COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2021-SC-0508-MR

JOSHUA AUSTIN WARD — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HON. RICHARD A. BRUEGGEMANN, JUDGE
INDICTMENT NO. 18-CR-00483

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, JOSHUA AUSTIN WARD

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CERTIFICATE REQUIRED BY CR 76.12(4):

The undersigned does hereby certify that copies of this brief was served upon the following named individuals by mail, first class postage paid on the 10th day of June, 2022: Hon. Richard A. Brueggemann, Chief Circuit Judge, Boone County Justice Center, 6025 Rogers Lane, Suite 414, Burlington, KY 41005; Hon. Louis Kelly, Commonwealth Attorney, 2995 Washington Street, P.O. Box 168, Burlington, KY 41005; electronically mailed to the Hon. Ashley B. Gotham, Assistant Public Advocate; and by state messenger service to Hon. Daniel Jay Cameron, Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40602. The undersigned does also certify that the record on appeal has been returned to the Clerk of this Court on this date.

SHANNON DUPREE — KAYLEY V. BARNES

INTRODUCTION

Joshua Ward was convicted by a Boone County jury of two counts of murder. He was sentenced to life imprisonment without the possibility of parole.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument.

STATEMENT CONCERNING CITATIONS TO THE RECORD

The written record consists of six volumes cited as "TR (I-VI), (page)."

The video record consists of thirteen CDs and will be referred to as "VR." The video record will be cited in accordance with CR 98(4)(a).

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT i

STATEMENT CONCERNING CITATIONS TO THE RECORD i

CR 98(4)(a) i

STATEMENT OF POINTS AND AUTHORITIES ..... i-viii

Statement of the Case 1-11

Josh and Karen and their relationship 1

Fetlife community. 1-2

The Girlfriends 2-4

Diane Christos – Girlfriend 1 (GF1) 2

Tonya Palmer – Girlfriend 2 (GF 2) 2

Kelli Kramer – Girlfriend 3 (GF3) 2-4

The breakup. 4-5

Moving on. 5-7

Target practice 7

The day of the murders. 7-8

Josh's whereabouts. 8-9

The investigation. 9-11

DNA evidence. 9

The Starbucks video. 9-10

Detective Tonya. 10

Ballistics evidence. 10-11

Surveillance videos on night of murder. 11

The indictment and conviction. 11

ARGUMENT 12-50

I. Josh was denied his right to present a defense when he was not allowed to recall witnesses as hybrid counsel. 12-19

Preservation. 12

Facts. 12-15

6th Amendment, U.S. Constitution ..... passim

McKaskle v. Wiggins, 465 U.S. 168 (1984) ..... passim

RCr 10.26 15

Peak v. Commonwealth, 197 S.W.3d 536 (Ky. 2006) 15

Hill v. Commonwealth, 125 S.W.3d 221 (Ky. 2004) 15

Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991) 15

Commonwealth v. Smith, 898 S.W.2d 496 (Ky. App. 1995) 15

Faretta v. California, 422 U.S. 806 (1975) ..... passim

United States v. Evans, 559 Fed. Appx. 475 (6th Cir. 2014) 15

United States v. Jones, 489 F.3d 243 (6th Cir. 2007) 15

Robards v. Rees, 789 F.2d 379, 383-84 (6th Cir. 1986) 15

United States v. Pryor, 842 F.3d 441 (6th Cir. 2016) 15

U.S. v. Clark, 774 F.3d 1108 (7th Cir. 2014) 15

Analysis. 15-19

Kentucky Constitution § 11 ..... 15, 16

6th Amendment of the U.S. Constitution 15

Wake v. Barker, 514 S.W.2d 692 (Ky. App. 1974) 15

Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992) 16

St. Clair v. Roark, 10 S.W.3d 482 (Ky. 1999) 16

Allen v. Commonwealth, 410 S.W.3d 125 (Ky. 2013) 16

Major v. Commonwealth, 265 S.W.3d 706 (Ky. 2009) 16

KY R BOONE GALLATIN DIST CT Rule 6 (c) 17

5th Amendment. U.S. Constitution 19

II. The trial court abused its discretion by denying Joshua Ward's Motion in Limine to limit the firearm examiner's testimony. 19-27

Preservation. 20

Facts. 20-23

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 21, 23

Analysis. 23-27

Garrett v. Commonwealth, 534 S.W.3d 217 (Ky. 2017) 23, 24

United States v. Otero, 849 F.Supp.2d 425 (D.N.J. 2012) 24

The President's Counsel of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (Sept. 20, 2016). 24

United States v. Davis, 2019 WL 4306971(W.D. Va. 2019) 24, 25, 27

Williams v. United States, 210 A.3d 734 (D.C.Cir. 2019) 24

United States v. Harris, 502 F.Supp. 3d 28 (D.D.C. 2020) 24

United States v. Shipp, 422 F.Supp. 3d 762 (E.D.N.Y. 2020) 24

United States v. Tibbs, No. 2016-CFI-19431,
2019 WL 4359486 (D.C. Super. Sep. 5, 2019) 24, 26, 27

United States v. Romero-Lobato, 379 F.Supp. 3d 1111 (D. Nev.2019) 24

United States v. Monteiro, 407 F. Supp. 2d 351 (D.Mass. 2006) 25

United States v. Glynn, 578 F. Supp. 2d 567 (S.D.N.Y. 2008) 25

United States v. Willock, 696 F. Supp. 2d 536 (D. Md. 2010) 25

U.S. v. Medley, 312 F.Supp 3d 493 (D. Md. 2018) 25, 27

United States v. Shipp, 422 F.Supp.3d 762 (E.D.N.Y. 2019) 25, 27

6th Amend., U.S. Const. 27

14th Amend., U.S. Const. 27

§ 2, Ky. Const. 27

§ 3, Ky. Const. 27

§ 7, Ky. Const. 27

§ 11, Ky. Const. 27

III. Detective Hull offered improper opinion testimony when he narrated and interpreted an irrelevant surveillance video. 28-35

Preservation. 28

RCr 10.26 28

Facts. 28-32

Analysis. 32-35

It was improper for Detective Hull to interpret what was on the video. 32-34

KRE 602 ..... 32, 33

KRE 701 ..... 32, 33

Gordon v. Commonwealth, 916 S.W.2d 176 (Ky. 1995) 32, 33

Morgan v. Commonwealth, 421 S.W.3d 388 (Ky. 2014) 32

Cuzick v. Commonwealth, 276 S.W.3d 260 (Ky. 2009) 32

Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999) 32

State v. King, 219 P.3d 642 (Wash. 2009) 34

State v. Kirkman, 155 P.3d 125 (Wash. 1997) 34

Alternatively, the video should have been excluded as irrelevant. 34-35

KRE 401 34

KRE 402 34

KRE 403 ..... 34, 35

Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705 (Ky. 2009) 35

Chapman v. California, 386 U.S. 18 (1967) 35

IV. The Commonwealth impermissibly commented on Josh's silence. 35-39

Preservation. 35

RCr 10.26 35

Facts. 35-36

Analysis. 36-39

5th Amendment, U.S. Constitution 37, 38, 39

United States v. Goodwin, 457 U.S. 368 (1982) 37

Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979) 37

Rachel v. Bordenkircher, 590 F.2d 600 (6th Cir. 1978) 37

Williams v. Commonwealth, 154 S.W.2d 728 (Ky. 1941) 37

Ragland v. Commonwealth, 191 S.W.3d 569 (Ky.2006) 37

Butler v. Rose, 686 F.2d 1163 (6th Cir.1982) 37

Byrd v. Commonwealth, 825 S.W.2d 272 (Ky. 1992) 37

4th Amendment, U.S. Constitution 38

Deno v. Commonwealth, 177 S.W.3d 753 (Ky. 2005) 38

Commonwealth v. McCarthy, 628 S.W.3d 18 (Ky. 2021) 38

Kentucky v. McCarthy, 142 S. Ct. 1126, 212 L. Ed. 2d 17 (2022) 38

Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 39

Griffin v. California, 380 U.S. 609 (1965) 39

V. Flagrant prosecutorial misconduct deprived Josh of a fair trial. 39-45

Preservation. 39

RCr 10.26 39

Misstatement of fact about the homemade silencer. 39-40

Dooley v. Commonwealth, 626 S.W.3d 487 (Ky. 2021) 39

Misrepresentation of Steven Weitz's testimony 40-41

Misrepresentation of Jennifer Owens' testimony. 41-42

Unreasonable inferences based on the testimony. 42

Law and analysis 42-45

Moore v. Commonwealth, 357 S.W.3d 470 (Ky. 2011) 42, 43

Berger v. United States, 295 U.S. 78 (1935) 43

Coates v. Commonwealth, 469 S.W.2d 346 (Ky. 1971) 43

Blair v. Commonwealth, 144 S.W.3d 801 (Ky. 2004) 43

Carter v. Commonwealth., 278 Ky. 14, 128 S.W.2d 214 (1939) 43

Parrish v. Commonwealth, 581 S.W.2d 560 (Ky. 1979) 43

Schaefer v. Commonwealth, 622 S.W.2d 218 (Ky. 1981) 43

Beavers v. Commonwealth, 612 S.W.2d 131 (Ky. 1980) 43

Miller v. Commonwealth, 283 S.W.3d 690 (Ky. 2009) 43

Barnes v. Commonwealth, 91 S.W.3d 564 (Ky. 2002) 43

Hannah v. Commonwealth, 306 S.W.3d 509 (Ky. 2010) 43

Faulkner v. Commonwealth, 423 S.W.2d 245 (Ky. 1968) 45

Berger v. United States. 295 U.S. 75 (1935) 45

6th Amendment, US Constitution 45

8th Amendment, US Constitution 45

14th Amendment, US Constitution 45

§ 2, KY Constitution 45

§ 3, KY Constitution 45

§ 7, KY Constitution 45

§ 11, KY Constitution 45

§ 17, KY Constitution 45

VI. Josh Ward was entitled to a directed verdict on both counts of murder. 45-50

Preservation. 45

Law. 45-49

Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991) 45

Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983) 45

Johnson v. Commonwealth, 885 S.W.2d 951 (Ky. 1994) 46

Adkins v. Commonwealth, 230 S.W.2d 453 (Ky. App. 1950) 46

DeAttley v. Commonwealth, 220 S.W.2d 106 (Ky. App. 1949) 46

14th Amendment. U,\.S. Constitution 46

Taylor v. Kentucky, 436 U.S. 478 (1978) 46

Nobody could place Josh at the scene because Josh was at home. 46

DNA and fingerprint evidence excluded Josh from the scene. 47

The Little Caesars video was irrelevant and did not prove anything. 47

No evidence linking Josh to Kelli after the breakup. 47-48

Gun and target practice. 48

Southworth v. Commonwealth, 435 S.W.3d 32 (Ky. 2014) 48

Collinsworth v. Commonwealth, 476 S.W.2d 201 (Ky. 1972) 48

Pseudo-Science Ballistics. 48-49

Encrypted apps and secrecy. 49

Conclusion. 49-50

Hodges v. Commonwealth, 473 S.W.2d 811 (Ky. 1971) 49

Conclusion 50

Statement of the Case

Kelli Kramer and her nine-year-old son were found shot to death in their apartment in March of 2018. Appellant, Joshua Ward, had dated Kelli at one time but had not had any contact with her since their breakup nine months earlier. Josh, Kelli, and most of the witnesses in this case had an alternative lifestyle involving multiple sex partners. Josh became the focus of the investigation when he was misidentified in a store video where Kelli worked. Despite DNA excluding him from the scene of the crime and cell phone data indicating he was at home at the time of the murders, Josh was indicted on two counts of murder. The Commonwealth's case against Josh was weak, both in terms of physical evidence and circumstantial evidence. There were many witnesses involved, and the relationships were often intermingled, overlapping, and confusing.

Josh and Karen and their relationship.

Josh and Karen Ward, a childless couple married for 16 years, had a polyamorous relationship. VR: 8/31/21; 10:49:00. Josh desired a family unit consisting of several "wives" with him as the leader. Id. 1:05:00. Karen preferred to keep her relationship with Josh's girlfriends strictly platonic. Id. 10:51:00. Josh took a transactional approach to bringing new women into the fold. There had to be a mutual desire, and his wife and current girlfriend(s) had to approve. Id. 1:07:00.

Fetlife community.

Josh and most of the witnesses involved in this case were members of Fetlife. Fetlife is an online community for people interested in kinky or unusual sexual things. VR:8/24/21; 9:55:32. In this community, Josh was considered "vanilla" because his sexual preferences were tame compared to others. VR: 8/25/21; 3:29:00. Josh was

interested in polyamorous relationships comprised of a dominant/submissive role. VR: 8/31/21; 1:07:00. Due to the unusual nature of the content on Fetlife, people often use anonymous profiles to protect their identities. VR: 8/31/21; 1:37:28.

The Girlfriends[1]

Diane Christos – Girlfriend 1 (GF1)

Josh had been dating Diane Christos since May of 2016. VR:8/25/21; 2:54:30. Diane and Karen (wife) were good friends. VR: 8/31/21; 10:52:00.

Tonya Palmer – Girlfriend 2 (GF 2)

Josh had met Tonya (GF2) from the Fetlife community in December of 2016. VR: 8/26/21; 10:00:00. Tonya, a swinger, was intrigued by the polyamorous lifestyle and began dating Josh. Tonya left for a month-long trip to Alaska, and upon her return she was dismayed to find that Josh had moved on. Id. 10:02:00. Josh, Karen (wife), Diane (GF1), and Kelli (GF3) had begun to form a family unit in Tonya's absence. Id. 9:12:00. Tonya (GF2) felt Josh had not given her time to decide about the polyamorous lifestyle before bringing in Kelli (GF3). Id. 10:02:00. Despite being intrigued, Tonya decided the polyamorous lifestyle was not for her. She and Josh remained friends, and she considered herself to be Josh's intellectual companion. Id. 9:13:00, 10:02:00.

Kelli Kramer – Girlfriend 3 (GF3)

In the winter of 2016, Josh met Kelli Kramer (GF3) on Fetlife. VR: 8/24/21 2:27:00. In January 2017, Kelli met with Josh and Diane (GF1) to discuss a potential relationship. VR: 8/31/21; 1:14:00. Kelli (GF3) impressed Josh with her willingness to stop smoking to become part of the family. VR: 8/24/21; 2:31:00. A bonus was that Kelli

[1] For clarity of the women in Josh's family unit: Karen Ward – Wife (wife); Diane Christos – Girlfriend 1 (GF1); Tonya Palmer – Girlfriend 2 (GF2); Kelli Kramer – Girlfriend 3 (GF3).

had a nine-year-old son, Aiden. Due to a childhood illness, Josh had never been able to have children, and he had always wanted his family to include children. VR: 8/25/21; 2:17:00.

Kelli had a tumultuous life. She struggled with paying her bills, debt, and obtaining gainful employment. Aside from Fetlife, Kelli was involved with drugs and prostitution. VR: 8/23/21; 3:59:00. Kelli had a sexual relationship with her "sugar daddy," Paul Sauer, who helped with her bills and bought presents for Aiden. VR: 8/25/21; 1:06:00. Due to Kelli's drug use and her chaotic lifestyle, Kelli's parents kept Aiden most of the time. VR: 8/23/21; 3:59:00; 4:01:00. Kelli kept much of her lifestyle private, and her parents knew little about it. Id. 3:59:00, 4:11:12.

Interestingly, Kelli had numerous "stalkers." The detective learned of at least three people who Kelli had claimed stalked her, including a man who would leave her notes on her car, a police officer driving a black SUV, and a man named Paul McCreety who stalked her on Facebook. VR: 8/24/21; 4:05:00, 4:06:00.

As Josh and Diane's (GF1) relationship with Kelli (GF3) progressed, Josh tried to provide stability for Kelli. He used his connections for job interviews and called credit agencies about consolidating her debt. VR: 8/31/21; 1:16:00-18:00. Kelli introduced Josh to her son, and the two began to develop a father-son relationship. Despite how private Kelli was about her life, she decided to introduce Josh to her parents. Id. 1:19:00. Josh had invited Kelly and Aiden to move in with him and his wife. Josh, concerned about the quality of nearby schools and the disruption of education, talked to Kelli's parents about Aiden staying there until the end of the school year. Id. 1:18:00. VR: 8/23/21; 4:03:00. Meanwhile, Josh and Karen (wife) began remodeling their home for Kelli (GF3) and

Aiden. VR: 8/25/21; 4:12:00. Outside of Josh and Kelli's relationship, Kelli (GF3) and Diane (GF1) became romantically involved. VR: 8/24/21; 2:48:00.

The breakup.

Just as Josh's envisioned family unit began to take shape, small cracks began to show. Polyamorous relationships, although open and consensual, are not immune to the mundane realities of virtually all relationships. Diane (GF1) became jealous of how much attention Josh gave Kelli (GF3). VR: 8/25/21; 3:36:00. Diane was self-conscious about her body and resentful of how often Josh was intimate with Kelli. VR: 8/31/21; 11:06:00. Soon, questions about Kelli's faithfulness to the family arose.

Part of Josh and Kelli's dominant/submissive relationship was that Josh had access to all of Kelli's accounts (email, social media, etc.) and passwords. VR: 8/24/21; 2:39:00. While looking for an email on Kelli's computer about a job application, Josh stumbled across emails detailing money transfers in exchange for sexual favors. VR: 8/31/21; 1:19:32. Both Josh and Diane (GF1) were hurt by this breach of trust in their family unit. They had to get tested for sexually transmitted diseases. Id.1:27:00. Josh was uneasy about continuing the relationship, but Kelli (GF3) claimed the emails were old and that she had no longer done such things. Id. 1:20:00. Everyone decided to continue the relationship, tenuous though it was. VR: 8/24/21; 2:44:00. Josh was not ready to give up on his vision of his family. He gave Kelli (GF3) a promise ring, and he and Karen (wife) continued with their home remodeling. Id. 2:36:00.

Five months into the relationship, Kelli (GF3) went to her job at a restaurant and accidentally left her phone at Josh's house. Id. 2:45:00. Josh saw the phone and called the restaurant to tell Kelli he would drop it off. Before leaving, he decided to check it. His

suspicions were confirmed when he discovered recent money transfer emails from Kelli's sugar daddy and a Facebook message from a guy asking if Kelli would give him oral sex again. Id. 2:46:00 – 47:00. Heartbroken, Josh drove to the restaurant.

On the way, he called Kelli's mom and told her Kelli needed help, and he couldn't do it anymore. He told her that if she wanted to fight for custody of Aiden, he would help her. VR: 8/31/21; 1:23:00. Josh entered the restaurant and found Kelli sitting at a table with her coworkers. In front of everyone, he ended the relationship. Josh told Kelli he had seen the texts and knew she was still prostituting. Josh told her he never wanted to see or talk to her again. Id. 1:21:00 – 1:22:00.

When Josh returned home, he signed on to Kelli's Facebook. Pretending to be Kelli, he posted that she was a prostitute and drug user. Id. 1:23:00. Josh never spoke to or saw Kelli again. Id. 1:24:33.

After the breakup, Josh was upset about losing his relationship with Aiden. On two occasions, Josh drove to Kelli's parents' house with the plan of talking to Kelli about seeing Aiden. However, he never saw Kelli's car in their driveway, so he eventually left after waiting a long time. Id. 1:24:00 – 1:25:32.

Moving on.

Although Josh was devastated by the breakup, he and Kelli eventually started dating other people. Josh began to date a woman named Sarah Johnson and became involved in travel and other activities. Id. 2:00:33. Meanwhile, Kelli started talking to David Sullivan, another Fetlife dominant/submissive member. VR: 8/24/21; 9:55:00. Notably, when Kelli started talking to David, David was in a relationship with a woman named Sigma. Id. 10:02:00.

In November 2017, David broke up with his girlfriend, Sigma Novak. Id. 10:02:00. Sigma was also a part of the Fetlife community and a member of the "Primal" subgroup on Fetlife[2]. Id. 12:16:40. One of Sigma's known fantasies was to track somebody down for multiple days, bind them, and torture them.[3] Id. 12:16:30. Sigma was described as jealous and possessive. Id. 12:13:42. Sigma would urinate around David's apartment to mark her territory. Id. 12:15:07. David testified that "based on some of the things that [he] had seen in that house, if [he] were ever to walk into a house and find dead bodies [he] thought it would be Sigma's house." Id. 12:15:40.

Sigma attended the same Beat My Valentine convention that David and Kelli attended in February 2018. This event was the first time that David and Kelli made their relationship public to the Fetlife crowd. Id. 10:00:30. Sigma, known for her jealousy and possessiveness, was not happy. Id. 12:13:00. She followed David throughout the convention. She yelled at him. She tracked Kelli down and sent her messages about David. Id. 12:14:40. After the convention, Sigma used her children's Facebook accounts to track David. Id. 12:18:07. David told the police that Sigma had tried to get a gun after they broke up. He was concerned because Sigma was not stable. Id. 12:18:14. In March of 2018 (the month of the murders), David believed he was being followed. Id. 12:20:00.

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[2] "In a general BDSM sense, Primals can identify as dominants or submissive but may choose to use alternate terms, such as hunter and prey." And "Primals release themselves from the inhibitions of our world to allow themselves a headspace that is instinctual and reactive to their base impulses and desires." Marla Steward, *Primal*, Kinkly, https://www.kinkly.com/defintiion/12231/primal (last visited May 26, 2022).

[3] "On a base level, primal play is a way to exhibit raw emotion and desire outside of the social constraints we live with every day. We generally aren't allowed to just 'take' what we want, and physically fighting for it is also off-limits. In primal play, however, those participating are fully aware and engaged in the idea of devolving back to our basic instincts of desire. Primals give themselves over to a sort of devolution during their scenes where rules and social niceties are discarded. Take what you want, when you want it." *Id.*

Josh did not attend the Beat My Valentine convention and had no contact with Kelli since May 2017. VR: 8/31/21; 2:40:00, 1:24:33.

Target practice.

Despite being restricted from guns due to a felony conviction when he was 18[4], Josh had always loved to target shoot. Josh's wife Karen, a paramedic, had started taking classes to overcome her fear of guns and have a hobby in common with her father. VR: 8/31/21; 10:53:00 The previous Christmas (December of 2016), Josh and Diane (GF1) had given Karen (wife) two guns—a .22 caliber handgun and a 9mm handgun—as a gift. Id. 10:52:00-53:00. Josh would often take Karen (wife) and Diane (GF1) on dates to target shoot at an indoor gun range. VR: 8/25/21; 4:16:00. 8/31/21; 10:54:00.

Josh used Karen's (wife) guns to target practice on Tonya's (GF2) farm in Ohio on three or four occasions in the summer of 2017. VR: 8/31/21; 1:40:00. Josh had agreed to pick up his shell casings so that Tonya's son would not have to deal with them when he mowed. VR: 8/31/21; 1:42:00. Tonya's son also shot guns at the farm. VR: 8/26/21; 11:08:00. Near the end of that summer, Josh stopped target shooting altogether. VR: 8/31/21; 1:45:15.

The day of the murders.

On Tuesday, March 20, 2018, Kelli and Aiden visited Chelsea Ballard in Crittenden. Even though Chelsea's mom was a notorious drug trafficker in the area, Chelsea and Kelli had decided to start their own drug trafficking business. VR:8/25/21; 1:56:00. Chelsea was short on cash, so Kelli withdrew $400.00—a significant sum to

[4] When Josh was 19 years old, he was charged with two counts of burglary and two counts of grand larceny for removing items from one office building that contained two separate businesses. VR: 8/24/21; 3:09:00.

her—from her account to buy drugs with the promise that Chelsea would pay Kelli back the $400 plus her share of the profit. Id. 1:31:00. Kelli lied to David about where she was going and what she was doing that day. VR: 8/24/21; 11:33:00.

Chelsea and Kelli drove to Dayton, Ohio, to buy drugs from Chelsea's dealer. VR: 8/25/21; 1:30:00. Upon their return, they realized half of the drugs were fake. Id. 1:32:00. Everybody at Chelsea's house did some meth, and Kelli left around 10:00 p.m. with Aiden. Kelli took about $10 worth of meth home with her. Id. 1:32:00; 1:36:00.

Kelli and Aiden stopped at the McDonalds drive-thru on the way home. Id. 1:33:00. David had called Kelli because they were supposed to meet later that evening. He said there was relief in Kelli's voice when they decided not to meet. David thought it was strange that she was relieved but also testified that Kelli had been acting weird the last few days. VR: 8/24/21; 11:41:00. This phone call was the last time anyone heard from her. Kelli's phone connected to her Wi-Fi router around 10:46 p.m., so police assumed she made it home around that time. VR: 8/27/21; 9:41:00.

David woke up at 2:00 a.m. and became worried when he realized Kelli had never texted him back. It was snowing that night, and he worried she may have wrecked. VR: 8/24/21; 10:11:00. David drove 30-35 minutes to her apartment. Id. 10:19:00. He entered the apartment at 3:30 a.m. and discovered Kelli and Aiden's bodies. There were no lights on, and Kelli and Aiden still had on their coats and shoes. Id. 10:23:00, 10:28:00.

Josh's whereabouts.

At the time of the murders, Josh's phone was on and consuming data within one mile of his home address (over 45 minutes away from Kelli's apartment), according to the cell phone towers. VR: 8/31/21; 9:56:18. Josh's wife, Karen, had worked a 24-hour

shift and returned home the morning of the 21st. Josh's car was at their apartment and was covered in four inches of snow. Id. 11:26:22. Josh testified he was still recovering from being sick after his vacation and had spent the evening reading. Id. 2:05:20. Josh had not had any contact with Kelli since the breakup in May of 2017. Id. 1:24:33.

The investigation.

DNA evidence. Kelli and Aiden had been shot nine times in total. VR: 8/24/21; 9:25:00, 9:37:00. No neighbors heard or saw anything. VR: 8/2/21; 10:58:00. Nine case shells were collected from the crime scene. The DNA on the shells contained a mixture of three persons, including one male. Kelli and Aiden's DNA were found on the casings, but Josh was excluded as a contributor. VR: 8/25/21; 9:28:00.

The Starbucks video. David, Kelli's boyfriend at the time of her death, showed police a text Kelli had sent him in December of 2017. VR: 8/24/21; 12:07:00. Kelli had been working at Starbucks and sent a text to David saying Josh had popped up out of nowhere and that it was weird. She made a joke about serving him decaf. Id. 10:03:43. After the murders (in March 2018), this text would turn the focus of the police on Josh. Police pulled the Starbucks video from the day Kelli sent the text. A large man in an orange sweatshirt could be seen in the store. Id. 4:25:00. The police were convinced the man was Josh. Det. Keipert admitted he had told the grand jury that it appeared to him that the man (whom he believed to be Josh) was staring at Kelli the whole time while Kelli was doing everything to avoid making eye contact with him. Id. 4:25:00.

The police questioned multiple witnesses, trying to get an identification, but none could affirmatively say it was Josh. VR: 8/24/21; 4:25:35; VR: 8/25/21; 4:48:10; VR: 8/27/21; 10:44:08. The police searched Josh's home for the orange sweatshirt but could

never find it. VR: 8/24/21; 4:25:00. The mystery was solved when the defense called Michael Edwards as a trial witness. Mr. Edwards identified himself as the man in the Starbucks video. He produced the orange sweatshirt and baseball cap he was wearing that day. The defense had been able to locate him because he had paid for his drink using the Starbucks app. Mr. Edwards had dropped off his wife for an appointment that day, popped in to get a venti caramel macchiato, and unwittingly became part of a double homicide investigation. VR: 8/31/21; 10:37:56 – 10:44:15.

Regardless, Kelli's **ONE** text to David about Josh showing up at Starbucks and watching her (which was proven to be a falsehood) sent **SEVEN MONTHS** after Josh's last contact with Kelli was what made Josh the key suspect in the investigation.

Detective Tonya. "Detective Tonya" (GF2). as she liked to call herself, became very caught up in the investigation. VR: 8/26/21; 10:28:00. Tonya made two separate reports to the crime stop tip line. Id. 9:42:00. She reported every phone call and text between her and Josh to the detectives. Id. 9:47:00. She even wore a wire and tried to (unsuccessfully) elicit incriminating statements from Josh over a four-hour lunch. Id. 9:48:00. She called the detectives daily, sometimes hourly, sometimes multiple times an hour, offering her insights. She even called them when they were on vacation. She emailed them articles about masochism and her personality so they could understand what aroused her and how she was an empath because she thought it was relevant to the investigation. Id. 10:20:00-28:00. "Detective Tonya" sought to inject herself countless times into the investigation, but rarely provided useful leads to the police.

Ballistics evidence. When police learned that Josh had target practiced at Tonya's (GF2) farm nine months earlier, they went to the farm and collected stray shell casings.

VR: 8/26/21; 3:43:00. Ballistics examination indicated that shell casings from the farm and the shell casings from the murder scene were consistent as having been fired from the same gun. Id. 2:05:00-07:00. However, the gun was never located. Id. 1:55:00.

Surveillance videos on night of murder. Surveillance videos near Kelli's apartment were pulled. Although the police admitted they could not identify the vehicles on the footage, the detective speculated (much like with the Starbucks video) that one of the vehicles was similar to Josh's. VR:8/27/21; 9:55:00. Josh was charged based on this tunnel vision investigation and with extremely weak evidence.

The indictment and conviction.

During deliberations after the seven-day trial, the jury had questions about Sigma. Sigma died of cancer before the trial. VR: 8/24/21; 10:01:48. The Commonwealth was also unable to collect enough DNA from Sigma's belongings to compare her DNA to the DNA at the crime scene; therefore, she could not be eliminated as a suspect. VR: 8/25/21; 9:37:14. Because of this lack of evidence, the jurors had concerns about Sigma. During deliberations, the jury asked whether Sigma was given a life expectancy after her diagnosis and the date of her death. VR: 9/1/21; 12:46:11.

Despite the jury's inquisition about Sigma, Josh was indicted in the deaths of Kelli and Aiden. After a seven-day trial, the jury found Josh guilty of the double homicide and the trial court imposed the recommended maximum life sentence without the possibility of parole. VR: 9/1/21; 5:08:00. VR: 11/18/21; 11:27:00. This appeal follows.

ARGUMENT

I. Josh was denied his right to present a defense when he was not allowed to recall witnesses as hybrid counsel.

Preservation. This issue is preserved. VR: 8/31/21; 9:41:05.

Facts. The written order granting Josh his role as hybrid counsel described several responsibilities that Josh would have as hybrid counsel including:

> The Defendant shall be jointly responsible for cross-examination of all witnesses called by the Commonwealth; and to raise any objections to evidence. The Defendant shall be jointly responsible for deciding whether to produce any witnesses at trial or to introduce any exhibits.... It will be the Defendant's joint responsibility to make all strategy decisions which would include whether to testify; to call other witnesses; and, to offer exhibits and other evidence.

TR III, 409. The order also provided that Josh and defense counsel should submit in writing their respective roles and responsibilities during trial. TR III, 410.

Although there was no written delineation of duties in the record, defense counsel stated his understanding on the record. VR: 8/2/21; 10:24:31. Defense counsel[5] stated:

> My understanding from speaking with [Josh], I think he is wanting me and Ms. Graham to take on 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.10:24:59. The court asked the Commonwealth if they had anything to add but did not ask Josh. Id.10:25:03.

The Commonwealth filed a Motion In Limine to Limit Examination of Certain Witnesses by Defendant Serving as Hybrid-Counsel. TR IV, 527-529. App. 2. The Commonwealth requested a "ruling from the [trial] court prohibiting the Defendant from personally examining, either via direct or cross-examination, three Commonwealth witnesses: Tonya Palmer, Diane Christos, and Adrienne Fiely." TR IV, 528. The

[5] Defense counsel for Josh Ward consisted of Hon. Daniel Schubert and Hon. Ashley Graham.

Commonwealth said these individuals indicated they feared harm by the defendant. Id. The Commonwealth did not object to "Defendant being allowed to prepare questions and consult with co-counsel before and during the direct or cross examination of Palmer, Christos, and Fiely." Id. The certificate of service for this motion only showed notice was sent to Mr. Schubert and Ms. Graham; Josh was not included as a recipient of the motion. TR. IV, 529.

During a hearing on the matter, the Commonwealth stated there was no reply or response filed, so they assumed there was no objection to the motion. Defense counsel responded "no" and the trial court granted the motion. VR: 8/2/21; 10:19:50. The trial court did not address whether Josh agreed or disagreed with the motion, nor did counsel acknowledge whether they consulted Josh about the motion limiting his rights to present a defense. Nothing in the record confirmed whether Josh was aware the motion was filed or if he had a chance to respond to it. This became an issue during day six of the jury trial when there was a disagreement between Josh and his defense counsel regarding trial strategy. VR: 8/31/21; 9:03:42.

As the defense was preparing to start their case on direct, Josh learned that counsel was not planning on recalling Tonya, Diane, Adrianne, or Nicole. Id. 9:17:50. Josh assumed they would be recalled as witnesses for the defense, and they would be able to impeach them further on their testimony. Id. 9:15:44. Defense counsel thought it would be negligent in recalling those witnesses "to establish very minor tweaks" and opening them up to cross-examination by the Commonwealth would "result in completely obliterating the work we have done thus far." Id. 9:18:30. Defense counsel "didn't feel like cutting our wrists by recalling them." Id. 9:16:00.

During the ex-parte hearing, Josh said if he had known that counsel would refuse to call the witnesses in the defense's case in chief, he would have demanded a more thorough cross. Id. 9:19:43. The trial court remained neutral and reminded Josh that although he was hybrid counsel, he had very experienced attorneys representing him. Id. at 9:21:10 – 9:23:05.

The trial court reminded Josh and defense counsel that the witnesses could be recalled, but that Josh would not be allowed to examine them personally due to the pretrial ruling. Id. 9:23:50. Defense counsel argued that since Josh could not personally question the witnesses, counsel would essentially be asking the questions that Josh prepared, which "turns me into his puppet as opposed to counsel. I no longer have autonomy." Id. 9:23:54.

Josh and defense counsel discussed how to move forward privately but remained at an impasse. Defense counsel did not believe recalling witnesses would help the case. Id. 9:41:10. Josh believed recalling the witnesses would impeach their testimony. Id. 9:16:00. The trial court, by remaining neutral, effectively resolved this matter in favor of defense counsel and merely confirmed with Josh that the issue was preserved on the record and the trial would move forward. Id. 9:41:56. The subject witnesses were not recalled. The trial court's failure to rule on this issue deprived Josh of his ability to present a defense and confront witnesses.

Josh was deprived of his 6th Amendment right to self-representation, which asserts structural error for which harm need not be shown to reverse. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error'

analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984).

A structural error is palpable error under RCr 10.26 and must be addressed regardless of how well it is preserved and is not subject to harmless error analysis. *Cf., Peak v. Commonwealth*, 197 S.W.3d 536 (Ky. 2006) (treating structural and palpable error as synonymous); *Hill v. Commonwealth*, 125 S.W.3d 221, 228-229 (Ky. 2004). Structural error is a legal issue, reviewable de novo. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991); *Commonwealth v. Smith*, 898 S.W.2d 496, 504 (Ky. App. 1995).

There is uncertainty in the 6th Circuit concerning the standard of review for *Faretta*[6] 6th Amendment self-representation claims. *See United States v. Evans*, 559 Fed. Appx. 475, 478 (6th Cir. 2014). Decisions denying and limiting a defendant's request for self-representation have been reviewed *de novo* and for abuse of discretion. *See, e.g. United States v. Jones*, 489 F.3d 243, 247 (6th Cir. 2007); *Robards v. Rees*, 789 F.2d 379, 383-84 (6th Cir. 1986). Despite the uncertainty, the 6th Circuit has affirmed courts under both standards of review. *See United States v. Pryor*, 842 F.3d 441, 448 (6th Cir. 2016); *U.S. v. Clark*, 774 F.3d 1108, 1112 (7th Cir. 2014).

Analysis. Kentucky Constitution § 11 provides that "[i]n all criminal prosecutions the accused has the right to be heard by himself and counsel…" As well the 6th Amendment of the U.S. Constitution enumerates the right "to have the assistance of counsel for his defense." In 1974, in *Wake v. Barker*, 514 S.W.2d 692 (Ky. App. 1974), this Court issued

[6] *Faretta v. California*, 422 U.S. 806 (1975).

a far-reaching ruling that Ky. Const.§ 11 guarantees the right to self-representation, and further that a defendant may also choose hybrid representation in which he acts as lead counsel, and his attorney acts as co-counsel or hybrid counsel, with whatever limits the defendant desires on the role his attorney will play.

In this case, the trial court followed the directives addressed in *Faretta* and *Wilson*[7] to ensure Josh understood what he was requesting and agreeing to when he made a motion to be hybrid counsel. TR III, 399-400. A *Faretta* hearing was held, and the trial court questioned Josh about his education level, work history, legal knowledge, and goals for hybrid counsel, and warned the landmines and pitfalls that can occur with *pro se* representation. VR: 3/1/21; TR III, 407-410. Having granted Josh's request for hybrid counsel, it was incumbent upon the trial court and defense counsel to respect Josh's decisions regarding trial strategy. "The *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 v. Wiggins*, 465 U.S. at 174 (emphasis added).

"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 v. Commonwealth*, 410 S.W.3d 125, 138-39 (Ky. 2013); see also *Major v. Commonwealth*, 265 S.W.3d 706, 718 (Ky. 2009), as corrected (Mar. 10,2009) ("Section 11 serves as the basis of the right to hybrid counsel, or the right to be heard 'by himself and counsel.'"). By undertaking the

[7] *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992), overruled on other grounds by *St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999)

remaining portion of his defense *pro se*, Josh is asserting his affirmative right to participate under *Faretta*. To determine if Josh's *Faretta* rights were violated, the Court must consider whether Josh "had a fair chance to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. at 177.

Josh was denied a fair chance to present his case in his own way when he was limited on which witnesses he was allowed to personally question because the trial court ruled in favor of defense's trial strategy, instead of Josh's. TR IV, 527 – 529. VR: 8/31/21; 9:41:00. Due to the allegations in this trial, some witnesses alleged that they feared Josh; therefore, the Commonwealth motioned the court to limit Josh's rights without sending Josh notice. TR IV, 528. Josh was hybrid counsel and therefore should have been treated like an attorney, which would have entitled him to receive service of all documents filed in the case.[8] TR IV, 529. Defense counsel did not object to this failure of notice, nor did the trial court give Josh a chance to respond to the motion. VR: 8/2/21; 10:19:50. The prosecutor and defense counsel agreed that Josh could help prepare questions for cross-examination of the specified witnesses. However, this agreement did nothing to help Josh when defense counsel refused to recall the witnesses on direct. TR IV, 527, VR 8/2/21; 10:19:50, VR: 8/31/21; 9:15:44.

At the core of a pro se defendant's *Faretta* right is the entitlement to preserve actual control over the case he chooses to present to the jury. *McKaskle v. Wiggins*, 465 U.S. at 178. Since Diane, Adriene, and Tonya were all subject to recall by the defense, Josh planned to call them on direct to confront and challenge their testimony further. VR:

[8] "Proof of service shall state the date and manner of service and shall include the names and addresses of all attorneys and parties not represented by counsel." KY R BOONE GALLATIN DIST CT Rule 6 (c).

8/25/21; 4:18:00, 5:04:00; VR: 8/26/21; 10:44:00; VR: 8/31/21; 9:15:00. Defense counsel refused to recall the witnesses because he disagreed with Josh's trial strategy. VR: 8/31/21; 9:16:00.

This disagreement between hybrid counsel interfered with Josh's ability to control how his case was presented to the jury. The witnesses were subject to recall, and the trial court enforced the pretrial order (that Josh did not receive notice of), limiting Josh's ability to question specific witnesses. Therefore, it was defense counsel and the trial court that hindered Josh's *Faretta* and 6th Amendment rights. Defense counsel's "participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded." *Mckaskle v. Wiggins*, 465 U.S. at 178. Josh was the one facing life without parole, not defense counsel or the trial court. Josh's freedom was at issue, and he could not control the presentation of his defense due to defense counsel's disagreement. Therefore, defense counsel substantially interfered with a tactical decision, leading to Josh's *Faretta* rights being dissolved.

Josh argued that defense counsel should have recalled them on direct to flesh out and confront the inconsistencies in their testimony. Josh was not allowed to recall certain witnesses because defense counsel refused to be a puppet by recalling them and consulting with Josh on which questions to ask. VR: 8/31/21; 9:23:54. This was a trial strategy impasse between hybrid counsel and co-counsel.

In *McKaskle v. Wiggins*, when there was an impasse, "all conflicts between Wiggins and counsel were resolved in Wiggins' favor. The trial judge repeatedly

explained to all concerned that Wiggins' strategic choices, not counsel's, would prevail." 465 U.S. at 181. Unlike the judge in *McKaskle*, the trial judge did not allow Josh's strategic choices to prevail. Instead, the trial judge affirmed defense counsel's choice not to be a puppet, thereby depriving Josh of his ability to present a defense

"Thus, *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." *Id.* at 179. Yes, Josh was able to address the court out of the jury's presence at the ex parte hearing, but the resolution was not in his favor.

It was Josh's freedom and life at stake. Josh wanted to confront and attack the credibility of the witnesses by showing inconsistencies in their testimony. The trial court should have resolved this in Josh's favor by allowing Josh to proceed as hybrid *pro se* counsel even if defense counsel disagreed with the strategy. In a trial where evidence was far from overwhelming, Josh's ability to cross-examine these witnesses was critical. Defense counsel believed his trial work and strategy would be weakened if Josh's demands were met. However, part of being hybrid or standby counsel is to act on behalf of the *pro se* defendant and to allow their strategic choices to prevail over the defense counsel's desires, difficult though that may be.

Josh deserved due process and the ability to present his case at a fair trial in the way he thought was best. His 5th and 6th Amendment rights were violated.

II. The trial court abused its discretion by denying Joshua Ward's Motion in Limine to limit the firearm examiner's testimony.

Preservation. This issue is preserved. TR IV, 565-569, 596. TR V, 622. VR: 08/02/21; 11:22:00-11:52:00.

Facts. There was minimal evidence connecting Josh to the murders. See Issue VI. The physical evidence collected in the case did not prove a connection between Josh and the murders, and the ballistics evidence was no exception.

"Detective Tonya" (as she liked to call herself) said Josh came to her farm on three occasions over six weeks in the summer of 2017 to target practice. VR: 8/26/21; 9:24:00. Josh's wife, Karen, testified that Josh used two of her guns (a .22 handgun and a 9mm handgun) to target practice at Tonya's farm and that she accompanied him on one occasion. Karen eventually traded both of these guns for a smaller 9mm handgun, which she still has. VR: 8/31/21; 10:58:00, 11:01:00.

After the March murders, in April 2018 (over nine months since Josh had last been at Tonya's property), Detective Faulkner took a metal detector to Tonya's farm and collected spent shell casings. VR: 8/26/21; 3:43:00. The ballistics evidence at issue consisted of nine .22 caliber shell casings collected from the crime scene at Kelli's apartment in Burlington, Kentucky ("crime scene casings"), and two .22 shell casings collected from Tonya's property in Hamersville, Ohio ("field casings"). TR IV, 577-582. VR: 8/2/21; 11:22:00-11:52:00. The weapon used in the murders of Kelli and Aiden was never recovered. VR: 8/26/21; 1:55:00.

This evidence was submitted to the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") laboratory for toolmark examination on April 19, 2018, and examined by the Commonwealth's expert witness, Jennifer Owens. In her report, Ms. Owens concluded that the crime scene and field casings "were identified as having been

fired from the same firearm."[9] TR IV, 566. Prior to trial, defense counsel filed a Motion in Limine to prohibit the Commonwealth from (1) eliciting any testimony using terms such as "match;"; (2) stating an opinion to a degree of statistical or scientific certainty; (3) phrasing an opinion "to the exclusion of all other firearms"; and (4) to any testimony concluding that the crime scene casings and field casings were fired from the same firearm. TR IV, 565.

The Commonwealth agreed with (1)-(3) in that Ms. Owens would not use the word "match," would not offer any testimony as to the degree of certainty, and would not offer an opinion to the exclusion of all other firearms. TR IV, 578. VR: 8/2/21; 11:00:34. However, the Commonwealth argued Ms. Owens could offer her conclusion that the crime scene casings and the field casings came from the same firearm based on the results of her examination. Id. 11:35:00.

At the hearing on the matter, defense counsel explained they were not asking for a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) because although the field of forensic firearm pattern examination had come under recent criticism, courts had largely found that ballistics/firearm examination testimony was admissible under a *Daubert* analysis. Id. 11:24:00-11:26:00. TR IV, 596. Rather, defense counsel wanted to limit Ms. Owens' testimony in accordance with recent federal cases.

[9] Detective Keipert testified that on May 8, 2018, he spoke with an agent from the ATF and had received information that there was already a result for the ballistics investigation. VR: 8/24/21; 4:29:00. However, Ms. Owens' report indicates she did not even examine the field casings until May 9, 2018. See Defense Exhibit 6, Jennifer Owens Case Notes, p.13. It is concerning that the ATF could have confirmed a result before the subject casings had even been examined. Yet one more reason this testimony should have been approached with caution.

Counsel argued the issue of limitations on firearm toolmark testimony had not been specifically addressed by Kentucky Courts. Id.; TR IV, 597. Not convinced, the trial court ratified the Commonwealth's agreement not to elicit (1)-(3). The judge ruled against the defense on (4) and allowed the witness to testify based on her expertise as to her opinion if the casings came from the same firearm. Id. 11:18:00-11:19:00.

The defense took issue with this ruling, arguing that a statement that the casings were "identified as having come from the same firearm" was essentially the same as saying there was a match. The defense requested that Ms. Owens' conclusions at least contain a modifier such as saying the crime scene casings and field casings were *consistent* with having been fired from the same firearm as opposed to "were identified as having come from the same firearm." Id. 11:41:00. The trial court believed this was a distinction without a difference and denied defense counsel's motion for Ms. Owens' testimony to be more nuanced. Id. 11:46:00-11:47:00; 11:41-11:42:00; 11:51:00.

At trial, Ms. Owens testified that her primary responsibility was to "compare fired bullets and cartridge cases to determine whether or not they were fired by the **same** firearm." VR: 8/26/21; 1:38:00. Ms. Owens explained that she first determined whether the class characteristics of the cartridge cases were consistent before undertaking a microscopic comparison. Id. 1:52:00. Using two microscopes joined by an optical bridge, Ms. Owens could simultaneously view two casings and compare the individual microscopic features on each casing. Id. 1:44:00, 1:45:00. She testified that based upon her analysis, the nine crime scene casings and the two field casings could be identified as having been fired from the **same** firearm. Id. 2:07:00; 2:16:00-2:17:00. On cross, Ms. Owens acknowledged her conclusions were a subjective determination. Id. 2:26:00.

In closing argument, the Commonwealth remarked on the ballistics evidence, saying it confirmed Josh was the killer and that the ballistics evidence was irrefutable:

> There is no bias here…Only confirmation. Physical evidence backed by 100 years of backed up forensic examinations of tool mark identification confirms that that man sitting before you killed Kelli Marie Kramer and her 9-year-old son Aiden. VR: 9/1/21; 10:16:00 …
>
> The markings that are important that were derived from the supervisor of the ATF lab are the markings distinctively made when it is fired through that weapon. 100 years this has been around for forensic examinations. It is credible. **It is irrefutable evidence. It is beyond a reasonable doubt evidence**. VR: 9/1/21; 10:46:00.

Josh was found guilty of the murders and was sentenced to the maximum sentence of life without the possibility of parole. VR: 9/1/21; 5:08:00. VR: 11/18/21; 11:27:00.

Analysis. Firearm Examiner conclusions have been routinely admitted into U.S. courts as expert evidence for around a century and in Kentucky since at least 1948. *See Garrett v. Commonwealth,* 534 S.W.3d 217 (Ky. 2017). However, as discussed below, in recent years concerns about the reliability of toolmarks have been repeatedly raised. The National Research Council ("NRC Report") and President's Council of Advisors on Science and Technology ("PCAST Report") have questioned the validity of assumptions about uniqueness and reproducibility in the context of toolmarks made by firearms, the precision of AFTE protocol, and the discipline's scientific knowledge base.

Garrett v. Commonwealth, 534 S.W.3d 217 (Ky. 2017) is the most recent case in Kentucky to deal with the reliability of the Commonwealth's ballistic examiner's testimony. *Garrett* ultimately held that the ballistic examiner's testimony survived a *Daubert* analysis and ruled that the examiner could testify that bullets found at two murder scenes were fired from the same weapon. Here, the Commonwealth contended, and the trial court agreed that *Garrett* was applicable to this case and that Ms. Owens

should be allowed to testify the casings were fired from the same firearm. VR: 8/2/21; 11:18:00-11:19:00. The defense argued that it was asking for a limitation on Ms. Owens' testimony in light of recent federal cases and that the *Garrett* case had not addressed such a request. Id. 11:41:00-11:51:00.

The *Garrett* opinion (which permitted testimony that bullets were fired from the same gun) relied heavily on the *Otero* case. *United States v. Otero*, 849 F.Supp.2d 425 (D.N.J. 2012). *Otero* was decided *before* the PCAST Report.[10] The PCAST Report's findings cast considerable doubt on the theory's reliability behind matching pieces of ballistics evidence. The *Garrett* opinion did not consider the PCAST Report at all. Since the PCAST Report was issued, federal courts that once routinely admitted firearm and toolmark identification evidence have approached such testimony with much more caution. See *United States v. Davis,* 2019 WL 4306971 *4 (W.D. Va. 2019); *Williams v. United States,* 210 A.3d 734 (D.C.Cir. 2019); *United States v. Harris,* 502 F.Supp. 3d 28 (D.D.C. 2020); *United States v. Shipp,* 422 F.Supp. 3d 762 (E.D.N.Y. 2020); *United States v. Tibbs,* No. 2016-CFI-19431, 2019 WL 4359486 (D.C. Super. Sep. 5, 2019).

One of the primary challenges to firearms and toolmark identification stems from the methodology's lack of objective criteria for examiners to determine a "match." *United States v. Romero-Lobato,* 379 F.Supp. 3d 1111 (D. Nev.2019). Courts have placed restrictions on the opinions the experts were permitted to offer, explaining

> "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty[,]".

[10] The President's Counsel of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (Sept. 20, 2016).

See United States v. Monteiro, 407 F. Supp. 2d 351 (D.Mass. 2006); *United States v. Glynn*, 578 F. Supp. 2d 567, 574-75 (S.D.N.Y. 2008); *United States v. Willock*, 696 F. Supp. 2d 536, 546-47 (D. Md. 2010).

As the PCAST report indicted the methods and principles of the purported science of firearms identification, courts across the country have increasingly curtailed what firearms experts can say about identification. And that diminution is exactly what Josh asked the trial court to do here: to curtail what Ms. Owens could say about identification.

In *United States v. Davis,* 2019 WL 4306971 (W.D. Va. 2019), the court strictly limited the testimony of the firearms expert:

> Concerns over the reliability of this testimony expressed in the NRC and PCAST reports and those reflected in a recent chorus of federal decisions lead the court to impose certain restrictions on the testimony of these toolmark examiners. The examiners may not testify that the marks indicate a "match," **or that cartridge cases were fired by the same firearm.** They may not testify that cartridge cases have "signature" toolmarks identifying a single firearm. The court expressly precludes the examiners from testifying "to a level of practical impossibility" that cartridges could be identified to a single firearm. Given the absence of any empirical basis upon which to ascertain an error rate for these examiners' testimony as to the existence of similar toolmarks, the examiners will not be permitted to express any confidence level.

Davis, 2019 WL 4306971 *7. Emphasis added. *See also U.S. v. Medley,* 312 F.Supp 3d 493 (D. Md. 2018) (expert could opine that the marks…that were found on the crime scene cartridges are *consistent* with the marks found on the test fire, but prohibited the expert from offering an opinion that the suspect cartridges came from a particular gun.).

In *United States v. Shipp,* 422 F.Supp.3d 762, 765-766 (E.D.N.Y. 2019), the court held that "because the PCAST Report's findings cast considerable doubt on the reliability of the theory behind matching pieces of ballistics evidence, [the expert] will be permitted to testify only that the toolmarks on the recovered bullet fragments and shell casing are ***consistent*** with having been fired from the recovered firearm." Emphasis added.

In the instant case, defense counsel asked that Ms. Owens' testimony be limited, arguing that a conclusion that the subject casings have been "identified as having been fired in the same firearm" was no different than saying there was a match. *United States v. Tibbs,* 2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019) helps analyze the wording the trial court allowed Ms. Owens to use here.

In *Tibbs,* the court found after an exhaustive analysis that reliable principles and methods did not adequately support the theory that a firearms examiner could identify a particular firearm as having fired a particular bullet or cartridge casing. *Id.* at *22. The court prohibited the firearms examiner from testifying in the form of such a source attribution statement. The court ruled that the government's expert could give general specialized opinion testimony such as describing his work and the comparisons he made; the basis of his conclusion regarding the physical consistency of the toolmarks that he observed; and a comparison of the samples based on class characteristics. *Id.* at *22-23.

In sum, the *Tibbs* judge concluded that the expert may conclude that based on his examination the recovered firearm **cannot be excluded** as the source of the cartridge casing found on the scene. In other words, that the firearm *may* have fired the recovered casing. Similarly, the expert was precluded from stating that individual marks are unique to a particular firearm or that observed individual characteristics can be used to 'match' a firearm to a piece of ballistics evidence. *Id.* at *22-23.

The government, however, wanted its expert to be able to testify that, based on his training and experience, he believed that the recovered cartridge casing was fired from the recovered gun. The court disallowed this, finding this wording was still making a source attribution statement even though it was characterized as the expert's opinion. *Id.*

Here, Ms. Owens testified that the crime scene and field casings were identified as having been **fired from the same gun**. If there had been a recovered gun, this testimony would have been prohibited under the reasoning of *Tibbs, Shipp, Davis,* and *Medley.* The fact that there was no recovered gun in this case in which to test-fire makes Ms. Owens' conclusions even more troubling and speculative. Similarly, Ms. Owens' language "identified as having come from the same firearm" is in no substantive way any different than saying there was a match. Again, the trial court and Commonwealth both agreed that Ms. Owens could not testify there was a match. Yet what Ms. Owens did testify to was the functional equivalent.

This testimony was particularly prejudicial where no gun was recovered, and there was virtually no evidence connecting Josh to the crime scene. No evidence showed that the case shells collected from Tonya's farm came from the gun Josh had fired **nine months earlier**. DNA collected from the bullet casings at the crime scene excluded Josh as a contributor. VR: 8/25/21; 9:19:00, 9:28:00. The Commonwealth could not establish that Josh was near Kelli's apartment on the night in question. See VR: 8/27/21; 9:17:00-10:02:00. See Issue III. The ballistics expert's testimony should have been limited to align with the aforementioned federal cases. The evidence was far from overwhelming, and for the jury to hear that the shell casings were fired from the same gun was the same as hearing there was a match.

Josh's right to a fair trial has been denied. 6th and 14th Amends., U.S. Const.; §§ 2, 3, 7, and 11, Ky. Const. Reversal is required with instructions that the Commonwealth not be permitted to offer pseudo-scientific testimony regarding specific source attribution or identification.

III. Detective Hull offered improper opinion testimony when he narrated and interpreted an irrelevant surveillance video.

Preservation. This issue is partially preserved. Defense counsel objected to Detective Hull's testimony about the supposed similarities between a car on the video and Josh's car (VR: 8/27/21; 9:58:00) and Hull's speculation as to the time of murders (Id. 9:48:00). The remaining part of this issue is unpreserved, and review is requested pursuant to RCr 10.26.

Facts. The Commonwealth called Detective Chris Hull to develop a timeline of events on the day of the murders. Kelli, with her son in tow, had been at Chelsea Ballard's house that day for a drug deal. VR: 8/25/21; 1:31:33. VR: 8/27/21; 9:24:00. Kelli sent a text to her boyfriend, David Sullivan, at 9:54 p.m. that she was leaving Chelsea's house. VR: 8/27/21; 9:24:00. Kelli and Aiden stopped at McDonald's at 10:20 p.m. Id. 9:34:00. Kelli's phone connected to her router in her apartment at 10:46 p.m. Id. 9:39:00. David discovered Kelli and Aiden's bodies at approximately 3:30 a.m. VR: 8/24/21; 10:22:00.

Det. Hull inappropriately hypothesized about what happened between 10:46 p.m. (when Kelli's phone connected to her Wi-Fi) and 3:30 a.m. (when the bodies were discovered) by interpreting an irrelevant Little Caesars video and trying to put Josh at the scene. Hull also speculated as to the exact time of the murders. VR: 8/27/21; 9:17:00 – 10:02:00.

The police had obtained surveillance videos from a Little Caesars Pizza that was located near Kelli's apartment complex. One surveillance camera showed the store's interior lobby ("front camera"). The front doors of the restaurant could be seen. One could glimpse vehicles passing by through the doors, up in the top left corner and

between window advertisement stickers. The road these cars were traveling on was People's Lane Avenue. Id. 9:26:00.

People's Lane Avenue was the only way to enter or exit Kelli's apartment complex. Id. There was another camera on the back of the Little Caesars store that also caught the reflection off the front of the apartment building doors ("back camera"). Id. The surveillance footage was timestamped. The time focused on by the Commonwealth was between approximately 10:15 p.m. and 11:30 p.m. Due to the lack of sunlight, the vehicles mostly appeared as flashes of headlights and vague, ghostly shaped objects as they drove by. Id. 9:27:00-9:48:00, *et seq.*

The police could not readily identify Josh's car from the video. The police asked several people if Josh had borrowed their car, even going so far as to ask one of Josh's friends, Diane, if Josh had borrowed her daughter's boyfriend's car. VR: 8/25/21; 4:17:22. Police asked Nicole Bohley, Diane Christos, and Adrienne Fiely if Josh had ever borrowed their cars, and they all answered "no". Id. at 2:15:37; 4:16:40; 4:56:17. Undeterred, the police just decided to interpret the video much like they did the Starbucks video. In that video, police were convinced the man in the video was Josh. They failed to do their due diligence and misidentified poor Michael Edwards, who was getting a venti macchiato. VR: 8/31/21; 10:37:56 – 10:44:15. Here, the same thing occurred. The police were convinced the headlights seen on the Little Caesars video was Josh's car.

The Commonwealth played the surveillance video footage from the night in question and asked Detective Hull if he noticed anything that he thought was relevant. VR: 8/27/21; 9:27:00. Hull began his testimony by pointing out a car (that he ultimately linked to Josh) that appeared to enter the apartment complex at 10:15 p,m. and did not

leave until 11:31 p.m. Hull based this conclusion on a car that "caught his attention" on the front camera, "a vehicle that appears to be the same" that could be seen on the back camera, and "what appears to be a sweep of headlights of a vehicle" on the back camera. Id. 9:27:00-9:28:00. The detective later linked this car to Josh by saying he could not exclude it as belonging to Josh. Id. 9:55:00.

The Commonwealth continued to play the surveillance videos and asked the detective to "narrate and tell us when these things are happening." Id. 9:31:00. The detective testified that what he believed to be Kelli's car appeared on the front camera at 10:46: p.m. Id. 9:37:00. The prosecutor questioned the detective about the timing of Kelli's phone connecting to her Wi-Fi router and then asked the detective to "please again narrate what we are seeing here." Id. 9:40:00. The detective pointed out the vehicle that "appears" to be Kelli's passing in front of the building and going out of the frame. Id. 9:41:00. The detective posited that Kelli arrived at her apartment at 10:46 p.m.

The detective then pointed out that at 11:30 p.m., the car that had previously arrived at 10:15 p.m. (and was linked by police to Josh) reappeared. The detective, narrating the video, concluded that the car pulled into a parking spot and was left running for about one minute. Id. 9:42:00. The prosecutor asked the detective to "again narrate to the jury what's happening here." Id. 9:43:00. Pointing to what he believed was the reflection of exhaust from Josh's running car, the detective said, "Now we wait." Id. 9:44:00. The video continued to play for approximately one minute. At 11:31 p.m., the car's lights came back on and the car left. The Commonwealth asked the detective, "So what do you think we just witnessed here?" Id. 9:46:00. Over objection, the detective

testified he believed "we are witnessing the timeframe when Kelli and Aiden were executed." Id. 9:48:00.

In sum, Detective Hull speculated Josh had arrived at the apartment complex at 10:15 p.m. and parked. Kelli arrived at 10:46 p.m. The detective believed that Josh pulled up near Kelli's apartment at 11:30 p.m., left his car running, went inside and murdered Kelli and Aiden, returned to his car at 11:31 p.m. and left. This interpretation was based on flashes of headlights, vague shapes of colorless cars, and reflections on glass.

After the video was shown, the Commonwealth had the detective offer opinion testimony on still photographs pulled from the video and compare those with a picture of Josh's vehicle. VR:8/27/21; 9:55:00. See Commonwealth Exhibit 155, Appendix Tab 5. Detective Hull said that after reviewing the car on the surveillance video, there were "several similar features" to Josh's car and that the car on the video could not be excluded as belonging to Josh. Id. 9:55:00.

Over objection, the detective was allowed to speculate as to the similarities he observed between the car on the video and Josh's car. Id. 9:58:00. The detective hypothesized that there were similarities between the two vehicles due to the way the back bumper was designed, the shape of the taillights and the reflection, and the way the lights reflected on the back bumper area allowed for a "dead area." Id. 10:00:00. The detective continued that the "basic geometry of the front hood and front quarter panel and the shape and overall feature of the headlights" indicated similarities. Id. 10:01:00. The detective continued to point out the "geometry of the hood" and the windshield itself. Id. 10:02:00. A color copy of the Commonwealth's exhibit is included in the appendix for this Court's reference. Appendix Tab 5. In closing, the Commonwealth argued that it was

Josh's car, not David Sullivan's, and that the quick in and out of the car showed what a cold, calculated murderer Josh was. VR: 9/1/21; 10:34:00.

Analysis.

It was improper for Detective Hull to interpret what was on the video.

Under KRE 602, a witness may not testify to a matter unless the witness has personal knowledge of the matter. KRE 701 further limits testimony by a lay witness to matters "a) rationally based on the perception of the witness; [and] b) helpful to a clear understanding of the witnesses' testimony or demonstration of a fact in issue."

A witness may not interpret what is on a recording. *Gordon v. Commonwealth*, 916 S.W.2d 176, 179–180 (Ky. 1995) ("it is apparent that the witness purported to interpret the tape recording rather than testify from his recollection. This was in error."). In other words, without personally observing events that were recorded under KRE 602 and 701, it is improper for a witness to interpret the footage of a video recording or offer an opinion of what is seen on a video recording. *Id.; Morgan v. Commonwealth*, 421 S.W.3d 388, 392 (Ky. 2014).

When a witness interprets what is on a recording, he impermissibly invades the province of the jury. *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265–66 (Ky. 2009). "It is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." *Gordon*, 916 S.W.2d at 180. Police are permitted to give simultaneous commentary on crime scene surveillance footage. *Mills v. Commonwealth*, 996 S.W.2d 473, 488 (Ky. 1999). Their testimony, however, is limited to video footage within their knowledge and experience. *Id.* Detective Keipert's

interpretation of the Starbucks video for the grand jury is a perfect example of why these rules are necessary.

To recap, the detective had told the grand jury he believed the man in the orange sweatshirt was Josh and that he was staring at Kelli, and that Kelli was avoiding eye contact. VR: 8/24/21; 4:25:00. Of course, the man turned out to be Michael Edwards, who had dropped his wife off for a medical appointment and had just dropped in to get a coffee. VR: 8/31/21; 10:37:56 – 10:44:15.

Likewise, Detective Hull's interpretation of what was on the Little Caesars surveillance videos bolstered the Commonwealth's theory of the case while damaging the defense's case. It was an error for the detective to interpret the video for the jury under KRE 602 and 701 and the abovementioned case law. He did not personally observe any vehicles enter or exit the apartment complex on the night in question. Instead, he interpreted what occurred on a video that only showed flashes and reflections of headlights. The issue of whether Josh's car was seen entering Kelli's apartment complex on the night in question was in the province of the jury alone to decide. Detective Hull's testimony took observable facts and instructed the jury on how it should view or understand those facts. "It is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." *Gordon v. Commonwealth,* 916 S.W.2d 176, 180 (Ky. 1995).

This improper testimony was even more prejudicial because it involved a detective indicating to the jury that he could see Kelli's car, Josh's car, and the time of the murders. There was no basis for concluding that the detective was more likely to identify the cars than the jury correctly. The detective's opinion testimony was especially prejudicial

because such an "officer's testimony often carries a special aura of reliability." *State v. King*, 219 P.3d 642, 646 (Wash. 2009) quoting *State v. Kirkman*, 155 P.3d 125 (Wash. 1997) (Impermissible opinion testimony is reversible error when such evidence violates the defendant's constitutional right to a jury trial by interfering with the independent determination of the facts by the jury.).

This error was not harmless. Hull's improper opinion testimony and interpretation of the video placed Josh at the murder scene in a case where there was virtually no physical evidence linking Josh to the murders. Telling the jurors that Kelli and Aiden were executed at 11:30-11:31 p.m. effectively eliminated David Sullivan (who arrived at Kelli's apartment at 3:30 a.m.) and various others as alternate perpetrators.

Alternatively, the video should have been excluded as irrelevant.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact ... of consequence ..." more or less probable. KRE 401. Further, KRE 402 provides that "[a]ll relevant evidence is admissible ..." unless excluded by the constitution, statute, or other rules, and irrelevant evidence is inadmissible. And, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice[.]" KRE 403.

Here, the poor quality of the video (for purposes of identifying cars) rendered it irrelevant. The footage depicting unidentified cars and headlights had no tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. The cars seen through the upper left-hand corner of the front door were colorless, and the glare of the headlights obscured any unique details of the cars. Even Detective Hull said he could not

identify any of the vehicles as belonging to Josh, only that he could not exclude Josh's vehicle. Id. 9:55:00. The probative value was nil. A car that could not be identified or reasonably connected to Josh did not have a tendency to prove or disprove a material issue in the case. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 717 (Ky. 2009).

Finally, any probative value was substantially outweighed by the danger of undue prejudice. KRE 403. The mere fact of the poor quality made it very likely the jury substituted Hull's opinion for its own, especially since Hull was a police detective. The tape showed flashes of headlights, reflections of headlights, and general shapes of cars. It was impossible to glean anything from the tape that was relevant to the case at hand. The evidence against Josh was weak, and the admission of this video and the concomitant narration was unduly prejudicial. The Commonwealth cannot prove this error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

IV. The Commonwealth impermissibly commented on Josh's silence.

Preservation. This issue is partially preserved. Defense counsel objected to any testimony from Detective VonDerHaar indicating that Josh would not give the police his password to unlock his cell phone. VR: 8/31/21; 9:47:00. Counsel did not object when the Commonwealth cross-examined Josh about making it impossible for the police to see what was on his phone. Josh requests review pursuant to RCr 10.26 for the unpreserved aspects of this issue.

Facts. The Commonwealth called Detective Tony VonDerHaar of the Boone County Sheriff's Office Electronic Crime Unit as a witness. The Commonwealth asked the detective if he had inspected any devices belonging to Josh. VR: 8/31/21; 9:45:00, 9:47:00. Defense counsel objected to any testimony about the inability to examine Josh's

cell phone because Josh had not given them his password. Id. 9:47:00. The Commonwealth argued that the detective should be allowed to testify that he tried to examine the contents of Josh's phone but could not access anything because the phone was encrypted. Id. 9:48:00.

Defense counsel maintained his objection, arguing that all phones were encrypted, and it was just whether law enforcement had the password. Counsel pointed out that Aiden had the same phone as Josh, and the police could not get into Aiden's phone either because it was encrypted. Id. 10:11:00. Regardless, defense counsel argued that commenting on Josh's refusal to give the password was akin to commenting on his right to remain silent. Id. 9:48:00. The trial court overruled the objection finding that as long as there was no testimony that Josh refused to give his password, then no constitutional rights would be implicated. Id.

Detective VonDerHaar testified that the cell phone in question was retrieved from Josh's person when he was arrested. Id. 9:51:00. When asked if he could access the contents of the phone, VonDerHaar said no. When asked why not, he responded, "Because it was encrypted." Id. 9:51:00, 9:52:00.

During the cross-examination of Josh, and in direct violation of the trial court's ruling, the prosecutor asked, "You made it impossible for anyone to look into your phone?" Id. 2:43:00. During closing argument, the prosecutor discussed how Josh tried to conceal evidence and pointed out that the defense wanted to twist the evidence by saying it was just a password to his phone. VR: 9/1/21; 10:41:00.

Analysis. The Commonwealth clearly invited the jury to infer guilt from Josh's refusal to turn over his password. The prosecutor's questions to Detective VonDerHaar and Josh

himself were of such character that a jury would naturally and necessarily construe it to amount to a comment on Josh's right to remain silent.

The Due Process Clause of the 5th Amendment "protects a person from being punished for exercising a protected . . . constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Under the 5th Amend. of the U.S. Const., "[n]o person ... shall be compelled in any criminal case to be a witness against himself ...." Amend. V, U.S. Const. This includes being forced to produce a testimonial password that can violate the Fifth Amendment privilege against compelled self-incrimination.

It is impermissible for a prosecutor to present arguments or evidence to the jury that are calculated to create in the jurors' minds any inferences based solely on the defendant's election to remain silent. *See Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979); *Rachel v. Bordenkircher*, 590 F.2d 600 (6th Cir. 1978). Comments, direct or indirect, violating a defendant's privilege against self-incrimination can be grounds for reversing a sentence. *Williams v. Commonwealth,* 154 S.W.2d 728, 729 (Ky. 1941). However, "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." *Ragland v. Commonwealth,* 191 S.W.3d 569, 589–90 (Ky.2006), *citing Butler v. Rose,* 686 F.2d 1163, 1170 (6th Cir.1982); *see also Byrd v. Commonwealth,* 825 S.W.2d 272, 275 (Ky. 1992). Overall, "prosecutorial comment must be examined in context, and, if 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." *Ragland,* 191 S.W.3d at 590 (internal citations omitted).

Here, the prosecutor's elicitation from the detective that Josh's phone was encrypted, in combination with the direct question to Josh that "You made it impossible for anyone to look into your phone?" leaves no doubt that the Commonwealth was using Josh's silence against him. Why wouldn't Josh unlock his phone? What was Josh hiding? Those were the questions brought to mind by the prosecutor's questions. The phone's encryption was emphasized in closing, when the prosecutor mocked the defense's argument that this was "just a password." VR: 9/1/21; 10:41:00.

Much like cases (dealing with 4th and 5th Amendment rights) where a defendant's refusal to consent to a search cannot be used against him, Josh's refusal to give his password should not have been allowed to be used against him in this case. See *Deno v. Commonwealth*, 177 S.W.3d 753 (Ky. 2005); *Commonwealth v. McCarthy*, 628 S.W.3d 18, 35 (Ky. 2021), *reh'g denied* (Aug. 26, 2021), *cert. denied sub nom. Kentucky v. McCarthy*, 142 S. Ct. 1126, 212 L. Ed. 2d 17 (2022).

Josh had a 5th Amendment right to refuse to provide the password to his phone, and during the trial, the Commonwealth invited the jury to draw an inference of guilt from Josh's silence. This action was not just a mere mention of the inability of the police to access the contents of the phone but a direct leading question in violation of the trial court's ruling about the refusal of Josh to turn over the password ("You made it impossible for anyone to look into your phone?"). Id. 2:43:00. In this context, the Commonwealth's use of Josh's refusal to provide the password violated Josh's rights under the 5th Amendment. The Commonwealth cannot show this was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705

(1967) (stating that "constitutional error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless").

The Commonwealth's case was far from overwhelming. The only physical evidence presented by the Commonwealth was a tenuous link between casings at the crime scene and casings found at Tonya's farm (see Issue II) and surveillance footage that showed headlights of unknown vehicles (see Issue III). In this case, the witnesses dabbled in a dark world of drugs, prostitution, and fetishes (including groups that fantasized about torturing women). The prosecutor's improper questions stressed to the jury that Josh was hiding something and that the jury should infer guilt because Josh impeded the government's investigation. Treating Josh's privileged refusal to turn over the password to his phone as "substantive evidence of guilt" violates the 5th Amendment right to silence. *Griffin v. California*, 380 U.S. 609 (1965). Josh received the maximum penalty in this case of two life sentences without the possibility of parole.

V. Flagrant prosecutorial misconduct deprived Josh of a fair trial.

Preservation. This issue is not preserved. Josh requests review pursuant to RCr 10.26.

Misstatement of fact about the homemade silencer. The Commonwealth needed to explain why no one in the apartment complex heard any gunshots fired on the night in question. Defense counsel filed a Motion in *Limine* to prohibit any reference, directly or indirectly, to the "PVC Silencer Internet Search" and the PVC pipes located at Mr. Ward's residence. TR IV, 562-564. The weapon was never discovered, and there was no evidence that a silencer was used. Citing *Dooley v. Commonwealth,* 626 S.W.3d 487 (Ky. 2021), the defense argued the Commonwealth could not prove a nexus between the PVC internet search and PVC pipes and the murder. TR IV, 563. The Commonwealth agreed

there was too little foundational evidence to support the relevance of the internet search and ultimately decided that it would not introduce any evidence about the PVC pipes at Josh's house. TR IV, 574. VR: 8/25/22; 4:31:00.

"Detective Tonya" testified about Josh target practicing at her farm. The prosecutor asked if Josh made any statements to her about accessories for weapons. She replied:

> Through our time talking about target practicing we talked about different things from different guns. Even the equipment he brought out to the property and set up from the table to the target. I was given a gun from my mother, and I wanted to learn how to shoot it. So, when we were talking about it, I was like 'yeah you can help me.' Again, being very nonchalant about it. We talked about everything from different types of guns, **we talked about silencers,** we talked about scopes, we talked about just different stuff you might use for different purposes from hunting to not needing certain things for that level to target shooting.

When asked if she recalled any more detail about what Josh had said about the silencer, Tonya said, "Just that they can be easily made from home." VR: 8/26/22; 9:21:00-22:00.

During closing argument, the Commonwealth misstated the evidence: "Nobody in that apartment complex heard one shot. You know why? Defendant told you just like he told Tonya. **I know how to make a homemade silencer**." VR: 9/1/21; 10:33:00. The Commonwealth mischaracterized the testimony of Tonya Palmer.

Misrepresentation of Steven Weitz's testimony. Steven Weitz, the chief of the DNA section at the ATF laboratory in Washington D.C., tested the fired case shells found at the crime scene. VR: 8/25/21; 9:12:00. He compared the DNA found on the shell casings against DNA from known individuals, including Josh. Id. The DNA retrieved was a mixture of three individuals, with at least one of those individuals being a male. Id. 9:19:00. Kelli and Aiden Kramer's DNA were two samples found on the crime scene shell casings. Id. 9:23:00, 9:24:00. As for the third sample, the male sample, Joshua

Ward, was **excluded** as a possible contributor to the DNA profile. Id. 9:28:00. David Sullivan could neither be included nor excluded as a contributor. Id. 9:31:00.

The prosecutor asked Weitz about possible reasons that a person's DNA might not be on an item. Id. 9:28:00. Over objection, Weitz testified there were many reasons a person's DNA might not be on the cartridge casing. First, the person may not have ever handled the cartridge casing. Id. 9:29:00. Another reason may be that the individual wore gloves or that the cartridges were cleaned after being fired. Id. 9:29:00, 9:30:00.

During closing argument, the prosecutor discussed all the evidence the police had examined, saying, "Not only to eliminate innocent people of interest but to find the real killer. That man sitting right there [referencing Josh]. **Steven Weitz**, 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; 10:45:00. The Commonwealth mischaracterized the testimony of Mr. Weitz.

Misrepresentation of Jennifer Owens' testimony. Before trial, the Commonwealth conceded that Jennifer Owens, the firearms examiner, could not use a term such as "match" in describing her findings, that she could not state an opinion to a degree of statistical or scientific certainty, and she could not phrase an opinion "to the exclusion of all other firearms" when discussing her conclusions. TR IV, 565. TR IV, 578. VR: 8/2/21; 11:00:34. As discussed in Issue II, the methodology and reliability of ballistic examinations have been called into question. Despite the Commonwealth's acknowledgment that its own firearms examiner could not state an opinion to a degree of statistical or scientific certainty, nor could she phrase an opinion "to the exclusion of all other firearms," the Commonwealth made the following statement during its closing:

The markings that are important that were derived from the Supervisor at the ATF lab are the markings distinctively made when it's fired through that weapon. 100 years this has been around for forensic examinations, it's credible, **it's irrefutable evidence**. It is beyond a reasonable doubt evidence. VR: 9/1/21; 10:46:00.

The Commonwealth agreed pretrial that Ms. Owens' subjective conclusions were, in fact, refutable. For the prosecutor to tell the jury in closing that the ballistics examination in this case was "irrefutable" was disingenuous and a misrepresentation of the field of firearms examinations as it exists today. Telling the jury that the examination was irrefutable implied a sense of certainty that did not exist.

Unreasonable inferences based on the testimony. "The blood stain on the wall. Defense brought that up, and you all have a photo of it, it's tiny. 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. That's him before he is falling to the ground." VR: 9/1/21; 10:32:00-10:33:00.

This testimony was an unreasonable inference and was clearly false based on the crime scene photo showing Aiden with no blood on his hands (See Commonwealth's exhibit 26, 44, 116) as well as the testimony of Det. Cochran.

Detective Cochran testified that Aiden bled from the position where he was located. VR: 8/27/21; 1:22:00, 1:23:00. The Commonwealth's contention that Aiden survived after the first shot, and was up walking around before he was shot again, was not only clearly false but also unduly prejudicial and emotionally inflammatory.

Law and analysis. In general, the Commonwealth has a "concomitant duty to pursue justice and serve the law, which is owed to everyone in this Commonwealth, including criminal defendants and convicted persons." *Moore v. Commonwealth*, 357 S.W.3d 470, 495 (Ky. 2011). Further, while the prosecutor should "prosecute with earnestness and

vigor..., [and] strike hard blows, he is not at liberty to strike foul ones." *Id.*, (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)).

It is always improper for counsel, in closing argument, to comment upon matters outside the record. *Coates v. Commonwealth*, 469 S.W.2d 346 (Ky. 1971). A prosecutor's closing argument must be confined to facts in evidence and inferences reasonably drawn from such evidence. *Blair v. Commonwealth,* 144 S.W.3d 801 (Ky. 2004); *Carter v. Commonwealth.*, 278 Ky. 14, 128 S.W.2d 214 (1939); *Parrish v. Commonwealth*, 581 S.W.2d 560 (Ky. 1979). It is always improper to refer to evidence excluded by the trial court. *Schaefer v. Commonwealth*, 622 S.W.2d 218 (Ky. 1981). Counsel may not misstate a fact in evidence. A misstatement of evidence may constitute reversible error. *Beavers v. Commonwealth*, 612 S.W.2d 131 (Ky. 1980).

Regarding the appropriate standard of review for prosecutorial misconduct during closing arguments, this Court has stated that reversal is required "only if the misconduct is flagrant. *Miller v. Commonwealth,* 283 S.W.3d 690, 704 (Ky. 2009) (quoting *Barnes v. Commonwealth,* 91 S.W.3d 564, 568 (Ky. 2002)). A four-part test is used to determine whether a prosecutor's improper comments amount to flagrant misconduct. The four factors to be considered are: "(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." *Hannah v. Commonwealth,* 306 S.W.3d 509, 518 (Ky. 2010).

As to the first factor, Josh was prejudiced by the Commonwealth's misstatements. The prosecutor's statements were not accurate. The Commonwealth's statement about the

silencer got into evidence the very thing it had agreed could not come in: evidence of Josh's ability to make a PVC silencer. The evidence did not show that Josh knew how to make a homemade silencer personally. Instead, the evidence merely showed that he had told Tonya that it was *possible* for someone to make a homemade silencer. Knowing that it is possible to make a homemade silencer is significantly different than personally knowing how to make a homemade silencer.

Regarding the misstatement about the DNA evidence, the chief of the ATF DNA lab section did not say Josh wore gloves. To attribute this (mis)statement to an ATF scientist cloaked it in credibility and made it even more prejudicial. Weitz did not make any such conclusion. The attribution of a misstatement to an expert is highly prejudicial.

Finally, the prosecutor's inference that Aiden stumbled around after being shot and touched the wall was an unreasonable one. The photographs and testimony refute this inference. For the jury to think that a 9-year-old suffered even a moment longer was unduly prejudicial. This factor weighs in Josh's favor.

As to the second factor, the Commonwealth's statements were not isolated, and they came one after another in closing argument. This factor weighs in Josh's favor.

As to the third factor, the comments were deliberately placed before the jury. The prosecutor wanted the jury to know that Josh knew how to personally make a homemade silencer even though this is not what Tonya said. The prosecutor wanted the jury to think that Weitz said that Josh wore gloves, that the ballistics testimony was irrefutable, and that Aiden was the source of blood on the wall and had suffered after being shot. These statements were not an accident or a misunderstanding of the testimony. They were deliberate. This factor also weighs in Josh's favor.

The fourth factor is the weight of the evidence against Josh. As discussed in Issue VI, the evidence against Josh was weak. This final factor weighs in Josh's favor. As such, the results of the four-factor test to determine whether the prosecutor's argument were flagrant demonstrate all four factors weighed in Josh's favor. The prosecutor's closing misstatements of the testimony undermined the essential fairness of Josh's trial.

Reversal is warranted where, as here, the prosecutor engaged in conduct "deliberately calculated to cause the jury's decision to be influenced by improper factors... [and] overstepped the bounds of propriety and fairness which should characterize the conduct of a prosecuting attorney." *Faulkner v. Commonwealth,* 423 S.W.2d 245, 248 (Ky. 1968). The legitimate interest of the prosecutor "is not that it shall win a case, but that justice shall be done." *Berger v. United States.* 295 U.S. 75, 88 (1935). The prosecutor's improper closing argument comments denied Joshua Ward's rights under the 6th, 8th, and 14th Amendments, US Constitution, and § 2, 3, 7, 11, 17, KY Constitution. He is entitled to reversal and remand for a new trial.

VI. Josh Ward was entitled to a directed verdict on both counts of murder.

Preservation. This issue is preserved. VR: 8/31/21; 10:15:31; 2:53:00. VR: 8/31/21; 10:15:37, 10:16:52, 2:53:00.

Law. The test on appellate review is that a directed verdict should be granted "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 (Ky. 1991). "The trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Id.* at 187-188. "Obviously, there must be evidence of substance." *Commonwealth v. Sawhill,* 660 S.W.2d 3, 5 (Ky. 1983). For the Commonwealth to meet their burden, the possibility that a defendant may have done

wrong provides less than a scintilla of evidence against him, and his conviction could not stand. *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994). See also *Adkins v. Commonwealth*, 230 S.W.2d 453 (Ky. App. 1950) (conviction not to be based on speculation, suspicion, conjecture) and *DeAttley v. Commonwealth,* 220 S.W.2d 106 (Ky. App. 1949) (accord).

The Due Process Clause of the 14th Amendment requires guilt be established by probative evidence. *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978). The evidence, in this case, was not probative. There was insufficient evidence that Josh Ward committed the murders of Kelli and Aiden Kramer. Taking the evidence in the light most favorable to the Commonwealth, a reasonable juror could not conclude beyond a reasonable doubt that Josh committed the crime. All of the evidence introduced by the Commonwealth was circumstantial and nonspecific to Josh.

Nobody could place Josh at the scene because Josh was at home. On March 20, 2018, Josh was at home reading. VR: 8/31/21; 2:05:20. Josh's phone records and Josh's cell phone data records indicated that at the time of the murders, Josh's cell phone was "approximately [within] a one-mile radius of Josh Ward's residence on Norborne drive in Forest Park" because it was "connecting to the towers between 10:46 [p.m.] on March 20 and 3:42 a.m. on March 21." Id. 9:55:43. Detective VonDerHaar testified that Josh's phone was on, consuming data, and connected to those cell towers by his house that night. Id. at 9:56:18. The Commonwealth's own witness corroborated Josh's testimony that he was at his home over 45 minutes away at the time of the murders. The possibility that Josh may have left his phone at home and snuck out is speculative.

DNA and fingerprint evidence excluded Josh from the scene. The police tested the cartridge casings from the crime scene and compared them to Josh's DNA. The casings contained a mixture of three individuals, including at least one male. Kelli and Aiden's DNA were found on the casing, but Josh was **excluded** as a contributor. VR: 8/25/21; 9:28:10. When asked why DNA may not show up on the cartridge casings, Weitz testified, "The easiest answer is that they never actually handled the fire cartridge cases; that would be maybe the number one answer." Id. 9:29:48. The police were unable to get any conclusive fingerprints from the scene. VR:8/27/21; 11:18:10; 11:19:15, 1:20:35.

The Little Caesars video was irrelevant and did not prove anything. The police tried to put Josh's vehicle at Kelli's apartment complex at the time of the murders by showing a Little Caesars surveillance video. Ultimately, all the detective could say about the surveillance videos on the night in question was that the colorless car and mere flashes of headlights passing by on the upper left corner of the surveillance video could not be excluded as Josh's car. VR:8/27/21; 9:55:00.

No evidence linking Josh to Kelli after the breakup. The Commonwealth failed to prove that Josh had any connection or communication with Kelli after they broke up. Josh and Kelli broke up in May 2017. No contact in June 2017. No contact in July 2017. No contact in August 2017. No contact in September, October, November, or December 2017. No contact in January or February 2018. And most importantly no contact in March 2018. VR: 8/31/21; 1:24:33. Kelli and Aiden were murdered nine months after Josh ended his relationship with Kelli. Id. 1:26:13. The whole focus of the investigation turned to Josh based on a text Kelli sent David in December of 2017, where she said Josh had popped up at Starbucks and she thought it was "weird." VR: 8/24/21; 10:03:43. The

defense proved this man at Starbucks was not Josh. VR: 8/31/21; 10:37:56 – 10:44:15. The Commonwealth provided no connection, not even a mere scintilla of evidence, connecting Josh to Kelli after May 2017.

Gun and target practice. The gun used in the murders was never found. Josh's last target practice at Tonya's farm was in the summer of 2017. The Commonwealth asserted that since Josh did not tell police about his target practice from EIGHT MONTHS earlier, he had something to hide. Indeed, a conviction obtained by circumstantial evidence cannot be sustained "if [the evidence] is as consistent with innocence as with guilt." *Southworth v. Commonwealth*, 435 S.W.3d 32, 44 (Ky. 2014) as modified on denial of reh'g (June 19, 2014) quoting *Collinsworth v. Commonwealth,* 476 S.W.2d 201, 202 (Ky. 1972).

Josh was not the only one in this case who was familiar with guns, especially a .22 caliber gun. Terry Ballard, Paul Saur, Tonya, Vickey Hughes, and Sigma Novak either owned a .22 gun or had mentioned wanting to buy a gun. VR: 8/24/21; 3:57:00; VR: 8/25/21; 1:13:00; VR:8/26/21; 11:09:00; VR: 8/31/21; 1:48:00; VR: 8/24/21; 12:18:00. The Commonwealth did not produce substantial evidence, and Josh's conviction cannot be based on speculation.

Pseudo-Science Ballistics. The ballistics testimony, at best, showed that two of the shell casings collected from Tonya's farm were consistent with the nine shell casings found at the murder scene. However, there was no substantive evidence that the two shell casings found at Tonya's farm belonged to Josh. In the light most favorable to the Commonwealth, there were shell casings at two different locations that were consistent with being fired from the same gun. Josh had been to one of those locations nine months

earlier, and target practiced, but there was no proof that Josh had been to the second location. This was insufficient evidence to sustain a conviction.

Encrypted apps and secrecy. The Commonwealth failed to show a link between Josh's use of encrypted apps and the murders. Josh started using an app called Wickr in the summer of 2017. VR: 8/31/21; 1:36:31. Josh used Wickr to maintain his privacy because anonymity in the Fetlife kinky, sexual fetish world was important. Id. at 1:37:16. Again, there was an equally plausible innocent explanation for the secrecy and encrypted apps.

Conclusion.

The Commonwealth failed to meet its burden. In addition to the feeble physical and circumstantial evidence, there were several reasonable alternate perpetrators. When the evidence is circumstantial, all circumstances must "point unerringly" to guilt rather than innocence. *Hodges v. Commonwealth*, 473 S.W.2d 811, 812 (Ky. 1971). Sigma Novak was part of the Primal subgroup of Fetlife that fantasized about tracking somebody down for multiple days, tying them up, and torturing them. VR; 8/24/21; 12:16:30. She was jealous and possessive and learned that David and Kelli were dating one month before the murders. VR: 8/24/21; 10:01:44. Sigma died before trial. VR: 8/24/21; 10:01:48.

Kelli lived a lifestyle replete with dangerous individuals. Kelli had sugar daddies with wives who didn't know about their secret relationships (and who googled "torture methods for females") VR: 8/25/21; 1:04:43, 1:12:10; 1:13:12. Kelli was involved in prostitution. Id. 4:01:15. She also had violent ex-boyfriends (VR: 8/24/21; 11:16:30), ex-girlfriends (VR: 8/25/21; 3:52:44), and friends. Id. 1:59:35. She was involved with drugs and had decided on the day she was murdered to start dealing drugs. VR: 8/25/21; 1:31:28

– 56, 1:32:19. On the day she was murdered, Kelli had been ripped off in a drug deal. Id. 1:51:00.

The Commonwealth was right when they described Kelli's life as being two-sided, one of light and one of darkness. But Josh was not the darkest part of her life or even part of the dark. Kelli put herself in questionable situations with violent people repeatedly throughout the years. Kelli's dangerous choices did not start when she met Josh. Kelli invited the darkness and danger into her life by her choices. No, she did not deserve to die, but neither did Josh Ward deserve to be blamed and held accountable for Kelli's choices. The Commonwealth did not prove beyond a reasonable doubt that Josh Ward killed Kelli and Aiden Kramer. There was more than one explanation for the evidence provided, and numerous alternate perpetrators existed. There was not a mere scintilla worth of evidence tying Josh Ward to the murder scene. It was all speculation derived from a lie the victim texted her boyfriend three months before her death. It was unreasonable for a jury to believe beyond a reasonable doubt that Josh Ward was guilty. Therefore, his conviction should be vacated.

Conclusion

For the foregoing reasons, reversal is required.

Respectfully submitted,

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