went behind the pair to slowly exit the store. Again, the jury was able to review the surveillance video and determine what actions were taken (or not taken) by Robert Turner and Bowling vis-à-vis Green during the robbery. Further, it was error for Detective Warner to testify about Green’s focus on Robert Turner and Bowling while he was exiting the store. As in the other examples raised by Green, Detective Warner’s conjecture was unnecessary as the jury was able to discern what occurred based on their own review of the recording.

It is clear that these portions of Detective Warner’s narration should have not been permitted as they were violative of KRE 602 and KRE 701. Green argues that this improper lay opinion violated his right to due process and Sections Two and Eleven of the Kentucky Constitution. However, the trial court’s error resulted in a violation of the rules of evidence, not Green’s constitutional rights. “A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). Here, the error was harmless as the jurors watched the recording and were in a position to interpret the footage independently from Detective Warner’s rather innocuous

testimony. As such, there was fair assurance that the judgment was not “substantially swayed by the error,” *Winstead*, and Green’s “substantial rights” were not affected by the error. RCr 9.24.

II. The Trial Court Properly Precluded Green From Asking an Improper Question of the Venire.

Green’s second argument on appeal is that the trial court erred by preventing him from questioning the venire panel on the differences between preponderance of the evidence and beyond a reasonable doubt. During voir dire, Green initially inquired whether any members of the panel had prior jury service in civil or criminal cases. He then asked, “[w]ere you made aware that there was a different—what they call—burden of proof in—in criminal cases as opposed to civil cases?” Before Green received a response, the Commonwealth requested permission to approach the bench.

At the bench conference, the Commonwealth objected to Green’s question arguing that it was impermissible to compare the criminal and civil burdens of proof and that the question was essentially defining reasonable doubt, in violation of our precedent. In response, Green argued “[w]ell I wasn’t going to try and—if they had any prior experience—that they knew it was preponderance—because there’s money involved as opposed to liberty, and that’s all.” The trial court sustained the Commonwealth’s objection. However, the trial court informed Green that while he could not compare the standards, he was permitted to say that they were different. In response Green asked,

“[c]an I say that one is less than the other, am I allowed to do that?” The trial court denied Green’s request.

Green acknowledges that this issue is only partially preserved and requests that this Court review this issue for palpable error pursuant to RCr 10.26. The palpable error rule requires reversal when “manifest injustice has resulted from the error.” *Elery v. Commonwealth*, 368 S.W.3d 78, 98 (Ky. 2012) (quoting RCr 10.26). To ascertain whether there has been manifest injustice, the Court focuses “on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.” *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

The trial court is permitted broad discretion in the control of the voir dire examination under RCr 9.38. The principal purpose of voir dire is for the trial court and counsel to obtain information from the prospective jurors about any suspected bias or prejudice. *Rogers v. Commonwealth*, 315 S.W.3d 303, 306 (Ky. 2010) (citing *Lawson v. Commonwealth*, 53 S.W.3d 534, 539 (Ky. 2001)) “Educating the jury on legal concepts is the function of the trial court.” *Id.* at 307. However, we acknowledge that “it is sometimes necessary to introduce legal concepts to the jury panel to ascertain if any prospective juror is unable or unwilling to adhere to the concept.” *Id.* As such, we have previously determined that the Commonwealth’s efforts “to point out that reasonable doubt is not ‘all doubt’ or a ‘shadow of a doubt’ were either proper or were, at most, harmless error.” *Id.* at 308. Similarly, we have permitted counsel to

inform the jury that “beyond a reasonable doubt” is not identical to “beyond a preponderance of the evidence.” *Id.*

Here, the trial court properly barred Green from questioning the venire about the differences between “beyond a reasonable doubt” and “a preponderance of the evidence” given the purpose for which Green sought to make the inquiry. During the bench conference, Green acknowledged that his purpose in asking the question was to point out to the venire that there was a difference in the standards, namely that preponderance was used in civil cases where money was at issue as opposed to liberty. This justification is insufficient. Green’s question about comparing the burdens of proof, would only be permissible when “used as the factual predicate for a question seeking to ascertain if any prospective juror would be unable to apply the reasonable doubt standard.” *Rogers*, 315 S.W.3d at 308. However, Green did not suggest to the trial court that he wanted to inquire as to whether a juror would be able to apply the criminal standard of beyond a reasonable doubt as opposed to the lower preponderance standard from a civil case. Rather than posing the question to elicit potentially disqualifying information from the venire, Green sought instead to educate the jury. As such, the trial court properly sustained the Commonwealth’s objection to Green’s voir dire questioning.

III. The Trial Court’s Ruling Permitting the Commonwealth to Inquire of Turner About What He Heard During the Bench Conference Did Not Constitute Palpable Error.

Green’s final argument on appeal is that the trial court violated his Sixth Amendment right to compulsory process by allowing the Commonwealth to

question Robert Turner, knowing he intended to invoke the Fifth Amendment to a particular question during cross-examination. This issue is unpreserved and there was no palpable error. RCr 10.26.

Prior to trial, Turner made a statement to police about his knowledge of three robberies – two of which involved Green. In exchange for his cooperation, Turner's case was not transferred from juvenile court to circuit court. At a pretrial hearing, Green stated his intention to call Turner as a witness at trial to address the benefit Turner received for making his statement to the police. Additionally, prior to trial, Bowling had also made a statement to police implicating Green in the robbery. However, according to Green there were contradictions in Bowling and Turner's statements regarding Green's role in the robbery. To address those contradictions and Turner's interest in staying in good favor with the Commonwealth, Green called Turner as a defense witness.

On direct examination, Green questioned Turner about his statement to the police. During cross-examination, the Commonwealth confronted Turner with transcripts of recorded jail phone calls he had with Green. In particular, the Commonwealth asked about an exchange in which Green told Turner to "stay out of the way." Green asked to approach the bench and objected to the question alleging a lack of foundation. As part of his objection, Green noted that "stay out of the way" could be defined as a slang term and that "[i]t may just mean stay out of trouble." The trial court overruled the objection and the Commonwealth restated the question asking, "[s]o in this January phone call,

[Green] told you to stay out of the way, didn't he?" Turner responded by saying, "[s]taying out of the way means, like, stay out of trouble, right."

After Turner answered using the same "stay out of trouble" explanation as Green's counsel had used in the bench conference, the trial court called a brief recess. During the recess, the trial court warned Turner that any statements that he made could be used against him. The trial court then inquired as to whether Turner had overheard the bench conference despite the "white noise." Turner denied overhearing the bench conference. Subsequently, Turner met with his attorney in a separate room. When Turner returned, the trial court informed him that when the trial resumed that the prosecutor was likely to inquire as to whether he had overheard the bench conference. The trial court cautioned Turner that if he made a false statement to the jury, that it could result in criminal charges. Additionally, the trial court informed Turner of his right to not answer the question due to his Fifth Amendment privilege against self-incrimination. When asked by the trial court whether he intended to invoke his Fifth Amendment right, Turner indicated that he would. When the trial resumed, the Commonwealth asked Turner if he had overheard the bench conference and he responded by invoking his Fifth Amendment privilege.

Green alleges that the trial court erred by permitting the Commonwealth to ask Turner a question, knowing that Turner planned to invoke his Fifth Amendment right. We begin by noting that this issue is not preserved. RCr 9.22 requires "that a party, at the time the ruling or order of the court is made

or sought, makes known to the court the action which [he] desires the court to take or [his] objection to the action of the court.” Green failed to object to the actions of the trial court. On appeal, Green claims that “counsel was effectively shushed by the court,” thus explaining the failure to object. However, a review of the record does not support this explanation. The trial court initially interrupted defense counsel’s remarks during the recess, likely to limit the amount of discussion conducted with Turner present. Yet, a lengthy discussion took place outside the presence of the jury, during which defense counsel could have objected to the actions of the trial court.

As Green did not properly raise these specific issues before the trial court our review is limited to palpable error. RCr 10.26. Green claims that his Sixth Amendment right to compulsory process was violated by the trial court’s treatment of Turner’s testimony. It is well established that a defendant’s right to present witnesses is essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Additionally, a defendant’s right to compel the attendance of witnesses and offer their testimony is protected by the compulsory process clause of the Sixth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Yet, a defendant “does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Id.* at 410. Similarly, “[a] defendant cannot invoke due process or compulsory process rights to immunize his witnesses from cross-examination on issues relevant to the truth of the direct testimony.” *United States v. Esparsen*, 930 F.2d 1461, 1469 (10th Cir. 1991).

As the United States Supreme Court observed fifty years ago, the Fifth Amendment's protection against an individual being compelled in a criminal case to be a witness against himself is so fundamental that it has been deemed "the mainstay of our adversary system of criminal justice." *Johnson v. State of N.J.*, 384 U.S. 719, 729 (1966). However, "the [F]ifth [A]mendment provides no immunity from cross-examination for a witness who elects to testify; it is not a 'positive invitation to mutilate the truth a party offers to tell.'" *Lawson v. Murray*, 837 F.2d 653 (4th Cir. 1988) (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)).

Green argues that it is impermissible for the prosecution or the defense to call a witness knowing that they will invoke their Fifth Amendment privilege. In *Clayton v. Commonwealth*, 786 S.W.2d 866, 867 (Ky. 1990), Clayton was charged with two counts of trafficking in cocaine, subsequent offense. As part of Clayton's defense, he argued that he only acted as an intermediary for another who was actually the drug trafficker. *Id.* Subsequently, Clayton called the alleged dealer to testify. *Id.* While on the stand, the witness informed the trial court of his name and address and then invoked his Fifth Amendment privilege. *Id.* at 868. As a result, the trial court excluded the witness from testifying. *Id.* On appeal, the Court found that the trial court did not commit reversible error in excluding the witness. *Id.* In doing so, the Court relied in part on *Brown v. Commonwealth*, 619 S.W.2d 699 (1981), *overruled on other grounds by Murphy v. Commonwealth*, 652 S.W.2d 69 (1983) (Commonwealth

was not permitted to call witnesses whom the Commonwealth knew would assert their Fifth Amendment privilege).

However, subsequent decisions have created an exception from this general rule to permit the testimony of a witness who selectively seeks to assert his Fifth Amendment privilege. In *Commonwealth v. Gettys*, 610 S.W.2d 899 (Ky. App. 1980), the Commonwealth sought certification of the law concerning a witness's claim of the privilege against self-incrimination. Gettys was indicted for bribery of public servant after allegedly receiving \$1,000. *Id.* at 899. The Commonwealth sought to call a witness who had allegedly paid Gettys \$1,000 to influence his actions as city manager. *Id.* The witness had pled guilty to a misdemeanor offense for his conduct, but had not yet been sentenced. *Id.* When called to testify at trial, the witness refused to testify, invoking his Fifth Amendment privilege. *Id.* The trial court determined that as the witness had not yet been sentenced, he could still withdraw his guilty plea, and that as such his testimony could indeed incriminate him. *Id.*

In response, the Commonwealth had the witness sentenced during a recess, so that he could testify when the trial resumed. However, after the break, the witness still refused to testify again invoking his Fifth Amendment privilege. *Id.* The basis for the witness's claim was a portion of his grand jury testimony wherein the witness testified that he had made no campaign contributions. However, Gettys was prepared to present evidence that would contradict the witness's grand jury testimony. *Id.*

Based on the witness's assertion of his Fifth Amendment privilege the trial court refused to permit the witness to testify. *Id.* On review, the Court of Appeals determined that the Fifth Amendment privilege was unavailable to the witness, "because the danger of self-incrimination was too remote and speculative." *Id.* at 901. Further, the Court of Appeals noted that the questions that Gettys sought to ask the witness concerned collateral matters which were not proper grounds for impeachment. *Id.* As such, the trial court could have limited the scope of Gettys's cross examination to avoid questioning that would have required the witness to assert his Fifth Amendment privilege.

Similarly, in *Combs v. Commonwealth*, 74 S.W.3d 738 (Ky. 2002), the Court addressed the exclusion of a witness's testimony due to her invocation of the Fifth Amendment privilege. Combs had been charged with two counts of trafficking in crack cocaine on two separate occasions. *Id.* at 739. The charges were based on two controlled purchases made by a confidential informant. *Id.* Combs's defense to one of the charges was that she was not present when the controlled purchase occurred but was, instead, shoplifting with a friend at a K-Mart store. *Id.* at 740.

During the trial, but while outside the presence of the jury, the trial court permitted Comb's alibi witness to be examined by the Commonwealth and the defense. *Id.* During questioning, the witness twice invoked her Fifth Amendment privilege. *Id.* at 740-741. Both invocations concerned the alleged shoplifting incident at the K-Mart. *Id.* After the examination, the Commonwealth requested that the trial court exclude the witness due to her

intention to invoke the privilege with respect to certain questions. *Id.* at 741.

The trial court agreed and refused to permit the witness to testify based on her intention to assert her Fifth Amendment privilege. *Id.* at 741-742.

On appeal, the Court concluded that the trial court erred in barring the testimony of the witness. *Id.* at 745. The Court determined that the trial court should have explored whether it was possible to limit the scope of the Commonwealth's cross-examination of the witness, without prejudicing the ability of the Commonwealth to ascertain the veracity of the witness's testimony. *Id.* Further, the Court concluded that the details which the witness sought to shield with her assertion of the Fifth Amendment privilege—whether she and the defendant had shoplifted at K-Mart—were unnecessary to an invasive cross-examination nor particularly probative as to the witness's truthfulness. *Id.*

We note that the case at bar differs from *Clayton*, *Gettys*, and *Combs* as Turner's invocation of the privilege could not have been anticipated prior to his trial testimony. Turner invoked his Fifth Amendment privilege to only one question, refusing to answer whether he overheard a bench conference that occurred during his cross-examination at trial. Obviously, this had nothing to do with the underlying robbery charge. We reaffirm the general rule articulated in *Clayton* that neither the Commonwealth nor defense should call a witness who intends to assert his or her Fifth Amendment privilege. However, *Clayton* addresses the situation where a witness's blanket assertion of the Fifth Amendment privilege would render examination meaningless. Where a witness

seeks a more limited application of the privilege, as in *Combs*, the trial court should examine whether the scope of cross-examination can be limited to avoid the assertion of the privilege in front of the jury. We acknowledge that limiting the scope of cross-examination, while still permitting a thorough examination by counsel may not always be possible and therefore may require the trial court to consider the exclusion of the witness's testimony.

In the case at bar, the trial court should have precluded the Commonwealth from asking Turner about the bench conference. Reviewing the record, the Commonwealth had already engaged in a thorough cross-examination of Turner. Through the use of jail recordings and other materials, the Commonwealth was able to raise doubts about Turner's credibility and examine his relationship with Green. As such, precluding the Commonwealth from inquiring of Turner about the bench conference would not have unduly limited the government from thoroughly examining Turner. Therefore, the trial court should not have permitted the Commonwealth to ask a question of Turner knowing that it would result in the invocation of his Fifth Amendment privilege.

Green alleges that the trial court's error was palpable arguing that his right to compulsory process was violated by the Turner's invocation of the Fifth Amendment.⁴ In particular, Green claims that the trial court's actions resulted

⁴ Green also alleges that the trial court threatened Turner into invoking his Fifth Amendment privilege. In particular, Green alleges that the trial court's warning to Turner about the possibility of perjury was a threat that "was tantamount to telling Turner that he had better take the Fifth in front of the jury, or else." Green's argument is unsupported by the record. The trial court alerted Turner to the potential

in Turner withholding testimony favorable to the defense. This argument is meritless. Turner asserted his Fifth Amendment privilege in response to a question from the Commonwealth during cross-examination about whether Turner had overheard a bench conference. The purpose of that question was to expose whether Turner had overheard a statement by Green's trial counsel during a bench objection and modified his answer about a recorded jailhouse phone conversation accordingly. Turner's assertion of his Fifth Amendment privilege did not restrict Green from asking questions of Turner on direct examination or re-direct examination.

Further, Green does not identify what favorable testimony was supposedly withheld due to Turner's invocation of his Fifth Amendment privilege. No suggestion was made during trial or in the briefs to this Court that Green was unable to ask particular questions of Turner or that the trial court's ruling had limited the introduction of favorable testimony. As such, the allegedly favorable testimony that Green sought to introduce during Turner's testimony remains a complete mystery to this Court.

The claim of further favorable testimony from Turner is also undermined by Green's purpose in calling Turner as a witness. Turner was not an alibi witness or a witness with testimony favorable to Green. Indeed, it was just the

charge of perjury in the first degree if he was found to knowingly lie to the jury. Green concludes that the trial court had an insufficient basis to conclude that Turner was lying when he claimed to not have overheard the bench conference. In substituting his judgment for that of the trial court, Green wrongly concludes that the risk of Turner's overhearing the bench conference was "very, very slight, to say the least." The trial court acted properly under these circumstances in advising Turner of his constitutional rights.

opposite. Green's questioning of Turner focused on contradictions in the statements of Turner and Bowling regarding Green's role in the robbery. Additionally, Green questioned Turner about the benefit he received, with Turner's case remaining in juvenile court, in exchange for making a statement to the police. Finally, during closing argument Green urged the jury to disbelieve Turner's testimony. In requesting the jury to disregard Turner's testimony, Green noted that Turner and Bowling "had very powerful reasons to not be truthful and that their story just doesn't—it doesn't make any sense under the circumstances." With these facts it is unclear how the Commonwealth's asking Turner a question about something that occurred in the court room, a question that caused Turner to invoke the Fifth Amendment, in any way harmed Green's defense to the charges.

Therefore, while it was error for the trial court to have permitted the Commonwealth to ask Turner about the bench conference that error did not result in manifest injustice.

CONCLUSION

For the reasons stated herein, we affirm the judgment and sentence of the Kenton Circuit Court.

All sitting. All concur.

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