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RENDERED: AUGUST 25, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000757-MR

BRYAN WILLIS — APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
CASE NO. 14-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

The Appellant, Bryan Willis, was convicted of several offenses based on his conduct before and during a police chase, including first-degree fleeing or evading police, first-degree wanton endangerment, and possession of a methamphetamine precursor. He makes the following claims on appeal: (1) that he was entitled to directed verdicts on the charges of first-degree fleeing or evading police, first-degree wanton endangerment, and possession of a methamphetamine precursor; (2) that the jury instruction for possession of a methamphetamine precursor was palpable error; and (3) that it was palpable error to admit certain recorded statements he gave to police. Because there was insufficient evidence to support Willis's convictions for first-degree fleeing or evading police and first-degree wanton endangerment and the jury instruction on the methamphetamine-precursor charge was palpably erroneous, this Court reverses those convictions and remands for further proceedings.

I. Background

At around 7:30 p.m. on January 9, 2014, Bryan Willis and his then-girlfriend, Sara Moran, were sitting in a parked late model SUV on the side of the road near a gravel pit in Leitchfield. Officer Jesse Townsend noticed them as he came from the other direction and stopped to make sure everything was okay. Willis then drove off. In response, Officer Townsend turned on his lights and sirens and pursued the vehicle, despite having not yet seen Willis or Moran do anything improper.

What some might consider a "low speed" (or at least non-high-speed)[1] chase ensued. While being pursued, Willis drove through a stop sign and a red light. There were no other cars or pedestrians near those intersections when this occurred. Officer Townsend called for backup when it became apparent that Willis was not going to stop but eventually called off the chase to avoid endangering himself and the officer that had joined in pursuit.

Officer Townsend returned to the gravel pit where the chase began and found coffee filters on the ground containing methamphetamine. Although he had not actually seen anything thrown from the SUV, the officer believed the drugs were likely tossed out of its passenger window before it fled.

Five days later, police found the SUV parked at a gas station. After running the SUV's tags, police determined that it had last been registered to a man who had been dead for several years. However, they ultimately determined

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[1] During the chase, Willis drove around 55 to 65 m.p.h. on Highway 54 and around 25 to 35 m.p.h. on the side roads. In ruling on Willis's motion for a directed verdict, the trial court characterized the chase as "low speed."

that it actually belonged to Benjamin Geary and his wife, Sarah. Sarah told police that she had allowed Willis and Moran to borrow the car but they never returned it. After obtaining Sarah's consent to search the vehicle, police discovered a container of Morton's iodized table salt, two brass pipes, two lithium cellphone batteries, and a glass jar covered in a white residue. Sarah testified that none of the items found during the search belonged to her but that she believed the salt and batteries belonged to her husband.

Based on Sarah's information, Willis and Moran were arrested. Willis gave a recorded statement to police in which he admitted being the driver and fleeing from police. He denied having any methamphetamine in the vehicle, however, and he denied that the various items found in the SUV belonged to him. Moran also gave a statement to police denying any knowledge about the drugs.

Willis was indicted for the following: first-degree fleeing or evading police, first-degree wanton endangerment, manufacturing methamphetamine, first-degree possession of a controlled substance (methamphetamine), possession of drug paraphernalia, and of being a second-degree persistent felony offender. Moran was also indicted on several charges.

At trial, Moran testified against Willis in exchange for a reduction in her charges. She testified that she and Willis had been dating at the time of the incident and had borrowed the SUV that evening to smoke methamphetamine. According to Moran, she tossed the coffee filters containing the drugs out of the SUV's passenger-side window at Willis's direction when they saw the police car stop. She further testified that Willis had the drugs with him before meeting up

with her that day. And Moran added that Willis had also brought along a duffel bag containing materials for manufacturing methamphetamine. She testified that they drove the borrowed SUV until it ran out of gas and then called a friend to pick them up. They also called the Gearys to let them know where they had left their SUV.

The jury acquitted Willis of possessing drug paraphernalia. It also acquitted him of manufacturing methamphetamine and instead found him guilty of unlawful possession of a methamphetamine precursor, which had been presented as a lesser included offense. The jury found Willis guilty of the remaining charges as originally indicted. Willis was sentenced to a total of twenty years in prison and now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b). Additional facts will be developed as needed in the discussion below.

II. Analysis

A. Willis was entitled to a directed verdict of acquittal for first-degree fleeing or evading police.

Willis claims that the trial court erred in denying his motion for a directed verdict on the charge of first-degree fleeing or evading police.

KRS 520.095 defines the offense of fleeing or evading police in the first degree, which is a Class D felony. Subsection (1)(a) provides that a person is guilty of that offense "[w]hen, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer," and at least one of four listed aggravating circumstances exists. Willis was prosecuted

under the fourth aggravator: "By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property." KRS 520.095(1)(a)4. And he now argues, as he did to the trial court below, that he was entitled to a directed verdict on this offense because the evidence was insufficient to show that he caused or created a substantial risk of injury during his flight from police.

When ruling on a motion for a directed verdict, a trial court "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). It must "assume that the evidence for the Commonwealth is true, but reserv[e] to the jury questions as to the credibility and weight to be given such testimony." *Id.* A directed verdict should not be granted "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." *Id.* And only if "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt," will a defendant be entitled to a directed verdict of acquittal on appeal. *Id.*

There is little dispute about what happened during the police pursuit of Willis. (The Commonwealth introduced a video recording from the dash camera in Officer Townsend's cruiser, which documented most of the chase.) The chase began when Officer Townsend encountered the vehicle Willis was driving parked on the side of the road at around 7:30 p.m. It was dark outside. As soon as Officer Townsend pulled his cruiser over to stop and check whether the motorist needed assistance, Willis drove off. Despite having witnessed nothing else to make him believe any crime or traffic violation had been committed at

that point, Officer Townsend chose to pursue Willis with emergency lights and siren activated. Willis refused to stop his vehicle, and Officer Townsend called for backup.

Willis led the police out of Leitchfield and for several miles through rural Grayson County. In the process, according to Officer Townsend, he went through a red light and a stop sign without stopping. (Willis can be seen running the stop sign on the dash camera recording.) There was no evidence that any other motorists or pedestrians were near the intersections when this occurred. The chase took place on Highway 54 and on smaller side roads, and according to the officers, Willis's speeds generally ranged from about 55 to 65 m.p.h. on the highway and 25 to 35 m.p.h. on the smaller roads. Some of the roads were narrow and winding. And Officer Townsend informed jurors that there had been a number of car crashes on Highway 54 in the past, which led him to opine that Willis's highway speed had been excessive at times. Willis did not pass, improperly or otherwise, any other vehicles in fleeing police. Instead, they encountered very little traffic toward the beginning of the pursuit and none thereafter. Willis did not drive erratically, nor did he run into or over anything or almost do so. There was apparently some water on the roads, but it was not raining at the time of the chase. Officer Townsend eventually called off the pursuit to avoid putting himself or the other officer in danger.

The question we must answer, then, is whether this evidence, when viewed in the light most favorable to the Commonwealth, is sufficient to believe beyond a reasonable doubt that Willis "cause[d], or create[d] substantial risk, of serious physical injury or death to any person or property" in fleeing and

eluding police. KRS 520.095(1)(a)4. If not, then Willis is entitled to a directed verdict.

First, all agree that there is no evidence that Willis actually caused injury, serious or otherwise, to anybody or anything during his flight from police. So the answer here instead turns on whether there was sufficient evidence that Willis created a "substantial risk" of serious injury by fleeing from police. The trial court, in ruling on Willis's motion for a directed verdict, remarked that answering this question was a close call. We agree. However, we must disagree with where the trial court came down on this close call.

This Court has previously defined what it means for a risk to be "substantial" under KRS 520.095(1)(a)4: "a *substantial* risk is a risk that is 'ample,' 'considerable in ... degree ... or extent,' and 'true or real; not imaginary.'" *Bell v. Commonwealth*, 122 S.W.3d 490, 497 (Ky. 2003) (footnotes omitted; brackets omitted; ellipses in original) (quoting *American Heritage Dictionary of the English Language* (4th ed. 2000)). It should go without saying that "not all risks are substantial ... and not every hypothetical scenario of 'what might have happened' represents a substantial risk." *Id.* The Court in *Bell* held that the evidence there was insufficient to find the substantial-risk element satisfied. But that case involved a chase on foot where the defendant dropped a loaded handgun while running from police; the facts of *Bell*, therefore, provide little guidance in answering the question posed by this case.

Several other decisions of this Court are helpful, though. In *Crain v. Commonwealth*, 257 S.W.3d 924, 929–30 (Ky. 2008), we held that a fleeing defendant, who was drunk, created a substantial risk of serious injury when he

drove erratically, swerved to avoid a police blockade, and crashed into three different vehicles, sending at least four people to the hospital (none of whom, apparently, were seriously injured). And in *Lawson v. Commonwealth*, 85 S.W.3d 571, 576 (Ky. 2002), this Court had little trouble concluding that the defendant created a substantial risk of serious injury or death when the evidence showed he had driven a stolen car at speeds reaching 125 m.p.h.; sped through multiple intersections, disregarding traffic signals and weaving the car between stopped vehicles in his path; and attempted to dodge a police roadblock by passing it in the emergency lane, ultimately causing his vehicle to become airborne and crash into a guardrail. Obviously, Willis's flight from police here did not approach the degree of danger created by the defendants in those two cases.

A closer factual scenario, however, is provided by the more recent case *McCleery v. Commonwealth*, 410 S.W.3d 597, 602 (Ky. 2013), where this Court held that there was sufficient evidence to create a jury question on the substantial-risk element. In that case, as here, the fleeing defendant did not drive erratically or at excessive speeds, traveling at or just above the speed limit. Also similar to the present facts, the defendant in *McCleery* ran three stop signs during the chase, yet there was no evidence of any "trouble arising from the failure to stop at those signs." *Id.*

At first blush, then, *McCleery* would seem to provide the answer in this case. There were, however, several additional circumstances in that case that increased the riskiness of the defendant's flight from police. For one, it happened on a Monday morning amidst heavy traffic and in the rain. *Id.* at

600. And while there was no evidence that ignoring the stop signs had caused any actual problems, there was additional testimony indicating that a school and shopping center were nearby, *id.* at 602, thus increasing the chances (i.e., the *risk*) that running the stop signs would end badly. These additional circumstances resulted in the defendant's fleeing being objectively more risky than it would have been without them. Considering all of the evidence, then, this Court rightly concluded that it would not be clearly unreasonable for a jury to find that McCleery's fleeing had created a substantial risk of serious injury.

But in this case, comparable risk-increasing circumstances were not present, and these factual differences make our decision in *McCleery* readily distinguishable from this case. While there may have been some water on the roads, there was no evidence that the roads were particularly wet, much less dangerously so, during Willis's fleeing, and it certainly was not raining at the time. There was only at most very light traffic at discrete points during the chase, and there was no evidence of endangered bystanders or potential sources of such bystanders nearby, such as a church or school. And Willis's flight from police occurred at night. This fact, while perhaps increasing the dangerousness of the chase in some respects, actually lessens the degree of risk associated with the only objectively risky actions taken by Willis—running the stop sign and light. It is easy to appreciate how the decision to travel through those intersections without coming to a stop is made less blindly, and thus with less risk, at night: when approaching an intersection in the dark, a noted absence of other headlights approaching the intersection at the same

time would obviously signal to the driver that there are in fact no other vehicles approaching. Of course, that is not to say that traffic signs can be ignored at night; emphatically, they cannot. But it does distinguish the risk created by Willis's ignoring traffic signals from the risk created by McCleery's doing the same. And, finally, this is especially true in light of the dash-camera footage that shows Willis actually braking and slowing as he approached the stop sign before then going through it and re-accelerating. It is also significant that the officers in this case called off their chase specifically so they could avoid being endangered.

So unlike in *McCleery* and the other cases, under the evidence as a whole, we must conclude that there was insufficient evidence to find that Willis created a substantial risk of serious injury or death. We are simply too hard-pressed to surmise any real or concrete danger that Willis's fleeing actually created to hold otherwise. A decision to the contrary would effectively make first-degree fleeing or evading police a strict liability offense under KRS 520.095(1)(a)4 anytime there is evidence that the accused disobeyed a traffic signal during the course of the pursuit. To put it another way, were we to find sufficient evidence of a significant risk here, we would be essentially holding that anytime a person runs a stop sign or red light, no matter the circumstances, they have per se created a significant risk of death or serious physical injury. Neither the Penal Code nor the case law supports such a conclusion.

Whether the accused's act of fleeing police in fact created a "substantial risk" of death or serious physical injury "depends upon proof." *Bell*, 122 S.W.3d

at 497 (quoting *Lofthouse v. Commonwealth*, 13 S.W.3d 236, 241 (Ky. 2000)). And the answer to that question must, "of course, 'turn[] on the unique circumstances of an individual case.'" *id.* (alteration in original) (quoting *Cooper v. Commonwealth*, 569 S.W.2d 668, 671 (Ky. 1978)). Given the proof and unique circumstances here, we must answer that question in the negative. The evidence was certainly sufficient to establish Willis created *some* risk of injury in fleeing police, just not a *substantial* risk. Just so, this case presents the mostly hypothetical "what might have happened" that is too speculative to amount to a substantial risk.

Accordingly, Willis is entitled to a directed verdict for first-degree fleeing or evading police. He may, however, be retried for second-degree fleeing or evading, which requires only that he "knowingly or wantonly disobey[] a recognized direction to stop his vehicle, given by a person recognized to be a peace officer." KRS 520.100(1)(b).

B. Willis was entitled to a directed verdict of acquittal for first-degree wanton endangerment.

KRS 508.060 provides that "[a] person is guilty of wanton endangerment in the first degree when, under circumstances manifesting an extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060(1). There are two general elements to this offense: (1) engaging in wanton conduct under circumstances manifesting extreme indifference to the value of human of life, and (2) creating a substantial danger

of death or serious injury to another. Willis claims that there was insufficient proof of either element to sustain his conviction.

First, as for whether Willis's conduct created a "substantial danger" of death or serious physical injury, our conclusion is dictated by our discussion above answering whether his conduct fleeing police created a "substantial risk" of death or serious injury. The fleeing-or-evading substantial-risk aggravator found in KRS 520.095(1)(a)4 has been interpreted to mirror the similar substantial-danger element required for first-degree wanton endangerment under KRS 508.060(1). *See Bell v. Commonwealth*, 122 S.W.3d 490, 496–97 (Ky. 2003). Having already determined that the evidence was insufficient to demonstrate that Willis created a "substantial risk" to allow his conviction for first-degree fleeing and evading police to stand, it follows that it was also insufficient to show that he created the "substantial danger" necessary to sustain his conviction of first-degree wanton endangerment. Willis was thus entitled to a directed verdict for this charge as well.

Moreover, as an alternative ground for granting a directed verdict, Willis maintains that there was insufficient evidence that he acted with the necessary mental state during the police pursuit to sustain the conviction. To be guilty of wanton endangerment, first and foremost, a person must have acted "wantonly." *See* KRS 508.060(1); *see also* KRS 508.070(1) (defining wanton endangerment in the second degree). "A person acts wantonly with respect to a result or to a circumstance ... when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(3). Further, "[t]he risk must be of such

nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.*

But to be guilty of first-degree wanton endangerment, "a more egregious mental state than mere wantonness" is required. *Brown v. Commonwealth*, 174 S.W.3d 421, 425 (Ky. 2005). That is, the accused's wanton mental state must have been accompanied by further "circumstances manifesting extreme indifference to the value of human life." KRS 508.060(1). This has been described as "aggravated wantonness." *E.g., Swan v. Commonwealth*, 384 S.W.3d 77, 102 (Ky. 2012). Classic examples of aggravated wantonness include firing a gun into an occupied building or vehicle, planting a bomb in public, and derailing a train. *Brown v. Commonwealth*, 174 S.W.3d 421, 426 (Ky. 2005); KRS 507.020 Ky. Crime Comm'n/Legis. Res. Comm'n Cmt. (1974). What sets such conduct apart from mere wantonness is:

> (i) homicidal risk that is exceptionally high; (ii) circumstances known to the actor that clearly show awareness of the magnitude of the risk; and (iii) minimal or non-existent social utility in the conduct. Such conduct plainly reflects more than mere awareness and conscious disregard of a substantial and unjustifiable risk of death. It manifests a high disregard for life and evinces what the common law chose to call a depravity of mind or heart.

Brown v. Commonwealth, 975 S.W.2d 922, 924 (Ky. 1998) (quoting Robert G. Lawson and William H. Fortune, *Kentucky Criminal Law*, § 8-2(c)(2), at 322 (1998)).

The facts of this case fall short of meeting that standard. The evidence simply is not there to allow one to reasonably believe Willis acted with aggravated wantonness when he fled from police. Notably, with the exception of

driving at the nominally "excessive" speeds of 55 to 65 m.p.h. on the highway, the only evidence of any wanton conduct at all during Willis's flight from police was his failing to stop at a red light and a stop sign. Even so, as noted above, Willis braked and slowed his vehicle before ultimately running the stop sign, thereby mitigating the objective wantonness of failing to come to a stop. There was no other evidence of improper or dangerous driving on Willis's part.

This evidence brings to mind the facts in *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994). In that case, this Court overturned a wanton-murder conviction because the evidence of wanton conduct consisted only of the defendant entering an intersection against a red light. The offense of wanton murder requires proof of the same "aggravated wantonness" *mens rea* as is required for first-degree wanton endangerment. *Compare* KRS 507.020(1)(b), *and id.* Ky. Crime Comm'n/Legis. Res. Comm'n Cmt. (1974), *with* KRS 508.060(1). The evidence in *Johnson*, without more, was insufficient to establish that the defendant acted under circumstances manifesting extreme indifference to the value of human life. 885 S.W.2d at 953.

On the other hand, the 2005 *Brown* case provides an instructive counterfactual scenario where, in addition to running a red light, there was evidence that the defendant was driving at a high rate of speed, possibly racing another driver, and not monitoring traffic as he approached the intersection where the fatal collision occurred. 174 S.W.3d at 428. This was sufficient to establish aggravated wantonness to sustain his conviction for wanton murder.

The circumstances of Willis's flight are a far cry from those present in *Brown*, but instead closely resemble those in *Johnson*. So like in *Johnson*, we

must conclude that the evidence here falls short of showing conduct rising to the level of aggravated wantonness necessary to sustain the conviction for first-degree wanton endangerment.

C. The jury instruction for possession of a methamphetamine precursor was palpable error.

Willis raises two related claims as to his conviction for possessing a methamphetamine precursor: (1) that there was no evidence that he had possessed any actual methamphetamine precursor, so he was entitled to a directed verdict; and (2) that the jury instructions were defective because they did not require the jury to find that he had possessed an actual methamphetamine precursor. Willis concedes that neither claim is preserved and requests palpable-error review under Criminal Rule 10.26.

The offense at issue is defined by KRS 218A.1437, which in part provides:

> A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to manufacturing methamphetamine or other controlled substance.

KRS 218A.1437(1).

Instead of tracking this language, however, the trial court instructed the jury as follows:

> If you do not find the Defendant guilty [of manufacturing methamphetamine] you will find the Defendant guilty of Possession of a Methamphetamine Precursor under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That ... he had in his possession coffee filters, lithium batteries, and iodized salt; AND

B. That he knew the substances so possessed by him was [sic] coffee filters, lithium batteries, and iodized salt; AND

C. That he intended to use the coffee filters, lithium batteries, and iodized salt as precursors to manufacture methamphetamine.

Both of Willis's related claims rely on the fact that none of the items he was alleged to have possessed—coffee filters, lithium batteries, and iodized salt—fall under the named "drug products ... or their salts, isomers, or salts of isomers" covered by KRS 218A.1437(1). Because of this fact, he first argues that the evidence was insufficient to support his conviction for that offense and that he was thus entitled to a directed verdict. Secondly, and in the alternative, he claims that the jury instruction amounts to palpable error because it directed the jury to find him guilty of this offense if they believed certain facts that do not actually constitute the offense under the statute.

In response, the Commonwealth contends that both related claims were waived and, therefore, are not subject to appellate review. The Commonwealth provides no substantive rebuttal of Willis's arguments.

First, as to the directed-verdict issue, we must agree with the Commonwealth that the record demonstrates that this claim of error was not only unpreserved, it was invited and thus waived. This is because defense counsel, when prompted by the trial judge, agreed that it was appropriate to have the jury instructed on possession of a methamphetamine precursor (ostensibly as a "lesser included" offense to the manufacturing-

methamphetamine[2] charge). In other words, counsel did more than fail to raise the issue of the sufficiency of the evidence; rather, counsel at least tacitly acknowledged that the evidence was indeed sufficient by agreeing that the jury should be instructed on the offense.

Under our case law, this error is deemed invited because defense counsel effectively, albeit with some court prompting, asked that the instruction be given. *See Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37–38 (Ky. 2011); *Mullins v. Commonwealth*, 350 S.W.3d 434, 438–39 (Ky. 2011). Under the invited-error doctrine, the alleged error is treated as waived and is not subject to palpable-error review. Thus, Willis is estopped from arguing on appeal that he was entitled to a directed verdict for possession of a methamphetamine precursor.

As to the related claim about defects in the instruction actually given, the Commonwealth maintains that this error too should be deemed invited and unreviewable. However, during the discussions between counsel and the trial court about the jury instructions, it is clear that Willis's counsel merely failed to recognize and object to the now-claimed error in the language of the instruction at issue, rather than affirmatively request the language given or decline to object to a recognized error. The latter constitutes a waiver of the objection and appellate review is unavailable. *See Tackett v. Commonwealth*, 445 S.W.3d 20, 28–29 (Ky. 2014). But in cases involving a mere failure to

[2] Manufacturing methamphetamine is an offense under KRS 218A.1432(1), which states: "A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: (a) [m]anufactures methamphetamine; or (b) [w]ith intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine."

object or to appreciate the need to object, the objection is instead deemed merely forfeited and the unpreserved error may be reviewed for palpable error. *Id.* This is because an error is waived only when the failure to object "reflect[s] the party's knowing relinquishment of a right" to object. *Id.* at 28 (quoting *Mullins v. Commonwealth*, 350 S.W.3d 434, 439 (Ky. 2011)).[3]

The Commonwealth's citation to *Graves v. Commonwealth*, 384 S.W.3d 144, 152 (Ky. 2012), to support its argument for waiver is unavailing. There, the instructional error was pointed out to defense counsel, who nevertheless affirmatively agreed to proceed with instructing the jury with the defective language left unchanged. That is not what happened here. Defense counsel's failure to object was not a knowing waiver of the objection, so Willis's unpreserved claim that the instruction was defective may be reviewed for palpable error. *See Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013) (holding that unpreserved allegations of defects in the language of instructions given may be reviewed for palpable error under Criminal Rule 10.26, as opposed to unpreserved claims that a particular instruction should or should not have been given, which are subject to the appellate-review bar of Criminal Rule 9.54(2)).

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[3] As explained by the federal courts, "[t]o distinguish between forfeiture [where plain- (or palpable-) error review is available] and waiver [where errors are not subject to appellate review], we examine a party's state of mind at the time that an objection could have been raised." *United States v. Anderson*, 604 F.3d 997, 1001 (7th Cir. 2010). "Forfeiture takes place when counsel or a defendant negligently bypasses a valid argument." *Id.* On the other hand, "waiver requires a calculated choice to stay silent on a particular matter." *Id.* (citing *United States v. Olano*, 507 U.S. 725, 733 (1993) ("[W]aiver is the 'intentional relinquishment or abandonment of a known right.'") (citations omitted)).

Under palpable-error review, we will reverse only if we are convinced that there is an error affecting Willis's substantial rights that will result in "manifest injustice" if left uncorrected. RCr 10.26. Here, "the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

The trial court's jury instruction on unlawful possession of a methamphetamine precursor meets that standard. Simply put, the language of the instruction does not amount to a crime under KRS 218A.1437, the statute criminalizing possession of a precursor.[4] The Penal Code criminalizes possessing only certain items for use as "precursors" in the manufacture of methamphetamine. Indeed, it very specifically lays out exactly what those items are: "drug products or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers." KRS 218A.1437(1). However, the jury was directed to find whether Willis had knowingly possessed coffee filters, lithium batteries, and iodized salt—none of which is included in the statutory meaning of methamphetamine precursor.[5] The facts as found by the jury, therefore, do not

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[4] As an aside, the elements laid out in the instruction could have actually constituted, with a little tweaking, the offense of manufacturing methamphetamine, which requires the jury to find possession, with the intent to manufacture methamphetamine, of two or more chemicals or two or more items of equipment that are in fact used in the manufacture of methamphetamine. *See* KRS 218A.1432(1). But the jury acquitted Willis of manufacturing, as a higher charge, under a different instruction. The jury turned to the precursor charge only because it was instructed to treat unlawful precursor possession as a lesser included offense of manufacturing.

[5] The inclusion of iodized salt in this instruction is perhaps understandable, as the instruction mentions "salts" specifically. But the salts referred to in the instruction

amount to the crime of unlawful possession of a methamphetamine precursor. It would be manifestly unjust to allow Willis's conviction for unlawful possession of a methamphetamine precursor to stand when the jury did not actually find facts that establish his guilt of that offense.

Therefore, Willis's conviction for possessing a methamphetamine precursor must be reversed and remanded. The flaw in this conviction stems not from the insufficiency of the evidence, but in the instruction as given, in that it does not describe the charged offense. This error is closely related to the directed-verdict claim, but it is different in nature because of the relief afforded. The error in using an instruction that includes the wrong elements can, in itself, result only in reversal of the conviction, whereas an error in the directed-verdict context would require reversal and remand for entry of a judgment of acquittal. Although we have concluded that the directed-verdict issue was waived for review on this appeal, nothing in this opinion should be construed to preclude Willis from arguing the sufficiency of the evidence on remand if the Commonwealth were to attempt to charge him again.[6]

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are salts of ephedrine, pseudoephedrine, or phenylpropanolamine, which are the primary base chemicals used in manufacturing methamphetamine. A "salt" as used in this context is simply an ionic compound of the base molecules. Iodized salt, the substance found in the car Willis drove, is simple table salt or sodium chloride. Although table salt is commonly used in the manufacture of methamphetamine, *see Fulcher v. Commonwealth*, 149 S.W.3d 363, 368 (Ky. 2004) (describing the use of "common salt" and sulfuric acid in one step of the "ephedrine reduction" methamphetamine-manufacturing process), it differs completely from the salts referred to as precursors in KRS 218A.1437.

[6] We note that because the jury acquitted Willis of manufacturing methamphetamine, that offense can no longer be pursued, and Willis is prosecutable only for lesser included offenses, such as unlawful possession of a precursor. That said, while unlawful possession of a precursor can be a lesser included offense of manufacturing, it can only be proved when a chemical possessed by the defendant is

D. The admission of Willis's recorded statements to police was not palpable error.

Finally, Willis argues that portions of the audio recording of statements he made to police following his arrest were erroneously admitted. He claims that he made a request for counsel that was ignored, thus rendering the statements he made thereafter inadmissible. And he claims that deceptive police questioning during the interrogation coerced him into an unknowing and involuntary waiver of his right to remain silent in violation of *Miranda*. Acknowledging that he did not object to the introduction of these statements at trial, Willis again requests palpable-error review.

First, as for Willis's claim that police continued to question him after he asked for counsel, the Commonwealth disputes that he ever even made such a request. The Commonwealth maintains, instead, that Officer Townsend can be heard on the audio recording saying, "This is what's gonna happen. I'll talk to the Commonwealth's Attorney—but depends on what you want to talk to me about." For his part, Willis claims that after Officer Townsend stated, "This is what's gonna happen," it was he that interjected, "Can I have an attorney?" to which the officer responded, "Depends on what you want to talk to me about."

The record demonstrates that the Commonwealth's interpretation is the correct one. The briefs cite only the video recording of the trial where the audio of the interrogation was played out loud. Listening to the interrogation in that context—a recording of a recording—it is difficult to surmise exactly which

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one of the precursor chemicals described in KRS 218A.1437. *Cf. Sevier v. Commonwealth*, 434 S.W.3d 443, 451 (Ky. 2014) (noting the only difference between the two statutes is that manufacturing requires "possession of additional contraband beyond that necessary for a possession-of-a-methamphetamine-precursor conviction").

speaker refers to an attorney. But the original audio recording that was played for the jury is also included in the record. This Court's review of that recording leaves no doubt as to the identity of the speaker and what is said. It was Officer Townsend who referred to the Commonwealth's attorney, not Willis asking for a lawyer. At no point during the police interview does Willis ask for a lawyer.

Next is Willis's argument that Officer Townsend employed deceptive and coercive questioning tactics that defeated his waiver of his right to remain silent under *Miranda*. He maintains that the statements induced by such tactics should have been suppressed and that their admission amounts to palpable error.

A waiver of a suspect's Fifth Amendment right to remain silent and to refuse to make self-incriminating statements must be made "voluntarily, knowingly and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). To that end, the Supreme Court made clear that before conducting a custodial interrogation, police are required to warn a suspect, among other things, "that he has the right to remain silent" and "that anything he says can be used against him in a court of law." *Id.* at 479. One purpose for requiring this recitation, the Court explained, is to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. To introduce evidence of an accused's incriminating custodial statement, the prosecutor must demonstrate that the waiver of the right to remain silent was free from coercion and that the accused understood "the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

Here, before questioning began, Officer Townsend read the *Miranda* warnings to Willis, who indicated that he understood but would choose to speak to the officer anyway. The tactics Willis complains about involve Officer Townsend's repeated questions, "You wanna help yourself out and make it go away?" and similar statements to that effect. The officer also made the following complained-about statements later in the interrogation: "Depends on what you want to talk to me about. ... I can make it go away. Make the manufacturing charge go away. Make the possession-of-meth charge go away."

Willis argues that these statements "vitiated the knowingness and voluntariness" of his waiver "by essentially promising that he could make all the charges go away if [Willis] would talk." In making this argument, he specifically relies on this Court's recent decision in *Leger v. Commonwealth*, 400 S.W.3d 745 (Ky. 2013), claiming that Officer Townsend's conduct during his interrogation was no different than the conduct we condemned in that case.

In *Leger*, this Court was called on to answer a question it had not yet addressed: whether an interrogating officer's express agreement that the suspect's custodial statements would be kept confidential vitiates the previously-given *Miranda* warning. *Id.* at 748. The short answer: it does. During the police interrogation in that case, Leger asked the officer: "Now, let me ask you this, what I am telling you now is between us, right? It won't go [unintelligible]?" The officer responded, "Right." *Id.* at 748–49.

After reviewing cases from other jurisdictions, this Court was left to conclude that statements made in response to such false assurances of confidentiality are "made in violation of *Miranda* and must be suppressed." *Id.*

at 751. The Court was clear: "*Miranda* warnings are a prerequisite to a custodial interrogation and may not be manipulated through deception." *Id.* Indeed, "[t]hese warnings would be senseless if interrogating officers can deceive suspects into believing their admissions will not go beyond the interrogation room. As the warnings are constitutionally required interrogation techniques designed to mislead suspects about those warnings are impermissible." *Id.* (quoting *State v. Stanga*, 617 N.W.2d 486, 491 (S.D. 2000)); *see also id.* at 749 ("[A]fter proper warnings and a knowing, intelligent, and voluntary waiver, the interrogator may not say or do something during the ensuing interrogation that subverts those warnings and thereby vitiates the suspect's earlier waiver by rendering it unknowing, involuntary, or both." (quoting *Lee v. State*, 12 A.3d 1238, 1248 (Md. 2011))).

When the purpose of these *Miranda* protections is recognized, the problem with Willis's argument becomes apparent: the complained-about statements by Officer Townsend are not the type of "false assurance[s] that the suspect's statements *will not* be used against him." *Id.* at 751. As *Leger* made clear, it is when interrogators deceive the suspect about the nature of his rights and the consequences of waiving those rights that *Miranda* is violated and suppression is called for. That is not what happened here. Instead, Officer Townsend sought to induce Willis to make incriminating statements by confiding that he could "make it go away" if Willis cooperated; nothing about

this suggests that Willis's statements would not then be able to be used against him outside the interrogation room.[7]

Although Willis did not fully develop an argument on this point, his brief suggests an additional problem, namely, that Officer Townsend's statements may have amounted to "illusory promises" of leniency. "In this context, an illusory promise is a statement in the form of a promise, but lacking its substance in that it does not actually commit the police to undertake or refrain from any particular course of action." *United States v. Johnson*, 351 F.3d 254, 262 n.1 (6th Cir. 2003); *see also Stanton v. Commonwealth*, 349 S.W.3d 914, 919 (Ky. 2011) ("One way in which investigators can overreach is to promise leniency in return for a confession .... Such promises ... are generally improper, as investigators are seldom in a position to honor them."). Illusory promises of leniency deliberately used to induce inculpatory statements may be coercive and render the resulting inculpatory statements involuntary and inadmissible. *Id.* at 262, 289; *accord Commonwealth v. Cooper*, 899 S.W.2d 75, 79 (Ky. 1995) ("It is a general rule that confessions which are induced by hopes ... raised by the promise[s] ... of the prosecutor, or of any person having authority over the prisoner at the time, are not considered voluntary, having been made under mental duress, and therefore not competent."). Typically, a totality-of-the-circumstances approach is used to determine whether such coercion was sufficient to overbear the will of the suspect so as to render the suspect's

[7] Indeed, Willis's responses actually demonstrate he was well aware that any statement he made could and would be used against him—e.g., refusing to admit knowledge about any of the evidence found in the SUV.

inculpatory statements involuntary and inadmissible. *See Smith v. Commonwealth*, 722 S.W.2d 892, 895 (Ky. 1987).

However, we need not conduct such a nuanced analysis here. That is because even if we were to agree with Willis that these interrogation tactics rendered his *Miranda* waiver involuntary, he would still not be entitled to relief because he has come nowhere near demonstrating that this unpreserved error rises to the level of palpable error.

The only arguably inculpatory statement Willis points to that may have been induced by Officer Townsend's suggestions that he could "make it go away" if Willis cooperated was his admission that it had been "over five days" since he last used drugs. Despite the Commonwealth's attempts to paint this statement as an implicit admission that Willis had last used methamphetamine on the night of the chase (that having occurred five days before the interrogation), Willis's follow-up statements on the recording refute that inference by clarifying that, despite having "lost track" of how long it had been, he was confident that he hadn't used "this month." Significantly, other than his marginally inculpatory statement about his drug use, Willis made only exculpatory statements in response to the alleged coercive promises by Officer Townsend. He denied having had or used drugs the night of the chase, and he denied any knowledge about the contraband found in the borrowed SUV. He also denied that Moran had used any drugs.

In sum, there was nothing particularly prejudicial about the contents of the recorded interrogation that was played for the jury. Thus, Willis cannot show manifest injustice—that is, "probability of a different result or error so

fundamental as to threaten [his] entitlement to due process of law," *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)—flowing from the introduction of his statements. Therefore, even assuming without deciding that his statements were admitted in error, Willis cannot show that this amounted to palpable error to be entitled to relief under Criminal Rule 10.26.

III. Conclusion

Willis's convictions and sentences for first-degree fleeing or evading police, first-degree wanton endangerment, and unlawful possession of a methamphetamine precursor are reversed; his conviction and sentence for possession of methamphetamine is affirmed; and this case is remanded to the Grayson Circuit Court for further proceedings consistent with this opinion.

All sitting. Minton, C.J.; Hughes, Keller, Noble, Venters and Wright, JJ., concur. Cunningham, J., concurs on the reversal of the possession of a methamphetamine precursor and affirmance of the possession of methamphetamine, but dissents on the reversals of the first-degree fleeing or evading police and first-degree wanton endangerment.

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