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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2015-SC-000348-MR

RALPH FOLEY

APPELLANT

V.

ON APPEAL FROM GREEN CIRCUIT COURT
HONORABLE SAMUEL T. SPALDING, JUDGE
NO. 14-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Ralph Foley appeals as a matter of right from a judgment of the Green Circuit Court sentencing him to life imprisonment without the possibility of parole for twenty-five years for three counts of incest, three counts of first-degree sexual abuse, third-degree sexual abuse, and being a first-degree persistent felony offender. Ky. Const. § 110(2)(b). Foley raises five issues on appeal: (1) the trial court erred by permitting the Commonwealth to elicit testimony from a lay witness about the sexual knowledge of children; (2) the trial court erred by overruling his motion for a mistrial; (3) the trial court erred by permitting the Commonwealth to admit drawings prepared by the victim; (4) the trial court erred by denying his motion to strike a juror for cause; and (5) the Commonwealth erred by introducing inaccurate parole

eligibility information.¹ For the following reasons, we affirm the judgment and sentence of the Green Circuit Court.

FACTUAL AND PROCEDURAL BACKGROUND

The evidence presented by the Commonwealth at trial reflected the following facts. In December 2013, the Green County Sheriff's Department (GCSO) received a complaint of possible sexual crimes committed by Foley against his daughter Caroline.² In response to the complaint, Deputy Sheriff Rainwater of the GCSO met with Caroline and her mother and contacted social services. Afterwards, Caroline participated in a forensic interview at the Lake Cumberland Child Advocacy Center.

Subsequently, Caroline revealed that Foley's abuse began in May 2013 and continued into December of that year. When the abuse began, Caroline was 15 years old. Caroline recounted that the first incident of abuse began with her father picking her up after school. However, instead of driving Caroline home, Foley took her to a secluded spot near a slipway. Afterwards, Foley and Caroline exited the car and Foley began to remove her clothes. Foley also fondled Caroline's breasts and her vaginal area. Caroline began screaming and told Foley "[p]lease no", which he responded to by striking her in the face.

¹ In each of the arguments raised by Foley on appeal, he asserts a violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

² The names of all minors in this opinion have been replaced with pseudonyms to preserve their privacy.

Ultimately, Caroline was allowed to put her clothes back on and Foley drove them home.

The second incident of abuse occurred between the spring and summer of 2013. Foley entered Caroline's room, where she was lying in bed, and carried her to his room. Subsequently, Foley removed Caroline's clothes, despite her pleas for him not to do so. Foley told Caroline to shut up and proceeded to touch Caroline's breasts and vaginal area.

The third incident of abuse also occurred that summer, with Foley assaulting Caroline in her bedroom. Initially, Foley took Caroline into her bedroom and locked the door behind them. After locking the door, Foley removed Caroline's clothes, and forced her onto the bed. Subsequently, he touched and licked her breasts and vaginal area.

The fourth incident of abuse occurred towards the end of summer, with Caroline sleeping on the family's couch. While his family was sleeping, Foley began touching Caroline and put his fingers in her vaginal area. When Caroline began to wake and struggle, Foley told her that she could sleep with her mother and that he would sleep on the couch.

The fifth incident occurred in December, where Foley had Caroline enter the bathroom, where he had been bathing. Foley commanded that Caroline join him in the bathtub. Caroline refused, ran into her room, locked her door, and hid in the closet.

The last three incidents of abuse occurred on December 7, 2013, while Caroline was home alone with Foley. While watching the first Lion King film

together, Caroline left briefly to use the bathroom, and Foley went to his bedroom. Afterwards, Caroline went into Foley's bedroom to find her father, and after she entered he locked the door to the room. Foley demanded that Caroline take off her clothes. Caroline complied, out of a concern that Foley would hurt her cat, Midnight, which her parents had recently given her, if she failed to obey. Subsequently, Foley began touching Caroline's breasts and touched and licked her vaginal area. Further, Foley began touching his penis to Caroline's vaginal area. During the assault, Caroline screamed and begged for her father to stop touching her. In response, Foley told Caroline to not be like her mother. Foley also struck Caroline in the face during the assault, but did not explain why he did so. The assault lasted approximately ten to twenty minutes.

Afterwards Caroline took a shower and returned to watching the Lion King films. Later, while watching the second Lion King film, Foley ordered Caroline to go into the bedroom and take off her pants and underwear or she would lose her cat. Caroline complied and Foley licked and rubbed her vaginal area. During this assault, Caroline once again told Foley "[p]lease no," but he refused and told her to shut up. This assault lasted approximately ten to fifteen minutes.

The final assault, took place shortly thereafter, towards the end of the second Lion King film. After taking another shower, Caroline had resumed watching the film with Foley in the living room. Subsequently, Foley ordered Caroline to go into her room and remove her pants and underwear. Foley then

had Caroline get down on her hands and knees and face the television. Foley threatened to put Caroline's cat outside or throw it in the pond if she failed to obey. During trial, Caroline explained that she also acted out of concern for her nieces, who she thought Foley might abuse if she didn't do what he wanted. Subsequently, Caroline complied and Foley took off his clothes below the waist and began touching Caroline's vaginal area with his penis.³ Caroline told Foley "[d]addy, please no," but he said nothing in response. This final incident of abuse lasted approximately ten to fifteen minutes. Additionally, after Foley finished assaulting Caroline, he tried to give her twenty dollars, but she refused to accept the money.⁴

Subsequently, Caroline went and took a shower and then called her best friend Brittany. Through Brittany, Caroline arranged for Brittany's mother to pick her up from the house. Subsequently, Brittany's mother contacted Caroline's mother, who took Caroline to the police station to be interviewed by Deputy Rainwater. Additionally, Caroline underwent a forensic interview, during which she detailed Foley's sexual abuse.

In February 2014, Foley was indicted for six counts of incest, two counts of first-degree sexual abuse, and for being a first-degree persistent felony offender. In March 2015, the case went to trial, with the Commonwealth primarily relying on the testimony of Caroline to establish the abuse. In

³ While during Foley's sexual assaults on Caroline his penis made contact with her vagina, Caroline denied that there was penetration.

⁴ After each assault, Foley attempted to pay Caroline twenty dollars, but each time she refused to accept the money.

response, Foley testified on his own behalf, and denied the abuse. At the close of Foley's case, the Commonwealth moved under Kentucky Rule of Criminal Procedure (RCr) 6.16 to amend two counts of incest to first-degree sexual abuse and dismiss one count of incest.

Subsequently, the jury found Foley guilty of three counts of incest, three counts of first-degree sexual abuse, and third-degree sexual abuse. Following the penalty phase of the trial, the jury found Foley guilty of being a first-degree persistent felony offender and recommended a sentence of life imprisonment without the possibility of parole for twenty-five years. The trial court sentenced Foley in conformance with the jury's recommendation. Foley now appeals as a matter of right.

ANALYSIS

I. No Error Occurred As a Result of Deputy Rainwater's Testimony About the Sexual Knowledge of Children.

Foley alleges that he was denied due process of law and a fair trial due to the trial court's permitting the Commonwealth to elicit improper lay opinion testimony from Deputy Rainwater. During his direct-examination testimony for the Commonwealth, Deputy Rainwater was asked, "[w]hen you're questioning a child, I want you to explain to the jury, whether or not you probe into details of allegations." Deputy Rainwater responded by saying, "[o]kay. When I'm interviewing with a child, I let them tell me in their own words, what happened. I don't try to give them leading questions or information that may lead them into saying something else, I try to hear everything in their own words."

Subsequently, the Commonwealth inquired as to why Deputy Rainwater does

not probe into the details of the allegations. He explained, "I want to hear in the children's own words what happened. I don't, I don't want need to try to put out misleading information and lead them in to giving them information they could in return tell me back. I want. Most children do not know about sexual nature."

Foley objected to Deputy Rainwater's last statement arguing that he was not a qualified expert and that his statement was inappropriate opinion testimony. The trial court overruled the objection explaining that Deputy Rainwater was speaking generally about how he interviews children based on his training and experience.⁵

Kentucky Rule of Evidence (KRE) 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) rationally based on the perception of the witness;
- (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

"The degree to which a witness may give an opinion, of course, is predicated in part upon whether and the extent to which the witness has sufficient life experiences that would permit making a judgment as to the

⁵ Foley also argued that he was prejudiced by Deputy Rainwater's testimony and requested a mistrial. The motion for a mistrial was considered by the trial court and denied. The denial of Foley's motion for a mistrial on this ground was not raised on appeal and will therefore not be addressed further.

matter involved.” *Hunt v. Commonwealth*, 304 S.W.3d 15, 35 (Ky. 2009) (quoting *Mondie v. Commonwealth*, 158 S.W.3d 203, 212 (Ky. 2005)).

Deputy Rainwater’s statement that most children do not know about sexual nature was not improper opinion testimony. Reviewing his statement in context, Deputy Rainwater was simply trying to explain how he interviews juvenile victims of sexual assault and, more specifically, how he avoids interjecting himself or any information of a sexual nature into the interviews. Despite Foley’s argument to the contrary, Deputy Rainwater clearly was not testifying about Caroline’s sexual knowledge or the knowledge expected of children Caroline’s age. Rather, he was making a general statement about his training and experience in interviewing child victims of sexual assault and the necessity of allowing the child to speak in his or her own words. Accordingly, the evidence was admissible under KRE 701.

However, even if we were to conclude that the admission of the statement was error, it did not prejudice Foley’s substantial rights, RCr 9.24, and was therefore harmless. Given the Commonwealth’s detailed evidence of Foley’s abuse of Caroline, we cannot say that this isolated statement, would have been sufficient to substantially sway the judgment of the jury. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946)).⁶

⁶ Foley also contends that even if Deputy Rainwater’s testimony was relevant that it does not pass the KRE 403 balancing test. Foley argues that Rainwater’s testimony improperly informed the jury that Caroline would only have known about sex from her father’s abuse. This is not supported by the record. The challenged portion of Deputy Rainwater’s testimony concerned his methods in interviewing child

II. The Trial Court Correctly Denied Foley's Motion For a Mistrial.

Foley alleges that he was denied due process of law and a fair trial due to the trial court's denial of his motion for a mistrial. Foley's motion was made in response to the Commonwealth's question about whether Foley had done anything of a sexual nature to Caroline's younger sister Beth.

During the Commonwealth's re-direct examination of Caroline, the Commonwealth asked, "[d]o you know, have any personal knowledge of whether he did anything of a sexual nature to [Beth]?" Foley objected to this question. At the subsequent bench conference, the Commonwealth argued that Foley had opened the door to this line of inquiry during its cross-examination of Caroline. The trial court disagreed and sustained the objection.⁷ Subsequently, Foley moved for a mistrial due to the Commonwealth's question, but that request was denied.

"It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion." *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004) (citing *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

victims of sexual assault. Again, Deputy Rainwater did not suggest what sexual knowledge Caroline or children her age possess. Deputy Rainwater's comment, was innocuous and was not barred by KRE 403.

⁷ After the trial court sustained Foley's objection, Foley did not request that the jury be admonished to disregard the Commonwealth's question.

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)).

While the trial court is vested with the authority to declare a mistrial, it is such an extreme remedy that it “should be resorted to only when there is a fundamental defect in the proceedings and there is a ‘manifest necessity for such an action.’” *Woodard*, 147 S.W.3d at 68 (quoting *Bray*, 68 S.W.3d at 383). “The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial].” *Gould v. Charlton Co.*, 929 S.W.2d 734, 738 (Ky. 1996) (citations omitted).

We agree with the trial court that the Commonwealth’s question was impermissible as nothing Foley asked could have opened the door to this line of inquiry regarding criminal sexual acts against the victim’s younger sister. However, any prejudicial effect Foley may have suffered from the Commonwealth’s question was slight due to the trial court immediately sustaining the objection prior to Caroline’s answer. Additionally, after the objection was sustained the Commonwealth concluded its questioning of Caroline. As such, we determine that the Commonwealth’s question did not create a fundamental defect in the trial and there was no abuse of discretion in denying Foley’s motion for a mistrial.

III. The Admission of Drawings Made by the Victim was Not Palpable Error.

Foley also contends that the trial court erred by permitting the admission into evidence of drawings made by Caroline detailing Foley's sexual abuse. Specifically, while at the Lake Cumberland Child Advocacy Center Caroline annotated body diagrams to identify what parts of her body had been inappropriately touched by her father. Additionally, Caroline made drawings depicting her father's sexual abuse. Caroline also included captions on the pictures, writing on one picture, her father's name and "please stop," and on another "[d]addy, stop. Shut up."⁸

At trial, Foley objected to the admission of these drawings on the ground that Caroline's testimony rather than the drawings was the best evidence of the abuse. KRE 1002. The trial court disagreed and overruled the objection. On appeal, Foley now argues that the drawings should never have been admitted because they were inadmissible hearsay under KRE 801. As this particular argument was never presented to the trial court, Foley's assignment of error on hearsay grounds is not properly preserved for appellate review. *See Fairrow v. Commonwealth*, 175 S.W.3d 601, 607 (Ky. 2005) (citations omitted) ("When a party states grounds for an objection at trial, that party cannot assert a different basis for the objection on appeal."). Accordingly, relief on this issue

⁸ Foley challenges the admission of both the diagrams and drawings depicting Caroline's abuse. Foley characterizes both the printed body diagrams and handmade drawings as "drawings." The Court will also refer to both groups of documents as "drawings."

may only be granted “upon a determination that manifest injustice has resulted from the error.” KRE 103(e).

The Commonwealth argues that the drawings were admissible based on our decision in *Tackett v. Commonwealth*, 445 S.W.3d 20 (Ky. 2014). After a trial, Tackett was convicted of sexually abusing his son and a friend of his son when they were children. *Id.* at 24. At trial the Commonwealth introduced a picture Tackett’s son drew when he was approximately six years old. *Id.* at 39. The picture was described as “containing representations of a naked man with a penis, a frowning naked girl with blood and semen coming out of her vagina, and a monster with fire coming out of its eye and an ejaculating penis.” *Id.* Tackett failed to object to the introduction of the picture, but the Court reviewed for palpable error. *Id.* at 40. Ultimately the Court concluded that the introduction of this evidence did not alter the outcome of the proceedings and therefore any error in the admission of this evidence was not palpable. *Id.* at 41. However, the Commonwealth’s reliance on *Tackett* is misplaced, as the Court’s determination that the drawing did not result in palpable error does not mean that the drawing was admissible.

It is clear that Caroline’s drawings constituted out-of-court statements offered for the truth of the matter asserted. Because Caroline’s written words and drawings, were intended by her to be assertions explaining past events, the pretrial drawings were inadmissible hearsay. However, we cannot conclude that the introduction of this evidence rises to the level of palpable error. The drawings were identified and explained during Caroline’s trial testimony and

constituted cumulative evidence. Due to the evidence being admitted through Caroline, she was subject to cross-examination on these issues. *See Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992) (holding that admission of evidence of drawings and captions by the victim was harmless error.). Accordingly, we conclude that while the admission of the drawings was error, this error was not palpable.

IV. The Trial Court Did Not Abuse Its Discretion In Denying Foley's Motion to Strike a Juror for Cause.

Foley's fourth argument concerns the trial court's decision to deny his motion to strike Juror 23 for cause. Foley contends that he was forced to remove Juror 23 through the use of a peremptory challenge, when he should have been stricken for cause, and he was therefore denied due process of law.

"In Kentucky, the right to an impartial jury is protected by Section 11 of the Kentucky Constitution, as well as the Sixth and Fourteenth Amendments to the [United States] Constitution." *Fugett v. Commonwealth*, 250 S.W.3d 604, 612 (Ky. 2008) (citing *Fugate v. Commonwealth*, 993 S.W.2d 931, 939 (Ky. 1999)). RCr 9.36(1) provides that a juror shall be excused for cause "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence[.]" It is the responsibility of the trial court to "evaluate the answers of the prospective jurors in context and in light of the juror's knowledge of the facts and understanding of the law. *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001).

In evaluating whether a juror should be stricken for cause, the test is “whether . . . the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.” *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). Additionally, it is well established that “a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court’s determination.” *Fugett*, 250 S.W.3d at 613 (quoting *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002). Even if there was an abuse of discretion in the trial court’s failure to strike a juror for cause, reversal is only proper if, “the party had to use a peremptory challenge to strike the juror and in fact, used all his peremptory challenges[.]” *Fugett*, 250 S.W.3d at 613 (quoting *Stopher*, 57 S.W.3d at 797).

In the case at bar, Foley asked the voir dire panel whether any close friends or family members worked in law enforcement. Juror 23 replied that he was an officer with the Kentucky State Police. Subsequently, the parties approached the bench to inquire about Juror 23’s background and potential biases. The trial court began by asking whether Juror 23 would be more inclined to believe police witnesses. While noting that he did not personally know any of the officers involved in the case, Juror 23 answered the court’s question by stating that he was not more inclined to believe police witnesses. Afterwards, the trial court rephrased its question, “[s]o just the fact that they would be an officer wouldn’t make you going in more inclined to believe them

than whatever you'd have to hear to judge the credibility on the witness stand. Is that correct?" Juror 23 replied by saying, "[w]ell actually, somewhat. I mean I would have to see some evidence that would dispute him. I mean why would they lie unless they had a reason to? I would be more inclined to believe that they were telling the truth." The trial court asked if that opinion was based on Juror 23's prior life experience, to which Juror 23 explained that it was due to his "being a police officer and knowing how other police officers and knowing how I operate myself."

Subsequently, the Commonwealth asked "[d]o you think regardless of your occupation, do you think if you were to sit and listen to the evidence today and maybe tomorrow, at the end of the day would you be able to set aside any of your feelings and render a fair and impartial decision, based just on the evidence you hear." In response, Juror 23 explained that he would base his decision on the evidence and that he would be impartial. Additionally, in response to Foley's questioning, Juror 23 explained that he would go by the evidence presented in the case. Further, he explained that if that evidence demonstrated that an officer was being untruthful that he would go with the evidence rather than believe the officer's testimony. Also, Juror 23 repeatedly emphasized his desire to see all available evidence before making a judgment about the case. Subsequently, the trial court denied Foley's motion to strike Juror 23 for cause.⁹

⁹ The record confirms that Foley used all nine of his peremptory challenges, including the strike exercised for Juror 23.

In *Sholler v. Commonwealth*, 969 S.W.2d 706 (Ky. 1998), the Court reviewed whether the trial court abused its discretion in failing to strike a potential juror for cause. The juror, a retired Secret Service agent, was acquainted with a nurse who would be a witness in the case. *Id.* at 708. Additionally, questions were raised about the juror's fitness to serve on the jury given his law enforcement background. *Id.* The juror explained that his background would not prevent him from deliberating fairly, describing himself as "very open-minded and stated that his verdict would be based strictly on the evidence." *Id.* However, during defense questioning the juror "admitted that he was very pro-law enforcement and that he placed substantial credence in police officers." *Id.*

On appeal, the Court noted that while the juror indicated that he would give credence to the testimony of a police officer that he did not indicate a bias against the defendants. *Id.* at 709. Additionally, the Court found that the juror's acquaintance with a witness in the case was insufficient to establish bias on a challenge for cause. *Id.* Accordingly, the Court concluded that the trial court did not err in overruling the motion to strike the juror for cause. *Id.*

Similarly, in *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007), the Court reviewed whether the trial court abused its discretion in failing to strike a potential juror for cause. The juror in question was a police officer who worked in the same district as two of the officers involved in the investigation and knew them. *Id.* at 337. While the juror noted that his past association with the officers would not affect his ability to be an impartial juror, he "went

on to say that he had ‘an inside point of view’; that he was ‘absolutely’ pro-police; that while ‘police are just like everybody else,’ he did not believe they would lie under oath because they took the oath more seriously; and that he would find it more likely that a police officer was telling the truth than a lay witness.” *Id.* Subsequently, the trial court denied Shane’s motion to strike the juror for cause. *Id.* at 338.

On review, the Court determined that the juror’s responses “indicated a probability that he could not enter the trial giving both sides a level playing field.” *Id.* Additionally, the Court found that the juror’s “statement that he “was ‘absolutely’ pro-police and that he did not believe an officer would lie under oath clearly indicated that a defendant would have little or no chance of challenging an officer’s testimony in this juror’s mind.” *Id.* As such, the Court concluded that the trial court’s failure to strike the juror was an abuse of discretion. *Id.*

Considering *Sholler* and *Shane* together, they support the conclusion that the trial court did not abuse its discretion in not striking Juror 23 for cause. While Juror 23 explained that he would be inclined to believe that a police officer would tell the truth, he pledged to make his decision based on the evidence presented in the case. *Cf. Fugett*, 250 S.W.3d at 613 (The trial court erred in failing to strike a juror for cause, where “he acknowledged that he would probably give more weight or greater credibility to the testimony of a police officer, simply because he was a police officer.”).

Further, Juror 23 stated that if evidence was presented that contradicted an officer's testimony he would accept that evidence rather than solely relying upon the officer's testimony. Based on these responses, Juror 23 did not suggest that he had made up his mind regarding the testimony of a police officer. Rather, his responses indicated his willingness to consider all available evidence prior to making a judgment in the case. Accordingly, we cannot say that the trial court abused its discretion in denying Foley's motion to strike Juror 23 for cause.¹⁰

V. The Commonwealth Offered Accurate Testimony Regarding Foley's Parole Eligibility.

In his last claim of error, Foley argues that the jury was misinformed as to his parole eligibility during the sentencing phase of the trial. This allegation of error is unpreserved, but Foley has requested that the Court review for palpable error under RCr 10.26. "The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material." *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005) (citing *Napue v. Illinois*, 360 U.S. 264, 269, 272, 79 S. Ct. 1173 (1959)).

Probation and Parole Officer Mary McLain Sapp testified about parole eligibility during the sentencing phase of Foley's trial. During the direct examination of Officer Sapp, the Commonwealth asked what would be the

¹⁰ Foley contends that the "trial court was reluctant to even permit the defense attorney to question the juror, and cut the questioning short." This is not supported by the record. The trial court allowed both the prosecutor and Foley to extensively question Juror 23. Only when the Foley's questioning became repetitive did the trial court conclude the questioning.

impact of the jury returning a verdict finding Foley guilty of being a first-degree persistent felony offender. Officer Sapp explained that if Foley were found to be a persistent felony offender in the first degree, it would enhance the penalty range of his convictions. Officer Sapp noted that Foley had been convicted of incest which is a Class B felony. If Foley were convicted of being a first-degree persistent felony offender, the penalty range for that offense would be enhanced to the penalty range of a Class A felony. Additionally, Officer Sapp noted that if a defendant were convicted of being a first-degree persistent felony offender and a Class A, Class B, or Class C felony, that individual would not be parole eligible until they had served ten years of their sentence.

Subsequently, the Commonwealth asked whether it was possible for Foley, if convicted of being a first-degree persistent felony offender, to receive a life sentence rather than a term of years. Officer Sapp explained that Foley could receive a life sentence or a life sentence without the possibility of parole for a period of twenty-five years.

Later in her testimony, Officer Sapp reiterated that the penalty range for a Class A felony was 20-50 years. Afterward, the prosecutor asked what Foley's parole eligibility would be if the jury were to give Foley a sentence in that 20 to 50 year range. Officer Sapp responded by assuming Foley's conviction for being a first-degree persistent felony offender that his parole eligibility would be ten years. The Commonwealth then asked what Foley's parole eligibility would be for a life sentence. In response, Officer Sapp erroneously stated that his parole eligibility for a life sentence would be 25

years. However, immediately after that answer, Foley began questioning Officer Sapp, by asking about whether the eligibility of parole on a life sentence was 20 or 25 years. In response to this question, Officer Sapp corrected her earlier mistake and informed the jury that the parole eligibility for a life sentence would be 10 years. To this Foley asked “[i]t’s 20 years is it not?” After reviewing her notes, Officer Sapp again stated that the parole eligibility for a life sentence would be 10 years.¹¹

Foley alleges that Officer Sapp misstated his parole eligibility for a life sentence. Further, Foley contends that “[he] never had a chance for a regular life sentence with the jury’s belief that he could be released after serving only 10 years.” While the parole eligibility testimony was confusing at times, Officer Sapp ultimately provided the correct information to the jury for parole eligibility for a life sentence obtained due to a first-degree persistent felony enhancement.

As Foley was found to be a first-degree persistent felony offender, his sentence is controlled by the provisions of Kentucky Revised Statutes (KRS) 532.080. Specifically, KRS 532.080(7) mandates that “[i]f the offense the person presently stands convicted of is a Class A, B, or C felony, the person shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years, unless another sentencing scheme

¹¹ After Officer Sapp’s answer, Foley’s counsel announced that she would move on to a different line of questioning, but that she would return to this topic later in her questioning (she did not go on to do so). However, in response to Foley’s counsel’s statement Officer Sapp noted that she was unsure about the parole eligibility and apologized for the confusion.

applies.” See also, *Brown v. Commonwealth*, 818 S.W.2d 600, 602 (Ky. 1991) (KRS 532.080(7) “prohibits a person convicted of PFO I from being given any form of probation, parole or conditional discharge until he has served a minimum sentence of 10 years.”). This ten-year requirement is also found in the Kentucky Administration Regulations (KAR) for the Kentucky Parole Board. 501 KAR 1:030 sets forth the requirements for a prisoner’s parole eligibility, and mandates that parole eligibility for a Class B felony offense (such as Foley’s incest conviction) committed after December 3, 1980, would be 10 years.^{12&13} Accordingly, Sapp was correct when she testified that Foley’s parole eligibility would be 10 years for a life sentence. As Sapp’s testimony accurately reflected the law as it pertains to parole eligibility there was no error.

¹² Both KRS 532.080(7) and 501 KAR 1:030 acknowledge an alternate sentencing scheme can apply which would alter a defendant’s parole eligibility. The existence of alternate sentencing schemes, is likely the root of Foley’s counsel’s mistaken belief that Foley’s parole eligibility for a life sentence would be after 20 years imprisonment. As an example, had Foley committed or attempted the commission of a Class A or Class B felony sex offense as defined in KRS Chapter 510 (*e.g.*, first-degree rape or first-degree sodomy) then his parole eligibility on a life sentence would have been 20 years. However, Foley’s crime of incest while a Class B felony did not fall under an alternate sentencing scheme and as such he was properly sentenced under the provisions of KRS 532.080.

¹³ During Foley’s questioning of Officer Sapp he asked about whether he would have to complete sex offender treatment. Officer Sapp noted that failure to complete that treatment would bar parole requiring a defendant to serve out his sentence prior to release. Officer Sapp indicated that a defendant who failed to complete sex offender treatment would still receive good time credit towards his release. When questioned on this point, Officer Sapp corrected herself noting that an inmate would not receive any custody credit without completing sex offender treatment. While Foley, notes this testimony he does not explain how it impacted his sentence. Nor can we see how this testimony adversely affected him given that Officer Sapp ultimately properly advised the jury on this issue.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence of the Green Circuit Court.

All sitting. All concur.

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