Supreme Court of Kentucky

Case No. 2021-SC-0568-MR

JOSHUA AUSTIN WARD — *Appellant*

v.

On Appeal from
Boone Circuit Court
Hon. Richard A. Brueggman
No. 18-CR-00483

COMMONWEALTH OF KENTUCKY — *Appellee*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

DANIEL CAMERON
Attorney General of Kentucky

HARRISON GRAY KILGORE (No. 99829)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300

Counsel for the Commonwealth of Kentucky

Certificate of Service

I certify that a copy of this brief was served on November 7, 2022, upon Hon. Richard A. Brueggemann, Chief Circuit Judge, Boone County Justice Center, 6025 Rogers Lane, Suite 444, Burlington, KY 41005 (by U.S. mail); Hon. Louis Kelly, Commonwealth Attorney, 2995 Washington Street, P.O. Box 168, Burlington, KY 41006 (by email); Shannon Dupree and Kayley V. Barnes, Assistant Public Advocates, Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, KY 40601 (by state messenger mail). I also certify that the record was returned before filling this brief.

/s/Harrison Gray Kilgore
Harrison Gray Kilgore

INTRODUCTION

A Boone County jury found Appellant Joshua Ward guilty of murdering his ex-girlfriend Kelli Kramer and her nine-year-old son Aiden. He now challenges his conviction.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth respectfully requests oral argument to address any factual or legal questions that the Court might have.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE[1]

Kelli Kramer was found dead in her apartment early one morning in March 2018. She had been shot six times: once in the leg and five times in the head. The body of Kelli's nine-year-old son, Aiden, was found lying next to her. He had been shot three times: once in the chest and twice in the head. Both had been killed with a .22-caliber gun, and the bullet casings littered the apartment floor near their bodies.

I. The evening of the murders and the morning after

Kelli and Aiden's bodies were discovered by Kelli's boyfriend, David Sullivan. (*See* VR: 8/24/21, 10:19:52–10:23:43.) Sullivan denied any involvement and provided officers some evidence that he was at home the night of the murders. (*See id.* at 10:12:12–10:13:12, 10:13:54–10:19:01.) Still, he helped investigators piece together Kelli and Aiden's final hours. He and Kelli were texting during the day about meeting up, but they spoke around 10:20 p.m. and decided not to. (*Id.* at 10:04:30–10:10:50.) Sullivan texted Kelli at 11:11 p.m. asking, "You home?" Kelli never texted back. (*Id.*) So when Sullivan woke up after 2 a.m. he was concerned because it was snowing that evening. (*Id.* at 10:10:47–10:12:00.) He went to Kelli's apartment, arriving around 3:30 a.m., and there he found Kelli

[1] The Commonwealth does not accept Ward's statement of the case. CR 76.12(d)(iii).

and Aiden in the living room floor. (*See id.* at 10:19:52–10:23:43.) He called 9-1-1. (*Id.*)

Kelli's friend Chelsea Ballard filled in what Kelli had been up to earlier that evening. Kelli and Aiden visited Ballard and her mom in Crittenden, Kentucky. (*See* VR: 8/25/21, 1:26:09–1:32:00.) Ballard and Kelli both struggled with addiction, and they decided to buy $400 of methamphetamine to resell for profit. (*Id.*) After Ballard connected with her dealer in Dayton, Ohio, she and Kelli drove up to meet him. (*Id.*) When the pair returned to Ballard's mom's house, they took some of the meth, and Kelli left with Aiden around 10 p.m. to return home. (*Id.* at 1:32:19–1:33:50.)

Kelli's next stop was McDonald's. She and Aiden went to the drive-thru at 10:20 p.m., around the same time Kelli and Sullivan decided not to meet up that evening. (*See* VR: 8/27/21, 9:34:00–9:36:45; VR: 8/24/21, 10:10:50–10:11:45.) Kelli's phone connected to the Wi-Fi router in her apartment around 10:46 p.m. (VR: 8/27/21, 9:37:45–9:40:15.) No neighbor reported hearing gun shots. But less than five hours later Sullivan discovered Kelli and Aiden murdered.

II. Joshua Ward becomes a suspect

Investigators soon learned that Kelli had an ex-boyfriend named Joshua Ward, and the relationship had ended badly. (*See* VR: 8/24/21 1:47:47–1:53:20.) The evidence against Ward began to mount.

A. The relationship and the breakup

Kelli and Ward met in late 2016 on FetLife—"Facebook for kinky people." (VR: 8/24/21, 9:55:10–9:55:38, 2:26:30–2:28:20.) Ward was a "dominant," while Kelli was a "submissive." (*Id.* at 2:29:00–2:30:55.) At the time, Ward was already married to his wife Karen. (*Id.* at 2:24:15–2:25:20, 2:29:00–2:30:55.) But he wanted a polyamorous family with multiple women and him as the lead male. (VR: 8/31/21, 1:05:15–1:07:42.) So along with Karen, Ward was also dating Diane Christos when he met Kelli. (VR: 8/24/21, 2:24:15–2:25:20, 2:29:00–2:30:55.) Indeed, Christos went with Ward to meet Kelli in person for the first time. (*Id.* at 2:31:00–2:32:30; VR: 8/25/21, 2:57:20–2:59:20.)

During that initial meeting, Ward told Kelli that she would have to stop smoking if she wanted to join the family, and he was pleased when she did. (*See* VR: 8/24/21, 2:31:00–2:32:30) Ward was also excited about the prospect of Aiden being part of the family because he could not have children himself. (*See* VR: 8/25/21, 2:17:18–2:18:06.) And so, Ward began planning for Kelli and Aiden to move in with him and Karen. (VR: 8/25/21, 3:04:00–3:07:55.) He also helped Kelli find work and consolidate some of her debts. (*See* VR: 8/24/21, 2:38:18–2:40:45.) In doing so, Ward obtained log-in information for Kelli's personal email. (*Id.*) As part of their relationship, Ward also had access to Kelli's other accounts—e.g., social media. (*Id.*)

Before her relationship with Ward, Kelli had been a sex worker. (*See id.* at

1:47:47–1:51:30.) While looking through Kelli's email, Ward found messages showing that she had received money transfers from a former "sugar daddy." (*Id.* at 2:41:15–2:44:35.) Ward and Christos were upset that Kelli had been unfaithful. (*See* VR: 8/25/21, 3:05:00–3:06:00.) When Ward confronted Kelli, she maintained that the emails were old and that she was no longer prostituting. (VR: 8/24/21, 2:41:15–2:44:35.) Ward forgave Kelli and pressed forward with getting his home ready for her and Aiden to move in. (*Id.*) He gave Kelli a promise ring. (*See id.* at 2:36:00–2:37:25.)

But the relationship imploded weeks later. Kelli left her phone at home one day when she went to work, and Ward's "spidey senses" told him to look through it. (*Id.* at 2:45:14–2:48:30.) Ward found new messages from Kelli's former sugar daaddy. (*Id.*) He also found a Facebook message from a man asking Kelli for oral sex "again." (*Id.*) Ward got very angry. (*See* VR: 8/25/21, 3:04:48–3:07:32.)

He decided to drive to Kelli's work and break things off immediately. (VR: 8/24/21, 2:48:30–2:56:15.) On the way, he called Kelli's parents to tell them that Kelli needed help. (*Id.*) And when he arrived at Kelli's work, he found her sitting at a table with co-workers. (*Id.*) In front of everyone, he told Kelli that he knew she had been lying and prostituting—he had seen the messages. (*Id.*) Ward told Kelli the relationship was over, sat her phone on the table, and left. (*Id.*) To Ward's surprise and disappointment, Kelli did not chase after him. (*Id.*)

Back home, Ward sought to publicly shame Kelli. (*Id.*) He signed into her Facebook and, pretending to be Kelli, posted that she was a drug user and prostitute. (*Id.*) He also messaged family members of the man who had asked Kelli for oral sex to let them know he was seeing a prostitute. (*Id.*) He then blocked Kelli on social media to prevent her from seeing what he was up to. (*See id.*)

B. After the breakup

Ward continued to keep tabs on Kelli. He would get updates on what she was doing from other FetLife community members. (*See id.* at 2:56:20–3:01:20.) And he learned she was working at Starbucks through Tinder. (*Id.* at 3:07:48–3:08:25.) He also went to her parent's house twice, waiting for hours in hopes of seeing Aiden. (*Id.* at 3:05:30–3:07:32.) But both times Aiden never showed. (*Id.*) Ward himself described this as stalker-behavior. (*Id.*) Kelli's friends reported to police that she was nervous about Ward, (*see id.* at 2:04:30–2:09:53), and Ballard testified that Kelli was upset and acting abnormally after the breakup, (*see* VR: 8/25/21, 1:24:40–1:25:40).

Ward wanted Kelli to be held accountable for the pain she caused him. (*See, e.g., id.* at 4:34:40–4:37:20.) Shortly after the breakup, Ward told Christos that he wished he had dealt with Kelli differently, which she interpreted to mean that Ward wanted Kelli dead. (*Id.* at 3:06:20–3:07:30.) Indeed, Ward proposed during a lunch with Christos that she pick Kelli up and drop her in a secluded location; Ward would deal with Kelli from there. (*Id.* at 3:08:40–3:11:25.)

Christos ended the relationship, although she continued a friendship with Ward's wife Karen. (*Id.*)

Ward made thinly veiled threats about Kelli to others, too. He suggested to his friend Tonya Palmer that Kelli would get what was coming to her. (*See* VR: 8/26/21, 9:16:02–9:22:18.) He later talked to Palmer about getting a gun that was unregistered and undetectable. (*Id.*) And he asked whether she knew where to get a lethal dose of heroin. (*Id.*)

Ward's good friend Adrienne Fiely also noticed a change in him after the breakup. (VR: 8/25/21, 4:34:40–4:37:20.) Ward was upset and began demanding more control in his relationships. (*Id.*) For months after the breakup, Ward would bring up Kelli, and he told Fiely that people who cause harm like Kelli should be held accountable. (*Id.*)

He told Nicole Bohley the same thing. Ward first contacted Bohley on social media posing as Kelli. (VR: 8/25/21, 2:04:20–2:05:11.) Ward had at first hoped for a romantic relationship with Bohley, but only a friendship materialized. (*See id.*) Ward told Bohley in late-2017 that Kelli had ruined his family, and that he was at a loss as to how someone who had caused so much hurt and abuse could be allowed to roam free. (*Id.* at 2:05:20–2:07:50.) He called Kelli a monster

and told Bohley that he felt it was his duty to protect other men from people like Kelli. (*Id.*)

Sigma Novak—who dated Sullivan until he started dating Kelli around November 2017—was one of the FetLife community members that updated Ward on what Kelli was up to. (*See* VR: 8/24/21, 2:56:20–3:01:20.) In February 2018, Novak told Ward that Kelli and Sullivan had gone public with their relationship to the FetLife community at the Beat My Valentine convention that month. (*Id.*) That bothered Ward. (VR: 8/26/21, 9:37:48–9:38:48.)

Kelli and Aiden were killed a month later.

C. The investigation of Ward

After Kelli's murder, Palmer contacted a local tip-line to suggest that the police investigate Ward. Although no fingerprint or DNA evidence definitively placed Ward at the crime scene, the shell casings did.

Ward enjoyed target shooting at Palmer's farm in Ohio. During the summer of 2017, he went to her farm on at least four occasions to shoot. (VR: 8/31/21, 1:38:12–1:42:15.) Ward used various guns for target practice, and sometimes he would wear gloves to avoid getting gun-shot residue on himself. (*See* VR: 8/26/21, 9:31:01–9:33:45.) He and Palmer would discuss shooting and gun accessories while he was target shooting, and Ward once mentioned that silencers could easily be made at home. (*See* VR: 8/26/21, 9:18:30–9:22:10.) Although Ward tried to pick up his casings at the farm, investigators found several

.22-caliber casings in the area Ward used for practice. (*Id.* at 9:31:01–9:33:45.) Investigators were confident that the casings were from Ward's shooting because no one else used that area of the farm for shooting. (*Id.*; *see also id.* at 11:06:20–11:09:29.)

Investigators submitted the casings found at the farm to the Bureau of Alcohol, Tobacco, Firearms, and Explosives lab for examination. Using the methodology established by the Association of Firearm Toolmark Examiners ("AFTE method")—"the field's established standard," *United States v. Ashburn*, F. Supp. 3d 239, 246 (E.D.N.Y. 2015)—forensic-toolmark-expert Jennifer Owens compared the casings found at the farm with the casings found at the murder scene. (VR: 8/26/21, 2:05:00–2:08:00, 2:16:35–2:17:10) She concluded that the bullets at the crime scene had been fired from the same firearm as the bullets at the farm. (*Id.*)

Investigators also set up a lunch meeting between Ward and Palmer. Palmer wore a wire. (VR: 8/26/21, 9:48:20–9:50:58.) During that lunch, investigators called Palmer to set up a time to speak with her about Kelli and Aiden's murders. (*Id.* at 9:51:40–9:53:15.) Palmer testified that Ward's demeanor changed after that call. (*Id.*) He wanted to understand why investigators were involving Palmer and discussed what they had asked him and Diane during their interviews. (*Id.*) Ward's demeanor changed again and he hushed Palmer when she tried to bring up his target practice at her farm. (*Id.*) He asked Palmer to go on a walk

outside, but first, he asked her to put her phone in her car in case their conversation was being recorded. (*Id.* at 9:53:16–9:54:50.) She did, and Ward then asked Palmer to lift her shirt to prove that she was not wearing a wire. (*Id.*) Palmer complied again, but Ward did not find the device. (*Id.*)

III. Ward is indicted and convicted

A Boone County grand jury indicted Ward for Kelli and Aiden's murders. TR I, 19–20. Following a seven-day trial, a jury found Ward guilty of both murders. TR V, 741–43. The jury recommended a life sentence without the possibility of parole, which the judge accepted and imposed. *Id.* This appeal follows.

ARGUMENT

I. Ward was not denied his right to present a defense.

"The Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution afford a criminal defendant the right to counsel, as well as the right of self-representation." *Allen v. Commonwealth*, 410 S.W.3d 125, 133 (Ky. 2013). But Section 11 offers a third alternative that the Sixth Amendment does not recognize—hybrid counsel. *Id.*; *see also Hill v. Commonwealth*, 125 S.W.3d 221, 225 (Ky. 2004), *overruled on over grounds by Grady v. Commonwealth*, 325 S.W.3d 333 (Ky. 2010) ("[T]he Sixth Amendment does not grant defendants the right to act as co-counsel, i.e., the right to 'hybrid representation.'"). "Kentucky courts view hybrid counsel as self-representation, in part. That is, the defendant

makes 'a limited waiver of counsel whereby he acts as co-counsel with a licensed attorney. The defendant specifies the extent of legal services he desires, but undertakes the remaining portion of his defense pro se.'" *Allen*, 410 S.W.3d at 138–39 (quoting *Stone v. Commonwealth*, 217 S.W.3d 233, 236 n.1 (Ky. 2007)).

Here, the trial court allowed Ward to proceed as hybrid counsel after conducting the hearing required by *Faretta v. California*, 422 U.S. 806 (1975). *See* (VR: 3/1/21, 9:13:15–10:03:15); TR III, 399–400, 407–10. Even so, Ward now alleges that he was denied his right to present a defense when he was not allowed to recall witnesses as hybrid counsel. Appellant Br. at 12–19. Ward cites two interrelated issues. First, the trial court granted the Commonwealth's motion in limine to prohibit Ward from personally questioning Palmer, Christos, and Fiely. *See id.* at 12–13. Second, the trial court refused to compel Ward's counsel to recall and question those witnesses—since Ward could not, given the order on the motion in limine—during his defense case. *See id.* at 14, 17–19. But Ward's claim is meritless however you slice it.

A. Ward waived any challenge to the trial court's ruling on the motion in limine, and in any event, that ruling was not an abuse of discretion.

The Commonwealth filed a motion in limine to prohibit Ward from personally examining Palmer, Christos, and Fiely. TR IV, 527–29. The Commonwealth explained that each of these witnesses feared Ward, and this Court has upheld trial court decisions precluding criminal defendants from personally

questioning witnesses in those circumstances. *Id.* at 528. "[I]n certain cases, the intimidation of the witness during cross-examination . . . may exceed what the Constitution and fundamental fairness in the adversarial process require." *Partin v. Commonwealth*, 168 S.W.3d 23, 29 (Ky. 2005), *superseded by statute on other grounds as stated in Stansbury v. Commonwealth*, 454 S.W.3d 293 (Ky. 2015). This is such a case, the Commonwealth argued. Even so, the Commonwealth did "not object to [Ward] being allowed to prepare questions and consult with co-counsel both before and during the direct or cross-examinations" of those witnesses. TR IV, 528. Nor did the Commonwealth object to Ward questioning other witnesses. *Id.*

Ward did not object to the Commonwealth's motion, and by doing so, he waived any subsequent challenge. *See Futrell v. Commonwealth*, 437 S.W.2d 487, 488 (Ky. 1969) ("Violations of constitutional rights, the same as of other rights, may be waived by failure to make timely and appropriate objection." (citation omitted)). Ward tries to obscure his acquiescence, complaining that he was not included on the certificate of service for the motion. *See* Appellant Br. at 12–13. But he tellingly does not suggest that he did not know about the motion or that he would have objected if given the chance.

Nor could he. Ward was present at counsel table, acting in his role as hybrid counsel, when the trial court took up the Commonwealth's motion. (VR: 8/2/21, 10:19:10–10:20:05.) When the trial court asked whether there was an

objection to the motion, Ward stayed silent, and his defense counsel confirmed that there was not. (*Id.*) "When a defendant's attorney is aware of an issue and elects to raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications." *Salisbury v. Commonwealth*, 556 S.W.2d 922, 927 (Ky. App. 1977). That is all the truer here, where Ward was acting as hybrid counsel and could have independently raised an objection from counsel table.

Indeed, even when the ruling on the motion became an issue at trial, Ward did not object to the trial court's prior ruling. (*See* VR: 8/31/21, 9:23:30–9:25:10.) During the ex parte hearing about Ward's desire to have witnesses recalled, the trial court reiterated that its order precluding Ward from questioning Palmer, Christos, and Fiely would stand. (*Id.*) Faced with another opportunity to object to that decision, Ward stayed silent. (*Id.*) He cannot now allege that the trial court's decision violated his constitutional rights. *See Futrell*, 437 S.W.2d at 488; *see also Parson v. Commonwealth*, 144 S.W.3d 775, 783 (Ky. 2004), *as modified* (June 21, 2004), *implied overruling on other grounds recognized by Shields v. Commonwealth*, 647 S.W.3d 144 (Ky. 2022).

In any event, the trial court's decision to preclude Ward from questioning these witnesses was not an abuse of discretion. Ward spills significant ink complaining that the trial court's decisions violated his rights under the Sixth Amendment to the U.S. Constitution. *See* Appellant Br. at 12–19. But that is a red

herring. "The right to defend *pro se* and the right to counsel" under the Sixth Amendment "have been aptly described as 'two faces of the same coin,' in that the waiver of one right constitutes a correlative assertion of the other." *United States v. Conder*, 423 F.2d 904, 908 (6th Cir. 1970) (internal citation omitted). The two are mutually exclusive. *See Arrendondo v. Neven*, 763 F.3d 1122, 1129 (9th Cir. 2014). Thus, logically, by electing to proceed as hybrid counsel—a category foreign to the Sixth Amendment—Ward waived his rights under both sides of the Sixth Amendment coin in favor of the protections afforded by Section 11 of the Kentucky Constitution and Kentucky law interpreting that section. *See Major v. Commonwealth*, 275 S.W.3d 706, 722 (Ky. 2009); *see also Stone*, 217 S.W.3d at 236–37; *Baucom v. Commonwealth*, 134 S.W.3d 591, 592 (Ky. 2004) (requiring courts to apply the Kentucky Constitution where it affords greater protection to criminal defendants than the federal constitution).

And limitations on a defendant's role as hybrid counsel are reviewed for abuse of discretion. *See Nunn v. Commonwealth*, 461 S.W.3d 741, 747–50 (Ky. 2015) ("The accused's right [to act as hybrid counsel] is, of course, subject to the trial court's inherent authority to impose measures necessary for an orderly trial."). For example, "a trial court may require hybrid counsel to cross-examine victim-witnesses over a defendant's objections." *Allen*, 410 S.W.3d at 134. Indeed, while a "blanket application of [a] policy" precluding a defendant acting as hybrid counsel from questioning witnesses "without individualized consideration of the

specific case is an abuse of discretion, *Nunn*, 461 S.W.3d at 749, that is not the case here.

Palmer, Christos, and Fiely all expressed fear that Ward would harm them because of their cooperation with law enforcement. *See* TR IV, 528. The Commonwealth argued that of the dozens of witnesses it anticipated at trial, Ward should be precluded from asking questions *only* of those three witnesses. *Id.* And that was the only limitation imposed by the trial court. (*See* VR: 8/2/21, 10:19:10–10:20:05; VR: 8/31/21, 9:23:30–9:25:10.) By considering individualized reasons for precluding Ward from questioning certain witnesses and tailoring its limitations according to those considerations, the trial court acted well within its discretion. *See Nunn*, 461 S.W.3d at 747–50; *Partin*, 168 S.W.3d at 29 ("In certain cases, the intimidation of the witness during cross-examination . . . may exceed what the Constitution and fundamental fairness in the adversarial process require.").

B. The trial court did not err in refusing to compel defense counsel to recall witnesses, and any error was harmless.

During the Commonwealth's case-in-chief, Ward's counsel vigorously cross-examined the Commonwealth's witnesses like Palmer, Christos, and Fiely. (VR: 8/25/21, 3:23:08–4:17:51, 4:48:05–5:03:30; VR: 8/26/21, 10:00:18–10:37:35.) But when it came time for the defense to put on its case, Ward wanted to recall those witnesses to impeach their testimony further. (*See* VR: 8/31/21,

9:15:24–9:25:10, 9:41:05–9:42:12.) Defense counsel advised that was a bad idea because putting those witnesses back on the stand would open them to cross-examination by the Commonwealth, "completely obliterating" the work the defense had done. (*Id.*) Defense counsel was particularly concerned that Ward wanted to recall those witnesses "to establish very minor tweaks" to their testimony. (*Id.*) Ward disagreed and asked the trial court to intervene. (*Id.*)

The trial court reiterated its decision that Ward could not personally question the witnesses. (*Id.* at 9:23:30–9:25:10.) That meant any questioning of witnesses like Palmer and Christos would have to be done by defense counsel, but he declined to recall the witnesses like Ward wanted because he believed doing so would be "like cutting our wrists." (*See id.* at 9:15:24–9:25:10.) Ward now argues that by failing to compel defense counsel to recall Palmer, Christos, and Fiely the trial court "deprived [him] of his ability to present a defense and confront witnesses." *See* Appellant Br. at 14. Not so.

To support his position, Ward cites heavily to the Supreme Court's decision in *McKaskle v. Wiggins*, 465 U.S. 168 (1984). But his reliance is misplaced. *McKaskle* did not deal with a defendant acting as hybrid counsel. Instead, the Supreme Court considered "what role *standby counsel* who is present at trial over the defendant's objection may play consistent with the protection of the defendant's *Faretta* rights." *McKaskle*, 465 U.S. at 170 (emphasis added). "Standby counsel is distinguished from hybrid counsel." *Allen*, 410 S.W.3d at 138. "As the

definition of standby counsel indicates, standby counsel does not represent the *pro se* defendant," meaning that courts must continue to treat the defendant as if he were acting pro se. *Id.* at 139 (cleaned up). And a "*pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle*, 465 U.S. at 174. Thus, when a conflict arises between a *pro se* defendant and standby counsel, generally the pro se defendant's "strategic choices, not counsel's, . . . prevail." *Id.* at 181.

Hybrid counsel is different. "[T]he defendant makes 'a limited waiver of counsel whereby he acts as co-counsel with a licensed attorney.'" *Allen*, 410 S.W.3d at 139 (quoting *Stone*, 217 S.W.3d at 236 n.1). Rather than retaining full agency over his own representation, a criminal defendant acting as hybrid counsel "specifies the extent of legal services he desires" the licensed attorney to control and undertakes only "the remaining portion of his defense pro se." *Id.* (quoting *Stone*, 217 S.W.3d at 236 n.1).

And here, the record shows that Ward intended for defense counsel to handle questioning and strategic decisions around witnesses. (*See* VR: 8/2/21, 10:23:48–10:25:30.) The trial court asked what the division of labor would be before trial, and defense counsel explained:

> My understanding in speaking with [Ward], I think he is wanting me and Ms. Graham to take on basically all the trial work. I think he wants to be involved but I don't plan on having him do anything that counsel would be doing. Me or Ms. Graham will be cross examining, examinations, opening, voir dire, etc. Arguing most objections.

(*Id.*) Ward, seated at counsel table in his capacity as hybrid counsel, did not dispute this description of defense counsel's responsibilities. (*Id.*) Thus, Ward had agreed before trial that his defense counsel could exercise professional judgment around strategic decision related to witnesses, and the trial court's decision adhering to the division of labor was not error. *See Allen*, 410 S.W.3d at 139. Ward cites no case requiring defense counsel to ignore his professional judgment and compelling him to recall witnesses here.

But even if the court should have required defense counsel to recall Palmer, Christos, and the like, its failure to do so was harmless. Only the "complete abridgment of the defendant's right to hybrid counsel" has been found to be "structural error." *Nunn*, 461 S.W.3d at 750. On the other hand, "[e]rroneous limitations imposed upon hybrid counsel arrangements . . . are subject to harmless error analysis." *Id.* "It is not too much that we expect a defendant, who claims that the accommodation of his hybrid counsel arrangement was unduly restrictive, to demonstrate some modicum of harm resulting from the claimed errors." *Id.*

Ward cannot make that showing here. The witnesses Ward sought to recall were vigorously cross-examined by defense counsel. (*See, e.g.*, VR: 8/25/21, 3:23:08–4:17:51, 4:48:05–5:03:30; VR: 8/26/21, 10:00:18–10:37:35.) And Ward has never specifically articulated what testimony he believes he could elicit from these witnesses to assist his defense—neither during the ex parte hearing nor in his brief. (VR: 8/31/21, 9:15:24–9:25:10, 9:41:05–9:42:12); Appellant Br. at 12–19. According to defense counsel, Ward hoped to impeach these witnesses by "establish[ing] very minor tweaks to their testimony," and he equated Ward's proposed questioning as "obliterating the work we have done" and "cutting [the defense's] wrist." (VR: 8/31/21, 9:15:24–9:25:10, 9:41:05–9:42:12.) Because Ward has not shown that recalling these witnesses would have elicited any testimony helpful to his defense, any error in not requiring defense counsel to recall them was harmless. *Nunn*, 461 S.W.3d at 749–50 (denying a Section 11 hybrid counsel claim when the defendant failed to produce "even one example of how he would have proceeded differently at trial in the absence of the offending conditions").

II. The circuit court properly admitted the firearm examiner's testimony.

Owens compared the nine .22-caliber shell casings collected from Kelli's apartment against two .22-caliber shell casings collected from the area where Ward would target shoot at Palmer's farm. (VR: 8/26/21, 2:05:00–2:08:00,

2:16:35–2:17:10.) And she determined, based on her expert opinion, that both sets of shell casings had been fired by the same gun. (*Id.*) Before trial, the Commonwealth agreed that Owens would not use the term "match," state her opinion to a degree of statistical or scientific certainty, nor state that her analysis had excluded all other firearms. TR IV, 578; (VR: 8/2/21, 11:22:40–11:23:50.) But Ward sought to cabin Owens's testimony further. TR IV, 565–69. Citing federal cases and a 2016 report from the President's Council of Advisors on Science and Technology ("PCAST Report") questioning the utility of toolmark analysis, Ward argued that Owens should have been allowed to testify only that the casings were "consistent" with having been fired from the same gun. *Id.*; (VR: 8/2/21, 11:40:05–11:46:55.) The trial court, however, allowed Owens to testify to her actual expert conclusion—the casings were fired from the same weapon—without Ward's requested modifier. (VR: 8/2/21, 11:40:05–11:46:55.) Ward argues that was reversible error. Appellant Br. at 19–27. Not so.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). An abuse of discretion occurs only if the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* Absent an abuse of discretion, "[t]his Court will not disturb the trial court's decision to admit evidence[.]" *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). There is no basis for reversal here under that standard.

This Court may be feeling déjà vu. Ward essentially repeats the same arguments this Court rejected five years ago in *Garrett v. Commonwealth*, 534 S.W.3d 217, 221–23 (Ky. 2017) (rejecting argument that ballistics experts should not be allowed to testify that a particular bullet was fired from a particular gun even though recent studies had questioned the validity of toolmark analysis). *See* Appellant Br. at 19–27. Only Ward's claims here are even weaker. He recognizes that expert ballistic testimony is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but argues that experts should be prohibited from contending that two bullets were fired from the "same" weapon. (*See* VR: 8/2/21, 11:24:12–11:43:24); Appellant Br. at 21. Trial courts, however, have broad discretion in deciding whether, and how, to limit admissible expert testimony. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 583 (Ky. 2000).

And this Court made clear in *Garrett* that Ward's proposed limitation on expert ballistic testimony is not required. There, the Court explained that firearm experts may testify without qualification that two bullets were fired from the same weapon based on their expert opinion. *Garrett*, 534 S.W.3d at 221–22. To the extent scientific studies have questioned the methodology and reliability of forensic ballistics, cross-examination is the appropriate arena to test those concerns. *Id.* at 222–23. And Ward tested Owens's findings on cross-examination. (*See* VR: 8/26/21, 2:17:50–2:28:50, 2:37:30–2:56:30.) Thus, the trial court's decision to admit Owens's testimony that the casings had been fired by the same

weapon was not "unsupported by sound legal principles," nor was it "arbitrary, unreasonable, [or] unfair" for the trial court to follow this Court's instructions in *Garrett*. *See English*, 993 S.W.2d at 945.

Even so, Ward dismisses *Garrett*'s import because it relied on *United States v. Otero*, 849 F. Supp. 2d 425 (D.N.J. 2012), which was decided before the PCAST report was released. Appellant Br. at 24.[2] But that argument fails for at least two reasons. First, this Court "agree[d]" only "with the *Otero* court's application of the *Daubert* factors to ballistics testimony." *Garrett*, 534 S.W.3d at 222. Ward concedes that such testimony remains admissible, (*see, e.g.*, VR: 8/2/21, 11:24:12–11:43:24), and he has not cited a *single* case excluding ballistics testimony under *Daubert*, even after the PCAST report. *See* Appellant Br. at 21, 24–27. Thus, the aspect of the *Otero*'s reasoning that *Garrett* relied on has not been questioned.

Second, *Otero* recognized even before the PCAST report that some courts had limited toolmark identification evidence. 849 F. Supp. 2d at 435. And this Court credited *Otero*'s concern that "claims for absolute certainty as to identifications made by practitioners in this area may well be overblown." *Garrett*, 534 S.W.3d at 222 (quoting *Otero*, 849 F. Supp. 2d at 438). Even so, this Court determined that such concerns did not require limits on the expert's testimony. *See id.*

---

[2] *Garrett* itself was decided after the PCAST report was issued, although the Court did not explicitly address it. *Garrett*, 534 S.W.3d at 222.

at 222–23. Instead, the "proper avenue" to address concerns "about the methodology and reliability of [ballistics] testimony" raised by reports like PCAST is through cross-examination or competing expert testimony. *Id.* at 223.

None of the out-of-jurisdiction cases that Ward relies on (Appellant Br. at 24–27) requires differently. True, some courts have exercised their discretion to require ballistics experts to qualify their conclusions. *See, e.g.*, *United States v. Shipp*, 422 F. Supp. 3d 762, 783 (E.D.N.Y. 2019) (allowing ballistics expert to testify only "that the toolmarks on the recovered bullet fragment and shell casing are *consistent* with having been fired from the recovered firearm" (emphasis added)). But "courts that impose[] limitations on firearm and toolmark expert testimony [a]re the exception rather than the rule," and "[m]any courts have continued to allow unfettered testimony from firearm examiners who have utilized the AFTE method." *United States v. Romero-Lobato*, 379 F. Supp. 3d 1111, 1117 (D. Nev. 2019). Even courts that have limited ballistics testimony have continued to allow experts to testify that "casings were fired from the same firearm." *United States v. Harris*, 502 F. Supp. 3d 28, 44–45 (D.D.C. 2020) (imposing the same testimony limitations that the trial court required here). Indeed, such testimony is explicitly allowed under the Department of Justice Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline—Pattern Matching Examination. *Id.* at 44–45.

That some (but not all) out-of-jurisdiction courts have exercised their independent discretion to prohibit firearms experts from testifying that two casings were fired from the same weapon does not mean that the trial court's contrary decision here was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945. That is particularly so given the broad discretion afford to Kentucky trial courts in admitting evidence, *id.*, and this Court's guidance in *Garrett*. Because the trial court was well within its discretion to allow Owens to testify to her opinion that the shell casings she analyzed were fired by the same weapon, there is no basis to disturb that decision. *See Anderson*, 231 S.W.3d at 119.

III. The Commonwealth did not impermissibly comment on Ward's silence.

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. An important corollary to that right is that neither a prosecutor not a trial judge may comment upon a criminal defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 614–15 (1965). That rule applies to indirect as well as direct comments on the failure to testify. *See Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006). But a comment violates a defendant's constitutional privilege against compulsory self-incrimination "only when it was manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon

the defendant's failure to testify . . . , or invited the jury to draw an adverse inference of guilt from that failure." *Id.* at 589–90 (citations omitted). That is not the case here.

A. The prosecutor's questioning of Detective VonDerHaar was permissible under the Fifth Amendment.

Detective Tony VonDerHaar of the Boone County Sheriff's Office Electronic Crime Unit testified about the electronic data evidence collected and examined during the investigation. (VR: 8/31/21, 9:45:15–9:47:35.) Right after Detective VonDerHaar testified that he had recovered and inspected electronic devices belonging to Ward, defense counsel requested a bench conference. (*Id.*) He objected to any questioning or testimony about Ward's refusal to give officers the passcode to his cellphone. (*See id.* at 9:47:40–9:50:45.) The prosecutor agreed that he would not ask Detective VonDerHaar about Ward's refusal. (*Id.*) Instead, the prosecutor would ask only whether the detective could access the phone, and he expected that Detective VonDerHaar would testify that he could not do so because it was encrypted, without attributing his inability to access the phone to Ward. (*Id.*)

And so it was. The prosecutor never asked whether the detective requested the phone's password from Ward. Nor did he ask whether Ward had refused to help police past the phone's encryption. Instead, he asked only whether Detective VonDerHaar could access the phone, and as anticipated, the

Detective testified he could not because it was encrypted, without ever commenting on whether Ward refused to provide his passcode. (*Id.* at 9:50:56–9:52:02.) Here is the full exchange:

> **Prosecutor:** OK. I want to ask you specifically about the phones. I think you said there were seven phones?
>
> **Detective VonDerHaar:** Yes sir.
>
> **Prosecutor:** Do you have an understanding of where these phones were recovered?
>
> **Detective VonDerHaar:** Yes sir.
>
> **Prosecutor:** Could you please explain where they were recovered?
>
> **Detective VonDerHaar:** Yes. There were six cellphones that we recovered from [Ward's] residence, Norbourne Drive in Forest Park. These were older devices. We were able to get into those. And the last activity on them was like around 2013. The other cellphone in question, the seventh cellphone, was recovered from Mr. Ward's person when he was arrested.
>
> **Prosecutor:** Ok. And were you able to access the contents of that phone?
>
> **Detective VonDerHaar:** No sir.
>
> **Prosecutor:** Why not?
>
> **Detective VonDerHaar:** Because it was encrypted.
>
> **Prosecutor:** OK. Thank you.

(*Id.*)

The trial court correctly determined the prosecutor's questioning did not violate Ward's constitutional privilege against compulsory self-incrimination. "Not every comment that refers or alludes to a nontestifying defendant is an impermissible comment on his failure to testify, and not every comment upon silence is reversible error." *Ragland*, 191 S.W.3d at 589 (citation omitted); *see also Dillard v. Commonwealth*, 995 S.W.2d 266, 374 (Ky. 1999). And here, the prosecutor's questioning neither referred to nor alluded to Ward's silence.

That Detective VonDerHaar tried to access Ward's phone but failed because it was encrypted is an objective fact relevant to the completeness of the investigation. Without attributing the detective's inability to access the phone to Ward, neither the prosecutor nor Detective VonDerHaar "manifestly intended" to comment upon Ward's silence. *Ragland*, 191 S.W.3d at 589. Nor was this questioning of "such character that the jury would necessarily take it" as a comment on Ward's refusal to provide his passcode. *Id.* Again, the prosecutor never asked whether Ward had refused to provide his passcode or even whether Detective VonDerHaar asked for that information. *See Murphy v. Commonwealth*, 509 S.W.3d 34, 53 (Ky. 2017) (finding no Fifth Amendment violation where the prosecutor's "statement did not refer to [the defendant] individually or his decision not to testify"). More importantly, "the prosecutor said nothing that could be construed

as a request that the jury should infer guilt from the fact that" Detective VonDer-Haar could not access Ward's phone. *See Ragland*, 191 S.W.3d at 590–91.

Indeed, "prosecutorial comment[s] must be examined in context[.]" *Id.* at 590 (cleaned up). "[I]f there is another, equally plausible explanation for a statement, malice will not be presumed and the statement will not be construed as comment on the defendant's failure to testify." *Id.* Here there is another plausible explanation for the prosecutor's questions related to Ward's phone. Detective VonDerHaar testified about the significant electronic evidence he had reviewed during his investigation, including six of Ward's cellphones that he could access. (VR: 8/31/21, 9:50:56–9:52:02.) Prohibiting the prosecutor from asking whether officers could access Ward's seventh phone would have left the false impression with jurors that the investigation was incomplete or shoddy. The prosecutor's questioning was intended to show the thoroughness of the investigation and explain why investigators could access some of Ward's phones but not others. And the prosecutor elicited this relevant information without ever suggesting that Ward helped prevent officers from gaining entry to his phone or that the jury should infer guilt because Ward's phone was encrypted. Thus, the prosecutor's

questioning did not violate constitutional privilege against compulsory self-incrimination. *See Ragland*, 191 S.W.3d at 589–90.

B. Ward's unpreserved Fifth Amendment challenge is also meritless.

Ward also challenges the prosecutor's question on cross-examination about whether he made it impossible for the police to access his phone. Appellant Br. at 35. As he concedes, this issue is not preserved, so he seeks palpable error review. *Id.* (citing RCr 10.26). But this Court should decline that request, particularly because Ward's argument is skeletal and undeveloped, *id.* at 36–37. *See* RCr 10.26 ("A palpable error which affects the substantial rights of a party *may* be considered" (emphasis added)); *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) ("It is not our function as an appellate court to research and construct a party's legal arguments[.]").

At any rate, the prosecutor's cross-examination was not palpable error. Palpable error requires an error. *See Commonwealth v. Jones*, 283 S.W.3d 665, 670–71 (Ky. 2009). Even then, the error must be "palpable and affect[] the substantial rights of a party." *Id.* at 668 (internal quotation marks omitted). An error is palpable "only if it is clear or plain under current law." *Id.* Ward cannot clear these threshold hurdles.

There was no error here. There is "a well-settled rule that when an accused takes the stand in his own defense, he thereby subjects himself to cross-

examination and waives the right of self-incrimination." *Lumpkins v. Commonwealth*, 425 S.W.2d 535, 536 (Ky. 1968). "By taking the stand, a defendant waives his 'cloak of immunity,' allowing cross-examination on prior silence." *Gordon v. Commonwealth*, 214 S.W.3d 921, 925 (Ky. App. 2006) (quoting *Raffel v. United States*, 271 U.S. 494, 497 (1926)); *see also Jenkins v. Anderson*, 447 U.S. 231, 238–39 (1980) (allowing a criminal defendant's prearrest silence to be used for impeachment purposes). Thus, Ward opened himself to the prosecutor's cross-examination about his prior refusal to give investigators the passcode to his phone by taking the stand. *See Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000).

Indeed, "[i]t is an inveterate principle that a defendant who takes the stand waives his fifth amendment privilege against self-incrimination at least to the extent of cross-examination relevant to issues raised by his testimony." *United States v. Beechum*, 582 F.2d 898, 907 (5th Cir. 1978); *see also Dillman v. Commonwealth*, 257 S.W.3d 126, 128 (Ky. App. 2008). And here, Ward testified on direct about his use of encrypted apps and steps to maintain his privacy on his phone. (*See* VR: 8/31/21, 1:36:32–1:38:20.) That testimony opened him to cross on those same subjects.

IV. There was no prosecutorial misconduct.

Ward alleges multiple instances of prosecutorial misconduct. Appellant Br. at 39–45. But for most of the comments he complains about Ward cannot make the threshold showing that misconduct or "improper comments"

occurred. *See Murphy*, 509 S.W.3d at 54. And in any event, because these issues are not preserved (Appellant Br. at 39), reversal is warranted only if "the misconduct was flagrant" and rendered "the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). Whether a prosecutor engaged in flagrant misconduct turns on four factors: "(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." *Brafman v. Commonwealth*, 612 S.W.3d 850, 861 (Ky. 2020). To determine whether alleged misconduct made a trial "fundamentally unfair," courts must consider the claimed error in context of the trial "as a whole." *Id.* Under that rubric, none of Ward's claims justifies reversal.

1. Ward first argues that the prosecutor engaged in misconduct when she said during closing arguments that he had told Palmer that he knew how to make a homemade silencer. Appellant Br. at 39–40, 42–45. But that "statement is reasonably supported by the evidence." *Padgett v. Commonwealth*, 312 S.W.3d 336, 353 (Ky. 2010). Palmer testified that she and Ward would talk about guns and gun accessories—including silencers—when he would target shoot at her farm. (VR: 8/26/21, 9:18:30–9:22:10.) When the prosecutor asked if Palmer recalled any

more detail about what Ward had said about silencers, she responded, "Just that they can be easily made from home." (*Id.*)

Prosecutors are "granted substantial latitude in making argument." *Murphy*, 509 S.W.3d at 54. Here, that Ward knew it was possible to make homemade silencers strongly suggests that he had investigated the topic, and because Ward said it would be easy to make one of these homemade silencers it is not unreasonable to interpret Palmer's testimony as Ward suggesting he knew how—or at least he had the means and interest to do so. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998) ("In his closing remarks, a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt."). Because the prosecutor's statement was "reasonably supported by the evidence," it was not improper and is thus not misconduct, flagrant or otherwise. *See Murphy*, 509 S.W.3d at 54 (quoting *Padgett*, 312 S.W.3d at 353).

2. The same is true the prosecutor's second alleged misstatement during closing arguments. *See* Appellant Br. at 40–41, 42–45. Ward was excluded as a contributor to the DNA found on the shell casings at the crime scene. (VR: 8/25/21, 9:27:00–9:28:23.) But during closing, the prosecutor explained the Commonwealth's theory why that might be: "Steven Weitz of the ATF lab, explained to you, it's very simple why the defendant's DNA *would not* be there. He wore gloves. One can conceal their DNA." (VR: 9/1/21, 10:45:30–10:45:50.)

Again, this "statement is reasonably supported by the evidence." *Padgett*, 312 S.W.3d at 353. Weitz testified that there are many reasons a person's DNA would not be on a shell casing, including the possibility that the individual wore gloves. (VR: 8/25/21, 9:26:00–9:28:00, 9:29:17–9:30:38.)

The prosecutor did not suggest that Weitz had definitively testified that Ward was wearing gloves when he murdered Kelli and Aiden. Instead, she accurately recounted Weitz's testimony about the different means for concealing DNA. (VR: 9/1/21, 10:45:30–10:45:50.) She then propounded the Commonwealth's theory based on reasonable inferences from that testimony: "[Ward] wore gloves." (*Id.*) That is permissible. *Tamme*, 973 S.W.3d at 39 ("[A] prosecutor may draw all reasonable inference from the evidence and propound his explanation of the evidence and why it supports a finding of guilt."). And that is particularly so considering the "substantial latitude" afford to prosecutors "in making argument." *See Murphy*, 509 S.W.3d at 54. Because the prosecutor's statement was not improper it does not support a prosecutorial misconduct claim.

3. Ward also claims the prosecutor's argument that Aiden had made the small ridge print on the wall in his blood was based on unreasonable inferences. Appellant Br. at 41–42, 42–45. Not so. During defense counsel's closing, he suggested that "the killer left fingerprints on a glass door [he] pushed open to leave and left a bloody fingerprint after touching Aiden on that wall. Those prints do not come back to [Ward]." (VR: 9/1/21; 10:03:00–10:03:18.) And the

Commonwealth offered its own explanation why: "The blood stain on the wall. Defense brought that up . . . . You heard from KSP lab it was Aiden's blood. I submit to you, ladies and gentlemen, Aiden wasn't just shot once and died. He was shot three times. That's Aiden's ridge print." (*Id.* at 10:32:00–10:33:00.)

That the blood stain on the wall came from Aiden was a reasonable inference based on the trial evidence. The blood was Aiden's. As the prosecutor pointed out, Aiden was shot once in the upper chest. It is not unreasonable, if that was the initial shot, to infer that Aiden could have continued moving around the apartment, touching the wall, before he was shot twice in the head.

Indeed, Detective Cochran's testimony supports this inference; at minimum, it does not render it unreasonable. (VR: 8/27/21, 1:20:14–1:24:15.) True, Detective Cochran testified that Aiden bled "predominately" where he was found. (*Id.*) But that accords with the fact that Aiden suffered his most serious injuries while he was in that position or right before. It does not make it unreasonable to advocate that Aiden first suffered a nonfatal wound and transferred blood from that wound to the wall before he came to that position. Indeed, although Detective Cochran conceded that he could not say for certain how Aiden's blood was transferred to the wall, he explicitly did not rule out the possibility that Aiden may have "run around," even if not "a lot." (*Id.*)

Nor does the lack of visible blood on Aiden's hands in Commonwealth's exhibits 26, 44, and 116 render the prosecutor's inferences unreasonable. *See*

Appellant Br. at 42. The blood stain on the wall was tiny, suggesting only a little blood would have been present on the individual's hand. So that blood may have been entirely transferred, or what little remained may not have been captured in those three photos. Again, prosecutors are "granted substantial latitude in making argument," *Murphy*, 509 S.W.3d at 54, and they may "draw all reasonable inferences from the evidence and propound [an] explanation of the evidence and why it supports a finding of guilt," *Tamme*, 973 S.W.2d at 39. What's more, "[a] prosecutor . . . may comment as to the falsity of a defense proposition." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). The prosecutor's statement therefore is not misconduct, flagrant or otherwise. *See Murphy*, 509 S.W.3d at 54.

4. Finally, Ward complains that the prosecutor suggested during her closing that forensic ballistic analysis is "irrefutable evidence." Appellant Br. at 41–42, 42–45. That was a misstatement, since there are means to refute ballistics evidence. *See Garrett*, 534 S.W.3d at 222–23. But this single errant clause delivered during the heat of closing arguments was not flagrant prosecutorial misconduct.

For starters, that statement would not have tended to mislead jurors because they saw Ward refute Owens's testimony during trial. Defense counsel cross-examined Owens extensively about her findings, suggesting that her conclusions were unreliable and unscientific because they were subjective. (*See* VR: 8/26/21, 2:17:55–2:56:35.) Defense counsel repeated those attacks during closing arguments. (*See* VR: 9/1/21, 9:27:56–9:34:38.) Whatever the prosecutor said,

the jury knew that Owens's testimony was refutable, because they witnessed defense counsel doing just that.

And none of the other *Brafman* factors supports finding that the prosecutor's misstatement was flagrant misconduct. It was an isolated misstatement delivered in the heat of closings. *Brafman*, 612 S.W.3d at 861 (explaining that courts should consider whether improper remarks "were isolated or extensive"). And while Ward only weakly suggests, *see* Appellant Br. at 41–42, that this misstatement was "deliberate[]," he offers no evidence to show as much. *Id.* (explaining courts should consider whether improper statements "were deliberately or accidentally placed before the jury"). Without such evidence, it is just as likely that the prosecutor accidentally inserted an imprecise three-word clause in her 40-minute closing. And finally, as discussed below (*infra* Section V), the evidence against Ward was significant, even given his attacks on Owens's testimony. Thus, Ward cannot establish prosecutorial misconduct warranting reversal. *See Brafman*, 612 S.W.3d at 861.

V. Ward was not entitled to a directed verdict on the murder charges.

Based on the trial evidence, a jury could (and did) reasonably find that Ward murdered Kelli and Aiden. So the trial court correctly denied Ward's motions for directed verdict. "The legal standards for a directed verdict motion are clear: if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of

acquittal." *Eversole v. Commonwealth*, 600 S.W.3d 209, 217 (Ky. 2020) (cleaned up). Thus, "[o]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The reviewing court must "construe all evidence below in a light most favorable to the Commonwealth." *Commonwealth v. Jones*, 497 S.W.3d 222, 225 (Ky. 2016). Under that rubric, it was not "clearly unreasonable" for the jury to find Ward guilty here.

Ward was charged with murder. A defendant is "guilty of murder when . . . [w]ith intent to cause the death of another person, he causes the death of such person or of a third person" or when the defendant "wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KRS 507.020(1)(a)–(b). The trial evidence supported finding Ward guilty. *Benham*, 816 S.W.2d at 187.

The most damning evidence against Ward were the ballistics. Ward admitted that he had used Palmer's farm for target shooting, including with .22-caliber weapons. (VR: 8/31/21, 1:38:12–1:42:15.) Although the murder weapon was never recovered, Owens testified that, in her expert opinion, the .22-caliber bullet casings found at the farm had been fired by "the same firearm" used to kill Kelli and Aiden. (VR: 8/26/21, 2:16:00–2:17:20.) And Palmer and her son both testified that Ward used that area of the property for shooting. (*Id.* at 9:31:01–9:33:45,

11:06:20–11:09:29.) Viewed in the light most favorable to the Commonwealth, this evidence draws a clear link between Ward and the murders.

There was also evidence of Ward's motive. He was angry that Kelli had ruined his ideal family, and he wanted her to be held accountable. He said so repeatedly to Christos, Fiely, and Bohley. Indeed, Ward suggested to Christos that she pick Kelli up and drop her in a secluded location so that he could take care of her. (*See* VR: 8/25/21, 3:07:56–3:11:25.) He asked Palmer about finding a gun that could not be traced and whether she knew how to get ahold of a lethal dose of heroin. (VR: 8/26/21, 9:15:50–9:20:32, 9:37:48–9:38:48.) Months after Ward and Kelli had split, he told Bohley that he could not understand how someone who had caused so much pain could be allowed to roam free; he told Bohley that Kelli was a monster; and Ward said he felt like he had a duty to protect other men from women like Kelli. (*See* VR: 8/25/21, 2:05:20–2:10:40.) The final straw was when Ward learned that Kelli had publicly announced her relationship with Sullivan to the FetLife community, which upset him. (*See* VR: 8/26/21, 9:37:48–9:38:48.)

Indeed, although the Commonwealth did not prove direct communication between Ward and Kelli in the months after the breakup, witnesses testified that Ward kept up with Kelli. He would hear about her relationships and activities through other FetLife members. (*See* VR: 8/24/21, 2:56:20–3:01:20.) And other evidence showed that Ward continued to be interested in Kelli and Aiden

even after the relationship ended. For example, Ward traveled to Kelli's parents' house and sat for hours in hope of catching a glimpse of Aiden. Ward himself described this behavior as stalker-like. (*Id.* at *Id.* at 3:05:30–3:07:32.) Given the forensic and testimonial evidence introduced at trial it was not "clearly unreasonable" for the jury to find Ward guilty. *Benham*, 816 S.W.2d at 187.

None of the allegedly mitigating evidence Ward cites changes that. Appellant Br. at 46–49. Ward argues that he could not have been at the murder scene because when Kelli and Aiden were shot his phone was on and consuming data from cell towers near his home 45 minutes away. *Id.* at 46. But it became clear during trial that Ward was extremely conscious that investigators use phones to obtain critical information, and he consistently sought to hide his digital and electronic profile.

When he first met with police, he left his phone at home. (VR: 8/24/21, 3:03:00–3:03:40.) When he met Christos for lunch after Kelli and Aiden's murder, he asked her to keep her phone in the car to prevent their conversation from being recorded or overheard. (*See* VR: 8/26/21, 3:17:00–3:21:30.) When he told Fiely about Kelli and Aiden's murders, he made her put her phone in the bathroom and turned on the exhaust fan for the same reasons. (*See* VR: 8/25/21, 4:40:29–4:46:40.) When he became suspicious of Palmer during their four-hour lunch, he insisted that she place her phone in her car and checked her for a wire

before continuing to discuss the investigation. (*See* VR: 8/26/21, 9:53:16–9:54:50.)

Ward counters that there may be "an equally plausible innocent explanation" for his secrecy and use of encrypted apps. Appellant Br. at 49. But the Court should view the evidence in the light most favorable to the Commonwealth. *Jones*, 497 S.W.3d at 225. And given the extensive testimony about the steps Ward took to conceal his electronic profile and digital evidence from investigators, the evidence that Ward's phone was at his house the night of the murders does not counterbalance the significant forensic and testimonial evidence suggesting his guilt. The jury was not "clearly unreasonable" to conclude that Ward was at Kelli and Aiden's apartment, even if his phone was not. *Benham*, 816 S.W.2d at 187.

Nor does the lack of DNA or fingerprint evidence render the jury's verdict "clearly unreasonable." True, Ward was excluded as a contributor to the DNA found on the shell casings at Kelli and Aiden's apartment, and his fingerprints were not found at the scene. But Palmer testified that Ward would often wear gloves while target shooting to avoid getting gunpowder residue on his hands. (VR: 8/26/21, 9:31:01–9:33:45.) As Weitz explained, if an individual wears gloves, their DNA will not be transfer to a cartridge. (VR: 8/25/21, 9:26:00–9:28:00, 9:29:17–9:30:38.) Gloves would also explain a lack of fingerprints. Considering the "evidence as a whole it would not be clearly unreasonable for a jury

to find the defendant guilty," even absent DNA or fingerprint evidence. *Eversole*, 600 S.W.3d at 217.

VI. The Little Caesar's surveillance video was relevant, and any error in Detective Hull's testimony was harmless.

Detective Chris Hull testified that the Boone County Sheriff's office had obtained surveillance footage from a Little Caesar's restaurant near Kelli's apartment as part of its investigation. (VR: 8/27/21, 9:25:12–9:34:00.) That footage showed two things. First, it recorded the only road in and out of Kelli's apartment complex. (*Id.*) A second camera depicted a segment of the area outside of Kelli and Aiden's apartment. (*Id.*)

A. The Little Caesar's video was relevant.

Ward claims that the surveillance video from Little Caesar's is irrelevant. But this Court should decline Ward's request to review this unpreserved issue, Appellant Br. at 28. *See* RCr 10.26 ("A palpable error which affects the substantial rights of a party *may* be considered" (emphasis added)). In any event, the video is relevant, and the trial court did not error, palpably or otherwise, in allowing it to be admitted.

Relevance is a low bar. Evidence is relevant if it has "any tendency to make the existence of any fact . . . of consequence . . . more probable or less probable." KRE 401. Here, the surveillance videos depicted the only means of ingress and egress from Kelli and Aiden's apartment complex. (VR: 8/27/21 9:25:12–

9:34:00.) Thus, it likely captured the killer's vehicle entering the apartment complex, a fact of consequence. Even if the footage is not crystal clear, important information can be gleaned from it, like the types of vehicles that did (or did not) enter the complex around the time of the murder—e.g., cars, SUVs, or pickup trucks. Indeed, the video depicts Kelli arriving at her apartment around 10:46 p.m. the night of the murders. (*Id.* at 9:37:29–9:38:59.) That alone makes it relevant to establishing a timeline. And the back camera footage—which captured the area outside Kelli and Aiden's apartment—also tended to establish a timeline. (*See id.* at 9:41:39–9:46:03.) Given the unusual behavior of the car seen around 11:30p.m.—stopping outside the building but remaining running, only to speed away a minute later—has some tendency to suggest that the murders occurred during this time. And because "all relevant evidence is admissible," KRE 402, the trial court did not err in admitting the surveillance video. Any error in doing so was not so easily perceptible and obvious that a 'manifest injustice' would result if appropriate relief is not granted. *See Shoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (defining when an error is "palpable").

Nor was the video's probative value so clearly outweighed by the danger of undue prejudice that its admission amounted to palpable error. The video was of sufficient quality to show at least some relevant information—such as the types of cars entering the complex—and any danger of unfair prejudice was "adequately addressed through cross-examination." *See Dooley v. Commonwealth*, 626

S.W.3d 487, 498 (Ky. 2021). Indeed, trial courts are "vested with broad discretion" to assess whether a recording is of sufficient quality to be shown to the jury. *See Gordon v. Commonwealth*, 916 S.W.2d 176, 181 (Ky. 1995). And jurors did not reflexively take Hull's word for what the video showed. They requested to review the video independently during deliberations. (VR: 9/1/21, 12:25:50–1:03:18.) Thus, even if it were an error to admit the video (it was not) that error was not "shocking or jurisprudentially intolerable," *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), because it was not "easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

B. Detective Hull's narrative testimony was not improper, and even if it was, it was harmless.

Lay witnesses typically may not interpret audio and video recordings for the jury. *See Cuzick v. Commonwealth*, 276 S.W.3d 260, 265–66 (Ky. 2009). But "[n]arrative testimony is not necessarily interpretive testimony[.]" *Id.* at 266. The admissibility of narrative testimony is governed by KRE 602 and 701. *Morgan v. Commonwealth*, 421 S.W.3d 388, 391–92 (Ky. 2014).

To the extent that Detective Hull's testimony was used to orient the jury to the location of the security cameras in relation to the crime scene or to explain why the Commonwealth was highlighting only certain portions of the videos, his testimony was proper. *See McRae v. Commonwealth*, 635 S.W.3d 60, 70 (Ky. 2021) ("While generally the jury must decide what is depicted in a video, a detective

may explain the relationship of different items of evidence in the context of his investigation, particularly when, as here, multiple video recordings are presented from different locations and different viewpoints within those locations."). Nor was it improper for Detective Hull to testify "about events he was not personally familiar with" so long as "he did not testify to anything that was not captured in the recordings." *Id.* at 71. Such "testimony [does] not progress improperly into the realm of offering opinions." *Id.*

And to the extent that Detective Hull's testimony was impermissibly interpretative, any error in allowing that testimony was harmless. "A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). Here, even if it were erroneous to allow Detective Hull to testify about what was depicted on the surveillance video, "the error was harmless because the jurors were watching the video and were in a position to interpret the security footage independently from the testimony, which provides fair assurance that the judgment was not 'substantially swayed by the error.'" *Boyd v. Commonwealth*, 439 S.W.3d 126, 131 (Ky. 2014) (quoting *Winstead*, 283 S.W.3d at 688).

Indeed, the jury requested to review the footage independently after deliberations began. (VR: 9/1/21, 12:25:50–1:03:18.) The jury was also provided Commonwealth's exhibit 155 comparing the vehicle depicted with Ward's car,

again allowing for their own independent assessment, ensuring that the judgment was not "substantially swayed by the error.'" *Boyd*, 439 S.W.3d at 132. And Detective Hull could testify only that he could not, based on his review of the evidence, exclude Ward; he did not definitively identify Ward as the driver of the car. (VR: 8/27/21, 9:54:40–9:55:50.) Even if that testimony were excluded, Ward cannot establish a "substantial possibility that the result would have been any different" considering "the whole case." *See Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005) (quoting *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969), *overruled on other grounds by Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983)).

CONCLUSION

For all these reasons, the Court should affirm the circuit court's judgment.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

/s/ Harrison Gray Kilgore
HARRISON GRAY KILGORE (No. 99829)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300