RENDERED: SEPTEMBER 28, 2023
TO BE PUBLISHED

# Supreme Court of Kentucky

2022-SC-0060-MR

NICHOLAS BEHRENS — APPELLANT

V.

ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
NO. 19-CR-00430

COMMONWEALTH OF KENTUCKY — APPELLEE

**OPINION OF THE COURT BY JUSTICE BISIG**

**AFFIRMING**

Appellant Nicholas Shane Behrens (Behrens) was indicted by a Campbell County grand jury on two counts of first-degree sexual abuse (victim under twelve) and one count of tampering with physical evidence. A supplemental indictment following further investigation added an additional count of first-degree sexual abuse (continuing course of conduct, victim under twelve), two counts of incest (victim under twelve), and twenty counts of possession of matter portraying a sexual performance by a minor.[1] Prior to trial, the Campbell Circuit Court granted an oral motion by the Commonwealth to amend the indictment to include two counts of first-degree sodomy (victim under twelve).

[1] For ease of reference, we will refer to the charges for possession of matter portraying a sexual performance by a minor as the "child pornography charges."

All of these charges relate to sexual abuse perpetrated by Behrens against his eight-year-old son Kevin,[2] Behrens' possession of child pornography, and Behrens' efforts to erase his digital footprint after law enforcement began its investigation. The Campbell Circuit Court severed all but one of the child pornography charges and proceeded with trial on the charges of first-degree sexual abuse, tampering with physical evidence, incest, sodomy, and the sole remaining child pornography charge. The jury returned a guilty verdict on all of the charges tried and recommended that some of the terms run consecutively for a total sentence of 140 years. The trial court imposed a sentence running all of the terms concurrently for a total of fifty years. Behrens now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). Following a careful review, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In the winter of 2018, Nicholas Behrens' eight-year-old son Kevin visited him in Kentucky. Kevin traveled alone from Arkansas to spend winter break with his father. During Kevin's visit, Behrens showed him pornography. Some of the pornography pictured child cartoon characters from a children's TV show engaging in sexual acts.

Behrens also put his hand on Kevin's penis and moved it up and down. He asked Kevin to do the same to him. In addition, Behrens used a sex toy on Kevin. The toy took the appearance of a green wine bottle. The bottle's

[2] "Kevin" is a pseudonym that we use here to protect the privacy of the child victim.

removable bottom covered up a fake vagina. Behrens would hook the bottle up to a machine that made it go back and forth and place it on Kevin's penis.

Behrens and Kevin shared a bathroom during Kevin's visit. While they were in the bathroom together, Behrens put some soap on his penis and inserted it into Kevin's anus. Kevin cried. It hurt and Kevin told him that he wanted him to stop. Later, Behrens and Kevin took a shower. After the shower, they went to Behrens' bed. Behrens asked Kevin to put Kevin's penis in Behrens' anus. Behrens told Kevin that he was not going hard enough. Kevin said that he "fixed it." Behrens told Kevin not to tell anyone about what Behrens had done to him. Kevin returned home and told his aunt, who then told Kevin's mother. The family reported the incident to law enforcement.

Det. Kyle Gray of the Crimes Against Children Unit of the Campbell County Police Department conducted an investigation that included, among other things, interviews with both Behrens and Kevin. Det. Gray also recovered from Behrens' girlfriend Brandi Kuntz a green wine bottle sex toy that matched Kevin's description of the device. Det. Gray ultimately arrested Behrens. After his arrest, Behrens exchanged messages with Brandi. He told her to change his iCloud[3] password and delete his digital files. Det. Gray monitored the messages, and on their basis he obtained a search warrant for some of

[3] Apple describes iCloud as a "service from Apple that securely stores [a user's] photos, files, notes, passwords, and other data in the cloud and keeps it up to date across all [of a user's] devices, automatically." *iCloud User Guide*, APPLE, https://support.apple.com/guide/icloud/introduction-to-icloud-mm74e822f6de/icloud (last visited Sept. 23, 2023). Cloud-based services in general allow for remote storage of digital files.

Behrens' devices and accounts. Det. Gray extracted data from the devices and changed the password to Behrens' iCloud account so that Behrens could not access it.

Det. Gray obtained the iCloud account's data from Apple. He searched the data and found a folder with screenshots of a conversation from an adult messaging app. One party to the conversation was an account with Behrens' picture on it. The other party was unnamed. The account with Behrens' picture on it said, "I have an experienced 9yo and 4yo [sic] we can hang out with. . . . Naturally I'm cautious . . . with things though. Neither of us need [sic] the trouble." Notably, Behrens had children of similar ages at the time. The unnamed account claimed to be in Franklin, Indiana. The account with Behrens' picture on it said that he had recently been in Indiana, that he would have liked to have met while he was there, and that he was interested in meeting in the future.

Det. Gray also found on Behrens' electronics a note with several links to dark net websites. Det. Gray followed the links to websites that contained child pornography. Det. Gray found some examples of the kind of cartoon TV show pornography that Kevin testified that Behrens had watched with him.

Det. Steve Cush, a forensic examiner, discovered that files had been erased from Behrens' iPad, that his MacBook laptop had been wiped, and that his iCloud account contained a number of layered zip files. Underneath those layers, Det. Cush found child pornography videos.

The grand jury indicted Behrens on two counts of incest (victim under

twelve), two counts of sodomy in the first degree (victim under twelve), two counts of sexual abuse in the first degree (victim under twelve), one count of sexual abuse in the first degree (continuing course of conduct, victim under twelve), one count of tampering with physical evidence, and twenty counts of possession of matter portraying a sexual performance by a minor.

The trial court severed nineteen of the child pornography charges, but it agreed with the Commonwealth's request to try the sole remaining child pornography charge alongside the sexual abuse, incest, tampering, and sodomy charges. The remaining charge related to Behrens' possession of a video titled "Big C**k F***s 8 yo Boy" (asterisks added), and the trial court based its decision on its expectation that Kevin's testimony would link that video to the sexual abuse perpetrated by Behrens.

After Kevin's testimony did not establish the anticipated link, Behrens renewed his motion to sever the child pornography charge. The Commonwealth argued in response that the charge, in addition to its relation to the sexual abuse charges, also shared an evidentiary link with the tampering charge. The trial court denied the motion to sever.

During its closing argument, the Commonwealth twice stated that Behrens had "anally raped his son." Arguments concluded, and the trial court instructed the jury on each charge. The subject of the tampering instruction was "physical evidence in the form of digital evidence," but the instruction did not distinguish between Behrens' MacBook, iPad, and iCloud account.

The jury returned a guilty verdict on all counts and recommended a

sentence of 140 years. The trial court imposed a sentence of fifty years. Behrens now appeals.

## ANALYSIS

Behrens' principal contentions are as follows: (1) that the jury instruction on the tampering charge yielded a verdict that violated the unanimity requirement; (2) that he was prejudiced by the trial court's refusal to sever the child pornography charge; (3) that he was prejudiced by the admission into evidence of the adult messaging app communications about "an experienced 9yo and 4yo [sic];" and (4) that the fairness of his trial was seriously affected by the Commonwealth's remarks during closing argument. We address these arguments in turn, discussing additional facts as necessary.

### I. The Tampering Instruction Did Not Yield a Verdict that Violated the Unanimous Jury Requirement.

Behrens contends that the jury instruction on the tampering with physical evidence charge yielded a verdict that violated his right to a unanimous jury. At trial, the Commonwealth presented evidence that Behrens erased files from his iPad, wiped his MacBook, and asked his girlfriend Brandi to change the password to his iCloud account. More particularly, Det. Gray testified that while Behrens was in jail, he sent messages telling Brandi to delete his files and change his passwords on his devices and accounts. Det. Cush, the forensic examiner, testified that files on Behrens' iPad had been erased and that Behrens' MacBook had been wiped totally clean. During closing argument, the Commonwealth contended that "these items were altered," and that they were evidence of the tampering charge. The

Commonwealth's theory was that Behrens tampered with digital evidence because he knew that this evidence was going to be used at trial.

The trial court's instruction on the tampering charge reads as follows:

> You will find the defendant guilty of Tampering with Physical Evidence under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all the following:
>
> A. That in this county, on or about June 13, 2019 through June 14, 2019, and before the finding of the Indictment herein,
> B. He altered, destroyed, concealed, or removed *physical evidence in the form of digital evidence*,
> C. Which he believed was about to be used or produced in an official proceeding,
> AND
> D. That he did so with the intent to impair its availability at the official proceeding.

(Emphasis added). Behrens now contends that Part B of the instruction yielded a verdict that violated the jury unanimity requirement by allowing each juror to find enough evidence for a conviction in any of three distinct actions: those related to the iPad, those related to the MacBook, or those related to the iCloud account. He argues that some of the jurors, for example, could have convicted him for having his MacBook wiped, while others could have convicted him for having files erased from his iPad.

Behrens failed to present any of these concerns to the trial court, so he did not properly preserve this issue for appeal. He therefore asks this Court to review the issue for palpable error. We must first answer whether Part B of the jury instruction on tampering yielded a verdict that violated Behrens' right to a unanimous jury. If the instruction was erroneous, then we must answer

whether the error was palpable under RCr[4] 10.26.

Under our state and federal Constitutions, a criminal verdict is not valid unless the jury is unanimous as to each of the elements of the charged offense. Ky. Const. § 7; U.S. Const. amend. VI. But unanimity as to the elements does not require unanimity as to the means,[5] so a jury need not agree on exactly how a defendant skinned a cat, just that he did it. Special considerations arise when a prosecutor supports a single charge with evidence of multiple wrongdoings. On one hand, where the evidence at issue tends to prove more than one instance of the same crime, the jurors might vote to convict without actually agreeing on which instance of the crime the defendant committed. On the other hand, where the evidence tends only to suggest alternative theories as to how the defendant committed a single crime, no such issue of jury unanimity arises.

In *Johnson v. Commonwealth*, No. 2021-SC-0541-MR, 2023 WL 4037845, at *5 (June 15, 2023) (to be published), we clarified the distinction between multiple acts and alternative means. The defendant in that case faced two counts of third-degree burglary, and the Commonwealth presented evidence at trial that he had entered multiple buildings for the purpose of theft.

[4] Rule of Criminal Procedure.

[5] We find support for this distinction in American Jurisprudence: "[T]here is a distinction between a fact that is a specific element of the crime and one that is but the means to the commission of a specific element. Jurors must unanimously agree on all elements of a crime in order to convict, but jurors need not agree on all underlying facts that make up a particular element." 75B AM. JUR. 2D *Trial* § 1448 (2023); *see also Brown v. Commonwealth*, 553 S.W.3d 826, 839-40 (Ky. 2018) (quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999).

The jury instructions for each count were identical, so there was no way for the jury to distinguish one entry from another when it found the defendant guilty for both. In ruling that the instructions yielded verdicts that violated the unanimity requirement, we held:

> If there is a break in time and conduct that allows for the defendant, even momentarily, to pause and reflect, and form or reform intent to commit an additional act, then the Commonwealth has not presented two alternative theories for the perpetration of one crime; it has presented proof of two separate criminal acts.

*Id*.

The *Johnson* Rule contemplates that there are crimes for which certain actions double as elements necessary for a conviction. For example, entry into a building is a necessary element for a conviction on a charge of third-degree burglary.[6] Each distinct entry—coupled with the requisite intent—is criminal on its own, without regard to its consequences, so all that is necessary in order to distinguish act from act and element from element is a sufficient "break in time and conduct." *Johnson*, 2023 WL 4037845, at *5. For such crimes, we require unanimity as to each action because each action is an independent element of an independent crime.

But the *Johnson* Rule also anticipates other crimes for which separate actions, taken together, constitute a common scheme towards an indivisible criminal consequence. None of the actions are criminal in themselves; rather, they become illegal in light of each other, and in light of their common criminal

[6] KRS 511.040.

purpose. From the multiplicity of actions emerges one criminal act.[7] The jury need only be unanimous on the latter.[8]

This case offers a useful example of the second category under the *Johnson* Rule. Here, the subject of Behrens' tampering charge was neither the iPad, the MacBook, nor the iCloud account individually, but rather the whole ensemble of incriminating data that Behrens sought to hide. The individual devices and accounts were all just components of that sole evidentiary source: Behrens' digital footprint.[9] The nature of the evidence here is relevant. In the realm of cloud and digital evidence, where copies and connections abound, where coveys of data populate devices that are coupled to one another, and where 1s and 0s trace one's every step,[10] to conceal a few copies—while still criminal tampering—is to conceal little in effect. To fully achieve its purpose, tampering in this context must often be a multi-step act because one piece of evidence can be stored and discovered on multiple devices.

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[7] That multiple actions may constitute a single criminal act is evident in our understanding of actus reus, defined as "[t]he wrongful deed that comprises the physical *components* of a crime and that generally must be coupled with mens rea to establish criminal liability." *Actus Reus*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

[8] Our view of this second category of crimes is also consistent with other authorities. For example, American Jurisprudence notes, "[i]f the gravamen of the crime is the 'result of the conduct,' the jury must be unanimous about the specific result required by the statute but not the specific conduct." 75B AM. JUR. 2D *Trial* § 1447 (2023).

[9] This is borne out by the language of both the instruction itself ("physical evidence in the form of digital evidence") and the Commonwealth's closing argument (referencing the digital evidence as a whole with the singular pronoun "it").

[10] Modern computers use binary strings—1s and 0s—to represent both code and data.

Suppose that a suspect falls under investigation for possession of child pornography. He knows that a search warrant would uncover three devices, each of which holds copies of the same fifty incriminating files. Before the search and seizure, he sits down at each device and manually right clicks and deletes all of the files that he intends to conceal. In one sense, he has committed three actions, one for the manual wiping of each device. In another sense, he has committed 150 actions, one for the manual deletion of each file. But in either sense, he has committed but one criminal act of tampering—the erasure of his digital footprint—to be charged and proved in one count. No "break . . . in conduct" has occurred, and to require unanimity as to each sub-component of the commission of the crime would be to require an extra layer of unanimity that neither our state nor our federal Constitution contemplates. *Id.*

As Behrens sat in jail under serious charges, he learned of an impending search of his digital devices. He had his MacBook wiped. He had files deleted from his iPad. He tried to have his iCloud password changed.[11] He did all of this towards one unifying end: the erasure of the incriminating components of his digital footprint. So the Commonwealth in this case presented evidence of several constitutive actions, several modes of commission, but just one criminal act, subject to one charge and one instruction. We therefore find no unanimity error in the trial court's tampering instruction.

We further note that even if the instruction here had been erroneous, the

[11] The language of the jury instruction refers to completed acts of tampering, so it plainly excluded Behrens' unsuccessful attempt to change the iCloud password from the jury's consideration for the tampering charge.

error would not have been palpable under RCr 10.26. In *Johnson*, we unwound the ci-devant rule that at one time all but bound this Court in certain circumstances to reverse as structural error most issues of jury unanimity. *Id.* at *8. This welcome clarification unburdens trial judges. The near guarantee of reversal on appeal under the old rule incentivized defendants against objecting to instructional issues at trial, where the defect could be cured contemporaneously.[12]

Under RCr 10.26, "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." In determining whether an error is palpable, we consider

> "whether on the whole case there is a substantial possibility that the result would have been any different." To be palpable, an error must be "easily perceptible, plain, obvious and readily noticeable." A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. "It should be so egregious that it jumps off the page . . . and cries out for relief."

*Davis v. Commonwealth*, 620 S.W.3d 16, 30 (Ky. 2021) (citations omitted). Even where an error is palpable, relief is warranted only where it also results in manifest injustice. *Commonwealth v. Caudill*, 540 S.W.3d 364, 367 (Ky. 2018). An error results in manifest injustice if it "so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or

[12] To be clear, we do not retreat from our ruling requiring unanimity in criminal jury verdicts as set forth in jury instructions, *i.e.*, differentiating identical charges by appropriate descriptors.

jurisprudentially intolerable.'" *Conrad v. Commonwealth*, 534 S.W.3d 779, 783 (Ky. 2017) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

After *Johnson*, our charge in the context of alleged palpable jury unanimity errors is to scrutinize the facts, weigh the evidence, and determine whether the error is "so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Johnson*, 2023 WL 4037845, at *8 (quoting *Martin*, 207 S.W.3d at 5). The relevant inquiry remains whether, but for the error, there is a "'substantial possibility' of a different result." *Id.* The touchstone of that inquiry for our purposes is therefore whether any of the alleged forms of conduct, if taken on its own, would have failed to warrant a conviction under an independent instruction.

Here, the Commonwealth presented strong evidence that Behrens tampered with all components of his digital footprint mentioned at trial. While in jail, Behrens became aware that his iPhone was in police possession. He intentionally sought to conceal the incriminating evidence contained on his other devices by messaging his girlfriend Brandi to change his passwords and delete his files. Brandi testified at trial that Behrens wanted her to change his iCloud password in order to prevent the police from searching his devices.

Police nonetheless gained access to his iPad and MacBook. Det. Cush testified that files had been deleted from Behrens' iPad prior to its being searched. The evidence regarding the MacBook is less direct but no less sufficient. Police recovered the MacBook at the Oklahoma home of Behrens' father. It had been wiped totally clean, and its serial number tied it to Behrens'

iCloud account.

No substantial possibility of a different result inheres in such strong evidence. No single juror, in voting guilty, could have relied on conduct that would have failed to support an independent conviction. So while the tampering instruction was not erroneous, we do not conclude that an instructional unanimity error here would have been palpable in any case given the volume of evidence in support of each sub-component of Behrens' tampering act.

## II. The Trial Court Did Not Err in Denying Behrens' Renewed Motion to Sever the Child Pornography Charge.

Behrens contends that the trial court abused its discretion when it denied his motion to sever the sole remaining child pornography charge against him. The Commonwealth's indictment joined several counts for sex crimes with one count of tampering and twenty counts of possession of child pornography. Before trial, Behrens moved to sever all twenty child pornography counts under the theory that the child pornography lacked a sufficient nexus to the tampering and the sexual crimes. The trial court severed nineteen of the counts, but it allowed the Commonwealth to prosecute the single child pornography charge for the video entitled "Big C**k F***s 8 yo Boy" alongside the tampering and the sex crimes because it expected Kevin's testimony to tie the video to the sex crimes.

However, Kevin only testified that Behrens had watched *some* pornography with him, and after Kevin made no specific reference to the video that was the subject of the charge, Behrens renewed his motion to sever. The

Commonwealth argued that the child pornography charge was "part and parcel" of the tampering charge, and that in any case the video was a step in the process of Behrens' sex crimes. The trial court relied on the tampering argument in denying the renewed motion to sever.

An analysis of joinder and severance requires a balancing of RCr 6.18 and RCr 8.31. Under RCr 6.18,

> [t]wo (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

Joinder is proper under this rule where the evidence shows a sufficient "nexus" or "logical relationship" between the crimes charged. *Peacher v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013). RCr 8.31 governs severance:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

So what RCr 6.18 ties together, RCr 8.31 unwinds upon a showing of undue prejudice. We have held that "in assessing whether joinder resulted in undue prejudice, we [ask], with KRE[13] 404(b) particularly in mind, 'whether evidence necessary to prove each offense would have been admissible in a separate trial of the other.'" *Peacher*, 391 S.W.3d at 838 (quoting *Roark v.*

[13] Kentucky Rule of Evidence.

*Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002)). Since joinder, severance, and the balance between the two are all within the broad discretion of the trial court, our inquiry is whether the trial court abused its discretion when it denied Behrens' renewed motion to sever. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 26 (Ky. 2011). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Here, the logical relationship between the child pornography charge and the tampering charge is sufficient to warrant their joinder together. The purpose of Behrens' tampering act was to hide child pornography, so the tampering charge arises in sequence and purpose from the child pornography charge. Further, the joinder did not unduly prejudice Behrens. Had the charges been tried separately, the evidence supporting the child pornography charge would have been admissible in order to prove the tampering charge. The child pornography evidence would have survived KRE 404(b) because it speaks to motive and knowledge for tampering. Behrens could not have been unduly prejudiced by evidence that the Commonwealth would have been able to introduce regardless of the trial court's decision on severance.

Although the trial court ultimately relied on the child pornography charge's nexus to the tampering charge in order to justify its denial of Behrens' renewed motion to sever, it could have also relied on its initial justification: that the evidence suggests that child pornography may have been a part of Behrens' process of grooming and sexually abusing Kevin. Kevin testified at

trial that Behrens watched child pornography with him, and the subject of the charge in question here was a video portraying the precise kinds of sex crimes that Behrens perpetrated against Kevin. The sex crimes in this sense arise from the child pornography as two steps in the same plan. And since KRE 404(b) allows evidence of other wrongs when such evidence tends to prove plan or preparation, the child pornography evidence would have been admissible at a separate trial for Behrens' sex crimes. Because there was no improper joinder or undue prejudice in either case, we do not conclude that the trial court abused its discretion in denying Behrens' renewed motion to sever.

### III. The Trial Court Did Not Err in Admitting Evidence of the Adult Messaging App Communications.

Behrens alleges errors under KRE 403 and KRE 404(b) regarding the trial court's admission into evidence of screenshots of Behrens' conversations on an adult messaging app. The screenshots showed an account bearing Behrens' picture telling another party that he has "an experienced 9yo and 4yo [sic] [they] can hang out with."

Before trial, Behrens filed a motion in limine under KRE 403 to exclude these communications from evidence. The record includes no trial court ruling on the motion, and Behrens offered no contemporaneous objection when the Commonwealth introduced the messages into evidence at trial. Since no order of record resolved the motion, the alleged error under KRE 403 is not preserved for appeal. KRE 103(d). Moreover, Behrens has not requested palpable error review of his KRE 403 arguments, so we do not consider them further.

However, Behrens has requested that we conduct a palpable error review

of his arguments under KRE 404(b). As noted above, our palpable error inquiry asks whether the alleged error constitutes a manifest injustice. RCr 10.26. The benchmark under that inquiry remains whether, but for the error, there is a "'substantial possibility' of a different result." *Johnson*, 2023 WL 4037845, at *8.

There is no error here in the first place. KRE 404(b) allows for the admission into evidence of other wrongs when such evidence tends to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). The screenshots at issue here appear to show Behrens describing his children as "experienced" in the context of sexual performance with adults. Given that Behrens faced charges of sexually abusing one of his children, such evidence is strongly probative of both motive and knowledge for the crimes charged. We therefore do not conclude that the trial court erred in admitting into evidence the screenshots of the messages.

## IV. The Commonwealth's Comments During Closing Arguments Do Not Warrant Reversal.

For his final argument, Behrens contends that the Commonwealth impeded the fairness of the trial when it twice said during closing argument that Behrens "anally raped his son." Though Behrens did not preserve this issue for appeal, he presents two principal arguments in his request for palpable error review. First, he argues that rape and sodomy are different crimes with different statutory elements, so the Commonwealth might have misled the jury when it referenced rape in the context of sodomy charges. Second, he argues that some of the jurors might have considered rape to be

more serious than sodomy, in which case the Commonwealth's comments might have been inflammatory or prejudicial.

This Court has afforded "wide latitude" to counsel during closing arguments. *Dickerson v. Commonwealth*, 485 S.W.3d 310, 332 (Ky. 2016). Since Behrens did not object to the comments at trial, reversal is only warranted here if the Commonwealth's conduct was flagrant and constituted palpable error. *Brafman v. Commonwealth*, 612 S.W.3d 850, 861 (Ky. 2020). In reviewing prosecutorial remarks for such error, we have evaluated "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Dickerson*, 485 S.W.3d at 329 (quoting *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010)).

None of those factors are satisfied here. First, the Commonwealth did not mislead the jury; it merely used layman's terms to describe conduct of which there was proof. The evidence suggested that Behrens used his penis to penetrate his son's anus. In that context, there is likely to be little colloquial distinction in the mind of a lay juror between "anal rape" and "sodomy." Second, the Commonwealth only referred to anal rape twice during its hour-long closing argument, so its comments were isolated. Third, the Commonwealth's comments were not deliberate insofar as, again, the Commonwealth merely used layman's terms to describe conduct of which there was proof. Fourth, the evidence in this case weighed heavily against Behrens.

All four factors therefore fall in the Commonwealth's favor. As such, we do not find that the Commonwealth's comments during closing argument warrant reversal or otherwise seriously affected the fairness of the trial.

## CONCLUSION

For the foregoing reasons, we affirm the judgment and sentence of the Campbell Circuit Court.

All sitting. All concur.

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