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# Supreme Court of Kentucky

2022-SC-0299-MR

PAUL W. JAMES APPELLANT

V.

ON APPEAL FROM GRANT CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
NOS. 18-CR-00177 & 18-CR-00197

COMMONWEALTH OF KENTUCKY APPELLEE

**OPINION OF THE COURT BY JUSTICE BISIG**

**AFFIRMING**

Paul W. James shot and killed Barry Kenner and was subsequently convicted by a Grant Circuit Court jury of murder and tampering with a witness. James was sentenced to life in prison consistent with the jury's recommendation and he now appeals as a matter of right. After review, we affirm the judgment.

## FACTS AND PROCEDURAL HISTORY

According to the Appellant, Paul W. James, there was longstanding animosity between the James family and their neighbor, Barry Kenner. In July 2018, Daniel, James's younger brother, went missing. Daniel, who struggled with addiction, was last seen wandering away from the family home with a bottle of pills. Tragically, Daniel's body was later discovered in a lake adjacent to the James and Kenner properties. Authorities believed he died from an

overdose before his body slid down an embankment and into the water. However, the James family believed there was foul play and insisted that police investigate Kenner.

Shortly after 6:00 p.m. on August 18, 2018, Kenner called 911 and told the dispatcher James shot him. Kenner also called his neighbor and reported that James shot him in the neck and asked for help. In a police interview after the shooting, James said that Kenner confronted him on the roadway and accused him of previously having tried to run him and a nephew down on his ATV. According to James, Kenner grabbed his left arm through his driver's side window and threatened to kill him. James explained that he then grabbed his gun and fired it. He conceded that he did not see Kenner with a weapon, Kenner was not trying to get in James's truck or pull him out of it, and after shooting Kenner he drove away from the scene. At 6:06 p.m., James called Deputy Scott Conrad and told him that he shot Kenner. Kenner was transported to the hospital and ultimately died from his injuries.

Other trial testimony indicated that Scott James, James's brother, messaged James on August 9, 2018, and alleged that Kenner and another individual killed Daniel. James replied, "We will get them love y'all." One witness testified that James told him Kenner and another individual killed his brother and that "these people are gonna pay." Additionally, a witness testified that James met her on the day of the murder to sell her pain pills. During the transaction, James told her that he believed two people were present when Daniel was murdered and that one of them lived a few houses down from his

parents' home. James told the witness that "as soon as he seen this guy, he was going to kill him."

On August 21, 2018, James called his brother Scott from the detention center and encouraged Scott to tell the police and court that he was on the phone with James at the time of the shooting and heard Kenner say, "I'll kill you motherfucker." James said, "you heard it" and "if you're in court, you're going to tell the Judge you heard it, you know what I mean." At trial, Scott testified that he initially told police he was on the phone with James and heard Kenner threaten James just before the shooting. However, Scott later contacted police, recanted this statement, and admitted he was not on the phone with James at the time of the shooting. Rather, Scott stated that James called him immediately after he shot Kenner.

DNA evidence established that blood found on the side of James's truck belonged to Kenner, and none of James's DNA was found under Kenner's fingernails. Officers located the gun used to shoot Kenner in James's truck. Other evidence collected by the police confirmed the shooting occurred in the roadway in front of Kenner's property. After Kenner was shot in the left side of the face, he managed to travel approximately sixty yards back to his residence, obtain his house phone, and go back into the front yard before collapsing. Law enforcement officers also testified that in police interviews, James exhibited a cold demeanor and did not act "appropriately distraught."

During deliberations, the jury asked the judge if they needed to be unanimous on all counts. After discussing how to proceed with counsel, the

trial court explained to the jury to return a guilty verdict, the jury had to be unanimous. The jury continued deliberating and after another hour, it returned guilty verdicts on murder, first-degree manslaughter, second-degree manslaughter, reckless homicide, and tampering with a witness. James's counsel moved for a mistrial. Outside the presence of the jury, the trial court conducted a hearing with counsel. James argued that the verdict was not unanimous, while the Commonwealth characterized the situation as a clerical error and mere confusion of the jury.

The trial court denied James's motion for a mistrial and brought the jury back into the court room. The trial court gave a thorough explanation of the instructions and sent the jury back to deliberate with a clean copy of the original instructions. The jury returned guilty verdicts on murder and tampering with a witness and recommended sentences of life imprisonment and five years, respectively, to run concurrently. The trial court imposed a life sentence consistent with the jury's recommendation. James now appeals as a matter of right.

## ANALYSIS

On appeal, James argues that (1) he was denied a unanimous verdict because the jury fundamentally misunderstood the trial court's instructions; (2) improper opinion testimony from two law enforcement officials rendered the trial fundamentally unfair; (3) inaccurate testimony regarding parole eligibility and meritorious good time credit rendered the sentencing phase unfair, and (4)

the Commonwealth presented an improper closing argument. We address each argument in turn.

## I. The jury instructions did not yield a verdict that violated the unanimous verdict requirement and the trial court properly denied James's motion for a mistrial.

James argues that the jury instructions for murder and the lesser included offenses violated his right to a unanimous jury, and therefore the trial court erred in refusing to grant a mistrial. At trial, the jury was given instructions on murder and the lesser-included offenses of first-degree manslaughter, second-degree manslaughter, and reckless homicide. During deliberations, the jury sent the following question to the trial court: "For each count, do we have to be 100% in agreement? Ex. murder – not 100%. First degree – 100%. Is this acceptable? Or do we need to be unanimous on each charge?" It is important to note that the instructions had the appropriate and standard language at the end of the murder instruction and at the beginning of each subsequent lesser-included offense instruction that clearly directed the jury how to proceed through each instruction and verdict form.

The trial court and counsel discussed the appropriate course of action. The trial court posited that the jury might be misunderstanding the instructions. Ultimately the trial court decided to bring the jury back in and asked the foreperson to ask the question again:

> Foreperson: The question the jury has, your honor, is if on a specific charge, the jury is not 100% in agreement about the charge, if we're broken up into any variable number that's not 12-0, is that a locked jury? . . . or do we just say not guilty because not all 12 are agreeing on the specific charge?

> Judge: As I explained, it has to be unanimous. If there is a guilty … if there is a verdict for guilty on any of these charges, it has to be unanimous. But you don't have to convict on any one charge. You understand that? Any verdict for guilty has to be unanimous.
>
> Foreperson: And not guilty . . . So if we don't have 12-0 on guilty, then it would just turn to not guilty, correct?
>
> Judge: (nods her head in agreement).

The trial court sent the jury back into deliberations. One hour later, the jury returned guilty verdicts for murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide in addition to a guilty verdict for tampering with a witness.

Outside the presence of the jury, the trial court conducted a brief hearing with counsel. The Commonwealth asked that the jury be polled given its clear confusion in rendering verdicts. James moved for a mistrial and objected to polling the jury, stating it would be improper to question the jury about its deliberations. The trial judge denied James's motion for a mistrial and brought the jury back into the court room.

In the presence of the jury, the trial judge acknowledged that she might not have fully understood the foreperson's question and therefore her answer may not have been helpful. The judge referenced the jury instructions and instructed the jury to pay attention to verdict form one. She explained to choose only one — not guilty or guilty, which the jury did — but to notice in bold print the portion that states "[i]f you found James guilty of murder, please proceed to verdict form number five." The judge explained:

> I think, in hindsight, what you were asking me is, do you have to go on and find the others. And the answer is if you found him

> guilty, you would proceed to number five, thereby skipping two, three, and four. If you had found him not guilty of murder, please proceed to verdict form number two. If you go to two, read that instruction as well. I want to make sure you understand that. . . . There are two charges, murder and tampering, but within the murder there are lesser includeds so that's why it's a bit confusing.

The trial court sent the jury back to deliberate with a clean set of instructions. Ultimately, the jury returned guilty verdicts for murder and tampering with a witness. Because it returned a guilty verdict on the murder charge, the jury correctly skipped over the verdict forms for the lesser included offenses of first-degree manslaughter, second-degree manslaughter, and reckless homicide.

James moved for a mistrial multiple times after the jury returned its first set of verdicts, so this issue is preserved for our review. In determining whether a mistrial was necessary, "we must look to see if either parties' right to a fair trial has been infringed upon." *Cardine v. Commonwealth,* 283 S.W.3d 641, 648 (Ky. 2009) (quoting *Radford v. Lovelace*, 212 S.W.3d 72, 80 (Ky. 2006)). "Specifically, 'the decision should be based on whether the complained of "event . . . prevented the [party] from receiving a fundamentally fair trial."'" *Id.* at 648-49 (quoting *Commonwealth v. Scott*, 12 S.W.3d 682, 685 (Ky. 2000)).

James argues that he was denied a unanimous verdict when the jury originally found him guilty of murder and all of the lesser-included offenses, and therefore the trial court should have declared a mistrial. The sequence of events in this case presents a unique circumstance and likewise requires different analysis than prescribed by our standard unanimity jurisprudence. Although James characterizes this issue as a unanimous verdict issue, it is

best reconciled by applying our standard for a mistrial and determining whether the initial jury verdicts, explanations provided by the trial court, subsequent deliberations, and ultimate ability of the jury to follow the instructions as provided prevented James from receiving a fundamentally fair trial.

In *McGinnis v. Commonwealth,* 875 S.W.2d 518, 522 (Ky. 1994), McGinnis fatally shot someone but claimed self-defense. On appeal, the Court explained that there was evidence to support a self-defense instruction. *Id.* at 523. As a result, the trial court should have instructed the jury only on intentional murder, not wanton murder since the issue was self-defense. *Id.* at 524. This Court reversed McGinnis's conviction for wanton murder and remanded the case for a new trial. *Id.* at 529.[1]

On remand, McGinnis raised an issue that implicated the first trial and ultimately led to a second appeal to this Court. *McGinnis v. Wine,* 959 S.W.2d 437 (Ky. 1998) ("*McGinnis II*"). At the first trial, the jury found McGinnis not guilty of intentional murder, and guilty of wanton murder. *Id.* at 438. But the jury ignored the final admonition in the wanton murder instruction that

[1] While immaterial to the issue before us, *McGinnis* precluded a conviction of wanton murder in any case where the defendant claims self-protection or any other KRS Chapter 503 justification. 875 S.W.2d at 524. Later, in *Elliot v. Commonwealth*, 976 S.W.2d 416, 421 (Ky. 1998), the Court explained that the *McGinnis* holding "permits the defendant to control his own prosecution by claiming self-protection in a case where the jury might otherwise convict him of wanton Murder." (Citation omitted). Therefore, *McGinnis* was later overruled by *Elliot*, in which the Court held that when evidence supports self-protection as a defense to an offense where the culpable mental state is wanton or reckless, the trial court must instruct the jury on self-protection. *Id.* at 422.

instructed "[i]f you find the defendant guilty under this Instruction, you shall say so by your verdict and no more." *Id.* The jury foreman signed the not guilty verdict forms for the lesser-included homicide offenses of first-degree manslaughter, second-degree manslaughter, and reckless homicide. *Id.* Based on this irregularity, upon remand to the trial court McGinnis moved to dismiss the indictment, or for a new judgment of acquittal, arguing that retrial on any of the lesser included offenses presented to the jury at the first trial would violate double jeopardy. *Id.*

The *McGinnins II* Court explained that "retrial after reversal of a conviction is not barred by the principle of double jeopardy[,]" and that convictions on lesser-included offenses have the effect of acquitting defendants of the greater charges, thus rejecting McGinnis's implied acquittal argument. *Id.* at 438-39. The Court next concluded that the jury's action of completing the not guilty portions of the verdict forms despite the admonition "say no more" did not bar retrial. *Id.* at 439. The trial judge gave the jury the typical "stairstep" instructions allowing the jury to consider intentional murder, wanton murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. *Id.* Each instruction for these offenses stated "[i]f you find the defendant guilty under this Instruction, you shall say so by your verdict and no more." *Id.* The *McGinnis II* Court explained

> [o]nce the jury found McGinnis guilty of an offense, **it is axiomatic that such conviction precluded a conviction on any lesser-included offense**. A defendant may not be charged and convicted of both a major offense and lesser-included offense arising out of the same facts.

*Id.* (emphasis added).

The Court acknowledged that there were no Kentucky cases directly on point but reasoned that this Court has held "that an action by a jury which exceeds the scope of its authority is mere surplusage, which is not binding on the trial court." *Id.* *See Brown v. Commonwealth,* 445 S.W.2d 845, 847 (1969); *Hall v. Commonwealth, Ky.,* 402 S.W.2d 701, 703 (1966); *Hall v. Commonwealth,* 283 Ky. 778, 143 S.W.2d 495, 496 (1940).

> [W]hen the jury found McGinnis guilty of wanton murder, it necessarily concluded that all of the elements of the lesser-included offenses were present. . . . By proceeding beyond its instructions and authority, the additional verdicts amounted to no more than mere surplusage. While requiring the jury to retire in order to strictly comply with the court's instructions may have been the better course, we are not persuaded that we should bind the trial court to the unauthorized not guilty verdicts. Consequently, **we hold the unauthorized recommendations of the jury on the lesser-included offenses to be nonbinding surplusage, which may be ignored.**

*McGinnis II*, 959 S.W.2d at 439 (emphasis added).

The jury in James's case was also given typical stairstep instructions. The instructions for each of the lesser-included offenses explicitly state at the top of the page "[i]f you **do not** find the Defendant guilty under Instructions No. 7," "[i]f you **do not** find the Defendant guilty under Instruction Nos. 7 and 8," etc. (Emphasis added). The verdict forms also explicitly instructed the jury to skip the verdict forms on lesser-included charges if it rendered a guilty verdict. For example, the murder verdict form contained the following language in bold print:

> **If you found Paul W. James, Jr., GUILTY of Murder, please proceed to Verdict Form No. 5** [(the tampering with a witness

> verdict form)].
>
> **If you found Paul W. James, Jr., NOT GUILTY of Murder, please proceed to Verdict Form No. 2** [(the first-degree manslaughter verdict form)].

The trial court reemphasized these portions of the verdict forms when providing additional explanation to the jury.

The instruction on the first lesser-included offense, first-degree manslaughter, likewise stated in bold "If you found Paul W. James GUILTY of First-Degree Manslaughter, please proceed to Verdict Form No. 5." Similar instructions were included on all other lesser-included offense verdict forms as well. The only reason the jury should have proceeded to verdict form two for first-degree manslaughter was if it determined James was not guilty of murder, and in fact the jury found the opposite result in both its first and second set of instructions. These clear directives should have been followed by the jury and were clearly outlined.

Unlike *McGinnis II,* the jury in James's case initially returned guilty verdicts for all lesser-included offenses. However, we must recall the initial confusion expressed by the foreperson on behalf of the jury regarding unanimity and the question as to whether the jury had to be "unanimous on each charge." The trial judge acknowledged that her initial answer to this question likely stemmed from a lack of true understanding of the question. Once the first set of verdicts was returned, the trial court appropriately discussed the issue with counsel and determined how to proceed. The jury was clearly confused about how to fill out the verdict forms and in fact ignored

the express language that would have resulted in skipping verdict forms had guilty verdicts been returned on greater offenses. After the trial court readdressed the jury and provided additional explanation, the jury correctly and properly filled out the verdict forms, following all instructions given. This indicates that confusion and failure to follow the instructions resulted in the first set of verdicts, not a lack of unanimity.

Although *McGinnis II* involved additional and unnecessary not guilty verdicts, compared to the additional and unnecessary guilty verdicts here, the principles espoused in *McGinnis II* nevertheless apply equally to this case. Despite the clear instructions, the jury continued and submitted verdicts for the lesser-included offenses, after already unanimously determining that James was guilty of murder, in direct contradiction to the explicit instructions. The jury's initial guilty verdicts on all lesser-included offenses were "nonbinding surplusage, which may be ignored." *McGinnis II,* 959 S.W.2d at 439. The verdict forms contained explicit directions for what to do if the jury found guilty or not guilty on each count.

Additionally, the *McGinnis II* Court acknowledged that "requiring the jury to retire in order to strictly comply with the court's instructions may have been the better course . . . ." *Id.* That is exactly what the trial court did in James's case. The trial court recognized that the jury appeared to have difficulty following the instructions and therefore provided additional guidance before ultimately requiring the jury to retire and strictly comply with the instructions, specifically those bolded portions of the instructions that explained when and

to which instructions to skip in the event of finding James guilty of either murder or the lesser-included offenses. Once the jury found James guilty of murder, "it is axiomatic that such conviction precluded a conviction on any lesser-included offense." *Id.* As such, the trial court properly navigated the initial jury verdict issue and, as a result, James was not prevented from receiving a fundamentally fair trial. Finally, even though the jury may have experienced some difficulty reaching a unanimous decision as evidenced by its first question to the trial court, clearly any lack of agreement among the jury was resolved by the time the jury rendered the first verdicts and again when the jury tendered the second verdicts which were in compliance with the written instructions.

### II. The opinion testimony of two police officers did not constitute palpable error.

Next James argues that the improper opinion testimony of two law enforcement officers violated Kentucky Rule of Evidence (KRE) 403 and KRE 701. James acknowledges that this issue is unpreserved, thus we will only review for palpable error. "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." Rule of Criminal Procedure (RCr) 10.26. Under our palpable error standard, we must ask "whether on the whole case there is a substantial possibility that the result would have been any different . . . . A palpable error

must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings." *Davis v. Commonwealth*, 620 S.W.3d 16, 30 (Ky. 2021) (citations omitted). Relief is only warranted where the error also results in manifest injustice. *Commonwealth v. Caudill*, 540 S.W.3d 364, 367 (Ky. 2018). Using these parameters, we address each officer's testimony in turn.

### A. A portion of Sergeant Whitten's testimony was improper but did not constitute palpable error.

The Commonwealth presented testimony from Sergeant Josh Whitten who conducted a police interview with James during the investigation:

> Commonwealth: Now this interview that you conducted with the defendant, Sergeant Whitten . . . talk to the jury about what his demeanor was.
>
> Sergeant Whitten: His demeanor seemed to me, like cold, like it was a recital of trying to say the key phrase of "I feared for my life." Numerous times throughout the interview. It wasn't how I'd imagine, if, **even if someone, being in a traumatic event and someone losing their life, I didn't think that he was like, appropriately distraught.**
>
> Commonwealth: Did he ever become emotional?
>
> Sergeant Whitten: No.
>
> Commonwealth: Did he ever cry, show any signs of remorse?
>
> Sergeant Whitten: No.

(Emphasis added).

KRE 701 permits a lay witness to provide opinion testimony "only if their opinion is (1) based on their perception; (2) helpful to a clear understanding of the witness' testimony or the determination of a fact at issue; and (3) not based on scientific, technical, or specialized knowledge." *Carson v. Commonwealth,*

621 S.W.3d 443, 446 (Ky. 2021). Generally, "a witness may testify as to a conclusion they drew about a person's behavior from their personal observation of certain facts." *Id.* at 447. Specifically, this Court has permitted law enforcement officers to testify as to experience-based interpretations of certain facts which they personally observed, but if the subject matter of the opinion is either not based on personal knowledge or based on specialized knowledge, the officer must first be qualified as an expert. *Id.*

In *Carson,* a detective testified about an interrogation technique used to interview the defendant and, specifically, that he was trained on his ability to determine a suspect's truthfulness. *Id.* at 447-48. Despite the trial court's admonition to the jury that the jury is the determiner of credibility and truth, the Commonwealth persisted in asking the detective veracity questions. *Id.* at 449. The Commonwealth even emphasized the meaning of the detective's post-admonition testimony during closing argument. *Id.*

The Court concluded that the detective's testimony "ventured beyond the proper scope of lay opinion." *Id.* In doing so, the Court emphasized that

> testimony regarding a suspect's body language is proper. Such testimony is fact-based and clearly derived from the perception of the interviewing officer. Furthermore, an investigating officer is surely permitted to testify as to his or her observations of a defendant during the interview and may even offer opinions regarding the defendant's demeanor.

*Id.* (citing *Bowling v. Commonwealth,* 942 S.W.2d 293 (Ky. 1997), *overruled on other grounds by McQueen v. Commonwealth,* 339 S.W.3d 441 (Ky. 2011)). The detective in *Carson* effectively testified that he was able to determine the defendant was lying through observation of his body language, which infringed

upon the province of the jury. *Id.* The impropriety of the testimony was compounded by the detective's additional explanation that he possessed specialized knowledge of behavioral analysis because he was trained by interrogation specialists. *Id.* Having significant concern that the detective's testimony had a substantial influence on the outcome of the case, the Court reversed and remanded the case for further proceedings. *Id.* at 452.

While *Carson* directs us to conclude that Sergeant Whitten was permitted to comment on James's body language, or his observations of James's demeanor, his comment that James was not "appropriately distraught" for someone who just experienced a traumatic event was improper. Sergeant Whitten is certainly allowed to testify that James seemed "cold," or that he did not exhibit physical emotion in any way. These conclusions are fact-based and derived from the personal observations of the interviewing officer. But stating that James was not "appropriately distraught" ventured beyond the scope of appropriate lay opinion.

James argues that the opinion testimony here is like the opinion testimony in *Ordway v. Commonwealth,* 391 S.W.3d 762 (Ky. 2013), wherein this Court reversed for a new trial based on an detectives's improper testimony. In *Ordway,* an officer testified that people who legitimately exercise self-defense typically do not leave the scene of the crime, but rather put their weapon down, call 911 or otherwise request assistance, and cooperate fully with police. *Id.* at 775. He further testified "[t]hey certainly don't leave the scene" and they "don't try to commandeer vehicles with force with a gun in their hand." *Id.*

The Court explained that the officer effectively "opined that [Ordway] did not act like those who had lawfully protected themselves but, had instead acted like those who were fabricating a self-protection defense." *Id.* This opinion of an experienced detective that the defendant's conduct did not match stereotypical conduct of an innocent person who acted in self-defense "authoritatively portrayed [Ordway's] defense as a fabrication." *Id.* at 777. Contrary to James's assertions, the facts of this case are distinguishable. Although we conclude that Sergeant Whitten's testimony regarding the appropriateness of his demeanor was improper, it did not rise to the level of the testimony in *Carson* or *Ordway.* Sergeant Whitten did not testify that James's lack of distress fit within any element of the crimes charged or negated his self-defense theory. He did not state or imply that James was lying in any way or fabricating his defense. Instead, he stated that James did not act in a way that he would expect someone who went through a traumatic event would act.

While improper, this testimony does not constitute palpable error. Given the overwhelming evidence against James, it is unlikely that the jury would have reached a different result absent this brief portion of the testimony. Nor can we say that the comment seriously affected the fairness of the proceedings. Therefore, reversal is not warranted.

**B. Detective Waters' testimony was not improper.**

Detective Isaac Waters testified that he learned Kenner died from his injuries before interviewing James a second time at the hospital. During the second interview, Detective Waters told James that Kenner died.

> Commonwealth: Tell the jury about his reaction when you told him Barry Kenner was dead.
>
> Detective Waters: I guess the best way to describe it was he just seemed completely indifferent. He displayed no outward physical emotion whatsoever, no change in his voice inflection, body language, he just seemed indifferent to me, and we just continued the conversation as normal. After that he told me, right after that, "well I feared for my life," and he would repeat that phrase over and over. I asked why he feared for his life, he said, "well because he put his hands on my arm and he threatened to kill me, so I feared for my life," and that was repeated over and over throughout the interviews.
>
> Commonwealth: At any point in the interviews, not just that one, but going back to that first time you talked to him at 7:20, when you talked to him at 8:35, when you talked to him at 10:15, at any point during those interviews did he ever become emotional with you, did you see him cry, did you see him openly display any source of regret or remorse for the situation at all?
>
> Detective Waters: No.

This portion of the testimony lasted approximately one minute.

Detective Waters' testimony did not exceed the bounds of this Court's holding in *Carson,* 621 S.W.3d at 443. Detective Waters commented on James's demeanor and recounted James's comments and behavior he personally observed during the interviews. This testimony did not have a substantial influence on the outcome of the case, nor did the testimony improperly invade the exclusive province of the jury as fact-finder. This testimony was "fact-based and clearly derived from the perception of the

interviewing officer." *Id.* at 449. Therefore, this testimony did not constitute error, much less palpable error.

James also argues that Detective Waters' testimony was irrelevant pursuant to KRE 401 and therefore inadmissible pursuant to KRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Here, James claimed he shot Kenner in self-defense. Therefore, his state of mind became an issue in the case, meaning Detective Waters' observations about James's demeanor are clearly relevant.

This evidence was also properly admitted. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. Testimony that James lacked emotion and was completely indifferent was prejudicial to James, but this prejudice was minimal at best—particularly considering the large volume of evidence against him. Further, this brief testimony did not confuse the issues, mislead the jury, or cause undue delay or cumulative evidence. This testimony lasted less than one minute, provided Detective Waters' straightforward observations of James's behavior, and provided the jury with important information regarding James's demeanor. Therefore, we cannot say the admission of the evidence violated KRE 403.

## III. The testimony regarding parole eligibility and meritorious good time credit did not render the trial fundamentally unfair.

James argues that during the penalty phase of trial, the Commonwealth elicited erroneous information regarding potential parole eligibility and meritorious good time credit. He acknowledges that this error is unpreserved and thus requests palpable error review. We again consider "whether on the whole case there is a substantial possibility that the result would have been any different[,]" *Davis,* 620 S.W.3d at 30 (citation omitted), and grant relief only for manifest injustice. *Caudill,* 540 S.W.3d at 367. "A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings." *Davis,* 620 S.W.3d at 30.

Officer Stephanie Rose, a probation and parole officer, testified as a witness for the Commonwealth during the penalty phase. The Commonwealth elicited the following testimony:

> Commonwealth: Can you explain the term "good time" to the jury?
>
> Officer Rose: Good time is a certain type of credit that can be applied to offender's sentence.
>
> Commonwealth: Alright, you've been in the courtroom and heard that the jury has returned a conviction with regard to the charges for murder and tampering with a witness. With regard to good time, is this defendant eligible for either statutory good time or meritorious good time?
>
> Officer Rose: Yes. He would be eligible for meritorious good time.
>
> Commonwealth: And explain to the jury what that means when you use that term please.
>
> Officer Rose: Meritorious good time is a credit that can be granted based on an offender's behavior while they are incarcerated. So if

it's deemed by the commissioner that they, you know, have met all of their rules and regulations while they are incarcerated, then they can be granted up to seven days per month while they are incarcerated.

Commonwealth: And that seven days a month would come off of their sentence or go toward the time that they meet the parole board, is that correct?

Officer Rose: Correct.

KRS 197.045(1)(b) describes meritorious good time credit as follows:

> (1) Any person convicted and sentenced to a state penal institution:
> . . . .
> (b) May receive a credit on his or her sentence for:
> . . . .
> 2. Performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs, awarded at the discretion of the commissioner in an amount not to exceed seven (7) days per month . . . .

James argues that meritorious good time credit requires more than merely following rules and regulations in prison, as Officer Rose stated. It requires exceptional acts and is only granted in the sole discretion of the commissioner. KRS 197.045(1)(b)(2). Additionally, James asserts that Officer Rose's testimony that meritorious good time credit can lower parole eligibility compounded this issue.

In *Robinson v. Commonwealth,* 181 S.W.3d 30, 38 (Ky. 2005), the Commonwealth presented incorrect testimony during the sentencing phase regarding the application of good-time credit.[2] The officer incorrectly told the

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[2] KRS 197.045(1)(b) describes three types of good time credit: (1) good behavior credit not exceeding ten days per month; (2) meritorious good time credit; and (3) credit for acts of exceptional service during emergencies. While the *Robinson* Opinion does not clarify which type of good time credit was implicated in the case, in any

jury that the good time credits would be figured into the defendant's parole eligibility. *Id.* In fact, a prisoner does not actually receive good time credit until he or she reaches the minimum parole eligibility. *Id.* The Commonwealth also re-emphasized the officer's incorrect testimony regarding good time credit and parole eligibility in its closing argument. *Id.*

The Court explained that:

> [t]he use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material. This is true irrespective of the good faith or bad faith of the prosecutor. When the prosecution knows or should have known that the testimony is false, the test for materiality is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

*Id.* (citations omitted). In determining that the incorrect testimony likely influenced the jury to render a greater sentence, the Court emphasized that the Commonwealth relied, almost solely, on the officer's testimony to persuade the jury to recommend the maximum sentence. *Id.* The Court reversed and remanded for a new sentencing phase. *Id.*

This case is distinguishable from *Robinson* because the very brief and incorrect parole eligibility was not re-emphasized by the Commonwealth or used to encourage the jury to impose the maximum sentence. In fact, later in its direct examination of Officer Rose, the Commonwealth elicited the parole eligibility information:

> Commonwealth: I see an asterisk on this chart, and with regard to the chart it says: twenty-four years up to and including life. Is that correct?

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event, these different types of good time credits appear in the same subsection of the statute and operate in similar ways.

> Officer Rose: Yes.
>
> Commonwealth: Am I correct in saying based on that, that any sentence that they impose on the defendant that is twenty-four years, clear up to the fifty years or a life sentence, he will be eligible for parole in twenty years?
>
> Officer Rose: Correct.
>
> Commonwealth: No matter. Twenty-four means I see the board in twenty, correct?
>
> Officer Rose: Correct.
>
> Commonwealth: And fifty means I see the parole board in twenty, is that correct?
>
> Officer Rose: Yes.
>
> Commonwealth: And, if they say life, he sees the parole board in twenty years?
>
> Officer Rose: Correct.

If anything, the Commonwealth emphasized the correct parole eligibility information. The Commonwealth did not reference parole eligibility or the effect of any good time credits during its closing argument.

Further, the jury had just returned guilty verdicts for intentional murder and tampering with a witness. The evidence of these crimes introduced at trial was overwhelming. While the probation and parole officer arguably, and likely inadvertently, downplayed what behavior may qualify for meritorious good time credit, we cannot say that this imperfect characterization was material, and it certainly did not constitute an error so grave that it seriously affected the fairness of the proceedings. Additionally, any confusion that may have arisen after the incorrect statement regarding the application of good time credit to

parole eligibility was reconciled through the Commonwealth's repeated parole eligibility inquiries with Officer Rose during which she affirmed that, regardless of the sentence length, James would not be eligible for parole until he served twenty years. Therefore, no error, much less palpable error, resulted from the probation and parole officer's testimony.

## IV. The Commonwealth's comments in closing argument during the penalty phase did not constitute palpable error.

Finally, James argues that the Commonwealth's improper closing argument in the penalty phase rendered the overall trial unfair. James acknowledges that this error is unpreserved and requests palpable error review. When reviewing claims of prosecutorial misconduct under our palpable error standard, "we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Doneghy v. Commonwealth,* 410 S.W.3d 95, 106 (Ky. 2013) (quoting *Brewer v. Commonwealth,* 206 S.W.3d 343, 349 (Ky. 2006)).

During the sentencing phase, James's father took the stand and asked the jury for compassion. In its ninety second closing argument, the Commonwealth made the following statements:

> Tonight, on Friday night, I've had a discussion with Barry Kenner's family. They're here in the courtroom. And there was a decision made; each of them could have come up to the witness stand and talked with you about their request, just as Mr. Shouse put on proof with the defendant's father. Barry Kenner was fifty-one years old when his life was taken. He would have been fifty-five years old today. Barry Kenner has three brothers and two sisters that will never have their brother again. They will not have him in seventeen years; they will not have him in twenty years; they have nothing.

> **They chose not to talk with you tonight with regard to that, but as a family, have asked on their bequest, that I request you, and I urge you, to return a sentence of life with regard to the murder conviction and a sentence of five years on the tampering with a witness, and they want you to know that they appreciate your time and attention to this case.** We respect you.

(Emphasis added).

"This Court has repeatedly held that a prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence." *Driver v. Commonwealth,* 361 S.W.3d 877, 889 (Ky. 2012). (citations omitted). When an appellant alleges prosecutorial misconduct during closing argument, this Court looks at the closing argument "as a whole." *Goncalves v. Commonwealth,* 404 S.W.3d 180, 194 (Ky. 2013).

First, the biological information about Kenner and his siblings was established during Kenner's brother's testimony. Additionally, thanking the jury on behalf of the victim's family is not misconduct. *Soto v. Commonwealth,* 139 S.W.3d 827, 873 (Ky. 2004). However, the prosecutor stating that Kenner's family asked for the jury to impose a life sentence for murder and a five-year sentence for the tampering charge was improper. While the prosecutor could have asked for a particular sentence on behalf of the Commonwealth, and one or all family members could have taken the stand and asked the jury to impose a particular sentence, it was improper for the Commonwealth to make this statement on their behalf.

However, while the prosecutor's comment was improper, it was not egregious enough to render the overall trial unfair. The Commonwealth's

statement on the Kenner family's behalf was a brief comment at the end of a five-day jury trial that included a number of witnesses, 150 exhibits, and countless hours of testimony. It is hard to imagine that this comment could destroy the overall fairness of the trial. While counsel did exceed the parameters of what is permitted during closing argument, the trial was not fundamentally unfair as a result.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the Grant Circuit Court.

All sitting. All concur.

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